The preventive state? Prevention and pre-emption in mental health, high risk offender and anti-terror laws

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The Preventive State? Prevention and Pre-emption in Mental Health, High Risk Offender and Anti-Terror Laws

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Following the terrorist attacks of September 11, 2001, the Australian government embarked on an anti-terror legislative agenda that prioritised the prevention of terrorism. Many of Australia's preventive anti-terror laws were justified as exceptional and isolated measures to meet the exceptional threat posed by transnational terrorism. This thesis is motivated by a desire to better understand prevention in anti-terror law and, in particular, how preventive anti-terror laws should be understood and situated within the Australian legal system.

The driving questions of this thesis are: is the preventive state concept a useful way to read developments in Australian law following September 11? Is prevention in Australian anti-terror law exceptional when compared to prevention in other areas of Australian law? This thesis answers these research questions in a narrow way. It begins by critically examining the preventive state concept, identifying its promise and limitations as a way to read prevention in contemporary lawmaking. The thesis then undertakes three case studies of preventive measures in Australian law: federal anti-terror control orders, post-sentence restraints on high risk offenders in NSW and involuntary detention of persons with mental illness in NSW.

The purpose of the case studies is to test whether control orders are novel when compared to other preventive measures. This is achieved by comparing where each legislative regime falls on a spectrum of anticipatory action in domestic law. The case studies also inform understandings of the preventive state concept by addressing its promise and limitations as a framework to read developments in Australian law.

This thesis concludes that the preventive state concept provides a useful way to read and conceptualise developments in Australian law since September 11. It identifies a number of continuities between the preventive measures studied, arguing that control orders are best understood as part of a pattern of preventive governance rather than as exceptional and isolated measures. However, this thesis also finds that control orders are exceptional in their reach when compared to the other measures studied, typifying pre-emption rather than prevention. These findings have broader implications for understandings of preventive anti-terror laws and the future directions of preventive scholarship in Australia.

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—ABSTRACT—

Following the terrorist attacks of September 11, 2001, the Australian government embarked on an anti-terror legislative agenda that prioritised the prevention of terrorism. Many of Australia's preventive anti-terror laws were justified as exceptional and isolated measures to meet the exceptional threat posed by transnational terrorism. This thesis is motivated by a desire to better understand prevention in anti-terror law and, in particular, how preventive anti-terror laws should be understood and situated within the Australian legal system.

The driving questions of this thesis are: is the preventive state concept a useful way to read developments in Australian law following September 11? Is prevention in Australian anti-terror law exceptional when compared to prevention in other areas of Australian law? This thesis answers these research questions in a narrow way. It begins by critically examining the preventive state concept, identifying its promise and limitations as a way to read prevention in contemporary lawmaking. The thesis then undertakes three case studies of preventive measures in Australian law: federal anti-terror control orders, post-sentence restraints on high risk offenders in NSW and involuntary detention of persons with mental illness in NSW.

The purpose of the case studies is to test whether control orders are novel when compared to other preventive measures. This is achieved by

comparing where each legislative regime falls on a spectrum of anticipatory action in domestic law. The case studies also inform understandings of the preventive state concept by addressing its promise and limitations as a framework to read developments in Australian law.

This thesis concludes that the preventive state concept provides a useful way to read and conceptualise developments in Australian law since September 11. It identifies a number of continuities between the preventive measures studied, arguing that control orders are best understood as part of a pattern of preventive governance rather than as exceptional and isolated measures. However, this thesis also finds that control orders are exceptional in their reach when compared to the other measures studied, typifying pre-emption rather than prevention. These findings have broader implications for understandings of preventive anti-terror laws and the future directions of preventive scholarship in Australia.

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—LIST OF PUBLICATIONS & PRESENTATIONS—

Publications arising from the writing of this thesis

- 'Adversarial Intelligence? Control Orders, TPIMs and Secret Evidence in Australia and the United Kingdom' (2012) 12(2) *The Oxford University Commonwealth Law Journal* 341
- 'Prevention and Pre-emption in Australia's Domestic Anti-Terrorism Legislation' (2012) 1(1) *International Journal of Crime and Justice* 52
- 'A View Inside the Preventive State: Reflections on a Decade of Anti-Terror Law' (2012) 21 (1) *Griffith Law Review* 209

Presentations arising from the writing of this thesis

- 'The Rise of the Preventive State? Prevention and Pre-emption in Mental Health, Serious Sex Offender and Anti-Terror Laws: Notes on a Case Study of NSW Mental Health Law', *Gilbert + Tobin Centre of Public Law 2012 Postgraduate Workshop in Public Law,* University of New South Wales, 12–13 July 2012
- 'Pre-emptive Surveillance: the curious case of the hybrid control order', *Surveillance in/and Everyday Life: Monitoring Pasts, Presents and Futures*, University of Sydney, 20–21 February 2012
- 'A View Inside the Preventive State: Australia's anti-terror laws', *Anti-Terror Laws & Preventive Justice Postgraduate Workshop*, Oxford University, United Kingdom, 5 December 2011
- 'Inside the Preventive State', *Crime, Justice & Social Democracy — An International Conference,* School of Justice, QUT, Brisbane, 25–28 September 2011

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—CHAPTER ONE—

INTRODUCTION

I INTRODUCTION

In the aftermath of the terrorist attacks of September 11 2001, governments and intergovernmental organisations grappled with how best to prevent the perpetration of further acts of terrorism. The United Nations Security Council passed a number of resolutions that imposed obligations on Member States to take action domestically to prevent and prosecute terrorist acts.[1] Security Council Resolution 1373 obliged Member States to bring to justice those engaged in or supporting the 'financing, planning, preparation or perpetuation of terrorist acts' and to establish such terrorism related activity 'as serious criminal offences in domestic laws'.[2] In addition, Security Council Resolution 1566 called on all Member States to, amongst other things, prevent acts of terrorism

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1 See, for example, SC Res 1368, UN SCOR, 57th sess, 4370th mtg, UN Doc S/RES/1368 (12 September 2001); SC Res 1373, UN SCOR, 57th sess, 4385th mtg, UN Doc S/RES/1373 (28 September 2001); SC Res 1455, UN SCOR, 58th sess, 4686th mtg, UN Doc S/RES/1455 (17 January 2003); SC Res 1456, UN SCOR, 58th sess, 4688th mtg, UN Doc S/RES/1456 (20 January 2003); SC Res 1566, UN SCOR, 60th sess, 5053rd mtg, UN Doc S/RES/1566 (8 October 2004). These resolutions are binding on Member States under Part VII of the United Nations Charter. See generally Eric Rosand, 'The Security Council as 'Global Legislator': Ultra Vires or Ultra Innovative?' (2004-5) 28 *Fordham International Law Journal* 542. The Security Council had, prior to September 11, 'selectively engaged terrorism issues'. However, after September 11, the Security Council's role in 'leading global counter-terrorism efforts' was 'unprecedented': Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 21 and generally 21–76.

2 SC Res 1373, UN SCOR, 57th sess, 4385th mtg, UN Doc S/RES/1373 (28 September 2001), para 2e.

'and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature'.[3]

Many nations responded to the September 11 attacks on the United States and the Security Council resolutions by enacting 'tough new antiterrorism laws'.[4] The United States and the United Kingdom, for example, were both swift to take legislative action.[5] On 26 October 2001 President George W Bush signed into law the *USA Patriot Act*,[6] and on 14 December 2001 the United Kingdom's *Anti-Terrorism, Crime, and Security Act 2001* (UK) received Royal Assent.[7] These laws were notable for their length, complexity and truncated parliamentary deliberation,[8]

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3 SC Res 1566, UN SCOR, 60th sess, 5053rd mtg, UN Doc S/RES/1566 (8 October 2004) para 3.

4 Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 2. For discussion of the countries that did not respond to September 11 with new anti-terrorism laws, including Israel, Indonesia and Egypt, see Roach 77–160.

5 While the United Kingdom's response to the threat of terrorism following September 11 has been primarily legislative in nature, the United States has relied heavily on executive and warlike powers, for example in relation to the detention of suspected terrorists at Guantánamo Bay. Roach has described the American response as characterised by resort to executive measures and extra-legalism, and the United Kingdom's response as 'a legislative war on terrorism': Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 161–234, 238–308.

6 While commonly referred to as either the USA Patriot Act or the Patriot Act, the full title of the legislation is: *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001* 18 USC.

7 As will be discussed in Chapter Four, features of the United Kingdom's anti-terror legislation were replicated by many Commonwealth nations, including Australia, following September 11: Kent Roach, 'The Post-9/11 Migration of Britain's Terrorism Act 2000' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 374; Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 442–444.

8 The *USA Patriot Act* ran to some 350 pages and passed both Houses of Congress in under three weeks. The Anti-Terrorism, Crime, and Security Bill 2001 (UK) was some 114 pages long. The Bill was introduced into House of Commons on 12 November 2001 and debated for 16 hours. It was debated for eight hours in the House of Lords before receiving Royal Assent on 14 December: see Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University

their use of immigration law to counter terrorism,[9] the creation or extension of terrorism financing regimes,[10] and their broadening of coercive, investigative and surveillance powers.[11]

Responses to September 11 were also marked by an 'increased emphasis' on the prevention of terrorism.[12] The Bush Administration, for example, defended its response, domestically and internationally, in preventive terms.[13] In its foreign policy, the Bush Administration

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Press, 2011) 175–6, 263–4; Andrew Lynch 'Legislating Anti-Terrorism: Observations on Form and Process' in Victor V Ramraj, Michael Hor, Kent Roach and George Williams (eds) *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2012) 151, 167.

9 For example, Part V of the *Anti-Terrorism, Crime, and Security Act 2001* (UK) introduced a regime of indefinite detention without charge or trial of foreign nationals suspected of terrorism. Section 412 of the *USA Patriot Act* provided for detention of noncitizens suspected of terrorism. However, Roach reports that s 412 has not been used as existing immigration law sufficed to found detention of noncitizen terrorist suspects: Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 184.

10 The *Anti-Terrorism, Crime, and Security Act 2001* (UK) extended the existing regime for terrorism financing contained in the *Terrorism Act 2000* (UK), for example in relation to civil forfeiture and foreign asset freezing orders. The *USA Patriot Act* provided, amongst other things, for asset freezing and forfeiture. See Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 179–80, 265–6.

11 The *USA Patriot Act* was, as Roach explains, rather modest when compared to the legislative responses of other nations. However, it controversially extended the offence of providing 'material support' to terrorists to include the provision of 'expert advice or assistance', and expanded the government's ability to conduct electronic surveillance or search an individual without probable cause: Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 175–95; See also William C Banks, 'The United States a decade after 9/11' in Victor V Ramraj, Michael Hor, Kent Roach and George Williams (eds) *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2012) 449, 470–3; David Cole and Jules Lobel, *Less Safe, Less Free: Why America is Losing the War on Terror* (The New Press, 2007), 31. In the United Kingdom, pt 3 of the *Anti-Terrorism, Crime, and Security Act 2001* (UK), for example, extended disclosure powers and s 117 reintroduced the offence of failing to disclose information that an individual knows or believes might be 'of material assistance' in the investigation, prevention or prosecution of an act of terrorism: see Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 266–8.

12 Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 447.

13 David Cole and Jules Lobel, *Less Safe, Less Free: Why America is Losing the War on Terror* (The New Press, 2007).

advocated what it termed 'pre-emption' to counter the new threat posed by terrorists and rogue states: anticipatory military action to target 'emerging threats before they are fully formed'.[14] Former United States Attorney-General John Ashcroft coined the 'paradigm of prevention' to describe domestic counter-terrorism measures enabling the government to take coercive action against individuals and groups on suspicion of future harm.[15] Prevention of terrorism also featured strongly in the United Kingdom's anti-terror laws and counter-terrorism strategy following September 11.[16]

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14 President George W Bush, *National Security Strategy of the United States of America* (2002), forwarding letter of President George W Bush, ix.

15 David Cole, 'Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror'' in Andrea Bianchi and Alexis Keller (eds), *Counter Terrorism: Democracy's Challenge* (Hart Publishing, 2008) 233, 235; Jude McCulloch and Sharon Pickering, 'Pre-Crime and Counter-Terrorism' (2009) 49 *British Journal of Criminology* 628, 630. Cole recounts that former United States Attorney-General Ashcroft first announced the preventive policy in the month after the terrorist attacks of September 11. In October 2001, in a speech to the United States Conference of Mayors, Ashcroft stated: 'Let the terrorists among us be warned: If you overstay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America. In the war on terror, this Department of Justice will arrest and detain any suspected terrorist who has violated the law. Our single objective is to prevent terrorist attacks by taking suspected terrorists off the street': quoted in David Cole, 'Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror'' in Andrea Bianchi and Alexis Keller (eds), *Counter Terrorism: Democracy's Challenge* (Hart Publishing, 2008) 233, 235 fn 8.

16 Fenwick and Phillipson describe the United Kingdom's domestic counter-terrorism approach as largely police-based, involving enhanced police powers, broadened coercive powers through the criminal law, such as expanded substantive terrorism offences including preparatory offences, and extraordinary 'pre-emptive' measures such as control orders: Helen Fenwick and Gavin Phillipson, 'UK Counter-Terror Law post-9/11: Initial Acceptance of Extraordinary Measures and the Partial Return to Human Rights Norms' in Victor V Ramraj, Michael Hor, Kent Roach and George Williams (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2012) 481, 481–3. 'Prevent' is one strand of CONTEST, the United Kingdom's counter-terrorism strategy. The other strands are pursue, protect and prepare. Prevent, aimed at counter radicalization, was identified as a key priority in CONTEST, and its revised 2009 version, and has since remained a high priority: see, for example, Clive Walker and Javaid Rehman, 'Prevent' Responses to Jihadi Extremism' in Victor V Ramraj, Michael Hor, Kent Roach and George Williams (eds), *Global*

In line with these nations, Australia responded to September 11 and the Security Council Resolutions by enacting a host of new anti-terror laws and adopting a domestic counter-terrorism policy that prioritised the prevention of terrorism. Former Attorney-General Phillip Ruddock championed prevention as a key cornerstone of Australia's anti-terror policy, and the hallmark of a protective and proactive government seeking to 'prevent rather than to react to terrorist offences'.[17] Prevention of terrorism remains one of the identified purposes of Australia's anti-terror regime in the 2010 Counter Terrorism White Paper, *Securing Australia, Protecting Our Community*,[18] and the 2012 *National Counter Terrorism Plan.*[19] How to anticipate and thwart a terrorist attack before it occurs has been a key concern of the Australian government throughout the so-called war on terror.

Anti-Terrorism Law and Policy (Cambridge University Press, 2012) 242, 242–267; United Kingdom, *Countering International Terrorism: The United Kingdom's Strategy*, Cm 6888 (2006); United Kingdom, *Pursue Prevent Protect Prepare: The United Kingdom's Strategy for Countering International Terrorism*, Cm 7547 (2009).

17 Phillip Ruddock, 'Law as a Preventative Weapon Against Terrorism' in Andrew Lynch, Edwina Macdonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 4.

18 Department of Prime Minister and Cabinet, Parliament of Australia, *Counter-terrorism White Paper—Securing Australia, Protecting Our Community* (2010).

19 This document 'sets out Australia's strategic approach to preventing, and dealing with, acts of terrorism in Australia and its territories'. It retains the 4-pronged approach to countering terrorism: 'Australia's strategic approach to terrorism recognises the need to prepare for, prevent, respond to, and recover (PPRR) from a terrorist act. The PPRR concept acknowledges that these activities will overlap and that elements of PPRR will often occur concurrently.' See National Counter Terrorism Committee, *National Counter Terrorism Plan* (3rd edition, 2012) [7].

When the attacks of September 11 occurred, Australia did not have specific federal laws targeting terrorism.[20] In the decade after September 11, the Commonwealth Parliament enacted 54 anti-terror laws.[21] The objective of preventing a terrorist attack permeates a broad spectrum of Australia's anti-terror legislative initiatives. These range from border management,[22] surveillance and intelligence analysis,[23] to the criminalisation of preparatory acts and associations,[24] the introduction of preventative detention and control orders,[25] and the extension of police powers.[26] The imperative of the prevention of terrorism forms an important part of the picture of 'hyper-legislation' that characterised Australia's response to terrorism following September 11.[27]

Importantly, terrorism related legal action has concentrated on these preventive laws. To date, 37 people have been charged with terrorism related offences pursuant to Part 5.3 of Schedule 1 of the *Criminal Code*

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20 Specific anti-terrorism legislation existed in only one Australian jurisdiction: the Northern Territory. See *Criminal Code Act 1983* (NT) pt 3 div 2; George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136, 1140.

21 George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136, 1144.

22 See, for example: *Aviation Transport Security Act 2004* (Cth); *Border Security Legislation Amendment Act 2002* (Cth); *Maritime Transport and Offshore Facilities Security Act 2003* (Cth).

23 See, for example: *Surveillance Devices Act 2004* (Cth); *Telecommunications (Interception and Access) Amendment Act 2010* (Cth); *Telecommunications Interception Legislation Amendment Act 2002* (Cth); Department of Prime Minister and Cabinet, Parliament of Australia, *Counter-terrorism White Paper—Securing Australia, Protecting Our Community* (2010).

24 *Criminal Code Act 1995* (Cth) sch 1 divs 101, 102 ('*Criminal Code*').

25 Ibid divs 104, 105.

26 Such as the Australian Security Intelligence Organisation's questioning and detention warrants: *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34F–34H.

27 Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 309–360.

Act 1995 (Cth) (*Criminal Code*), resulting in 26 convictions.[28] Fourteen people have been charged with the offence of conspiracy to engage in an act in preparation for an act of terrorism,[29] and no one has yet been charged with the offence of engaging in a terrorist act.[30] Two control orders have been issued, in respect of Jack Thomas and David Hicks,[31] and no preventive detention order has been made. Dr Mohamed Haneef was arrested and detained for 12 days without charge under Part 1C of the *Crimes Act 1914* (Cth), before being charged with a terrorism related offence that was subsequently withdrawn.[32] Preventive measures have

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28 Former Attorney-General Robert McClelland has made reference to 38 persons prosecuted with terrorism related offences. He includes in his count David Hicks, who was neither charged nor prosecuted under Australia law but was the subject of a control order under Div. 104 of the *Criminal Code*: George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136, 1153. For an excellent overview of Australia's terrorism prosecutions, see Nicola McGarrity, '"Testing" Our Counter-Terrorism Laws: The Prosectuion of Individuals for Terrorism Offences in Australia' (2010) 34 *Criminal Law Journal* 92; Nicola McGarrity, '"Let the Punishment Match the Offence": Determining Sentences for Australian Terrorists' (2013) 2 (1) *International Journal for Crime and Justice* 18.

29 Pursuant to ss 11.5 and 101.6 of the *Criminal Code.* Although, as McGarrity highlights, all 14 were not convicted of this offence. For example, four of the nine men charged with this offence as part of Operation Hammerli entered pleas of guilty to lesser offences: Nicola McGarrity, '"Let the Punishment Match the Offence": Determining Sentences for Australian Terrorists' (2013) 2 (1) *International Journal for Crime and Justice* 18, 22 and generally 19–23.

30 David Irving AO, Director-General of Security, Australian Security Intelligence Organisation, argues that the failure to charge anyone with the substantive offence of enagaging in a terrorist act pursuant to s 101.1 of the *Criminal Code* is, for a security intelligence agency, 'precisely the point': 'if we had detected terrorist planning and then allowed it to develop to the attack stage—where many things could go wrong—critics would be entitled to ask why lives had been put at potential risk by not nipping it in the bud earlier': David Irving AO, 'Freedom and Security: Maintaining the Balance' (2012) 33 *Adelaide Law Review* 295, 305–6.

31 For the proceedings in respect of David Hicks, see: *Jabbour v Hicks* (2007) FCMA 2139; *Jabbour v Hicks* [2008] FMCA 178. For the proceedings in respect of Jack Thomas, see: *Jabbour v Thomas* [2006] FMCA 1286.

32 Dr Haneef was charged with the offence of providing support to a terrorist organisation, being reckless as to whether the organisation was a terrorist organisation, under s 102.7(2) of the *Criminal Code*. For further discussion, see MJ Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef* (November 2008); Fergal Davis, 'Extra-constitutionalism, Dr Mohamed Haneef and Controlling Executive Power in Times of Emergency' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The*

been central to Australia's domestic legal response to terrorism, and the focal point of legal action.

This thesis is motivated by a desire to better understand prevention in Australia's legislative response to the threat of terrorism following September 11, 2001. This thesis does not seek to explain or justify prevention in anti-terror lawmaking. Rather, it aims to better understand how preventive anti-terror laws should be understood and situated within the Australian legal system—as exceptional measures that may be isolated as a response to the threat posed by transnational terrorism, or as part of a broader picture of preventive governance in Australia. This thesis approaches this task in a limited way. It tests whether control orders, as an example of prevention in anti-terror law, are novel when compared to two preventive measures in other areas of Australian law.

Part II of this chapter provides a brief note on the terminology of prevention. Part III examines how many of Australia's preventive anti-terror measures were originally justified as 'exceptional' and 'unprecedented' measures in response to the threat of terrorism following September 11. It questions whether another view is available given that preventive measures more generally are not unprecedented.

Culture of Law and Justice After 9/11 (Routledge, 2010) 219; Mark Rix, 'The Show Must Go On: The Drama of Dr Mohamed Haneef and the Theatre of Counter-Terrorism' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge, 2010) 199.

Part III outlines different approaches to understanding prevention in contemporary lawmaking, suggesting that the preventive state concept is the best framework for investigating the exceptionality of Australia's anti-terror control orders. Part IV provides an overview of the research questions and orientation of this thesis as well as chapter outlines.

II A Brief Note on The Terminology of Prevention

Following September 11, a number of terms gained currency as descriptors of governmental efforts to anticipate and thwart acts of terrorism. 'Prevention', 'pre-emption' and 'precaution' in particular have been variously, and often inconsistency, invoked to describe efforts to prevent terrorism at the domestic and international levels. As will be discussed in Chapter Three, the dominance of these three terms since September 11—in academic literature, political statements and media commentary—as descriptors of anticipatory military action and domestic legislative action designed to preclude acts of terrorism belies the lack of consensus regarding their use and meaning. As will be further discussed in Chapter Three, this has resulted in a fractured discourse that challenges meaningful analysis of prevention in domestic lawmaking.

For the purposes of this chapter, the term 'prevention' is employed to generally describe domestic law and policy that is anticipatory or future focused. This is because prevention is the term most often employed by

governments and commentators to describe governmental action to avert harm. At this general level, it is the most accurate descriptor of measures and modes of governance that are anticipatory and seek to preclude harm from occurring. It is in this collective and general sense that prevention is used in this introductory chapter in discussion of prevention in Australia's anti-terror laws and different approaches to understanding prevention in contemporary lawmaking.

As will be further discussed in Chapter Three, when given content in the specific context of domestic lawmaking, 'prevention', alongside related terms such as 'pre-emption', may serve as a way to distinguish between different types of preventive measures. For the purpose of this thesis, a 'preventive measure' refers to laws that sanction the imposition of restraints on liberty to avert the occurrence of future harm. Nickel has described preventive measures as follows:[33]

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[33] James W Nickel, 'Restraining Orders, Liberty, and Due Process' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) 156, 158; Zedner and Ashworth have defined preventive measures according to three features: '(i) restrictions on individual liberty of action (ii) in order to prevent harm or a risk of harm and (iii) are backed by threats of coercive sanctions'. They argue that '[p]reventive measures differ because their primary justifying aim is to restrict individual liberty in order to prevent future harm and not to punish wrongdoing (even where the measure is imposed as a consequence of past wrongdoing): Andrew Ashworth and Lucia Zedner, 'Preventive Orders: A Problem of Undercriminalisation?' in RA Duff, L Farmer, S Marshall, M Renzo & V Tadros (eds), *The Boundaries of the Criminal Law* (Oxford University Press, 2010) 59, 61–2. Ashworth and Zedner created this definition in discussion of measures backed by the threat of imprisonment. However, arguably mental health preventive detention also meets this definition. A person who absconds from a mental health facility may be apprehended and returned by the police or other statutorily prescribed persons: *Mental Health Act 2007* (NSW) ss 48–9, 81. To avoid any confusion as to the meaning of 'coercive sanction' and whether it extends beyond a criminal justice context, this thesis adopts Nickel's formulation of 'coercive threats or forceful incapacitation'.

> Preventive measures in law use coercive threats or forceful incapacitation in hopes of preventing some future harm, crime, nuisance, or obstruction of legitimate government activities.

The following section begins with a general overview of how many of Australia's preventive anti-terror laws have been justified, opposed and conceived of as 'exceptional' and 'unprecedented' measures. It also considers the influence of prevention on the form of two of Australia's preventive anti-terror laws: control orders and preparatory offences.

III PREVENTION IN AUSTRALIA'S DOMESTIC ANTI-TERROR LAWMAKING

A *Exceptional and Unprecedented Measures*

When enacted, many of Australia's preventive anti-terror laws were justified—and opposed—on the basis that they constituted exceptional and temporary measures in response to the exceptional threat of transnational terrorism following September 11.[34] The parliamentary

[34] Nicola McGarrity and George Williams, 'When Extraordinary Measures Become Normal: Pre-emption in Counter-Terrorism and Other Laws' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 131; Justice Mark Weinberg, 'Australia's Ant-Terrorism Laws—Trials and Tribulations' (speech delivered at the International Society for the Reform of Criminal Law, 25th International Conference "Crime and Criminal Justice—Exploring the International, Transnational and Local Perspectives", Washington DC, 24 October 2012) <https://assets.justice.vic.gov.au/scv/resources/45adacb7-b7c3-4c26-b8ae-2864a81449c5/australia%27s_anti-terrorism_laws_-_trials_and_tribulations.pdf>. Justice Weinberg points out that while originally justified as temporary, 'Australia's anti-terrorism laws are today viewed as permanent': 2.

debates surrounding the introduction of the Anti-Terrorism Bill (No. 2) 2005 are instructive. This Bill contained a package of controversial anti-terror measures including control orders, preventative detention orders and sedition offences. Members of Parliament and the Senate reflected that Australia was amidst 'extraordinary', 'unusual' and 'dangerous' times.[35] Many viewed the extraordinary threat to Australia posed by terrorism as necessitating 'extraordinary' and 'unprecedented' anti-terror initiatives to prevent terrorism and protect Australians.[36] Other Members of Parliament opposed the 'extraordinary' measures contained in the Bill for their lack justification and safeguards.[37]

Similarly, the powers conferred on the Australian Security Intelligence Organisation (ASIO) to monitor, question and detain terrorism suspects and non-suspects were justified as exceptional measures to meet extraordinary threat of terrorism.[38] Then Attorney-General Daryl

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35 Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 28 November 2005, 82 (Turnbull) Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 29 November 2005 48–9 (Baldwin); Commonwealth of Australia, *Parliamentary Debates,* Senate, 5 December 2005, 96–8 (Carol Brown), 124 (Mason), 125 (Fielding); see also Commonwealth of Australia, *Parliamentary Debates,* Senate, 6 December 2005, 15 (Faulkner). It is noteworthy that the argument was also put in the debates that there is nothing exceptional about this particular period, that we always live in dangerous times: see for example, Commonwealth of Australia, *Parliamentary Debates,* Senate, 5 December 2005, 115 (Murray).

36 Ibid. Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 28 November 2005, 88 (Moylan); Commonwealth of Australia, *Parliamentary Debates,* Senate, 5 December 2005, 124 (Mason), 125 (Fielding), 129 (Conroy).

37 Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 28 November 2005, 107 (Lawrence); Commonwealth of Australia, *Parliamentary Debates,* Senate, 5 December 2005, 9 (Stott Despoja); Commonwealth of Australia, *Parliamentary Debates,* Senate, 6 December 2005, 9–10 (Stott Despoja), 15 (Faulkner).

38 This regime was first proposed in the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002. In the second reading speech to the Bill, then Attorney-General Williams remarked that

Williams said, in relation to the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No. 2][2003] that contained these powers:[39]

> We have always said that we recognise that this bill is extraordinary; indeed, I have indicated repeatedly that I hope the powers under the bill never have to be exercised.

In supporting this Bill, members of the opposition made similar remarks.[40] Kerr, for example, commented that '[a]s a parliament we have accepted that these exceptional circumstances require exceptional responses.'[41]

These excerpts are illustrative of the way in which many of Australia's preventive anti-terror laws were justified—as exceptional measures necessary to meet the extraordinary threat posed by terrorism. This

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'[t]hese measures are extraordinary, but so too is the evil at which they are directed': Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 21 March 2002, 1932 (Williams). This Bill was laid aside in December 2002. A similar, however more limited, regime was introduced into Parliament on 20 March 2003 in the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No. 2][2003]. This Bill passed both Houses of Parliament and received Royal Assent on 22 July 2003. See Lisa Burton, Nicola McGarrity and George Williams, 'The Extraordinary Questioning and Detention Powers of the Australian Security and Intellgience Organisation' (2012) 36 *Melbourne University Law Review* 415, 421–26.

39 Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 26 June 2003, 17671 (Williams).

40 For example, then leader of the opposition, Simon Crean, stated: '[e]xtraordinary times call for extraordinary measures': Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 26 June 2003, 17675 (Crean).

41 Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 26 June 2003, 17682 (Kerr).

point was recently made by Michael Keenan, who was at the time the Shadow Minister for Justice, Customs and Border Protection and is currently the Minister for Justice. Keenan's observations were made on the tabling in Parliament of the reports of two reviews of Australia's anti-terrorism legislation: the Council of Australian Governments (COAG) *Review of Counter Terrorism Legislation* and the 2012 Annual Report of the Independent National Security Legislation Monitor.[42] Keenan remarked:[43]

> The principle behind the establishment of the independent monitor and the COAG review is the protective principle. It is to add to the armoury of parliamentary surveillance another mechanism designed to ensure that the counterterrorism laws, which were amended so as to expand the executive and policing powers of the state in extraordinary times by introducing into our laws extraordinary measures, are not allowed to become ordinary measures by the passing of time…Those of us who remember those debates also remember that the government that introduced them, the Howard government, made it clear that these were extraordinary measures. It is to be hoped that the time comes when these laws are no longer necessary. However, it is clear, as

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42 Both reports were tabled in Parliament on 14 May 2013. Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013); Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20 December 2012).

43 Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 14 May 2013, 3113 (Keenan).

the Attorney-General did observe, that that time is not yet.

This view of anti-terror measures as exceptional measures is not without precedent: it is shared by some academics and commentators who accept that anti-terror laws are discrete deviations from accepted legal norms and protections to meet the exigent and exceptional threat of terrorism.[44]

At the same time, many commentators have criticised Australia's anti-terror laws for being exceptional and extraordinary measures that depart from accepted legal standards.[45] Williams recently encapsulated this position well:[46]

> The problem arising from Australia's anti-terror laws is not that they exist, but the extraordinary and far reaching form in which

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44 See, for example, Eric Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts*, (Oxford University Press, 2007); Richard A Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford University Press, 2006); Carl Schmitt, *The Concept of the Political* (George Schwab trans, University of Chicago Press, 1996) [trans of *Der Begriff des Politischen* first published 1888].

45 See, for example, Andrew Lynch, Nicola McGarrity and George Willaims, 'The Emergence of a Culture of Control' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routlegde, 2010) 3; Nicola McGarrity and George Williams, 'When Extraordinary Measures Become Normal: Pre-emption in Counter-Terrorism and Other Laws' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 131; George Williams, 'The Legal Legacy of the 'War on Terror" (2013) 12 *Macquarie Law Journal* 3, in particular 6–11; George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 Melbourne University Law Review 1136; For a contrary position as to the exceptional nature of anti-terror laws, see: Simon Bronitt, 'Australia's Legal Response to Terrorism: Neither Novel Nor Extraordinary?' (Paper presented at the Castan Centre For Human Rights Law Conference "Human Rights 2003: The Year in Review", CUB Malthouse – Melbourne, 4 December 2003).

46 George Williams, 'The Legal Legacy of the 'War on Terror" (2013) 12 *Macquarie Law Journal* 3, 6 (footnotes omitted).

> they were enacted. Australia's response to September 11 was similar to that of many other countries. It emphasised the need to deviate from the ordinary criminal law—with its emphasis on punishment of individuals after the fact—by preventing terrorist acts from occurring in the first place. The result was a bout of lawmaking that continues to challenge long-held assumptions as to the proper limits of the law, and criminal law in particular, and also accepted understandings of the respective roles of the executive, parliament and the judiciary.

Indeed, how these preventive laws interact with the legal norms, precepts and protections of the criminal justice system in particular has attracted considerable attention and criticism. Legal academics and criminologists have argued that the policy objective of prevention has led to novel—'dangerously innovative'[47]—legislative developments that stretch the boundaries of the criminal law and evade or erode protections within the criminal justice system.[48] Ericson has evocatively

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47 To adopt the language used by Finnane and Donkin to describe how anti-terror law has been perceived within criminology and criminal law: 'The proliferation of preventive and punitive statutes has been regarded as incompatible with conventional liberal norms in criminal law and as dangerously innovative in its embrace of new strategies and new categories of control': Mark Finnane and Susan Donkin, 'Fighting Terror with Law? Some Other Genealogies of Pre-emption' (2013) (2)1*International Journal of Crime and Justice* 3, 3.

48 Bernadette McSherry, 'Expanding the Boundaries of Inchoate Crimes: The Growing Reliance on Preparatory Offences' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009) 141; Jude McCulloch and Bree Carlton, 'Preempting Justice: Suppression of Financing of Terrorism and the 'War on Terror' (2006) 17(3) *Current Issues in Criminal Justice* 397; Jude McCulloch and Sharon Pickering, 'Counter-Terrorism: The Law and Policing of Pre-emption' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routlegde, 2010) 13; Andrew Lynch and George Williams, *What Price Security?*

described such preventive innovations as a form of counter-law, being 'laws against law':[49]

> New laws are enacted and new uses of existing law are invented to erode or eliminate traditional principles, standards, and procedures of criminal law that get in the way of pre-empting imagined sources of harm.

In the Australian context, the introduction of anti-terror control orders and preparatory offences in Divisions 104 and 101 respectively of the *Criminal Code* has generated concerted criticism along these lines.[50]

Taking Stock of Australia's Anti-Terror Laws (UNSW Press, 2006); Edwina MacDonald and George Williams, 'Combating Terrorism: Australia's *Criminal Code* Since September 11, 2001' (2007) 16(1) *Griffith Law Review* 27; See also, Andrew Ashworth and Lucia Zedner, 'Just Prevention: Preventive Rationales and the Limits of the Criminal Law' in Antony Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 279; Richard V Ericson, *Crime in an Insecure World* (Polity Press, 2007); Lucia Zedner, 'Seeking Security by Eroding Rights: The Side-Stepping of Due Process' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart, 2007) 257; Kent Roach, 'The Criminal Law and its Less Restrained Alternatives' in Victor V Ramraj and others (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 91.

[49] Richard V Ericson, *Crime in an Insecure World* (Polity Press, 2007) 24.

[50] See, for example, Susan Donkin, *Preventing Terrorism and Controlling Risk: A Comparative Analysis of Control Orders in the UK and Australia* (Springer, 2014) ch 2; Keiran Hardy, 'Bright Lines and Open Prisons: The Effect of a Statutory Human Rights Instrument on Control Order Regimes' (2011) 36(1) *Alternative Law Journal* 4; Andrew Lynch, 'Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law' (2008) 8 *Oxford University Commonwealth Law Journal* 159; Jude McCulloch, 'Australia's Anti-Terrorism Legislation and the Jack Thomas case' (2006) 18(2) *Current Issues in Criminal Justice* 357; Bernadette McSherry, 'Expanding the Boundaries of Inchoate Crimes: The Growing Reliance on Preparatory Offences' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009) 141; Edwina MacDonald and George Williams, 'Combating Terrorism: Australia's *Criminal Code* Since September 11, 2001' (2007) 16(1) *Griffith Law Review* 27; Justice Mark Weinberg, 'Australia's Ant-Terrorism Laws—Trials and Tribulations' (speech delivered at the International Society for the Reform of Criminal Law, 25th International Conference "Crime and Criminal Justice—Exploring the International, Transnational and Local Perspectives", Washington

Control orders are civil preventive orders that enable restrictions, obligations and prohibitions to be imposed on an individual for the purpose of preventing a terrorist act.[51] An individual's liberty may thus be preventively restrained on the basis of an anticipated harm. Importantly, this harm need not be directly connected to the individual: a control order may be imposed on the basis of an estimation 'of some future act, not necessarily one to be committed by the person subject to the proposed order'.[52] This is in stark contrast to the traditional retrospective orientation of the criminal justice system, where the state reacts and responds to harm that has occurred such as by investigating and punishing criminal acts.

Then Attorney-General Phillip Ruddock explained and justified the introduction of control orders in Division 104 of the *Criminal Code* as follows:[53]

DC, 24 October 2012) <https://assets.justice.vic.gov.au/scv/resources/45adacb7-b7c3-4c26-b8ae-2864a81449c5/australia%27s_anti-terrorism_laws_-_trials_and_tribulations.pdf>.

51 *Criminal Code* div 104. The *Criminal Code* defines a terrorist act as 'action or threat of action' that is done or made with the intention of 'advancing a political, religious or ideological cause' and 'coercing, or influencing by intimidation' an Australian or foreign government or part of a state or country, or 'intimidating the public' or a section thereof: s 100.1. Action to which the subsection refers includes action that causes serious physical harm to a person; endangers life or causes death; causes serious damage to property; creates a serious risk to the health or safety of the public or section thereof; seriously interferes with, disrupts or destroys an electronic system. It does not include advocacy, protest, dissent or industrial action that is not intended to cause serious physical harm, death or endanger life or 'to create a serious risk to the health or safety of the public' or section thereof: ss 100.1(2)–(3).

52 *Thomas v Mowbray* (2007) 233 CLR 307, [357] (Kirby J).

53 Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 29 November 2005, 100–1 (Ruddock).

> [Y]es, control orders are new; they are very different. The burden of proof is different. It is certainly not within the criminal code as we would normally understand it, with the normal burdens of proof that follow, because what we are seeking to do is protect people's lives from possible terrorist acts.

In order to restrain an individual's liberty to forestall 'possible terrorist acts', a control order is issued in civil proceedings. The civil nature of control orders enables the government to target 'pre-crime' acts and intervene early, well before a terrorist attack occurs or is attempted, in order to avert an anticipated terrorist threat.[54] In doing so, the government may impose significant restrictions upon an individual's liberty while 'side-stepping' the enhanced procedural protections that attach to the criminal justice system.[55]

Control orders do not, however, completely 'side-step' the criminal justice system. Control orders are civil orders when made but, if

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54 'Pre-crime' owes its origin to the Precrime Agency in Phillip K Dick's short story *The Minority Report* (1956). In 2002, a film adaptation of this short story was released, directed by Stephen Spielberg and entitled *Minority Report*. Following September 11, 'pre-crime' has become one of the most evocative descriptors of anti-terror initiatives designed to anticipate and avert threats. See, for example, Lucia Zedner, 'Pre-Crime and Post-Criminology?' (2007) 11(2) *Theoretical Criminology* 261; Jude McCulloch and Sharon Pickering, 'Pre-Crime and Counter-Terrorism: Imagining Future Crime in the 'War on Terror' (2009) 49 *British Journal of Criminology* 628.

55 Lucia Zedner, 'Seeking Security by Eroding Rights: The Side-Stepping of Due Process' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart, 2007) 257; Kent Roach, 'The Criminal Law and its Less Restrained Alternatives' in Victor V Ramraj and others (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 91.

breached, attract criminal liability. A person who contravenes, without reasonable excuse, any of the terms of a control order to which he or she is subject commits an offence with a maximum penalty of five years imprisonment.[56] Ashworth and Zedner point out that an individual subject to a civil preventive order has fewer rights than if charged with a criminal offence. Nonetheless following the civil proceedings in which the order is issued, the individual is 'subjected to a detailed and possibly wide-ranging personal criminal code' that attracts a maximum term of imprisonment on breach that is higher than that of most criminal offences.[57]

The introduction of preparatory offences in Division 101 of the *Criminal Code* provides an example of the pursuit of the prevention of terrorism enlarging the boundaries of the criminal law.[58] Preparatory offences involve the criminalisation of acts taken well before and further removed

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56 *Criminal Code* s 104.27.

57 While these remarks were made in respect to another species of civil preventive order in the United Kingdom, the Anti-Social Behaviour Order, they are of equal relevance to control orders: Andrew Ashworth and Lucia Zedner, 'Preventive Orders: A Problem of Undercriminalisation?' in RA Duff, L Farmer, S Marshall, M Renzo & V Tadros (eds), *The Boundaries of the Criminal Law* (Oxford University Press, 2010) 59, 74–75.

58 Bernadette McSherry, 'Expanding the Boundaries of Inchoate Crimes: The Growing Reliance on Preparatory Offences' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009) 141; Edwina MacDonald and George Williams, 'Combating Terrorism: Australia's *Criminal Code* Since September 11, 2001' (2007) 16(1) *Griffith Law Review* 27; See also, Andrew Ashworth and Lucia Zedner, 'Just Prevention: Preventive Rationales and the Limits of the Criminal Law' in Antony Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 279.

from harm than that which is traditionally accepted in Australian criminal law. As Spigelman CJ made clear in *Lodhi v R*:[59]

> Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was, in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct, e.g. well before an agreement has been reached for a conspiracy charge.

The introduction of anti-terror preparatory offences may thus be understood as extending the reach of the criminal law by enabling criminal liability to arise at points in time prior to inchoate liability. The *Criminal Code* contains a number of inchoate offences, including attempt, conspiracy and incitement.[60] Inchoate liability is, however, not uncontroversial: in particular, because it enables the state to intervene and prosecute and punish a person who intends to cause harm but who

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59 [2006] NSWCCA 121, [66].

60 The federal inchoate offences are contained in pt 2.4 of the *Criminal Code*. Inchoate liability has a long history as part of the common law and statute. The crime of conspiracy, for example, has been traced in statutory form to the 13th century. However, as Bronitt and McSherry highlight, it is only comparatively recently that inchoate offences have been regarded as substantive offences. Inchoate offences, as substantive offences, are statutorily prescribed in all Australian jurisdictions: see Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (LBC Information Services, 2001) ch 9, 431–3, 444–5.

has not yet done so.[61] In criminalising acts and associations further removed from the commission of a terrorist act, preparatory offences have been described as giving rise to pre-inchoate liability.[62]

At the same time, these preparatory offences attract the severest range of penalties available under the *Criminal Code.* For example, the maximum penalty for the offence of doing 'any act in preparation for, or planning, a terrorist act' under s 101.6 of the *Criminal Code* is life imprisonment. MacDonald and Williams highlight that these offences thereby 'render individuals liable to very serious penalties even before there is clear criminal intent' to engage in a terrorist act.[63] Thus, in contrast to the inchoate offences, criminal liability arises prior to the formation of intent to commit the substantive offence of engaging in a terrorist act.

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61 Edwina MacDonald and George Williams, 'Combating Terrorism: Australia's *Criminal Code* Since September 11, 2001' (2007) 16(1) *Griffith Law Review* 27, 33–35; Bernadette McSherry, 'Expanding the Boundaries of Inchoate Crimes: The Growing Reliance on Preparatory Offences' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009) 141.

62 Andrew Ashworth and Lucia Zedner, 'Just Prevention: Preventive Rationales and the Limits of the Criminal Law' in Antony Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 279, 285–6.

63 Edwina MacDonald and George Williams, 'Combating Terrorism: Australia's *Criminal Code* Since September 11, 2001' (2007) 16(1) *Griffith Law Review* 27, 34.

B *Exceptional and Unprecedented Measures? Historical and Contemporary Preventive Measures*

Although many preventive anti-terror laws were originally heralded as 'unprecedented' and 'exceptional' initiatives to counter the threat posed by terrorism, preventive measures more generally are not unprecedented. Governments have long employed strategies to control future conduct by restricting an individual's liberty.[64] Examples include the power historically granted to a Justice of the Peace to bind over and incarcerate an individual to prevent a breach of the peace,[65] and the statutory power of courts to restrain an individual to prevent future violence, such as by making an apprehended violence order.[66] Similarly,

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64 See, for example, Alan M Dershowitz, *Pre-emption: A Knife that Cuts Both Ways* (WW Norton & Company, 2006); Susan Donkin, *Preventing Terrorism and Controlling Risk: A Comparative Analysis of Control Orders in the UK and Australia* (Springer, 2014) 18–20; David Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Ashgate, 2007); Mark Finnane and Susan Donkin, 'Fighting Terror with Law? Some Other Genealogies of Pre-emption' (2013) (2)1 *International Journal of Crime and Justice* 3; Bernadette McSherry, 'Sex, Drugs and 'Evil' Souls: The Growing Reliance on Preventive Detention Regimes' (2006) 32 (2) *Monash University Law Review* 237; *South Australia v Totani* (2010) 242 CLR 1, 30–33 (French CJ), 142–146 (Heydon J); *Thomas v Mowbray* (2007) 233 CLR 307.

65 Dershowitz traces the Office of Justice of the Peace to the time of Richard I in the 12th century (then called the Office of Conservator of the Peace, to become Guardian of the Peace, Keeper of the Peace, and finally, Justice of the Peace). The power of a Justice of the Peace to prevent breaches of the peace extended to incarcerating an individual who it was suspected might commit a harmful or criminal act: Alan M Dershowitz, *Pre-emption: A Knife that Cuts Both Ways* (W. W. Norton & Company, 2006) 43, 50. Blackstone, in his commentaries, coined 'preventive justice' to describe those laws that sought to intervene before a crime is committed, at the point of 'probable suspicion', such as securities for keeping the peace, and which were thus not intended to punish: William Blackstone, *Commentaries on the Laws of England* (R. Bell, 1772), Bk IV, 248.

66 In New South Wales, for example, these orders are now made pursuant to the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which replaced the apprehended violence order (AVO) scheme in pt 15A of the *Crimes Act 1900* (NSW). AVOs were first introduced in New South Wales in 1982 through the *Crimes (Domestic Violence) Amendment Act 1982* (NSW). This Act empowered magistrates to make an order, for up to 6 months, restraining an individual where domestic violence was apprehended. AVOs are hybrid orders: that is, civil

the statute books have historically featured legislation that provides for an individual's liberty to be restrained to avoid the occurrence of identified harms. These include legislative regimes prescribing the preventive detention of persons with severe substance dependence, persons with mental illness and those carrying infectious diseases.[67]

In addition, over the last decade, legislation has been introduced in many Australian jurisdictions permitting the post-sentence preventive detention and continued supervision of serious sex offenders.[68] Each of these measures enables an individual's liberty to be restrained on the basis of an estimation of future harm, rather than past acts (even if past acts form part of the prediction of future harm). Likewise, preparatory offences, while not commonplace, have long been part of the criminal law in Australian jurisdictions.[69] For example, in New

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orders that attract a criminal penality of 6 months imprisonment on breach. These orders have since been extended to all situtations in which violence is feared. For a history of AVOs in New South Wales see NSW Law Reform Commission, *Apprehended Violence Orders* Discussion Paper No 45 (2002) ch 2; NSW Law Reform Commission, *Apprehended Violence Orders*, Report No.103 (2003).

67 For example, in New South Wales this detention occurs pursuant, respectively, to the *Drug and Alcohol Treatment Act 2007* (NSW), *Mental Health Act 2007* (NSW) and *Public Health Act 2010* (NSW).

68 Queensland was the first jurisdiction to introduce post-sentence preventive detention and supervision, followed by Western Australia, New South Wales, Victoria and, in 2013, the Northern Territory: *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Dangerous Sexual Offenders Act 2006* (WA); *Crimes (Serious Sex Offenders) Act 2006* (NSW); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic); *Sex Offenders Act 2013* (NT). In March 2013, the New South Wales regime was extended to high risk violent offenders. The *Crimes (Serious Sex Offender) Act* 2006 (NSW) was amended and renamed the *Crimes (High Risk Offenders) Act* 2006 (NSW).

69 For an excellent overview and comparison of preparatory offences in Australia's states and territories see: Victorian Sentencing Advisory Council, *Review of Maximum Penalties for Preparatory Offences Report* (December 2006).

South Wales the *Crimes Act* 1900 (NSW) has, since its enactment, contained four preparatory offences in s 114.[70]

Importantly, these measures have often departed from accepted legal principles and protections. Finnane and Donkin, for example, conducted a study of three security practices of the modern liberal state: the preventive detention of persons with mental illness, the preventive detention of dangerous and habitual offenders, and wartime internment.[71] Each provides an example of the state derogating from accepted principles and protections to secure security, such as, in the case of the indefinite sentencing of habitual offenders, the principle of proportionality in sentencing. This study demonstrates that the liberal state in its pursuit of security has 'long adopted means that sidestep, avoid or are indifferent to the operations and concerns of the criminal law'.[72]

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70 Section 114, 'Being armed with intent to commit indictable offence', reads:

(1) Any person who:

(a) is armed with any weapon, or instrument, with intent to commit an indictable offence,

(b) has in his or her possession, without lawful excuse, any implement of housebreaking or safebreaking, or any implement capable of being used to enter or drive or enter and drive a conveyance,

(c) has his or her face blackened or otherwise disguised, or has in his or her possession the means of blacking or otherwise disguising his or her face, with intent to commit an indictable offence,

(d) enters or remains in or upon any part of a building or any land occupied or used in connection therewith with intent to commit an indictable offence in or upon the building, shall be liable to imprisonment for seven years.

71 Mark Finnane and Susan Donkin, 'Fighting Terror with Law? Some Other Genealogies of Pre-emption' (2013) (2)1 *International Journal of Crime and Justice* 3.

72 Ibid 13.

Indeed, to take a uniquely Australian example, the *Robbers and Housebreakers Act 1830* (11 Geo IV No 10), known as the Bushranger Act for its use against suspected bushrangers, was criticised for undermining established legal principles.[73] This Act permitted the apprehension and detention without charge of a person suspected of being a felon until the suspected felon established, to the reasonable satisfaction of a Justice of the Peace, that he or she was not a felon.[74] McSherry reports that Justice Burton of the New South Wales Supreme Court criticised this aspect of the regime as offending 'the common law principle that every person is presumed to be free.'[75] Indeed, Bronitt has drawn on historical and contemporary examples, such as legislation targeting Bushrangers and contemporary drug and organised crime laws, to argue that '[t]here is little that is truly novel behind these recent [anti-terrorism] reforms in Australia and elsewhere'.[76]

This raises the question of just how new, novel or exceptional preventive anti-terror laws are and how they should be understood and situated within the Australian legal system. Are they, for example, best understood as extraordinary measures that may be isolated as a specific response to the threat of terrorism following September 11 or might they form part of a picture of preventive governance that preceded

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73 Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (Routledge, 2014) 12–15.

74 Ibid.

75 Ibid 12.

76 Simon Bronitt, 'Australia's Legal Response to Terrorism: Neither Novel Nor Extraordinary?' (Paper presented at the Castan Centre For Human Rights Law Conference "Human Rights 2003: The Year in Review", CUB Malthouse — Melbourne, 4 December 2003).

the events of that day, yet took its most visible form thereafter? Further, are preventive anti-terror laws nonetheless exceptional in their reach when compared to preventive measures employed in other areas of Australian law?

Prior to September 11 academics had begun to apprehend a rise in the number and type of preventive measures employed by governments and to articulate new approaches to understanding prevention. The next section examines different approaches to reading and understanding prevention in lawmaking. It argues that the concept of the preventive state, in particular, has been an influential way that academics have conceptualised the predominance of preventive measures in contemporary lawmaking and constitutes the best fit for investigating whether preventive anti-terror laws are exceptional when compared to other preventive practices.

IV Approaches to Understanding Prevention

There are, and will always be, competing ways to conceive of prevention in contemporary lawmaking.[77] Many accounts that explain or analyse

[77] Other ways to view or read these developments include 'the security state' (See, for example, Mark Brown, 'Prevention and the Security State: Observations on an Emerging Jurisprudence of Risk' (2011) VII *Champ Pénal* <http://champpenal.revues.org/8016>; Simon Hallsworth and John Lea, 'Reconstructing Leviathan: Emerging Contours of the Security State' (2011) 15 *Theoretical Criminology* 141); 'the security society' (see, for example, Lucia Zedner, *Security* (Routledge, 2009); 'the insecurity state' (see, for example, Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford University Press, 2012); 'the state of pre-emption' (see, for example Richard V Ericson, 'The State of Preemption: Managing Terrorism

the current prevalence of preventive measures are, as Ashworth has identified, couched in terms of a 'marked shift in political emphasis'.[78] Albeit that the extent and newness of this shift is contested.[79] For some, this shift is articulated in terms of the 'emergent phenomenon' of the 'new penology' or 'actuarial justice';[80] for others, the emergence of 'the risk society' and 'world risk society';[81] others yet identify that risk has now been surpassed by uncertainty, giving rise to questions of precautionary action.[82] These perspectives are neither exhaustive nor

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through Counter Law' in Louise Amoore and Marieke de Goede (eds), *Risk and the War on Terror* (Routledge, 2008) 57.

78 Andrew Ashworth, 'Criminal Law, Human Rights and Preventative Justice' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009) 87, 87. See also Bernadette McSherry and Patrick Keyzer, *Sex Offenders and Preventive Detention: Politics, Policy and Practice* (The Federation Press, 2009) 20–3.

79 See, for example, in relation to the new penology, David Garland's argument that movement from the individual and transformative orientation of the 'old' penology to the managerial orientation and actuarial nature of the 'new' penology is 'neither as new nor extensive' as suggested by Simon and Feeley: David Garland, 'Penal Modernism and Postmodernism' in Thomas G Blomberg and Stanley Cohen (eds), *Punishment and Social Control* (Transaction Publishers, 3rd edition, 2012) 45, 65; For rebuttal, see Jonathan Simon and Malcolm M Feeley, 'The Form and Limits of the New Penology' in Thomas G Blomberg and Stanley Cohen (eds), *Punishment and Social Control* (Transaction Publishers, 3rd edition, 2012) 75, 76. See also Lucia Zedner, 'Policing Before and After the Police: The Historical Antecedents of Contemporary Crime Control' (2006) 46 *British Journal of Criminology* 78.

80 Malcolm M Feeley and Jonathan Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications' (1992) 30 *Criminology* 449; Malcolm M Feeley and Jonathan Simon, 'Actuarial Justice: Power/Knowledge in Contemporary Criminal Justice' in David Nelken (ed), *The Futures of Criminology* (Sage, 1994) 173; Jonathan Simon and Malcolm M Feeley, 'The Form and Limits of the New Penology' in Thomas G Blomberg and Stanley Cohen (eds), *Punishment and Social Control* (Transaction Publishers, 3rd edition, 2012) 75, 77.

81 Ulrich Beck, *Risk Society* (Sage Publications, 1992); Ulrich Beck, *World Risk Society* (Polity Press, 1999); Ulrich Beck, *World at Risk* (Polity Press, 2009).

82 Richard V Ericson, *Crime in an Insecure World* (Polity Press, 2007); François Ewald, 'The Return of the Crafty Genius: An Outline of a Philosophy of Precaution' (1999) 6(1) *Connecticut Insurance Law Journal* 47 reproduced in Pat O'Malley (ed), *Governing Risks* (Ashgate, 2005) 538; François Ewald, 'The Return of Descartes's Malicious Demon: An Outline of a Philosophy of Precaution' in Tom Baker and Jonathon Simon (eds), *Embracing Risk: The Changing Culture of Insurance and Responsibility* (University of Chicago Press, Stephen Utz translation, 2002) 273; Lucia Zedner, *Security* (Routledge, 2009).

necessarily mutually exclusive.[83] McSherry, for example, having canvassed these perspectives as well as those from social psychology, argues that:[84]

> What *is* new is the growing reliance upon preventive detention and supervision regimes at both the pre-crime and post-sentence ends of the spectrum *in conjunction with* a growing emphasis on risk and precaution.

This reliance, McSherry argues, is a 'product of different, but coalescing trends' including the growth of the risk society, actuarial justice and precautionary action.[85]

The following sections briefly canvas these different perspectives—the new penology, the risk society and those dealing with uncertainty and precaution—before outlining the preventive state concept. These first three perspectives are canvassed as they are predominant ways in which the contemporary use of preventive measures is explained or couched, and provide necessary context for both the preventive state concept and preventive state practices. The literature on the preventive state concept is thereby situated amongst other attempts to

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83 Ericson and Haggerty, for example, have drawn on both the governmentality and risk society perspectives in Richard V Ericson and Kevin D Haggerty, *Policing the Risk Society* (Oxford University Press, 1997). See also Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention* (Routledge, 2014) ch 2.

84 Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention* (Routledge, 2014) 29–30 (emphasis in original).

85 Ibid 30, 229.

understand, explain or conceptualise contemporary preventive practices—illustrating how the preventive state concept differs from these accounts in its core project. The following sections also provide important context for understanding preventive state practices as the perspectives discussed contribute to understandings of prevention in lawmaking. Although the preventive state concept is advanced as the best fit for testing assumptions regarding the exceptionality and reach of anti-terror laws, these other perspectives are drawn upon throughout this thesis to assist in contextualising and understanding preventive state practices.

A *The New Penology: The Identification and Management of Risk*

Feeley and Simon were the first to articulate the 'emergent phenomenon' of what they called the 'new penology' or 'actuarial justice'.[86] The 'new penology' may be understood as 'a shift in the way crime is governed (known about and acted on)' that is evident from the mid-1980s onwards.[87] The new penology is put forward as one aspect of contemporary criminal justice practice that has emerged 'alongside and

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86 Malcolm M Feeley and Jonathan Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications' (1992) 30 *Criminology* 449; Malcolm M Feeley and Jonathan Simon, 'Actuarial Justice: Power/Knowledge in Contemporary Criminal Justice' in David Nelken (ed), *The Futures of Criminology* (Sage, 1994) 173; Jonathan Simon and Malcolm M Feeley, 'The Form and Limits of the New Penology' in Thomas G Blomberg and Stanley Cohen (eds), *Punishment and Social Control* (Transaction Publishers, 3rd edition, 2012) 75, 77. I note that Bottoms wrote of 'new managerialism' in the early 1980s: Anthony Bottoms, 'Neglected features of contemporary penal systems' in David Garland and Peter Young (eds) *The Power to Punish: Contemporary Penality and Social Analysis* (Heinemann Educational Books, 1983) 166.

87 Jonathan Simon and Malcolm M Feeley, 'The Form and Limits of the New Penology' in Thomas G Blomberg and Stanley Cohen (eds), *Punishment and Social Control* (Transaction Publishers, 3rd edition, 2012) 75, 77–8.

is partner to a changed political culture underpinned by neo-liberal politics and a global concern with security'.[88]

The new penology is grounded in the Foucauldian analytic of governmentality and, in particular, Anglophonic governmentality scholarship.[89] For Foucault, governmentality was:[90]

> understood in the broad sense of techniques and procedures directing human behavior. Government of children, government of souls and consciences, government of household, of a state, or of oneself.

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88 Martin O'Brien and Majid Yar, *Criminology: The Key Concepts* (Taylor and Francis, 2008) 3.

89 This scholarship is sometimes referred to as the 'Anglo-Foucauldian effect', having taken off after the publication of Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press, 1991). While governmentality scholarship commenced in the 1980s, it flourished following this publication, which shifted the focus of governmentality research from the French-speaking world to the English-speaking world. The Anglophonic collection of scholarship has largely stepped away from the genealogical-historical orientation of the Francophone studies and focused instead on the use of 'Foucault's instruments to analyse processes of contemporary social transformation': Ulrich Bröckling, Susanne Krasmann and Thomas Lemke, 'From Foucault's Lectures at the Collège de France to Studies in Governmentality: An Introduction' in Ulrich Bröckling, Susanne Krasmann and Thomas Lemke (eds), *Governmentality: Current Issues and Future Challenges* (2011) 1, 9; Bob Jessop, 'Constituting Another Foucault Effect: Foucault on States and Statecraft' in Ulrich Bröckling, Susanne Krasmann and Thomas Lemke (eds), *Governmentality: Current Issues and Future Challenges* (2011) 56. See also Nikolas Rose, Pat O'Malley and Mariana Valverde, 'Governmentality' (2006) 2 *Annual Review of Law and Social Science* 83.

90 Michel Foucault, *Ethics: Subjectivity and Truth (Essential Works of Michel Foucault, 1954–1984. Vol. 1)* (New Press, 1997) 82 extracted in Nikolas Rose, Pat O'Malley and Mariana Valverde, 'Governmentality' (2006) 2 *Annual Review of Law and Social Science* 83, 83. The term 'governmentality' derives from Foucault's lectures at the Collège de France in 1978. Dean identifies two meanings of the term 'governmentality' in the literature: the first is its general meaning, an inquiry into the art of government, and the second a historically specific version of the first: Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (Sage Publications Ltd, 2nd ed, 2010) 24–8; Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–1978* (Picador, Graham Burchell trans, 2007) 108; see also Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge-Cavendish, 2009) 29–35.

Generally speaking, an analysis of governmentality involves an inquiry into the art of governing: the different styles of thought and the complex practices, institutions, procedures and programmes through which we govern and are governed.[91] A key concern of governmentality scholarship has been the use of technologies of risk in governing:[92] in particular, 'how neo-liberal states discipline and govern through risk'.[93]

The new penology is concerned with changes to the way in which crime is governed that have been influenced by the application of actuarial methods in criminal justice contexts. The 19th and 20th centuries bore witness to the development and expansion of actuarial methods. By the 20th century, the impact of these developments was visible in many areas of governance, including crime, as risk became a way of viewing and responding to societal problems.[94] The shift in how crime is governed is discernible in the different orientation, discourses and practices of the 'old' and 'new' penology. The 'old' penology had an individualised and transformative orientation, and emphasised

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91 Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–1978* (Picador, Graham Burchell trans, 2007) 108; Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (Sage Publications Ltd, 2nd ed, 2010), 24–8; Nikolas Rose, Pat O'Malley and Mariana Valverde, 'Governmentality' (2006) 2 *Annual Review of Law and Social Science* 83, 84.

92 Nikolas Rose, Pat O'Malley and Mariana Valverde, 'Governmentality' (2006) 2 *Annual Review of Law and Social Science* 83, 95.

93 Gabe Mythen and Sandra Walklate, 'Which Thesis? Risk Society or Governmentality?' (2006) 46 *British Journal of Criminology* 379, 385. This is not, however, to suggest that governmentally scholarship is monolithic or homogenous. Rather differences also exist within governmentality scholarship as to crime and risk: Pat O'Malley, 'Discontinuity, Government and Risk: A Response to Rigakos and Hadden' (2001) 5 *Theoretical Criminology* 85, 90.

94 Jonathan Simon, 'Review Symposium: Il miglior fabbro (the finer craftsman)' (2011) 15 (2) *Theoretical Criminology* 223, 224.

'responsibility, fault, moral sensibility, diagnosis, or intervention and treatment of the individual offender'.[95] The 'new' penology, by contrast, was identified as managerial in orientation: concerned with the management of risk and the regulation of levels of deviance, with 'techniques to identify, classify, and manage groupings sorted by dangerousness'.[96] The new penology has not replaced the old, rather its elements are discernible alongside those of the old penology.

The new penology is thus predicated upon predicting dangerousness and managing safety. It relies on the language of risk as part of the machinery of criminal justice as well as new narratives of criminality.[97] This is seen, for example, in the emergence of 'high-risk' offenders. The new penology entails new ways of identifying and managing risk, from electronic monitoring in the community and racial profiling of suspected terrorists to the use of statistical models to assess risk and predict the likelihood of future harm.[98]

Pratt has illustrated how the increasing reliance on actuarial methods can be understood as part of the neo-liberal state's commitment to public protection. With the emergence of the neo-liberal state, laws of neo-liberal rule continued to focus on 'public protection' and the neo-

95 Malcolm M Feeley and Jonathan Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications' (1992) 30 *Criminology* 449, 452.

96 Ibid.

97 See generally Jonathan Simon, 'Managing the Monstrous: Sex Offenders and the New Penology' (1998) 4 *Psychology, Public Policy and Law* 452.

98 Malcolm M Feeley and Jonathan Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications' (1992) 30 *Criminology* 449, 457.

liberal state continued to accept responsibility for the protection of citizens from those deemed 'dangerous'. However, it did so alongside new strategies that enjoined citizens in the self-management of, or self-protection from, risk.[99] The self-management of risks by the citizenry increased—and increases—the visibility of risk, crime and insecurity, which, somewhat ironically, promotes the role of the state as protector of 'ungovernable' risks, such as the dangerous.[100] As Pratt makes clear:[101]

> To further guarantee public protection, it [the neo-liberal state] began to show an increasing interest in the calibration of future risk: new knowledges (actuarialism), new strategies (a further harnessing of formerly autonomous experts to pre-given national objectives) began to replace outmoded welfarist concepts and vocabularies.

In line with this, new policies and preventive measures are formulated and introduced to maximise safety and security. These are based not on attempts to rehabilitate or 'cure' offenders but upon the assessment and management of risk. These measures are prized for their management of risk: such as incapacitation through detention or, for those of lower

99 John Pratt, *Governing the Dangerous* (The Federation Press, 1997) 157–9.
100 Ibid.
101 Ibid 177.

risk, other methods falling short of incapacitation are employed, such as probation or community supervision.[102]

The growing influence and obsession with security, particularly evident since September 11, is, as Zedner highlights, in large part a function of the significance of risk assessment and prudentialism 'whose coalescing in the 'new penology'…has signified a marked shift away from the largely retrospective orientation of the criminal justice process'.[103] This is evident in the introduction of security maximising preventive and pre-crime measures. For Zedner, these pre-crime legislative developments are an aspect of the ascendance of security in governance, society and private enterprise. In 'the security society', crime and security are increasingly blurred, altering how crime is conceived and the types of measures taken in response to security threats. Security, governed by a pre-emptive logic, is overshadowing the post-crime logic of criminal justice and ushering in pre-crime measures grounded not in punishment but in prevention and, as will be discussed below in Part IV(C), precaution.[104]

The new penology is not without critics. It has been challenged as neither as 'novel' nor 'extensive' as suggested,[105] as neither reflected in

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102 Nikolas Rose, 'Government and Control' (2000) 40 *British Journal of Criminology* 321, 332.

103 Lucia Zedner, *Security* (Routledge, 2009) 1.

104 Ibid 67–88.

105 David Garland, 'Penal Modernism and Postmodernism' in Thomas G Blomberg and Stanley Cohen (eds), *Punishment and Social Control* (Transaction Publishers, 3rd edition, 2012) 45, 65.

the practices of those engaged in the criminal justice system nor resonating with the public.[106] Rose, for example, argues that the enhanced focus on prevention and risk management strategies should not be misunderstood as 'a totalised shift towards actuarial control'.[107] Those engaged in criminal justice practice do employ probabilistic language and calculative techniques, but rarely actuarial methods.[108] Rather, in this setting, Rose argues it is better to understand this:[109]

> in terms of the emergence and routinization of a particular style of thought: risk thinking. This is concerned with bringing possible future undesired events into calculations in the present, making their avoidance the central object of decision-making processes, and administering individuals, institutions, expertise and resources in the service of that ambition. Understood in this way, risk thinking has become central to the management of exclusion in post-welfare strategies of control.

B *The Risk Society and World Risk Society: Modernisation Risks*

Another way in which the rise in preventive measures has been explained is through the emergence of the risk society, in which society

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106 Jonathan Simon and Malcolm M Feeley 'The Form and Limits of the New Penology' in Thomas G Blomberg and Stanley Cohen (eds), *Punishment and Social Control* (Transaction Publishers, 3rd edition, 2012) 75, 76, 101.

107 Nikolas Rose, 'Government and Control' (2000) 40 *British Journal of Criminology* 321.

108 Ibid 332.

109 Ibid.

is increasing preoccupied with risk, security and the future.[110] This approach, led by sociologist Ulrich Beck, provides a meta narrative of the emergence and centrality of risk to late modern society. It differs markedly, however, from accounts that draw upon a Foucauldian analytic, such as Feeley and Simon's 'new penology'.[111]

For Beck, risk constitutes the central organising principle of late modernity, replacing the logic of wealth distribution that governed modernity.[112] The process of modernisation transitioned modernity to late modernity and moved society beyond scarcity, allowing for the reduction and isolation of genuine material need. However, this process also produced unforeseen, adverse and latent side effects: 'modernisation risks'.[113] The key dilemma facing the 'risk society' is the prevention or management of these risks.[114]

In his more recent work, Beck contends that we are now part of a 'world risk society' in which risks may have global reach and catastrophic

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110 Ulrich Beck, 'The Terrorist Threat: World Risk Society Revisited' (2002) 19(4) *Theory, Culture & Society* 39; Gabe Mythen and Sandra Walklate, 'Which Thesis? Risk Society or Governmentality?' (2006) 46 *British Journal of Criminology* 37; Gabe Mythen, 'Reappraising the Risk Society Thesis: Telescopic Sight or Myopic Vision' (2007) 55(6) *Current Sociology* 793; Mikkel Vedby Rasmussen, "It Sounds Like a Riddle': Security Studies, the War on Terror and Risk' (2004) 33 *Millennium—Journal of International Studies* 381; Shlomo Griner, 'Living in a World Risk Society: A Reply to Mikkel V. Rasmussen' (2002) 31 *Millennium—Journal of International Studies* 149.

111 Although, I note, that some scholars, most notably Ericson and Haggerty, have drawn on both the governmentality and risk society perspectives: Richard V Ericson and Kevin D Haggerty, *Policing the Risk Society* (Oxford University Press, 1997).

112 Ulrich Beck, *Risk Society* (Sage Publications, 1992) 19–20.

113 Ibid.

114 Ibid.

potential, such as climate change and transnational terrorism.[115] In contrast to 'first modernity', in which risks were calculable and the welfare state was reliant on protecting its citizenry for its legitimacy, in the world risk society risks are uncontrollable: they move beyond national borders, often arise from collectives rather than individuals and 'can hardly be controlled on the level of the nation state'.[116] For Beck, however, it is not the case that the world is suddenly more risky. Rather, it is the known uncontrollability of risks that defines this historical time.[117] Giddens, for example, explains it in terms of the distinction between risk and hazards: risk, a modern notion, is 'bound up with the aspiration to control and particularly with the idea of controlling the future'.[118]

Beck explains that global risks are de-localised, incalculable and non-compensable,[119] and governed by the logic of precaution.[120] Precaution, by necessity, relies on hypotheses and suspicion.[121] Decision makers

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115 Ulrich Beck, *World Risk Society* (Polity Press, 1999); Ulrich Beck, 'The Terrorist Threat: World Risk Society Revisited' (2002) 19 *Theory, Culture & Society* 39; Ulrich Beck, 'Living in the World Risk Society' (2006) 35(3) *Economy and Society* 329; Ulrich Beck, *World at Risk* (Polity Press, 2009). Beck distinguishes between climate change and terrorism in terms of intentionality: climate change is an unintended side effects catastrophe, whereas terrorism is intentional catastrophe, the 'intentional triggering of unintentional side effects': Ulrich Beck, *World at Risk* (Polity Press, 2009) 41, 203.

116 Ulrich Beck, 'The Terrorist Threat: World Risk Society Revisited' (2002) 19 *Theory, Culture & Society* 39, 41.

117 Joshua Yates, 'An Interview with Ulrich Beck on Fear and Risk Society' (Fall 2003) 5 (3) *The Hedgehog Review: Critical Reflections on Contemporary Culture* 96, 99.

118 Anthony Giddens, 'Risk and Responsibility' (1999) 62 *The Modern Law Review* 1, 3.

119 Ulrich Beck, 'Living in the World Risk Society' (2006) 35 (3) *Economy and Society* 329, 333.

120 Ibid 333, 334.

121 Ulrich Beck, *World at Risk* (Polity Press, 2009) 119.

are required to make critical decisions in circumstances of uncertainty. Action is stimulated and dictated by the potential nature of risks that have catastrophic potential: action taken after the occurrence of catastrophic harm would be impossible and 'meaningless'.[122] Security is elevated to the highest societal value, but can no longer be guaranteed by the nation state alone.[123]

In the 'terrorist risk society', the experience of past acts of terror reinforces the known catastrophic potential of an act of terrorism and compels preventive action.[124] Beck contends that by prioritising prevention 'society as a whole is transposed into the *subjunctive mood* by the anticipation of terrorism. What *could* happen?'.[125] In the 'could-be' society, the imperative to intervene earlier to prevent a terrorist attack makes it increasingly difficult to employ exiting evidential criteria in the prosecution of alleged terrorists: 'it may in the end only be necessary to prove the possibility of a crime—whatever that may mean—in order to justify a conviction.'[126]

A criticism of Beck's thesis is that it conflates risk and uncertainty. Dwyer and Minnegal, for example, argue that this distinction is critical to the extent that decision makers, in the different contexts of risk and

122 Ulrich Beck, *Risk Society* (Sage Publications, 1992) 34.
123 Ulrich Beck, *World at Risk* (Polity Press, 2009) 41.
124 Ibid 104–5.
125 Ibid 105.
126 Ibid 106.

uncertainty, make different types of decisions.[127] In distinguishing between risk and uncertainty they rely on the work of Frank Knight, an early 20th century economist. Knight's work has become increasingly influential beyond the discipline of economics as scholars grapple with questions of risk and uncertainty. Knight wrote:[128]

> Uncertainty must be taken in a sense radically distinct from the familiar notion of Risk, from which it has never been properly separated. The term "risk," as loosely used in everyday speech and in economic discussion, really covers two things which, functionally at least, in their causal relations to the phenomena of economic organization, are categorically different … The essential fact is that "risk" means in some cases a quantity susceptible of measurement, while at other times it is something distinctly not of this character; and there are far-reaching and crucial differences in the bearings of the phenomenon depending on which of the two is really present and operating … It will appear that a measurable uncertainty, or "risk" proper, as we shall use the term, is so far different from an unmeasurable one that it is not in effect an uncertainty at all. We shall accordingly restrict the term "uncertainty" to cases of the non-quantitative type.

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127 Peter Dwyer and Monica Minnegal, 'The Good, the Bad and the Ugly: Risk, Uncertainty and Decision-Making by Victorian Fishers' (2006) 13 *Journal of Political Ecology* 1, 3.

128 Frank H Knight, *Risk, Uncertainty and Profit* (Houghton Mifflin Company, 1921; reprint *August M Kelley,* 1964) 19–20.

Beck's work has also been critiqued for its lack of detailed engagement with how risk operates in the criminal justice context, a key setting in which risk arises.[129] Further critique has been made of the risk society thesis by those advancing a governmentality analytic. O'Malley, a key proponet of the latter, has argued that there is 'the almost polar opposition of Beck's work to the kinds of analysis of risk generated by the governmentality literature'.[130] Sites of critique include the meta narration of the risk society, and its somewhat monolithic view of power and risk.[131]

C *Uncertainty and Precaution*

Ericson, Ewald and Zedner have argued that risk has now been overtaken by uncertainty.[132] Ericson explains:[133]

> western societies are now governed through the problem of uncertainty…the problem of uncertainty also subsumes and

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129 Gabe Mythen and Sandra Walklate, 'Which Thesis? Risk Society or Governmentality?' (2006) 46 *British Journal of Criminology* 379, 383; Pat O'Malley, 'Discontinuity, Government and Risk: A Response to Rigakos and Hadden' (2001) 5 *Theoretical Criminology* 85, 89–90.

130 Pat O'Malley, 'Governmentality and Risk' in Jens O Zinn (ed), *Social Theories of Risk and Uncertainty: An Introduction* (Blackwell Publishing Ltd, 2008) 52, 65.

131 Ibid 64–5; *Contra* George S Rigakos, 'On Continuity, Risk and Political Economy: A Response to O'Malley' (2001) 5 *Theoretical Criminology* 93, 96–7.

132 Richard V Ericson, *Crime in an Insecure World* (Polity Press, 2007); François Ewald, 'The Return of the Crafty Genius: An Outline of a Philosophy of Precaution' (1999) 6(1) *Connecticut Insurance Law Journal* 47 reproduced in Pat O'Malley (ed) *Governing Risks* (Ashgate, 2005) 538; François Ewald, 'The Return of Descartes's Malicious Demon: An Outline of a Philosophy of Precaution' in Tom Baker and Jonathon Simon (eds), *Embracing Risk: The Changing Culture of Insurance and Responsibility* (University of Chicago Press, Stephen Utz translation, 2002) 273; Lucia Zedner, *Security* (Routledge, 2009).

133 Richard V Ericson, *Crime in an Insecure World* (Polity Press, 2007) 205.

> replaces the problem of risk as envisaged by risk society theorists of the late 20th century. It is not simply risk assessment and management through science and technology that is of concern, but limitations of knowledge as a capacity to act and how they magnify uncertainty. Scientific knowledge is used less as a source of greater certainty for taking risk, and more as a source of uncertainty for preempting risk.

A central concern for Ericson is how the problem of uncertainty has altered the role of the criminal law, and enjoined civil and administrative law in new forms of criminalisation.[134] Ericson explains that the problem of uncertainty reveals the growing doubt about liberal governments' ability 'to govern the future and provide security'.[135] Over the last decade or so, a key way in which liberal governments have responded to the problem of uncertainty has been through criminalisation.[136] Increasingly, distant and imagined sources of harm are being treated as crimes,[137] and made punishable by severe sanctions.[138]

Ericson argues that when faced with the problem of uncertainty, criminalisation through counter-law is '*the* way' that the liberal state

134 Ibid 1–2, 20.
135 Ibid 21.
136 Ibid 206.
137 Ibid 1.
138 Ibid 206.

expresses 'authoritative certainty'.[139] This type of counter-law is expressed as 'laws against law'. It involves the creation of new criminal laws, or the reconfiguration of existing civil and administrative laws, to undermine or eliminate the protections and principles of the criminal law that interfere with 'preempting imagined sources of harm'.[140] Criminalisation through counter-law is fundamentally altering the way in which the criminal law works: transforming law into a 'an instrument of suspicion, discriminatory practices, invasion of privacy, denial of rights and exclusion'.[141]

For Ericson, the logic of uncertainty is precautionary. It is precautionary logic that drives criminalisation through counter-law.[142] When faced with uncertainty, governments often turn to the precautionary principle to guide decision-making. As will be further discussed in Chapter Three, what the precautionary principle precisely entails is not settled.[143] However, Sunstein identifies that behind all versions of the principle is the idea that 'regulators should take steps to protect against potential harms, even if causal chains are unclear and even if we do not know that those harms will come to fruition'.[144] While in the past uncertainty equated to innocence, Ericson argues it now

139 Ibid 207 (emphasis in original).
140 Ibid 24, 207.
141 Ibid 209.
142 Ibid 24.
143 Cass Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press, 2005) 18.
144 Ibid 4.

justifies and generates pre-emptive action.[145] It is in 'a political culture of precautionary logic and war on everything' that counter-law thrives.[146]

Zedner helpfully explains the distinction between risk-thinking and precautionary-thinking:[147]

> Precaution does not require that it is possible to calculate future risks before action is taken (Haggerty 2003). Rather than relying on the identification of risky individuals, the precautionary approach treats all as possible sources of suspicion or threat. So that whereas risk-thinking stimulated the development of profiling, targeted surveillance, categorization of suspect populations, and other actuarial techniques for managing risky populations, precaution promotes pre-emptive action to avert potentially grave harms using undifferentiated measures that target everyone. Whereas risk made claims as to the possibility of calculating future harms and required therefore that officials assess the likelihood and degree of threat posed before taking preventive measures, precaution has the effect of licensing pre-emptive action even where it is impossible to know what precise threat is posed.

145 Richard V Ericson, *Crime in an Insecure World* (Polity Press, 2007) 23–4.
146 Ibid 42.
147 Lucia Zedner, *Security* (Routledge, 2009) 84.

Zedner identifies precautionary logic at play in domestic anti-terror laws that seek to 'legislate for uncertainty' and 'govern at the limits of knowledge'.[148] This results in broad, vague and indeterminate legal definitions, the criminalisation of remote conduct and associations, and the creation of hybrid civil–criminal orders that impose significant liberty restrictions consequent to civil proceedings yet attract criminal sanctions on breach.[149] Zedner argues that the push for security through law not only undermines or side steps traditional criminal law principles, but highlights that the values and principles of the criminal justice system are incongruous with the security society.[150] Attention should instead be focused on developing principles to guide the pursuit of security, including through law.[151]

Ericson acknowledges that the drive for pre-emption of harm in domestic law is not new, being visible in respect to the treatment of those deemed dangerous since the late 19th century.[152] However, he argues that recent permutations of counter-law in domestic law go further than 'efforts to identify and pre-empt dangerous offenders'.[153] These new laws are no longer checked, for example, by the principles of the criminal law—rather, they adopt a precautionary logic to pre-empt

148 Ibid 128–30.
149 Ibid 130–5.
150 Ibid 88.
151 Ibid 88, 167–74.
152 Richard V Ericson, *Crime in an Insecure World* (Polity Press, 2007) 157.
153 Ibid.

threats and circumvent the protections of the criminal law.[154] He argues that the waning of 'actuarial justice' is a product of actuarial methods being too uncertain and equivocal, and has thus been replaced by precautionary logic of uncertainty.[155] Risk remains part of the language of the criminal justice system, but is used differently. It no longer forms 'part of an actuarial science approach to threats' but instead is a stigmatic label for anyone deemed threatening to security.[156] The individual or group deemed to be a threat to security then becomes the target of counter-law.[157] He argues that the neo-liberal state is, in the face of uncertainty, creating 'suitable enemies as malicious demons' and then targeting them using counter-law.[158] In doing so the state is transforming itself and also unravelling 'as selected populations are criminalized in ways that create terror, insecurity, injustice and diminished property. Uncertainty ends up proving itself'.[159]

The use of the precautionary principle or a precautionary approach by governments has been the subject of criticism. Sunstein, for example, argues that we can identify weak and strong versions of the precautionary principle adopted by governments.[160] The weaker versions suggest that 'a lack of decisive evidence of harm should not be

154 Ibid 157–8.
155 Ibid 157.
156 Ibid.
157 Richard V Ericson, *Crime in an Insecure World* (Polity Press, 2007) 159.
158 Ibid 35.
159 Ibid.
160 Cass Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press, 2005) 18–26.

a ground for refusing to regulate'.[161] Stronger versions mandate preventive action for lesser harms (not catastrophic and irreversible), on a likelihood of harm (such as where evidence suggests harm 'may' occur),[162] and may even require action until there exists proof that the harm will not occur.[163] Sunstein argues that the weaker forms of precaution are innocuous and desirable, the stronger versions, however, can be highly problematic.[164] There are a number criticisms of the precautionary approach, and strong versions of the precautionary principle specifically, including that it is vague, offers no guidance to decision makers and is paralysing as action to avoid risk creates risk, and that it is error prone—it generates false positives and false negatives.[165] False positives relate to the finding of harm where none exists, false negatives to finding no harm where harm exists.[166]

These concerns are amplified when precaution is applied to liberty contexts where intervention occurs in respect of harms of lesser severity than catastrophic and irreversible, and on the basis of low standards of proof.[167] Sunstein further contends that governments, when faced with

161 Ibid 18.
162 Ibid 19.
163 Ibid.
164 Ibid 24.
165 Ibid 4–5, 25–6; Jessica Stern and Jonathan B Wiener 'Precaution Against Terrorism' (2006) 9 (4) *Journal of Risk Research* 393, 396.
166 Cass Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press, 2005) 56–7.
167 Sunstein advocates a more limited anti-catastrophe principle to overcome many of these concerns with the precautionary principle: ibid.

threats to security, 'often impose selective rather than broad restriction on liberty'.[168] This selectivity, argues Sunstein:[169]

> creates serious risks. If the restrictions are selective, most of the public will not face them, and hence the ordinary political checks on unjustified restrictions are not activated. In these circumstances, public fear of national security risks might well lead to precautions that amount to excessive restrictions on civil liberties.

Each of these perspectives—the new penology, the risk society, and those highlighting uncertainty and precaution—provides a way to conceive of prevention in contemporary lawmaking. While these perspectives are drawn upon in this thesis to contextualise and aid understandings of preventive governance practices, none has been adopted as the dominant framework of this thesis. This is because the preventive state concept is the best fit for investigating the novelty and reach of control orders, as an example of prevention in anti-terror law. Significantly, as will be explored in the next section, preventive state scholarship provides a way to respond to the use of prevention in lawmaking—the comparative study of preventive practices to engender a jurisprudence to guide and constrain state action to prevent harm.

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168 Ibid 204.
169 Ibid 204–5.

D *The Preventive State Concept*

The preventive state concept is another way in which this shifting emphasis in governmental policy has been articulated and conceptualised. The preventive state is a concept constructed and employed by academics to draw attention to state action that is concerned with anticipating and averting or minimising harm, as opposed to punishing wrongdoing. The preventive state is presented as a normative conceptual model: it is designed to illuminate the lack of constraints on the state when it acts to prevent harm, and to generate consideration of the limits, principles and values that ought to guide preventive interventions.

The preventive state has been chosen as the conceptual model for this thesis for a number of reasons. It is an influential way in which academics have conceptualised the pervasion of prevention in lawmaking before and after September 11. In particular, the preventive state concept has been employed by legal academics and criminologists to identify and trace the contemporary use of preventive measures by governments, to identify issues this raises and to consider how legal systems are responding and should respond.

The concept of the preventive state is concerned with the nature and limits of governmental action to prevent harm, and has been applied in respect to legislative measures that seek to prevent harm by the

restraint or deprivation of liberty. Further, a key aspect of the project of preventive state scholarship is to better understand whether continuities or discontinuities exist between disparate preventive measures, and what this might reveal about the contours and limits of preventive governance. The preventive state concept is thus a good fit for investigating whether control orders, as an example of prevention in anti-terror law, are exceptional when compared to other preventive practices.

The focus of the concept of the preventive state is the use of state power to prevent harm. As such, the concept may encompass a variety of preventive practices, not simply those connected to the criminal law or criminal justice system. Further, by not targeting dangerousness, risk or uncertainty, the preventive state concept may provide a way to read developments in Australian law that captures the range of governmental responses that seek to prevent future harm whether couched in terms of risk, security, uncertainty or dangerousness. Importantly, scholarship on the preventive state concept, and preventive justice inquiries that have succeeded it, suggests a way forward to alleviate the problems identified as arising out of the use of preventive measures. It proposes the comparative study of preventive policies and practice to promote the development of principles and values—a preventive jurisprudence—to guide and limit action by governments to prevent harm.

1 Background: The Preventive State Concept

The preventive state as a concept was first articulated by Steiker in 1998 to draw attention to the accumulation of preventive measures in the United States and to the question of the limits of governmental action to prevent harm.[170] For Steiker, the preventive state captured the array of measures employed in the United States to 'prevent or prophylactically deter (as opposed to investigate) crime and to incapacitate or treat (as opposed to punish) wrongdoers'.[171] These included preventive policing initiatives, such as the empowering of police officers to prevent crime by enabling them to intervene well before a crime is committed through the creation of new offences including 'drug loitering' and the broadening of the power to conduct suspicionless searches and seizures.[172] In addition, Steiker identified new or revived 'prophylactic' legislative measures to restrain the liberty of persons deemed dangerous, such as pre-trial detention, post-sentence indefinite civil commitment of sex offenders, and sex offender community notification laws.[173]

The preventive state was, Steiker identified, 'all the rage' in the late nineties, yet it suffered from a lack of cohesive treatment.[174] Preventive policies and practices were viewed as discrete and isolated rather than

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170 Carol S Steiker, 'Forward: The Limits of the Preventive State' (1998) 88(3) *Journal of Criminal Law and Criminology* 771, 776–80.
171 Ibid.
172 Ibid 774–5.
173 Ibid 775–6.
174 Ibid 773–774, 778.

as part of a 'unified problem'—'a facet of a larger question in need of a more general conceptual framework'.[175] This obscured identification of similarities and distinctions that might inform and enhance understandings of preventive governance. Importantly, Steiker suggested that focusing critical attention on the assortment of preventive practices employed by governments would facilitate the articulation and policing of the limits of state action to prevent harm.[176]

Following September 11, the preventive state concept has remained at the fore.[177] However, the broad spectrum of preventive measures employed by governments has, to a large extent, elided attention.[178]

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175 Ibid 778.

176 Ibid 773–4.

177 Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 *Criminal Law and Philosophy* 21; Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013); Alan M Dershowitz, 'The Preventive State: Uncharted Waters after 9/11' in Matthew J Morgan (ed), *The Impact of 9/11 and the New Legal Landscape: The Day that Changed Everything?* (Macmillan, 2009) 7; Eric S Janus, 'The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence' (2004) 40 *Criminal Law Bulletin* 576; Eric S Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Cornell University Press, 2006); Eric S Janus, 'The Preventive State: When is Prevention of Harm Harmful?' in Mike Nash and Andy Williams (eds), *Handbook of Public Protection* (Willian Publishing, 2010) 316; Rik Peeters, *The Preventive Gaze: How Prevention Transforms Our Understanding of the State* (Eleven International Publishing, 2013).

178 It is important to note that there exist pre and post-9/11 examples of more holistic studies: see, for example, Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 *Criminal Law and Philosophy* 21; Andrew Ashworth and Lucia Zedner, 'Preventive Orders: A Problem of Undercriminalization' in RA Duff, L Farmer, S Marshall, M Renzo and V Tadros (eds), *The Boundaries of the Criminal Law* (Oxford University Press, 2010) 59; Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013); Alan M Dershowitz, *Pre-emption: A Knife that Cuts Both Ways* (WW Norton Limited, 2006); Mark Finnane and Susan Donkin, 'Fighting Terror with Law? Some Other Genealogies of Pre-emption' (2013) (2)1 *International Journal of Crime and Justice* 3; Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (Routlegde, 2014); Bernadette

Indeed, Dershowitz has gone so far as to suggest that: '[t]he shift from responding to past events to preventing future harms is part of one of the most significant, but unnoticed, trends in the world today'.[179] In the decade since September 11, preventive scholarship has concentrated on prevention in anti-terror law and/or regarding serious sex offenders, the latter being more pronounced in scholarship emanating from the United States.[180] In these two areas, as Janus suggests, 'the impulse for prevention has taken its strongest form'.[181] Outside of the United States, preventive state scholarship has primarily focused on the

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McSherry and Patrick Keyzer (eds), *Dangerous People: Policy, Prediction, Practice* (Routledge, 2011); Paul H Robinson, 'Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice' (2001) 114 (5) *Harvard Law Review* 1429; Christopher Slobogin, *Minding Justice: Laws that Deprive People with Mental Disability of Life and Liberty* (Harvard University Press, 2006).

179 Alan M Dershowitz, 'The Preventive State: Uncharted Waters after 9/11' in Matthew J Morgan (ed) *The Impact of 9/11 and the New Legal Landscape: The Day that Changed Everything?* (Palgrave Macmillan, 2009) 7, 11.

180 See, for example, for sex offenders: Wayne Logan, 'Liberty interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws' (1999) 89 (4) *Journal of Criminal Law and Criminology* 1167; Michele Olson, 'Putting the Brakes on the Preventive State: Challenging Residency Restrictions on Child Sex Offenders in Illinois under the Ex Post Facto Clause' (2010) 5(2) *Northwestern Journal of Law & Social Policy* 403; See also, Bernadette McSherry and Patrick Keyzer, *Sex Offenders and Preventive Detention: Politics, Policy and Practice* (The Federation Press, 2009); Bernadette McSherry and Patrick Keyzer (eds), *Dangerous People: Policy, Prediction, Practice* (Routledge, 2011); For terrorists: Robert Chesney and Jack Goldsmith, 'Terrorism and the Convergence of Criminal and Military Detention Models' (2008) 60 *Stanford Law Review* 1079; David Cole and Jules Lobel, *Less Safe, Less Free: Why America is Losing the War on Terror* (The New Press, 2007); David Cole, 'Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror'' in Andrea Bianchi and Alexis Keller (eds), *Counter Terrorism: Democracy's Challenge* (Hart Publishing, 2008) 233; For terrorists and sex offenders, see Eric S Janus, 'The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence' (2004) 40 *Criminal Law Bulletin* 576; Eric S Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Cornell University Press, 2006); Eric S Janus, 'The Preventive State: When is Prevention of Harm Harmful?' in Mike Nash and Andy Williams (eds), *Handbook of Public Protection* (Willian Publishing, 2010) 316.

181 Eric S Janus, 'The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence' (2004) 40 *Criminal Law Bulletin* 576, 576; Eric S Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Cornell University Press, 2006).

prevention anti-terror lawmaking after September 11 and the proper role of the state, and the criminal justice system, in these preventive endeavours.[182] Recently, the focus of scholarship has both broadened and sharpened: examining prevention, more generally, in the criminal justice context and focusing on the development of principles, justifications and parameters of preventive justice.[183]

Scholarship referring to 'preventive justice' references Blackstone's commentaries. Blackstone coined preventive justice to describe an area of law devoted to 'the means of preventing the commission of crimes and misdemeanors', which included obliging persons suspected of

182 Andrew Ashworth and Lucia Zedner, 'Just Prevention: Preventive Rationales and the Limits of the Criminal Law' in Antony Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 279; Francesca Galli, 'The War on Terror and Crusading Judges: Re-establishing the Primacy of the Criminal Justice System' in Aniceto Masferrer (ed), *Post 9-11 and the State of Permanent Legal Emergency* (Springer, 2012) 153; Susanne Krasmann, 'The Right of Government': Torture and the Rule of Law' in Ulrich Bröckling, Susanne Krasmann and Thomas Lemke (eds), *Governmentality: Current Issues and Future Challenges* (Routledge, 2011) 115; Jude McCulloch, 'Australia's Anti-Terrorism Legislation and the Jack Thomas case' (2006) 18(2) *Current Issues in Criminal Justice* 357; Jude McCulloch and Bree Carlton, 'Preempting Justice: Suppression of Financing of Terrorism and the "War on Terror"' (2006) 17 (3) *Current Issues in Criminal Justice* 397; Jude McCulloch and Sharon Pickering, 'Pre-Crime and Counter-Terrorism: Imagining Future Crime in the War on Terror' (2009) 49(5) *British Journal of Criminology* 628; Heidi Mork Lomell, 'Punishing the Uncommitted Crime: Prevention, Pre-emption, Precaution and the Transformation of the Criminal Law' in Barbara Hudson and Synnøve Ugelvik (eds), *Justice and Security in the 21st Century: Risks, Rights and the Rule of Law* (Routledge, 2012) 83; András Sajó, 'From Militant Democracy to the Preventive State?' (2006) 27(5) *Cardozo Law Review* 2255; Lucia Zedner, 'Preventive Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems* 174; Lucia Zedner, 'Terrorizing Criminal Law' (2014) 8(1) *Criminal Law and Philosophy* 99.

183 Andrew Ashworth and Lucia Zedner's Arts and Humanities Research Council funded 3 year project 'Preventive Justice' has led this. See for example Andrew Ashworth and Lucia Zedner, 'Preventive Orders: A Problem of Undercriminalization' in RA Duff, L Farmer, S Marshall, M Renzo & V Tadros (eds), *The Boundaries of the Criminal Law* (Oxford University Press, 2010) 59; Andrew Ashworth and Lucia Zedner, 'Just Prevention: Preventive Rationales and the Limits of the Criminal Law' in Antony Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 279; Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013).

'future misbehaviour' to provide assurances against reoffending such as securities that they will be of good behaviour.[184] Blackstone distinguished this form of prevention from the general preventive rationale of the criminal law:[185]

> [b]ut the caution, which we speak of at present, is such as is intended merely for prevention, without any crime actually committed by the party, but arising only from a probable suspicion, that some crime is intended or likely to happen; and consequently it is not meant as any degree of punishment.

Following September 11, the preventive state concept remains influential—it is out of Steiker's work that much of the contemporary preventive justice scholarship has arisen and from which it takes its central project to develop principles to guide and constrain state action to prevent future harm. However, just how much the preventive state concept can do remains largely untested. While the preventive state concept has been regularly invoked in relation to governmental initiatives to incapacitate and treat as opposed to punish, its precise contours have by and large escaped attention. Following September 11, preventive scholarship has arguably moved away from the broader mandate of cohesively investigating preventive measures and

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184 William Blackstone, *Commentaries on the Laws of England* (R. Bell, 1772), Bk IV, 248.

185 Ibid 249. In *Thomas v Mowbray* (2007) 233 CLR 307, 356 [116] Gummow and Crennan JJ refer to 'preventive justice' measures such as binding over orders as 'part of the legal inheritance of the Australian colonies'.

governance, and primarily focused on preventive measures in anti-terror law and, more recently, in the criminal justice system. At the same time, it is unclear whether preventive measures are capable of being viewed as part of a 'unified problem': whether dissimilarities between different preventive initiatives defy such a classification and, further, whether the potential breadth of the preventive state concept weakens its purchase as a critical tool. This raises the question of what work the preventive state concept can now do in the broader project of understanding preventive governmental practices, and whether exploration of preventive practices outside of anti-terror and criminal justice contexts might contribute to contemporary understandings of the preventive state concept and, ultimately, the preventive push in Australian anti-terror law.

V THESIS ORIENTATION AND CHAPTER OUTLINES

As noted, this thesis is motivated by a desire to better understand prevention in anti-terror law and, in particular, how to understand and situate preventive anti-terror laws within the Australian legal system. This thesis seeks to understand whether the preventive state concept provides a useful way to read developments in Australia's anti-terror law since September 11 and, in doing so, test assumptions regarding the exceptionality of preventive anti-terror laws. This thesis is driven by two research questions:

- Does the preventive state concept provide a useful framework to read and understand prevention in Australia's domestic anti-terror lawmaking?

- Is prevention in Australian anti-terror law novel, such as in regards to its extent or reach, when compared to other preventive measures in Australian law?

This thesis answers these research questions in a narrow way. It begins by engaging with the general: critically examining the preventive state concept, identifying its potential promise and limitations as a way to read developments in Australian law following September 11. The thesis then turns to the particular: undertaking three case studies of preventive measures in Australian law. The three case studies are: federal anti-terror control orders contained in the *Criminal Code;* post-sentence continuing detention and ongoing supervision of high risk offenders in New South Wales; and involuntary detention of persons with mental illness pursuant to *Mental Health Act 2007* (NSW). Each of these civil orders has a protective purpose and enables an individual's liberty to be restrained on the basis of what they or another might do, rather than what the individual has done. The purpose of the case studies is to test whether control orders, as an example of prevention in anti-terror law, are novel when compared to the preventive measures contained in the high risk offender and civil mental health regimes. This is achieved by comparing where each regime falls on a spectrum of

anticipatory action in domestic law, that is outlined in Chapter Three. The case studies also contribute to understandings of the preventive state concept by informing discussion, in Chapter Seven, of the promise and limitations of the preventive state concept as a way to read developments in Australian law.

In navigating these two planes—the conceptual and the particular—this thesis pursues the 'optimal vantage point' from which to examine prevention in anti-terror law, and to best address the criticisms that may be levied at the conceptual level, including simplification, and at the particular, namely broader significance.[186] As Garland has usefully explained:[187]

> For the individual author, there is no escaping this dilemma. He or she must go back and forth between the general and the particular, the big picture and the local detail, until alighting upon a level of analysis that seems to offer the optimal vantage point—given the inevitable restraints of time, resources, skills and stamina.

In adopting an approach that mediates between the general and the particular, this thesis views the two levels of analysis as interactive. As noted above, the case studies have been chosen to test claims that

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186 David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) viiii–viii.

187 Ibid viiii.

Australia's preventive anti-terror laws are novel by comparing control orders with other preventive measures, and also to inform understandings of the utility of the preventive state concept in the Australian context by addressing its promise and limitations as a framework to read and understand prevention in anti-terror lawmaking.

The significance of this inquiry lies in its contribution to debates regarding the exceptionality of Australia's preventive anti-terror laws, in particular control orders, and to how academics have conceptualised prevention in lawmaking, namely the concept of the preventive state. To date, scant regard has been paid to the accumulation of preventive measures in Australia and the issues to which they give rise.[188] This thesis goes a small way towards rectifying this deficit: clarifying the terminology of prevention and a spectrum of anticipatory action in domestic law, and querying its use as a basis for comparing preventive measures in domestic law; undertaking three case studies of preventive measures in Australian law to test whether control orders are novel when compared to other preventive practices in Australian law; and questioning whether divergent preventive measures are capable of categorisation as a unified problem and usefully read through the

188 Although there are notable contributions: Bernadette McSherry, 'Indefinite and preventive detention legislation: From caution to an open door' (2005) 29 *Criminal Law Journal* 94; Bernadette McSherry, 'Sex, Drugs and 'Evil' Souls: The Growing Reliance on Preventive Detention Regimes' (2006) 32 (2) *Monash University Law Review* 237; Bernadette McSherry and Patrick Keyzer (eds) *Dangerous People: Policy, Prediction, Practice* (Routledge, 2011); Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (Routledge, 2014); Mark Finnane and Susan Donkin, 'Fighting Terror with Law? Some Other Genealogies of Pre-emption' (2013) (2)1 *International Journal of Crime and Justice* 3.

preventive state concept. This inquiry has the potential to raise new questions about the apparent rise of prevention in lawmaking following September 11 and to generate fresh insights regarding the rapid development of Australia's preventive anti-terror regime, its ongoing acceptance and the modelling of its innovations in other areas of law. It also has the potential to contribute to understandings of preventive governance in the Australian context, and to the future direction of preventive scholarship in Australia

Chapters Two and Three of this thesis are devoted to better understanding the preventive state concept and its utility as a way to read developments in Australian law following September 11, notably anti-terror law. Chapter Two commences with a detailed treatment of the concept of the preventive state: what it is, its averred utility as a normative framework and how it has been employed by academics before and after September 11. Chapter Two then explores the potential of the preventive state concept as one way to read prevention in anti-terror law after September 11. It suggests that there is much promise to the preventive state concept including: drawing attention to and promoting critical engagement with the assortment of preventive measures in Australia, both within and beyond the anti-terror and criminal justice contexts; highlighting questions of the limits of preventive state action and the principles that should guide it, as well as selectivity in, and proportionality of, preventive measures; and

promoting examination of continuity and discontinuity between contemporary preventive practices and historical counterparts.

The preventive state concept is not, however, faultless. Chapter Two critically assesses the preventive state concept, highlighting a number of limitations and criticisms that go to its utility as a way to read prevention in domestic lawmaking. These include: the potential breadth of the preventive state concept undermining its critical purchase and normative potential; a lack of precision regarding the scope of the conceptual framework, when and how it applies and the relationship between its component parts; the want of an analytical framework or means to compare preventive measures; and uncertainty as to whether preventive measures are sufficiently similar to be capable of categorisation as part of a 'unified project'. In order to assess whether the preventive state concept can be a useful critical tool to read and understand prevention in Australian lawmaking, these limitations and criticisms need to be addressed.

Chapter Three looks to how we might assess, in practice, the utility of the preventive state concept and compare preventive measures in Australian law. It addresses factors that impact on the utility of the concept of the preventive state in understanding preventive measures in the Australian legal system: the lack of clarity regarding the terminology of prevention and want of a mechanism to compare preventive measures in domestic law. This chapter suggests that the register of

anticipatory military action may provide a way to distinguish between and compare preventive measures. It suggests that 'anticipatory self-defence as pre-emption', 'prevention' and 'Bush pre-emption' may be used to assess whether and how prevention in anti-terror law is distinct from prevention as employed in other areas of Australian law. However, whether anticipatory self-defence as pre-emption, prevention and Bush pre-emption provide a sufficient or useful basis for distinguishing between preventive measures in domestic law is untested and will be explored, following the case studies, in Chapter Seven.

Building on the framework developed in Chapters Two and Three, the thesis turns to the practice of prevention in Australia. Three case studies are undertaken of civil orders from within and beyond the anti-terror and criminal justice contexts. As noted, the purpose of the case studies is to test whether control orders, as an example of prevention in anti-terror law, are exceptional when compared to preventive measures in other areas of Australian law. The case studies have also been chosen to inform understandings of the preventive state concept by addressing, in Chapter Seven, the potential limitations identified in Chapter Two: in particular, whether divergent preventive measures are sufficiently similar to be capable of being viewed as part of a 'unified problem'; whether the criminal justice system should be the norm against which preventive state action is judged; and whether the potential breadth of the concept undermines its purchase as a critical tool. The case studies will also, as will be discussed in Chapter Seven,

contribute to consideration of whether the spectrum of anticipatory action is a useful way to distinguish between domestic laws.

This thesis does not attempt to be comprehensive in its use of case studies or to establish a norm or ideal of prevention in Australia. At the same time, the case studies of preventive measures outside of the anti-terror context are not themselves exceptional or outlier regimes. This thesis concentrates on the legislative frameworks for preventive detention of person with mental illness and high risk offenders in New South Wales, as these legislative frameworks are largely representative of like regimes that exist in other Australian states and territories. In addition, to date much of the focus of preventive scholarship in Australia has related to Commonwealth anti-terror laws. Undertaking two case studies of prevention at the sub national level in the Australian federal system has the potential to provide a broader and more nuanced analysis of preventive practices employed by governments in Australia.

Building on Chapter Three, each case study considers where the provisions in question fall on the spectrum of anticipatory action as applied to domestic law. The purpose of this inquiry is to establish a basis for comparing the three case studies and assessing whether control orders, as an example of prevention in anti-terror law, are exceptional and unprecedented. The first case study thus examines the anti-terror control order legislative framework contained in the *Criminal*

Code, providing a basis from which to assess whether and how control orders differ from the high risk offender and civil mental health regimes.

This thesis selects control orders as the example of prevention in anti-terror law as control orders constitute a central plank of Australia's preventive response to terrorism, and the prime anti-terror example of a 'pre-crime' measure and a civil preventive order. As mentioned in Part III(A), control orders are hybrid civil–criminal measures: they are issued in civil proceedings, enabling the targeting of pre-crime acts, yet backed by criminal sanctions. Control orders are also, as the National Security Legislation Monitor recently reported, 'perhaps the most striking' of Australia's anti-terror laws as they prescribe 'restraints on personal liberty without there being any criminal conviction or even charge.'[189]

As noted above, control orders were originally justified as exceptional measures required to prevent possible terrorist acts and have since garnered criticism for their deviation from accepted principles and protections of the criminal law. Despite this, state and territory governments have been quick to model anti-terror control orders in their legislative responses to organised crime.[190] While it has been

189 Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20th December 2012) 10.

190 Serious organised crime control orders have been introduced in several Australian jurisdictions: *Criminal Organisation Act 2009* (Qld); *Serious Crime Control Act 2009* (NT); *Serious and Organised Crime (Control) Act 2008* (SA)—in 2010, the control order provisions of this Act, contained in s 14(1), were held to be constitutionally invalid by the High Court in *State of South Australia v Totani* (2010) 242 CLR 1. In 2012, the South Australian Parliament passed the *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act* 2012 (SA) which introduced an amended control order scheme in part 3 of the *Serious and*

pointed out by the High Court in *Thomas v Mowbray* (2007) 233 CLR 307 and the National Security Legislation Monitor that control orders are not without 'historical precedents and analogues',[191] precisely how analogous these measures are is not settled.[192]

Control orders thus provide a useful case study through which to address, in the limited approach adopted in this thesis, the research question of whether prevention in anti-terror law is novel. Whether control orders are exceptional has the potential to promote fresh insights on their continuing acceptance in Australia and the ease with which they have been used as legislative templates in relation to state government responses to organised crime. Chapter Four begins with a brief history of the control order regime before outlining the control order legislative framework contained in the *Criminal Code.* It then assesses where the control order provisions fall on the spectrum of anticipatory action in domestic law—that is, whether they amount to anticipatory self-defence, prevention or Bush pre-emption. This provides

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Organised Crime (Control) Act 2008 (SA). In a recent decision, the High Court found the *Crimes (Criminal Organisations Control) Act 2009* (NSW), which provided for the declaration of criminal organisations and control of the members of declared organisations, to be invalid: *Wainohu v New South Wales* [2011] HCA 24. Following *Wainohu*, the O'Farrell government introduced into parliament the Crimes (Criminal Organisations Control) Bill 2012 (NSW), which received Royal Assent on 21 March 2012. In 2012, the Western Australian Parliament followed suit with the passage of the *Criminal Organisations Control Act 2012* (WA).

191 *Thomas v Mowbray* (2007) 233 CLR 307 see, for example, 328–9 (Gleeson CJ), 347–8 (Gummow and Crennan JJ), 507 (Callinan J); Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20th December 2012) 7.

192 See, for example, Andrew Lynch, '*Thomas v Mowbray*: Australia's 'War on Terror' Reaches the High Court' (2008) 32 *Melbourne University Law Review* 1182, 1202–3; Denise Meyerson, 'Using Judges to Manage Risk: The Case of *Thomas v Mowbray'* (2008) 36 *Federal Law Review* 209.

a basis from which to assess, in Chapters Five and Six, whether and how the control order regime differs from, or is similar to, the high risk offender and civil mental health regimes.

The second case study explores the legislative regime for the post-sentence preventive detention and extended supervision of high risk offenders in New South Wales contained in the *Crimes (High Risk Offenders*) *Act* 2006 (NSW). The New South Wales Parliament first introduced its regime of post-sentence preventive detention and supervision in 2006 with the enactment of the *Crimes (Serious Sex Offenders) Act* 2006 (NSW). However, at that time, the regime targeted one class of offenders: serious sex offenders. It was one of a number of like regimes introduced by State governments:[193] the first laws of their type in Australia to prescribe the ongoing preventive detention, in prison, of a class of offenders at the completion of a custodial sentence.[194] In March 2013, the New South Wales Parliament extended its regime to a new category of offender: high risk violent offenders.[195] New South Wales is the only jurisdiction to have done so.

Post-sentence preventive detention and ongoing supervision of high risk offenders in New South Wales presents a contemporary example of

193 See footnote 68.

194 Bernadette McSherry, 'The Preventive Detention of 'Dangerous' People' (2012) 112 *Precedent* 4, 5.

195 On 19 March 2013, the *Crimes (Serious Sex Offenders) Amendment Act* 2013 (NSW) received Royal Assent and commenced operation. It extends the regime of post-sentence preventive detention and supervision of serious sex offenders to high-risk violent offenders. Consequently, the *Crimes (Serious Sex Offender) Act* 2006 (NSW) has undergone a name change and is now the *Crimes (High Risk Offenders*) *Act* 2006 (NSW).

prevention by liberty restraint that is connected to the criminal justice system. Pursuant to this regime, an individual may be detained or restrained upon the completion of a term of imprisonment where a court determines, to the standard of a high degree of probability, that the individual poses an unacceptable risk of committing a serious violent or sex offence.[196] This form of preventive measure involves the imposition of restraints on liberty at a point in time after that which is traditionally accepted in the criminal justice system: that is, post-sentence. Finally, this form of preventive restraint is often discussed in tandem with, or as a suggested use of, predictive anti-terror laws making it a compelling comparator. The National Security Legislation Monitor, for example, has recently suggested that this form of post-sentence restraint on liberty could serve as a less extreme adaptation of anti-terror control order legislation.[197]

The preventive detention and ongoing supervision of high risk offenders is the archetypal contemporary example of a civil order enabling post-sentence preventive restraints on liberty. As such, it provides a useful comparator against which to assess whether control orders are novel or go further than preventive measures employed in other areas of Australian law. Chapter Five outlines the history of post-sentence restraints in Australia, briefly canvassing the long use of measures imposed at the time of sentence and recent attempts to impose liberty

196 *Crimes (High Risk Offenders) Act* 2006 (NSW) pt 1A divs 1–2.

197 Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20th December 2012) 37.

restraints at the expiration of an offender's sentence—initially against an individual offender, then a class of offender. Chapter Five then outlines the current New South Wales regime for high risk offenders and assesses where the provisions for post-sentence preventive detention and extended supervision of high risk offenders fall on the spectrum of anticipatory action as applied to domestic law. It considers what this analysis contributes to understandings of the novelty and reach of anti-terror control orders.

The final case study explores the civil mental health legislative framework in New South Wales and, in particular, the provisions for involuntary detention of persons with mental illness in the *Mental Health Act 2007* (NSW). Involuntary detention of persons with mental illness is the quintessential example of the prevention of future harm by the restrain of liberty, and a recognisable and largely accepted species of governmental intervention to prevent harm. It provides both an historical and contemporary example of preventive detention, with a lineage traceable to British settlement of Australia. It constitutes a prime example of a preventive measure beyond the criminal justice system.[198] An individual may be detained if assessed as suffering from a mental illness and, as a consequence of that illness, requires care, treatment or control for the protection of the person or others from

[198] This is not to discount that connections exist to the criminal justice system, for instance diversionary processes from the criminal justice system to the mental health system by ss 32 and 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) and s 22 of the *Mental Health Act 2007* (NSW).

serious harm.[199] The provisions for involuntary detention of persons with mental illness are also heavily engaged in New South Wales. In 2011–12, 14 331 persons were involuntarily admitted to mental health facilities in New South Wales, and 3895 were made the subject of an involuntary patient order pursuant to the *Mental Health Act 2007* (NSW).[200]

Civil mental health involuntary detention thus provides a compelling comparator against which to assess the novelty and reach of anti-terror control orders: an example of preventive detention which has a long legislative history, is extensively used and stands outside of the criminal justice system.[201] Chapter Six briefly canvasses the history of involuntary detention of persons with mental illness in New South Wales, before outlining the New South Wales legislative framework. It then examines where the provisions for involuntary detention of persons with mental illness fall on the spectrum of anticipatory action

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199 *Mental Health Act 2007* (NSW) s 14.

200 The figures for involuntary admission and involuntary patient orders include the reclassification of voluntary patients as involuntary: Mental Health Review Tribunal, *Annual Report of the Mental Health Review Tribunal for the Period from 1 July 2011 to 30 June 2012,* Mental Health Review Tribunal (2012) 24 < http://www.mhrt.nsw.gov.au/assets/files/mhrt/pdf/Annualreportfinal2012.pdf>.

201 It is for these reasons that this thesis does not examine the forensic mental health legislative framework in New South Wales contained in the *Mental Health (Forensic Provisions) Act 1990* (NSW). That Act provides for the detention of persons found to be unfit to be tried for a criminal offence or not guilty by reason of mental illness, as well as for the care, treatment and control of serving prisoners found to be suffering from mental illness: div 4. At 30 June 2012, there were 387 forensic and correctional patients detained pursuant to it: Mental Health Review Tribunal, *Annual Report of the Mental Health Review Tribunal for the Period from 1 July 2011 to 30 June 2012,* Mental Health Review Tribunal (2012) 36 < http://www.mhrt.nsw.gov.au/assets/files/mhrt/pdf/Annualreportfinal2012.pdf>.

in domestic law. It considers what this analysis reveals about whether anti-terror control orders are exceptional.

Building on the insights drawn from the preceding chapters, Chapter Seven ties together the three case studies and theoretical framework to answer the research questions posed in this thesis. It critically assesses what these case studies reveal about the utility of the preventive state concept as a way to read and understand developments in Australian law, with particular emphasis on the key promises and limitations identified in Chapter Two. In particular, it considers whether it is possible to categorise preventive measures as part of a 'unified problem' and how the case studies support or militate against this. This chapter also questions the method of comparing preventive measures adopted in this thesis, considering whether the spectrum of anticipatory action in domestic law provides a useful basis for distinguishing between preventive measures. Chapter Seven considers how, following this analysis, preventive anti-terror measures should be understood and situated within the Australian legal system—as exceptional and unprecedented measures that may be isolated in response to the threat of terrorism or as forming part of a pattern of preventive governance.

In answering the research questions, this thesis argues that the preventive state concept is a useful way to read and conceptualise developments in Australian law since September 11. This thesis identifies a number of continuities between the preventive measures

studied, arguing that control orders are best understood as part of a pattern of preventive governance rather than as exceptional and isolated measures. However, this thesis also finds that control orders are exceptional when compared to the other preventive measures studied, typifying Bush pre-emption rather than prevention. Chapter Seven concludes by considering the implications of these findings for understandings of preventive anti-terror laws more broadly and the future directions of preventive scholarship in Australia.

—CHAPTER TWO—

THE PREVENTIVE STATE

I INTRODUCTION

The preventive state is one conceptual framework through which to approach, view and enhance understandings of divergent preventive governmental practices. It is concerned with the use of sovereign governmental power to prevent harm, such as by incapacitating or treating individuals deemed 'dangerous'. The focus on the preventive role of the state is deliberate and normative: to illuminate the problematic treatment of preventive measures as unrelated and discrete and the need for the articulation of legal limitations on preventive governmental action.

This chapter critically engages with the preventive state concept and its utility as a framework to read, contextualise and critique the rise of prevention in Australian anti-terror law. It begins, in Parts II and III, by outlining the concept of the preventive state, its averred utility in the project of understanding preventive governmental practices and how it has been employed by academics before and after September 11. However, as noted in Chapter One, just how much work the concept of the preventive state can do is largely untested. In Part IV, this chapter explores the potential of the preventive state concept as one way to read

the rise of prevention in anti-terror law following September 11. In Part V, it highlights criticisms and limitations that need to be addressed in order for the preventive state concept to be a useful tool to read and understand prevention in Australian lawmaking.

II THE PREVENTIVE STATE CONCEPT

The preventive state concept rose to prominence following its invocation by Steiker in the late nineties to describe a host of measures introduced in various jurisdictions in the United States which sought to prevent crime by incapacitating or treating those deemed dangerous.[1] Steiker was referring to a disparate collection of new or expanded 'preventive' laws and policing initiatives, ranging from pre-trial preventive detention of juveniles and adults to post-sentence indefinite detention of serious violent sex offenders, and the expansion of police powers to conduct suspicionless searches.[2] Steiker traced the genesis of the preventive state to the 19th century, and its growth to favourable conditions in the 20th century: the creation of the modern police force and institutions such as prisons and psychiatric hospitals in the former was bolstered by the growth of the regulatory state in the latter. These developments enabled and promulgating diverse preventive practices by governments.[3]

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1 Carol S Steiker, 'Forward: The Limits of the Preventive State' (1998) 88(3) *Journal of Criminal Law and Criminology* 771, 774.

2 Ibid 774–5.

3 Ibid 778–9.

For Steiker, the emergence of the preventive state demanded further and different scrutiny. Preventive policies and practices were being treated as discrete and unrelated, rather than, as Steiker argued they should be, as part of a 'unified problem'—'a facet of a larger question in need of a more general conceptual framework'.[4] Without a holistic approach, jurisprudence relating to preventive measures would remain undernourished; 'salient similarities' between preventive measures and the concerns they raise would evade discovery.[5] Importantly, focusing attention on the collection of preventive practices employed by governments would enable the articulation and policing of the limits of the preventive state. Steiker highlighted that unlike 'the punitive state', in respect of which the constitutional and due process limitations on state action were well enshrined and maintained, the limits of state action to prevent harm remained largely unchecked.[6] This was, she noted, in part a function of the timing of the drafting of the American Constitution. The dangers of the punitive state were well known to the Founders and thus constraints on the state as punisher were included in the Constitution.[7] The emergence of the preventive state, however, came later: a function of the coalescing of events in the 19th and 20th centuries. As a result, preventive state practices and institutions were

4 Ibid 778.
5 Ibid 779.
6 Ibid 773–4.
7 Ibid 778. It is beyond the scope of this thesis, but it would be interesting to consider whether and to what extent preventive state practices were considered by the drafters of the Australian Constitution in the lead up to Federation in 1901.

'cabined' within the existing constitutional framework, making it 'harder to see the preventive state as a category than it is to so view the punitive state'.[8]

The preventive state is thus proffered as an umbrella concept to encompass state action in furtherance of a particular objective—the prevention of harm. As such, it is contrasted with 'the punitive state', being representative of state action in furtherance of the objective of punishment. Similarly, the distinct temporal viewpoints of these roles are often compared: the prospective, future focus of prevention, where the state intervenes prior to harm by, for instance, incapacitating those deemed dangerous, and the retrospective focus of the state as punisher, engaged in after the fact investigation and punishment of criminal acts. Steiker, and many after her, have distinguished between the preventive state and the punitive or reactive state to illustrate both the growing collection of preventive measures and the lack of consideration given to the question of the limits of governmental action to prevent harm.[9]

However, this contradistinction, while useful, should not be understood as suggesting that these two objectives, prevention and punishment, are easily distinguishable or mutually exclusive. The relationship between

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8 Ibid 779.

9 See for example Alan M Dershowitz, *Pre-emption: A Knife that Cuts Both Ways* (WW Norton Limited, 2006); Alan M Dershowitz, 'The Preventive State: Uncharted Waters after 9/11' in Matthew J Morgan (ed), *The Impact of 9/11 and the New Legal Landscape: The Day that Changed Everything?* (Macmillan, 2009) 7; Lucia Zedner 'Preventative Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems* 174.

relevant objectives, be they prevention, punishment, protection or treatment, is often intricate and complex, and an adequate distinction between objectives may be difficult to strike. Punishment, imbued as it is with a confluence of purposes, is a helpful example.[10] Members of the High Court remarked in *Veen* v *The Queen (No 2)*:[11]

> [t]he purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.

Nor should it be inferred that the preventive state is displacing the punitive state. Rather, it has been argued that preventive measures are rising in prominence and being used to extend as opposed to supplant the criminal justice system.[12]

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10 And one used by many others. See, for example, Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 *Criminal Law and Philosophy* 21.

11 (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ). This is also reflected in sentencing legislation. See for example s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which stipulates the purposes for which a court may impose a sentence on an offender and includes, at s 3A (b), 'to prevent crime by deterring the offender and other persons from committing similar offences.'

12 Andrew Ashworth, 'Criminal Law, Human Rights and Preventative Justice' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009) 87, 87–8.

In invoking the concept of the preventive state, Steiker presented a normative model: arguing that the limits of the preventive state ought to be articulated and policed, as are those of the punitive state.[13] There are a number of guises through which the limits of state action to prevent harm may be articulated, including the principles of criminalisation, public law or human rights law.[14] Steiker focused on the constitutional and due process limits of the preventive state. She identified that the question of the limits of preventive action had been sidelined because, amongst other reasons, the courts were preoccupied with whether a measure amounted to punishment, and therefore whether the enhanced protections of the criminal justice system apply.[15] This leaves what Steiker argues is the 'mistaken impression that if the state is not punishing, it is not doing anything objectionable at all, constitutionally speaking or otherwise'.[16] The general conceptual framework of the preventive state provided one way to begin the project of identifying and establishing limits on preventive state action.

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13 Carol S Steiker, 'Forward: The Limits of the Preventive State' (1998) 88(3) *Journal of Criminal Law and Criminology* 771, 773–4.

14 See, for example, Andrew Ashworth, 'Criminal Law, Human Rights and Preventative Justice' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009) 87; Andrew Ashworth and Lucia Zedner, 'Just Prevention: Preventive Rationales and the Limits of the Criminal Law' in Antony Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 279; Andrew Ashworth and Lucia Zedner 'Prevention and Criminalization: Justifications and Limits' (2012) 15 (4) *New Criminal Law Journal* 542; Carol S Steiker, 'Forward: The Limits of the Preventive State' (1998) 88(3) *Journal of Criminal Law and Criminology* 771; See also Carol S Steiker, 'Proportionality as a Limit on Preventive Justice' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) 194; Peter Ramsay, 'Democratic Limits to Preventive Criminal Law' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) 214.

15 Carol S Steiker, 'Forward: The Limits of the Preventive State' (1998) 88(3) *Journal of Criminal Law and Criminology* 771, 783–4.

16 Ibid 784.

It is important to note that Steiker deliberately pitched the preventive state at a high 'level of conceptual generalization' in order that it may capture the diverse set of preventive measures employed by governments.[17] The high level of conceptual generalisation may, Steiker suggested, facilitate the drawing of fresh insights about particular preventive practices and, by moving beyond the 'exceptionally particularised way in which the law has been developed on these issues up to this point', produce greater predictability for those generating policy and subject to it.[18]

Steiker further identified benefits of drawing attention to, and recognising connections between, the practices of the preventive state: it may engender a constructive dialogue about the proper limits of preventive state action,[19] and concerns raised in respect of 'certain preventive practices may shed light on what may (or may not) be cause for concern about other preventive practices'.[20] This highlights the normative potential of the preventive state concept: identifying similarities between the diverse set of preventive measures may avoid dangers discovered in one measure being blindly reproduced in another.[21] Further, as Zedner identifies, recognising 'there are similar

17 Ibid 779–80.
18 Ibid.
19 In particular, without needing to refer back to, or construct arguments in terms of, the punitive state: ibid 779.
20 Ibid 779.
21 Lucia Zedner, 'Preventative Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems* 174, 189. See also, Alan M

issues at stake in respect of' various preventive measures, from pre-trial, mental health and immigration detention to preparatory offences:[22]

> might also permit the articulation of larger principles and values by which preventive justice might legitimately be pursued without the need for reference back to the entrenched and often inappropriate provisions of civil and criminal procedure.

III PREVENTIVE SCHOLARSHIP IN THE WAR ON TERROR

The preventive state concept has been influential in academic commentary following September 11.[23] The events of September 11 and the ensuing war on terror have played a pivotal role in the contemporary publicity and pervasion of preventive practices. Domestic

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Dershowitz, *Pre-emption: A Knife that Cuts Both Ways* (WW Norton Limited, 2006).

22 Lucia Zedner, 'Preventative Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems* 174, 190.

23 Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 *Criminal Law and Philosophy* 21; Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013); Alan M Dershowitz, 'The Preventive State: Uncharted Waters after 9/11' in Matthew J Morgan (ed), *The Impact of 9/11 and the New Legal Landscape: The Day that Changed Everything?* (Macmillan, 2009) 7; Eric S Janus, 'The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence' (2004) 40 *Criminal Law Bulletin* 576; Eric S Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Cornell University Press, 2006); Eric S Janus, 'The Preventive State: When is Prevention of Harm Harmful?' in Mike Nash and Andy Williams (eds), *Handbook of Public Protection* (Willian Publishing, 2010) 316; Rik Peeters, *The Preventive Gaze: How Prevention Transforms Our Understanding of the State* (Eleven International Publishing, 2013).

anti-terror legislative regimes in Australia, the United Kingdom and the United States feature measures targeting individuals deemed 'dangerous'—namely, but not limited to, suspected terrorists—and restraining their liberty before they cause harm.[24] Dershowitz, for example, argues that September 11 served to both expedite and, for many, legitimate what had hitherto been a gradual movement from reactive to preventive state practices.[25] Zedner has argued that the terrorist attacks of September 11, as well as the Madrid, Bali and London bombings, 'accelerated an existing trend towards pre-emptive endeavours, particularly in respect to serious crime and political violence'.[26] Similarly, McCulloch and Pickering assert that 'the focus on risk and threat anticipation have, however, undeniably consolidated and expanded in the context of post-9/11 counter-terrorism legislation'.[27] Janus identifies the vulnerability experienced as a result of the threat of terrorism as a source of 'growing pressures to expand prevention'.[28] Steiker, in her more recent work, contends that:[29]

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24 David Cole and Jules Lobel, *Less Safe, Less Free: Why America is Losing the War on Terror* (The New Press, 2007); Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (UNSW Press, 2006); Victor V Ramraj, Michael Hor, Kent Roach and George Williams (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press. 2nd Edition, 2012); Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011).

25 Alan M Dershowitz, 'The Preventive State: Uncharted Waters after 9/11' in Matthew J Morgan (ed), *The Impact of 9/11 and the New Legal Landscape: The Day that Changed Everything?* (Macmillan, 2009) 7, 8.

26 Lucia Zedner, 'Seeking Security by Eroding Rights: The Side-Stepping of Due Process' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart 2007) 257, 260.

27 Jude McCulloch and Sharon Pickering, 'Counter-Terrorism: The Law and Policing of Pre-emption' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routlegde, 2010) 13, 18.

28 Eric S Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Cornell University Press, 2006) 94.

> [t]he post-9/11 world has pushed the issue of the scope of state preventive regulation more to the fore than it has ever been in the past, raising profound questions about how we should delineate the substantive and procedural limits of the state's power to prevent harmful or undesirable conduct.

Indeed, following September 11 renewed calls were made for attention to be paid to the development of a conceptual framework, and a preventive jurisprudence, to embody and guide the use of preventive restraints by the state.[30] Ashworth, Zedner and Tomlin have recently remarked:[31]

> [t]here are good reasons to justify state use of coercion to protect the public from harm. And yet, although the rationales for and justifications of state punishment have been explored extensively, the scope, limits, and principles of what we term preventive justice—the use of the criminal law and related coercive measures in a directly preventive way—have attracted

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29 Carol S Steiker, 'Proportionality as a Limit on Preventive Justice' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) 194.

30 See, for example, Lucia Zedner, 'Preventative Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems* 174, 189-90; Alan M Dershowitz, *Pre-emption: A Knife that Cuts Both Ways* (WW Norton Limited, 2006); Andrew Ashworth, Lucia Zedner and Patrick Tomlin, 'Introduction' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) 1.

31 Andrew Ashworth, Lucia Zedner and Patrick Tomlin, 'Introduction' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) 1.

little doctrinal or conceptual analysis (save in respect of counterterrorist measures).

Perhaps in line with the breadth and intensity of the preventive response to terrorism embarked upon by many nations, scholarship on the preventive state has, over the last decade, largely focused on terrorist suspects.[32] Although, not exclusively so: preventive measures in respect of sex offenders have featured in American, and to a lesser extent Australian, scholarship.[33] Outside of the United States,

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32 However, as noted in Chapter One, there are examples of the comparative treatment of preventive measures after September 11: see, for example, Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 *Criminal Law and Philosophy* 21; Andrew Ashworth and Lucia Zedner, 'Preventive Orders: A Problem of Undercriminalization' in RA Duff, L Farmer, S Marshall, M Renzo and V Tadros (eds), *The Boundaries of the Criminal Law* (Oxford University Press, 2010) 59; Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013); Alan M Dershowitz, *Pre-emption: A Knife that Cuts Both Ways* (WW Norton Limited, 2006); Mark Finnane and Susan Donkin, 'Fighting Terror with Law? Some Other Genealogies of Pre-emption' (2013) (2)1 *International Journal of Crime and Justice* 3; Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (Routlegde, 2014); Bernadette McSherry and Patrick Keyzer (eds), *Dangerous People: Policy, Prediction, Practice* (Routledge, 2011); Christopher Slobogin, *Minding Justice: Laws that Deprive People with Mental Disability of Life and Liberty* (Harvard University Press, 2006).

33 See, for example, for sex offenders: Wayne Logan, 'Liberty interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws' (1999) 89 (4) *Journal of Criminal Law and Criminology* 1167; Michele Olson, 'Putting the Brakes on the Preventive State: Challenging Residency Restrictions on Child Sex Offenders in Illinois under the Ex Post Facto Clause' (2010) 5(2) *Northwestern Journal of Law & Social Policy* 403; See also, Bernadette McSherry and Patrick Keyzer, *Sex Offenders and Preventive Detention: Politics, Policy and Practice* (The Federation Press, 2009); Bernadette McSherry and Patrick Keyzer (eds), *Dangerous People: Policy, Prediction, Practice* (Routledge, 2011). See, for example, for terrorists: Robert Chesney and Jack Goldsmith, 'Terrorism and the Convergence of Criminal and Military Detention Models (2008) 60 *Stanford Law Review* 1079; David Cole and Jules Lobel, *Less Safe, Less Free: Why America is Losing the War on Terror* (The New Press, 2007); David Cole, *'Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror'' in* Andrea Bianchi and Alexis Keller (eds), *Counter Terrorism: Democracy's Challenge* (Hart Publishing, 2008) 233. See, for example, for terrorists and sex offenders, see Eric S Janus, 'The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New

scholarship has principally concentrated on preventive anti-terror measures and the concerns they raise for the role the state and the criminal justice system.[34] Recently, however, the focus of scholarship has sharpened on the principles and parameters of preventive justice with particular emphasis on the role and rationales of coercive preventive measures.[35] Preventive scholarship has also adopted a more reflective and critical posture: challenging the categories and assumptions upon which it is based.[36]

Outsider Jurisprudence' (2004) 40 *Criminal Law Bulletin* 576; Eric S Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Cornell University Press, 2006); Eric S Janus, 'The Preventive State: When is Prevention of Harm Harmful?' in Mike Nash and Andy Williams (eds), *Handbook of Public Protection* (Willian Publishing, 2010) 316.

34 Andrew Ashworth and Lucia Zedner, 'Just Prevention: Preventive Rationales and the Limits of the Criminal Law' in Antony Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 279; Francesca Galli, 'The War on Terror and Crusading Judges: Re-establishing the Primacy of the Criminal Justice System' in Aniceto Masferrer (ed), *Post 9-11 and the State of Permanent Legal Emergency* (Springer, 2012) 153; Susanne Krasmann, 'The Right of Government: Torture and the Rule of Law' in Ulrich Bröckling, Susanne Krasmann and Thomas Lemke (eds), *Governmentality: Current Issues and Future Challenges* (Routledge, 2011) 115; Jude McCulloch, 'Australia's Anti-Terrorism Legislation and the Jack Thomas case' (2006) 18(2) *Current Issues in Criminal Justice* 357; Jude McCulloch and Bree Carlton, 'Preempting Justice: Suppression of Financing of Terrorism and the "War on Terror"' (2006) 17 (3) *Current Issues in Criminal Justice* 397; Jude McCulloch and Sharon Pickering, 'Pre-Crime and Counter-Terrorism: Imagining Future Crime in the War on Terror' (2009) 49(5) *British Journal of Criminology* 628; Heidi Mork Lomell, 'Punishing the Uncommitted Crime: Prevention, Pre-emption, Precaution and the Transformation of the Criminal Law' in Barbara Hudson and Synnøve Ugelvik (eds), *Justice and Security in the 21st Century: Risks, Rights and the Rule of Law* (Routledge, 2012) 83; András Sajó, 'From Militant Democracy to the Preventive State?' (2006) 27(5) *Cardozo Law Review* 2255; Lucia Zedner, 'Preventive Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems* 174; Lucia Zedner, 'Terrorizing Criminal Law' (2014) 8(1) *Criminal Law and Philosophy* 99.

35 See for example Andrew Ashworth and Lucia Zedner 'Preventive Orders: A Problem of Undercriminalization' in RA Duff, L Farmer, S Marshall, M Renzo & V Tadros (eds), *The Boundaries of the Criminal Law* (Oxford University Press, 2010) 59; Andrew Ashworth and Lucia Zedner 'Just Prevention: Preventive Rationales and the Limits of the Criminal Law' in Antony Duff and Stuart Green (eds) *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 279; Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds) *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013).

36 See, for example, Markus D Dubber 'Preventive Justice: The Quest for Principle' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds) *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) 47; Mark Finnane

To a large extent, however, preventive justice inquiries have concentrated on prevention and its relationship to the criminal law: demonstrating both the long presence and profusion of prevention in the criminal justice system, and its influence on conceptions of crime, punishment, and the criminal law.[37] Concerns have been raised about prevention driving the unprincipled development of the criminal law and subverting its protections,[38] giving rise to significant questions about the proper role of the criminal law, and its jurisprudence, in the face of burgeoning prevention.[39] Within this context, important work has been done on the difficult questions of what values, constraints and justifications ought to guide and support coercive preventive measures,[40] and preventive and pre-emptive decision-making.[41]

This thesis builds on but differs to this scholarship. It does not seek to justify the use of prevention or to articulate values to guide prevention

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and Susan Donkin, 'Fighting Terror with Law? Some Other Genealogies of Pre-emption' (2013) (2)1 *International Journal of Crime and Justice* 3.

37 See, for example, the contributions to the edited collection: Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds) *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013); Alan M Dershowitz*, Pre-emption: A Knife that Cuts Both Ways* (WW Norton Limited, 2006).

38 Andrew Ashworth and Lucia Zedner 'Just Prevention: Preventive Rationales and the Limits of the Criminal Law' in Antony Duff and Stuart Green (eds) *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 279.

39 Lucia Zedner 'Preventative Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems* 174; Christopher Slobogin 'The Civilization of the Criminal Law' (2005) 58 (1) *Vanderbilt Law Review* 121; Lucia Zedner, 'Terrorizing Criminal Law' (2014) 8(1) *Criminal Law and Philosophy* 99; Jeremy Waldron, 'Responses to Zedner, Haque and Mendus' (2014) 8(1) *Criminal Law and Philosophy* 135.

40 See, for example, the contributions to the edited collection: Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds) *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013).

41 See, for example, Alan M Dershowitz*, Pre-emption: A Knife that Cuts Both Ways* (WW Norton Limited, 2006).

in Australian lawmaking. Similarly, it does not provide an account of the emergence of the preventive state in the Australian context. Rather, the project of this thesis is to understand whether the concept of the preventive state is, in fact, a useful way to read developments in Australian law following September 11 and, in doing so, to test assumptions as to the exceptionality and reach of anti-terror laws. In order to do this, this thesis questions what work the preventive state concept can now do in the broader project of understanding preventive governmental practices, and whether exploration of preventive governmental practices outside of the anti-terror and criminal justice contexts might contribute to contemporary understandings of the preventive state concept and, ultimately, prevention in Australian anti-terror law. The following two sections of this chapter begin the task of answering these questions by examining the potential promise and pitfalls of the preventive state concept.

IV THE PROMISE OF THE PREVENTIVE STATE CONCEPT

The preventive state is but one way to conceptualise and view governmental interventions that are preventive. It does, however, offer much to the scholarship of prevention: it promotes critical engagement with the multifarious forms of prevention employed by governments, with the potential to highlight questions as to the limits of preventive state action as well as issues of selectivity in and proportionality of and between preventive measures. The preventive state concept has

sufficient depth to enable identification of continuity and discontinuity between contemporary preventive practices and historical counterparts. In doing so, it may contribute to understanding prevention in Australian anti-terror lawmaking by challenging, on the one hand, assumptions regarding the exceptionality of present anti-terror practices and, on the other, similarities between prevention in different areas of Australian law. However, as will be outlined in Part IV, the promise of the preventive state concept is matched by its limitations.

To date, scant regard has been paid to the accumulation of preventive laws in Australia, the continuities and discontinuities between them and the challenges to which they give rise.[42] The preventive state affords one way in which attention may be had to developing a more cohesive preventive jurisprudence in Australia, and to articulating what principles, values and limits adhere to state action that seeks to prevent future harm by restricting liberty in the present.[43]

By focusing attention on, and promoting critical engagement with, the collection of preventive measures employed by Australian governments,

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42 Although, as noted in Chapter One, there are notable contributions: Mark Finnane and Susan Donkin, 'Fighting Terror with Law? Some Other Genealogies of Pre-emption' (2013) (2)1 *International Journal of Crime and Justice* 3; Bernadette McSherry, 'Indefinite and preventive detention legislation: From caution to an open door' (2005) 29 *Criminal Law Journal* 94; Bernadette McSherry, 'Sex, Drugs and 'Evil' Souls: The Growing Reliance on Preventive Detention Regimes' (2006) 32 (2) *Monash University Law Review* 237; Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (Routlegde, 2014); Bernadette McSherry and Patrick Keyzer (eds) *Dangerous People: Policy, Prediction, Practice* (Routledge, 2011).

43 Lucia Zedner 'Preventative Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems* 174.

the preventive state concept has the potential to highlight broader issues of selectivity in and proportionality of preventive measures. That is, who is—and isn't—subject to preventive measures and how different types of preventive measures compare to each other: including whether and why, for instance, there are preconditions, such as past harm, or principles, such as the least restrictive alternative, for some measures and not others.

The answers to these questions have broader implications. Janus, for example, has argued that 'risk' has now replaced 'race, gender, sexual orientation and disability' as the 'marker of otherness' and the 'foundation of outsider jurisprudence'.[44] The sexual predator legislation in the United States, as well as what he terms the 'radically preventive' measures contained in the *USA Patriot Act*,[45] provide a deleterious road map for the expansion of preventive incursions on liberty more generally. Importantly, Janus argues that these legislative schemes 'reintroduce and relegitimise the concept of the degraded other' and create an alternative system of justice that is devoid of, or contains an attenuated version of, the normal civil liberties protections afforded.[46]

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44 Eric S Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Cornell University Press, 2006) 103–4.

45 *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001* 18 USC (*USA Patriot Act*).

46 Eric S Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Cornell University Press, 2006) 94.

These concerns resonate in the Australian context where preventive measures predominantly affect marginalised and excluded members of society, such as the mentally ill, serious sex offenders and terrorist suspects. Of the 37 persons charged with terrorism related offences in Australia, for example, the overwhelming majority have been Muslim men and all but one of the terrorist organisations that are listed pursuant to Division 102 of the *Criminal Code* have been Muslim groups.[47] Moreover, the civil liberties concerns raised by international commentators regarding the dangers of blindness to the limits of the preventive state are amplified in the Australian context,[48] where reliance

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47 As at 16 December 2013, there are 18 listed terrorist organisations, one—the Kurdistan Workers' Party (PKK)—is not a Muslim organisation: Attorney-General's Department, Commonwealth Government, *Listing of Terrorist Organisations*, Australian National Security (26 November 2013) <http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument>; see also: Attorney-General Robert McClelland, 'Address to the United States Studies Centre, 'The 9/11 decade" (Speech delivered at the United States Studies Centre 2011 National Summit The 9/11 Decade: how everything changed, Sydney, 7 June 2011) <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2011_SecondQuarter_7June2011-AddresstotheUnitedStatesstudiescentre>; Nicola McGarrity, '"Testing" our counter-terrorism laws: The prosectuion of individuals for terrorism offences in Australia' (2010) 34 *Criminal Law Journal* 92, 117; For the experience of Muslims in Australia post September 11, Scott Poynting and Barbara Perry 'Climates of Hate: Media and State Inspired Victimisation of Muslims in Canada and Australia since 9/11' (2007) 19 *Current Issues in Criminal Justice* 151.

48 See, for example, Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 *Criminal Law and Philosophy* 21; Alan M Dershowitz, 'The Preventive State: Uncharted Waters after 9/11' in Matthew J Morgan (ed) *The Impact of 9/11 and the New Legal Landscape: The Day that Changed Everything?* (Palgrave Macmillan, 2009) 7; Lucia Zedner, 'Seeking Security by Eroding Rights: The Side-Stepping of Due Process' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (2007); Lucia Zedner 'Fixing the Future? The Pre-emptive Turn in Criminal Justice' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds) *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009) 35.

cannot be placed on a federal bill of rights nor, depending on the jurisdiction, on a charter of rights at the sub national level.[49]

The preventive state can, as a conceptual framework, assist in drawing out these issues by promoting the comparative study of preventive practices and consideration of common issues that they raise.[50] Detailed treatment of different preventive measures has the potential to expose issues of selectivity and proportionality, which may in turn inform the articulation of broader principles and constraints that might guide and limit preventive action.

Similarly, the preventive state concept has the potential to provide a more nuanced account of prevention in Australian law by promoting the identification of similarities and distinctions between preventive practices. For example, a member of the New South Wales Parliament recently remarked, in the course of debate about the extension of the serious sex offender post-sentence preventive detention regime to serious violent offenders, that:[51]

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49 Only two jurisdictions in Australia have a general regime of statutory rights protection: the Australian Capital Territory and Victoria: *Human Rights Act 2004* (ACT); *Charter of Human Right and Responsibilities Act 2006* (Vic). See generally Nicola McGarrity and George Williams, 'Counter-Terrorism Laws in a Nation without a Bill of Rights: The Australian Experience' (2010) 2 *City University of Hong Kong Law Review* 45.

50 Carol S Steiker, 'Forward: The Limits of the Preventive State' (1998) 88(3) *Journal of Criminal Law and Criminology* 771; Lucia Zedner, 'Preventative Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems* 174.

51 New South Wales, *Parliamentary Debates,* Legislative Assembly, 27 February 2013, 18157 (Bromhead).

> [a] number of schemes in Australia recognise that, in exceptional situations, it may be necessary to detain a person for the safety of the community. Examples include compulsory detention under mental health, terrorism or quarantine laws.

While these measures all share the commonality of detention for public protection, whether and how they are different is relevant to understanding preventive governance and its limits. Similarly, as it is broad enough to encapsulate practices that go beyond the criminal justice context, the preventive state concept has the potential to test whether preventive state action should be viewed against criminal justice or other standards. Unexpected patterns may (or may not) emerge between preventive measures within and beyond the criminal justice system that raise questions about what constitute appropriate limitations on state action to prevent harm.

Reading practices through the preventive state concept may prompt new question about the rise and endurance of preventive anti-terror measures, such as control orders, and the ease with which control orders have been used as templates for governmental responses to organised crime. In particular, how this has occurred despite significant misgivings regarding the impact of these measures on civil liberties and traditional principles of the criminal law.

While speaking to contemporary preventive practices, the preventive state concept—as it was invoked by Steiker—is not ahistorical. For Steiker, as noted, the current role of the state as preventer of harm and disorder was made possible by the coalescing of events in the 19th and 20th centuries: the creation of the modern police force and institutions such as prisons and hospitals for the mentally ill in the 19th century and the growth of the regulatory state in the 20th century.[52] What distinguishes the contemporary preventive state is, as Ashworth and Zedner suggest, a 'preoccupation with risk and public protection' coupled with consequentialist reasoning that 'privileges efficacy, economy and outcome over justice'.[53] Nonetheless, Dershowitz reminds us that societies have, from 'the beginning of recorded history', 'worried about dangerous people who had not "yet" done the harm it was believed—or predicted—they would do'.[54] However, as Steiker has remarked, it is only relatively recently, with the events she averred to dating from the 19th century, that modern states have 'amassed the power, knowledge and institutions to undertake large-scale preventive practices'.[55]

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52 Although, it can be noted that it does not seek to provide a more detailed account of the emergence or trajectory of the preventive state.

53 Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 *Criminal Law and Philosophy* 21, 40–4.

54 Alan M Dershowitz, *Pre-emption: A Knife that Cuts Both Ways* (WW Norton Limited, 2006), 39.

55 Carol S Steiker 'Proportionality as a Limit on Preventive Justice' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds) *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) 194, 194.

As such, the preventive state concept provides one way to read contemporary preventive practices that is alive to history. It is not the purpose of this thesis to provide an historical account of the rise of preventive practices or of risk and uncertainty in the Australian context. Rather, it is to suggest that the preventive state concept is deep enough to facilitate an exploration of similarities and distinctions between contemporary and historical preventive practices. This, in turn, may challenge accounts that suggest prevention in contemporary lawmaking is novel.

Many accounts of the contemporary preoccupation with managing—and averting—future harm ascribe, however, to a view that there has been a recent transformation in governance and society.[56] Many suggest that the fixation on risk, (in)security and uncertainty dating from around the middle of the last century, or even from the war on terror, has radically transformed how we govern and are governed. The latter view is often reflected in and bolstered by political pronouncements. In 2004, then

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[56] See, for example, Beck's risk society thesis which explains, at the level of grand theory, how risk has become the central organising principle of late modernity, transforming governance and society in the 21st century: Ulrich Beck, *Risk Society* (Sage Publications, 1992); Ulrich Beck, *World Risk Society* (Polity Press, 1999); Ulrich Beck, *World at Risk* (Polity Press, 2009). See also Dershowitz who, although noting the shift from reactive to preventive practices pre-dates September 11, argues that the terrorist attacks 'brought about fundamental changes in our legal and political cultures. Among the most controversial of these changes is the dramatic shift from what I call the "reactive state" to what I call the "preventive state"': Alan M Dershowitz, 'The Preventive State: Uncharted Waters after 9/11' in Matthew J. Morgan (ed) *The Impact of 9/11 and the New Legal Landscape: The Day that Changed Everything?* (Palgrave Macmillan, 2009) 7. See also Ericson who argues that the classical criminal law model is being radically transformed in the neo-liberal era: Richard V Ericson, *Crime in an Insecure World* (Polity Press, 2007) 20. See also David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press, 2001).

Prime Minister Howard, for example, stated that 'the events of the 11th of September … changed forever the world in which we live. And it changed the way in which we must … respond'.[57]

The rise of risk in popular consciousness, political discourse and scholarly inquiry in the later part of the 21st century has been well documented.[58] Furedi, for example, calculated an almost 9 fold increase in the mentions of 'at risk' in United Kingdom newspapers from 1994 to 2000, demonstrating 'the language we use reflects our unprecedented preoccupation with risk'.[59] In Australia, risk continues to feature prominently in anti-terror policy and rhetoric.[60] Interestingly, its

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57 Prime Minister John Howard, 'Closing Address' (Speech delivered at the Liberal Party National Convention, Adelaide, 8 June 2003) <http://www.pm.gov.au/news/speeches/speechI06.html> at 5 November 2004 extracted in Jenny Hocking, 'Protecting Democracy by Preserving Justice: 'Even for the Feared and Hated' (2004) 27 (2) *University of New South Wales Law Journal* 319, 335.

58 Mythen and Walklate assert that the momentum of risk, coupled with the visibility of hazards and uncertainties, have led it to be one of the 'defining themes of investigation in the social sciences in the last two decades': Gabe Mythen and Sandra Walklate, 'Introduction: Thinking beyond the risk society' in Gabe Mythen and Sandra Walklate (eds), *Beyond the Risk Society: Critical Reflections on Risk and Human Security* (Open University Press, 2006) 2. For rise of risk in current perception, see Frank Furedi, *Culture of Fear: risk-taking and the morality of low expectation* (Continuum, Revised ed, 2002) 488; Cass Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press, 2005) chs 2-4; Brian Massumi (ed), *The Politics of Everyday Fear* (University of Minnesota Press, 1993); Paul Slovic, *The Perception of Risk* (Earthscan, 2000).

59 Furedi's calculation was that 'at risk' was mentioned in UK newspapers 2037 times in 1994 and six years later, in 2000, there were 18003 mentions: Frank Furedi, *Culture of Fear: risk-taking and the morality of low expectation* (Continuum, Revised ed, 2002) xii.

60 For example, the 2010 White Paper stresses a 'risk informed and layered approach' and public protection: Department of Prime Minister and Cabinet, Parliament of Australia, *Counter-terrorism White Paper—Securing Australia, protecting our community* (2010), para 3.2.3. This is mirrored in the language of former Attorney-General Robert McClelland, see for example Attorney-General Robert McClelland, 'Address to the National Security College, Senior Executive Development Course Dinner' Old Parliament House Thursday 10 March 2011) <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2011_FirstQuarter_10March2011-

reference is on the rise: there are 37 mentions of 'risk' in the Howard Government's 2006 Counter Terrorism White Paper, *Protecting Australia against Terrorism,*[61] whereas four years on, in the Rudd Government's 2010 White Paper, *Securing Australia, Protecting our Community,* there are 58 references to 'risk'.[62] Another, more recent example, is the extension and rebadging of the serious sex offender post-sentence preventive detention regime in New South Wales to one devoted to 'high risk offenders', which include high risk violent and sex offenders.[63]

However, accounts that ascribe to the view that there has been a transformation in governance and society run a real danger of missing critical continuities—or relevant discontinuities—with historical practices and overlooking enduring or recurring preoccupations, such as uncertainty and dangerous persons.[64] This is not to suggest that no change has occurred socially, culturally, economically or politically

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AddresstotheNationalSecurityCollegeSeniorExecutiveDevelopmentCourseDinner >.

61 Department of Prime Minister and Cabinet, *Protecting Australia against Terrorism* (2006).

62 Department of Prime Minister and Cabinet, Parliament of Australia, *Counter-terrorism White Paper—Securing Australia, protecting our community* (2010).

63 In the Second Reading Speech of the Crimes (Serious Sex Offenders) Amendment Bill 2013 (NSW) to the Legislative Council, Clarke said: 'The bill responds to this very clear danger and ensure the protection of the community from a clear risk': New South Wales, *Parliamentary Debates,* Legislative Council, 12 March 2013, 18328 (Clarke); see also New South Wales, *Parliamentary Debates,* Legislative Assembly, 20 February 2013, 17680 (Smith).

64 See for example Alan M Dershowitz*, Pre-emption: A Knife that Cuts Both Ways* (WW Norton Limited, 2006); François Ewald, 'The Return of Descartes's Malicious Demon: An Outline of a Philosophy of Precaution' in Tom Baker and Jonathon Simon (eds), *Embracing Risk: The Changing Culture of Insurance and Responsibility* (University of Chicago Press, Stephen Utz translation, 2002) 273.

since the middle of the last century.[65] Nor is it to suggest that the preoccupation with risk, uncertainty and (in)security that has characterised the later part of the 21st century hasn't shaped and been shaped by the particular circumstances in which it arose.[66] Influential accounts have demonstrated that the current preoccupation with risk and (in)security has altered how crime is governed,[67] how governance is rationalised through crime,[68] the calibration of dangerousness,[69] and the categorization of criminological behaviour from categorisations of dangerousness to risk to precaution.[70] Indeed, as noted in Chapter One, many commentators have observed a new precautionary logic influencing contemporary governance practices and lawmaking.[71] Aradau and van Munster, for example, argue that:[72]

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65 See, for example, David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press, 2001) ch 4; John Pratt, *Governing the Dangerous* (The Federation Press, 1997).

66 Ulrich Beck, *Risk Society* (Sage Publications, 1992); Richard V Ericson, *Crime in an Insecure World* (Polity Press, 2007); Bill Hebenton and Tony Seddon, 'From Dangerousness to Precaution: Managing Sexual and Violent Offenders in an Insecure and Uncertain Age' (2009) 49 *British Journal of Criminology* 343, 345; Lucia Zedner, *Security* (Routledge, 2009).

67 See, for example, scholarship on the new peneology, Jonathan Simon and Malcolm M Feeley, 'The Form and Limits of the New Penology' in Thomas G Blomberg and Stanley Cohen (eds), *Punishment and Social Control* (Transaction Publishers, 3rd edition, 2012) 75; Malcolm M Feeley and Jonathan Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications' (1992) 30 *Criminology* 449; See, generally, Tim Hope and Richard Sparks (eds), *Crime, Risk and Insecurity* (Routledge, 2000).

68 Jonathon Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press, 2007).

69 John Pratt, *Governing the Dangerous* (The Federation Press, 1997); John Pratt, 'Dangerousness, Risk and Technologies of Power' (1995) 28 (3) *Australian and New Zealand Journal of Criminology* 3.

70 Robert Castel, 'From Dangerousness to Risk' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect* (University of Chicago Press, 1991) 281; Bill Hebenton and Tony Seddon, 'From Dangerousness to Precaution: Managing Sexual and Violent Offenders in an Insecure and Uncertain Age' (2009) 49 *British Journal of Criminology* 343.

71 Richard V Ericson, *Crime in an Insecure World* (Polity Press, 2007); Lucia Zedner, *Security* (Routledge, 2009).

72 Claudia Aradau and Rens Van Munster, 'Governing Terrorism Through Risk:

> What is new is not so much the advent of a risk society as the emergence of a 'precautionary' element that has given birth to new configurations of risk that require that the catastrophic prospects of the future be avoided at all costs.

Rather, it is to suggest that accounts that neglect the relevance of history are invariably myopic. O'Malley, for example, has sketched a genealogy of risk to illustrate how risk and prevention have featured strongly, but with variance, in liberal governance since the 19th century.[73] Importantly, O'Malley illustrates that risk is neither a recent phenomenon nor static: risk has played 'many different roles, and appears in many different guises and institutional forms over this long period'.[74] Ewald, for example, postulates that precaution represents the mechanism by which society responds to and frames uncertainty under contemporary political, social and economic circumstances, which he describes as governed by an attitude or behaviour framed as the paradigm of security or safety.[75] Different paradigms are in existence at

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Taking Precautions, (un)Knowing the Future' (2007) 13 *European Journal of International Relations* 89, 91.

73 Pat O'Malley, 'Risk Societies and the Government of Crime' in Mark Brown and John Pratt (eds), *Dangerous Offenders: Punishment and Social Order* (Routledge, 2000) 17.

74 Ibid 18.

75 Ewald described this new paradigm as having 'not yet found its true name'. The translations from French to English differ on what moniker Ewald used to refer to this new paradigm — it is a 'paradigm of security' in the Utz translation and a 'paradigm of safety' in version published in the Connecticut Insurance Law Journal. See François Ewald, 'The Return of the Crafty Genius: An Outline of a Philosophy of Precaution' (1999) 6(1) *Connecticut Insurance Law Journal* 47, 48 (reproduced in Pat O'Malley (ed), *Governing Risks* (Ashgate, 2005) 538; François Ewald, 'The Return of Descartes's Malicious Demon: An Outline of a Philosophy of Precaution' in Tom Baker and Jonathon Simon (eds), *Embracing Risk: The*

different historical moments, with different mechanisms for framing uncertainty.

The recent study by Finnane and Donkin illustrates how pre-emptive strategies have long been part of the arsenal of liberal states. As noted in Chapter One, they examine three historical examples of pre-emption drawn from times of war and peace and from within and beyond the criminal law context: the preventive detention of persons with mental illness, the preventive detention of habitual and dangerous offenders, and wartime internment. They argue that the continuities between present and historical practices cast doubt upon concerns that anti-terror measures will be normalized and corrosive of the criminal justice system, such measures having long been adopted. Finnane and Donkin remark:[76]

> Rather than counter-terrorist measures having the potential to leach into the normal criminal process, we suggest, instead, that it makes as much sense, if not more, to consider that the counter-terrorist measures enact strategies that have long been pursued by the modern liberal state's vision of securing its citizens in the interests of order and security, very often at the cost of individual liberty.

Changing Culture of Insurance and Responsibility (University of Chicago Press, Stephen Utz translation, 2002) 273, 274.

76 Mark Finnane and Susan Donkin, 'Fighting Terror with Law? Some Other Genealogies of Pre-emption' (2013) (2)1 *International Journal of Crime and Justice* 3, 13.

In this way, the preventive state concept has promise as a way to read developments in lawmaking that encompasses a wide array of contemporary and historical preventive practices. By looking broadly at the role of the state as preventer of harm, rather than targeting dangerousness or risk or uncertainty, the preventive state concept may in fact provide a framework that captures a variety of governmental responses to the need to prevent future harm, be they couched in terms of risk, security or uncertainty. However, harnessing the averred potential of the preventive state concept is not an easy task—nor is it a certain one. The next section explores criticisms and limitations of the preventive state concept.

V LIMITS OF THE PREVENTIVE STATE CONCEPT

There are a number of criticisms that may be mounted at the preventive state concept. These include: the potential breadth of the preventive state concept undermining its critical purchase and normative potential; a lack of precision regarding the scope of the conceptual framework, when and how it applies and the relationship between its component parts; no means of comparing preventive measures; uncertainty as to whether preventive measures are capable of being viewed as part of a unified project; the potential for a totalising and homogenising account.

While the preventive state concept may hold the promises of breadth, it runs the attendant risk of being used in a totalising manner, there being 'danger to any account that centres one or another dimension of life',[77] and of homogenising prevention. As O'Malley has remarked in respect to the risk society thesis, but which is also relevant to the preventive state concept:[78]

> it should recognise one of the major dangers inherent in the idea of the risk society itself, namely, the tendency to interpret all major developments as if they are shaped by risk without recognising that risk is itself marginalised, fostered or shaped in different ways and degrees by multifarious other issues and developments.

While, as discussed in Chapter One, O'Malley's critique of the risk society thesis arises from the methodological distinctions between the governmentality and risk society perspectives, his point has resonance. Albeit that the narrower ambit of the preventive state concept, focusing on governmental action to prevent harm as opposed to articulating the centrality of risk to late modern society, minimizes the potential for a totalizing account. Nonetheless, without clarity as to the contours of the conceptual framework of the preventive state and attention to the practice of prevention, there is a risk it may be misused.

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77 Pat O'Malley, 'Risk Societies and the Government of Crime' in Mark Brown and John Pratt (eds), *Dangerous Offenders: Punishment and Social Order* (Routledge, 2000) 17, 27.

78 Ibid 18.

At the same time, the potentially broad ambit of the preventive state concept risks rendering it meaningless as a critical tool: allowing it to represent everything and thereby nothing, and lacking a measure against which to judge action. Steiker, as noted, deliberately pitched the preventive state at a high 'level of conceptual generalization' in order that it may serve as a canopy under which to collate and investigate the diverse set of preventive measures employed by governments.[79] This was to counteract the treatment of preventive measures as sui generis and to thereby generate fresh insights about particular practices and broader insights about preventive governance and its limits. However, a veritable panoply of measures may be said to fall within the preventive state concept: from the various species of preventive detention (pre-trial, immigration, mental health, quarantine, post-sentence etc) to preventive restraints on liberty (such as control orders and other civil preventive orders, community supervision of sex offenders, apprehended violence orders), preventive offences (for example precursor, inchoate, preparatory offences) and preventive police practices (such as warrants, suspicionless searches, surveillance). This breadth risks undermining not only the utility of the concept as reflective of a concentration of preventive governmental practices but also the project of articulating of limits of state action to prevent harm. It is a live question whether constraining values, principles or doctrines

79 Carol S Steiker, 'Forward: The Limits of the Preventive State' (1998) 88(3) *Journal of Criminal Law and Criminology* 771, 779–80.

can be developed that apply to such a broad variety of preventive practices.

This raises the further issue of where and how the boundaries of the preventive state concept should be drawn. While the preventive state concept is often invoked in academic literature as representative of a shift in or concentration of governmental practices, attention has not generally focused on the contours of the conceptual framework of the preventive state.[80] It may neither be possible nor desirable to identify a rationale that is preventive in order to demarcate preventive measures. Prevention is, it might be recalled, a rationale of the criminal justice system.[81] Further, as noted in Part II, the relationship between relevant objectives, such as prevention and punishment, may be complex and difficulties may arise in drawing an adequate distinction between them. Even if an adequate distinction may be drawn, the effect of a law may negate or undermine the label: a preventive label or objective does not insulate a law from being 'stigmatic, burdensome or punitive' in substance or effect,[82] or from incurring a punitive sanction. The following extract from Whealy J's sentencing remarks in *R v Elomar*, which relate to the offence of conspiracy to do acts in preparation for a

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80 Although, I note Ashworth and Zedner have, amongst other things, created a taxonomy of preventive measures: Andrew Ashworth and Lucia Zedner, 'Preventive Orders: A Problem of Undercriminalization' in RA Duff, L Farmer, S Marshall, M Renzo & V Tadros (eds), *The Boundaries of the Criminal Law* (Oxford University Press, 2010) 59.

81 Andrew Ashworth and Lucia Zedner, 'Just Prevention: Preventive Rationales and the Limits of the Criminal Law' in Antony Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 279.

82 Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 *Criminal Law and Philosophy* 21, 41.

terrorist act or acts under s 101.6 of the *Criminal Code*, encapsulates these difficulties:[83]

> The broad purpose of the creation of offences of the kind involved in the present sentencing exercises is to prevent the emergence of circumstances which may render more likely the carrying out of a serious terrorist act. Obviously enough, it is also to punish those who contemplate action of the prohibited kind. Importantly, it is to denounce their activities and to incapacitate them so that the community will be protected from the horrific consequences contemplated by their mindset and their actions.

Further, preventive measures may be, and often are, experienced as punishment.[84] For example, the experience of involuntary mental health detention was recently described by a mental health consumer as 'overwhelming. You feel as if you've done something wrong…if feels like a prison sentence'.[85] Delineating prevention and punishment is a difficult, if not fraught, task and it may be that attempts to quantify characteristics of laws that might fall within the conceptual framework of the preventive state along these lines simply generates something of a

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83 [2010] NSWSC 10, [79].

84 Bernadette McSherry, 'Sex, Drugs and 'Evil' Souls: The Growing Reliance on Preventive Detention Regimes' (2006) 32 (2) *Monash University Law Review* 237, 271–2.

85 Communio, *Evaluation of Efficacy and Cost of the Mental Health Inquiry System –Final Report* (30 January 2012) NSW Health, 55 <http://www0.health.nsw.gov.au/resources/whatsnew/pdf/communio_report.pdf>.

'tick the box' guide to the preventive state rather than a useful heuristic.

Nonetheless, a real question remains as to whether preventive practices and policies are amenable, as Steiker suggests, to categorisation as part of a unified problem: whether the dissimilarities between different preventive initiatives defy such a classification. That is, whether on closer inspection specific and relevant differences emerge that render impossible the conception of preventive practices as part of a unified problem. It may be, rather, that this is a question of the relationship between the different measures that fall within the conceptual framework of preventive state,[86] as opposed to the futility of the categorisation of preventive practices as a unified problem. This question cannot be answered in the abstract. This thesis will further explore this question through its case studies.

However, this raises yet a further limitation. The preventive state concept provides a normative conceptual framework to begin the project of viewing and comparing preventive measures, but it does not provide tools to conduct such a comparison. There needs to be a basis from which to identify and test similarities and distinctions between

86 That is, the relationship between the concepts in the cluster identified as the conceptual framework of the preventive state: see, for example, Hyman Rodman, 'Are Conceptual Frameworks Necessary for Theory Building? The Case of Family Sociology' (1980) 21(3) *Sociological Quarterly* 429, 430.

preventive measures. While 'future law'[87] and 'future governance'[88] might be in vogue descriptions of laws with a future orientation, that attempt to govern the future by imposing restrictions on the liberty of a person in the present, the differences between types of 'future law' lack precision. While attempts have been made to distinguish between preventive measures on the basis of whether they are preventive, pre-emptive or precautionary, they have, as Chapter Three highlights, been largely inconsistent. Descriptions of and debates about prevention in contemporary lawmaking have been marked by a lack of clarity in the terms used, which poses a challenge to analysis of domestic preventive measures.

VI Conclusion

This chapter has outlined the preventive state concept and how it has been used by academics before and after September 11. It has assessed the potential of the preventive state concept as one way to read the rise of prevention in anti-terror law since September 11. In particular, it has suggested that the preventive state is a useful conceptual framework through which to critically engage with the assortment of preventive practices employed by governments and to examine continuities and discontinuities between preventive practices, both past and present. In

87 Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 *Criminal Law and Philosophy* 21, 42.

88 Adam Crawford, 'Governing Through Anti-social Behaviour' (2009) 49(6) *British Journal of Criminology* 810, 819.

doing so, it may engender a broader preventive jurisprudence to guide preventive interventions, highlight issues of selectivity and proportionality in preventive measures, and draw attention to the question of the constraints that should be placed on governmental action to prevent future harm.

However, this chapter has also argued that the promise of the preventive state is matched by its limitations. These limitations include: the potential breadth of the concept undermining its critical purchase and normative potential; the lack of precision as to the scope of the conceptual framework; the want of an analytical framework and uncertainty as to whether preventive practices are capable of being classified as part of a unified project. These limitations need to be addressed if the preventive state concept is to be harnessed as a useful way to read and understand prevention in Australian lawmaking.

Determining whether these limitations are fatal or surmountable is part of the broader project of this thesis, informed by the case studies. This thesis undertakes three case studies of preventive measures in Australian law in order to better understand whether the preventive state concept is a useful way to read developments in lawmaking following September 11, and to test assumptions about the exceptionality and reach of control orders as an example of prevention in anti-terror law. In Chapter Seven, this thesis considers what the case

studies reveal about the promise and limitations of the preventive state concept that were identified in this chapter. This includes considering what the case studies reveal about the assumptions underlying the preventive state concept, such as whether preventive measures are sufficiently similar to be categorised as part of a 'unified project'. It will also involve consideration of the conceptual limits of the preventive state concept. For example, questioning whether all preventive measures should be included in the conceptual framework of the preventive state or only those connected to the criminal justice system.

Before undertaking these case studies, however, this thesis addresses how to describe and compare preventive measures in domestic law. As noted, the push to prevent acts of terrorism through domestic law has generated an abundance of preventive measures, and of terms to describe them. However, these terms have been inconsistently applied to describe preventive measures. In order to assess the utility of the concept of the preventive state in understanding preventive measures in the Australian legal system, there needs to be clarity regarding the terminology invoked to describe and compare domestic measures that are anticipatory. The next chapter examines the terminology of prevention and seeks to bring clarity to the debate by distinguishing between preventive laws on the basis of the register of anticipatory military action: namely 'anticipatory self-defence as pre-emption', 'prevention' and 'Bush pre-emption'.

—CHAPTER THREE—

ANTICIPATORY ACTION IN DOMESTIC LAW

If we wait for threats to fully materialize, we will have waited too long.

> President GW Bush, West Point Address, 1 June 2002[1]

It does what any responsible government must do and pursue policies that will help protect its citizens by offering us some chance of preventing an attack before it materializes. That is the intent of this bill.

> Senator Todd, Second Reading debate, Anti-Terrorism Bill (No 2) 2005 (Cth), Australian Senate, 6 December 2005[2]

I INTRODUCTION

Chapter One briefly touched on the terminology of prevention, highlighting the key terms employed since September 11 to describe governmental action to preclude terrorism—'pre-emption', 'prevention' and 'precaution'. Pre-emption and prevention were the first terms invoked to describe state responses to terrorism following September 11, and have since pervaded policy, rhetoric and commentary on domestic and international anti-terror efforts. Precaution, on the other hand, has featured more prominently in commentary and analysis of anti-terror law and policy, domestically and internationally, in the latter

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1 President George W Bush 'Graduation Speech at West Point' (Speech delivered at United States Military Academy, West Point New York, 1 June 2002) <http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020601-3.html>.

2 Commonwealth of Australia, *Parliamentary Debates,* Senate, 6 December 2005, 19 (Todd).

half of the last decade.[3] The dominance of these three terms—in academic literature, political statements and media commentary—as descriptors of anticipatory action taken by governments to forestall terrorist threats belies the lack of consensus regarding their use and meaning.

Indeed, as mentioned in Chapter Two, one of the striking features of recent attempts to describe and explain state action that seeks to intervene and avert a terrorist attack, is the fragmented and unwieldy state of the discourse. This is manifested on several levels: ambiguous and contested terminology; inconsistent use of terms; a separation between the discourse of practice and theory, and of policy and action; and an uneasy migration of terminology from the international to the national, and between disciplines. This fractured discourse reflects, more broadly, a lack of clarity regarding the meaning of and assumptions underlying the terms engaged. Without clarification of the specific meanings of the terms in the context in which they are used, the discourse has little explanatory or analytical power and hampers broader discussion of preventive measures employed by governments.

This chapter seeks to bring clarity to the debate by exploring how these terms have been used since September 11 and considering how they might be relied upon to distinguish between preventive measures in

[3] Simon Bronitt, 'Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform' in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (ANU E Press, 2008) 65, 79.

domestic law. In Part II, this chapter traverses the many ways in which prevention in anti-terror law has been explained and described since September 11, and the challenges that vague and inconsistent use of terminology pose to meaningful analysis of prevention in lawmaking. This chapter argues for the adoption of consistent terminology to describe anticipatory action taken by governments at the domestic and international levels. In Part III, it is suggested that a broader account of this terminology, drawing on international relations scholarship, may provide a basis for distinguishing between different modes of anticipatory legislative action by governments within and beyond the anti-terror context.

Part III further suggests that 'anticipatory self-defence', 'prevention' and 'Bush pre-emption', so understood as three registers of anticipatory action, can be used to assess whether and how control orders are distinct from preventive measures employed in other areas of Australian law. This thesis will then, in Chapters Four, Five and Six, compare where each of the case studies fall on the spectrum of anticipatory action in domestic law and, in doing so, test whether control orders are novel when compared to the other preventive measures studied. This inquiry will also contribute to consideration, in Chapter Seven, of the utility of the preventive state concept, including whether preventive measures are capable of categorisation as part of a 'unified problem' or whether relevant distinctions negate this. However, whether the spectrum of anticipatory action provides a sufficient and useful way to

distinguish between preventive measures in domestic law is untested and will be considered, following the case studies, in Chapter Seven.

II THE TERMINOLOGY OF ANTICIPATORY ACTION

Pre-emption is arguably the most reported and contested term of the so-called 'war on terror', following its incantation in the Bush administration's 2002 *National Security Strategy*. The rationale of the 'doctrine of pre-emption' or 'Bush doctrine', as it variously known, is captured in the following excerpt:[4]

> [t]he United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.

By this doctrine, the Bush administration proposed an adaptation of the international law doctrine of anticipatory self-defence. At customary international law, anticipatory self-defence relates to the right of states

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[4] President George W Bush, *National Security Strategy of the United States of America* (2002) 15.

to act in self-defence where two conditions exist: necessity (an imminent threat of armed attack) and proportionality (action that is neither unreasonable nor excessive, limited by necessity).[5] The Bush Administration argued that the new threat posed by 'today's adversaries', being 'rogue states and terrorists', necessitated a loosening of the imminence requirement.[6] 'Today's adversaries' possessed new capabilities and objectives: the capacity to procure weapons of mass destruction and the 'specific objective' of effecting 'mass civilian casualties'.[7] The potential for catastrophic harm mandated anticipatory action despite uncertainty regarding when and where an attack may be launched.[8]

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5 This is also known as the '*Caroline* doctrine', following an incident in 1837 in which Britain destroyed the Caroline, a steamer, on US terrority. The Caroline was being used by Canadians and US supporters to procure a rebellion against British rule. The vessel transported supporters and ammunition to Navy Island from where an attack was to be launched on the Canadian mainland. It was in a letter, in 1842, that then United States Secretary of State Daniel Webster formulated what was to become known as the Caroline doctine: he said it was for the British government to show 'necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada...did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it': extracted in RY Jennings, 'The Caroline and McLeod Cases' (1938) 32 *American Journal of International Law* 82, 89. The International Court of Justice has confirmed that both of these conditions must be met for the lawful exercise of anticipatory self-defence. Nicole Abadee and Donald R Rothwell, 'The Howard Doctrine: Australia and Anticipatory Self-Defence against Terrorist Attacks' (2007) 26 *Australian Year Book of International Law* 19, 23 (fn 27). See also Donald R Rothwell, 'Anticipatory self-defence in the Age of International Terrorism' (2005) 24(2) *University of Queensland Law Journal* 337, 339. For a summary of the debate regarding whether the customary law principle of anticipatory self-defence survives s 51 (right to self-defence) of the United Nations Charter, see Abadee and Rothwell, 24–29.

6 President George W Bush, *National Security Strategy of the United States of America* (2002) 6, 15.

7 Ibid.

8 Ibid.

To counter this new threat, the Bush Administration advocated what it termed 'pre-emption': anticipatory military action to target 'emerging threats before they are fully formed'.[9] While anticipatory self-defence has hitherto been called 'pre-emption',[10] many now distinguish the Bush Administration's 'pre-emptive self-defence' as designating something more remote, where an attack is neither imminent nor threatened, but possible or expected.[11] The temporality of this distinction is significant, and it introduces an important point that is of equal relevance to preventive measures in domestic law. That is, the threshold of knowledge required to found earlier intervention.

Despite expressly invoking the term 'pre-emption', scholars have argued that the Bush Administration was in fact advocating prevention: preventive war not pre-emptive war.[12] Pre-emption and prevention, or pre-emptive war and preventive war, have long featured in the linguistic

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9 Ibid, forwarding letter of President George W Bush, ix.

10 Steven J Barela, 'Preemptive or Preventive War: A Discussion of Legal and Moral Standards' (2004) 33(1) *Denver Journal of International Law and Policy* 31, 33; Russell Powell, 'The Law and Philosophy of Preventive War: An Institution-Based Approach to Collective Self-Defence' (2007) 32 *Australian Journal of Legal Philosophy* 67.

11 See, for example, Nicole Abadee and Donald R Rothwell, 'The Howard Doctrine: Australia and Anticipatory Self-Defence against Terrorist Attacks' (2007) 26 *Australian Year Book of International Law* 19; Steven J Barela, 'Preemptive or Preventive War: A Discussion of Legal and Moral Standards' (2004) 33(1) *Denver Journal of International Law and Policy* 31; Thomas M Franck, 'Preemption, Prevention and Anticipatory Self-Defense: New Law Regarding Recourse to Force?' (2004) 27 *Hastings International and Comparative Law Review* 425; TD Gill, 'The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy' (2006) 11(3) *Journal of Conflict and Security Law* 361; Niaz A Shah, 'Self-defence, Anticipatory Self-defence and Pre-emption: International Law's Response to Terrorism' (2007) 12(1) *Journal of Conflict and Security Law* 95.

12 Steven J Barela, 'Preemptive or Preventive War: A Discussion of Legal and Moral Standards' (2004) 33(1) *Denver Journal of International Law and Policy* 31; Russell Powell, 'The Law and Philosophy of Preventive War: An Institution-Based Approach to Collective Self-Defence' (2007) 32 *Australian Journal of Legal Philosophy* 67.

register of anticipatory military action.[13] They both signify action taken by a state in advance of an attack by an enemy,[14] but may be distinguished according to the proximity of the threat of attack. That is, whether the anticipatory military action seeks to avert an imminent or distant threat.[15] It is worth recalling that the Bush Administration's doctrine of pre-emption, which I will refer to as 'Bush Pre-emption', expressly targeted distant threats: emergent threats, where there may yet exist uncertainty regarding when and where an attack might occur.[16] Adopting proximity to threat as a distinguishing criterion, Bush

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13 Alan M Dershowitz, *Pre-emption: A Knife that Cuts Both Ways* (WW Norton & Company, 2006) ch 2; Steven J Barela, 'Preemptive or Preventive War: A Discussion of Legal and Moral Standards' (2004) 33(1) *Denver Journal of International Law and Policy* 31, 33–36; Rachel Bzostek, *Why Not Preempt?: Security, Law, Norms and Anticipatory Military Activities* (Ashgate, 2008) 9-10; Hew Strachan, 'Preemption and Prevention in Historical Perspective' in Henry Shue and David Rodin (eds), *Preemption: Military Action and Moral Justification* (Oxford University Press, 2007).

14 Steven J Barela, 'Preemptive or Preventive War: A Discussion of Legal and Moral Standards' (2004) 33(1) *Denver Journal of International Law and Policy* 31, 33.

15 Imminence is an important basis upon which pre-emptive and preventive military action are distinguished, although not an exclusive basis. Bzostek argues that the definitions of preventive and pre-emptive military action may be placed in four (at times overlapping) categories: those which distinguish between the two according to proximity to threat ("imminent and more distant threats"); those which emphasize 'the importance of "windows of opportunity" or shifting power differentials between states'; definitions which are limited to the specific context of 'nuclear weapons or weapons of mass destruction'; those which include a requirement of regime change. She concedes, however, almost all include proximity to threat, or imminence, as a criterion: Rachel Bzostek, *Why Not Preempt?: Security, Law, Norms and Anticipatory Military Activities* (Ashgate, 2008) 9–10. It is important to note that imminence does constitute the main reason why commentators argue that the Bush administration was advocating prevention not pre-emption: see for example Steven J Barela, 'Preemptive or Preventive War: A Discussion of Legal and Moral Standards' (2004) 33(1) *Denver Journal of International Law and Policy* 31, 36–41; Russell Powell, 'The Law and Philosophy of Preventive War: An Institution-Based Approach to Collective Self-Defence' (2007) 32 *Australian Journal of Legal Philosophy* 67, 72; David Cole and Jules Lobel, *Less Safe, Less Free: Why America is Losing the War on Terror* (The New Press, 2007); David Luban, 'Preventive War' (2004) 32 (3) *Philosophy and Public Affairs* 207; Jessica Stern and Jonathan B Wiener, 'Precaution Against Terrorism' (2006) 9(4) *Journal of Risk Research* 393, 398.

16 President George W Bush, *National Security Strategy of the United States of America* (2002) 15.

pre-emption is more aligned with prevention than pre-emption: targeting distant threats before they materialise, rather than imminent threats. In this way Freedman, writing from an international relations perspective, argues that what the Bush Administration advocated amounts to prevention, being 'a means of confronting factors that are likely to contribute to the development of a threat before it has had the chance to become imminent'.[17] This is in contrast to pre-emption which denotes intervention 'at some point between the moment when an enemy decides to attack—or, more precisely, is perceived to be about to attack—and when the attack is actually launched'.[18]

This understanding of prevention and pre-emption accords with contemporary military usage of the terms. For example, the United States Department of Defense *Dictionary of Military and Associated Terms*, as amended through 15 July 2011, defines a pre-emptive attack as initiated 'on the basis of incontrovertible evidence that an enemy attack is imminent.'[19] This definition remains in the current online version of the *Oxford Essential Dictionary of the United States Military*.[20] While preventive war is absent from the current version of the Dictionary, in the 2004 version it was defined as 'a war initiated in the

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17 Lawrence Freedman, 'Prevention, Not Preemption' (2003) 26(2) *The Washington Quarterly* 105, 113.

18 Ibid.

19 Department of Defense, United States (2010–11) *Joint Publication 1–02, Department of Defense Dictionary of Military and Associated Terms* (8 November 2010, as amended through 15 July 2011) 280. The newest version of the dictionary, as amended through 15 November 2012, does not include 'pre-emptive attack'.

20 Oxford Reference, *The Oxford Essential Dictionary of the U.S. Military* (at 1 April 2013, Current Online Version 2012)(Oxford University Press, 2001).

belief that military conflict, while not imminent, is inevitable, and that to delay would involve greater risk'.[21]

The murkiness of the temporal distinction between pre-emption and prevention following the release of the Bush Administration's 2002 *National Security Strategy* was not limited to foreign policy pronouncements of the United States government. It caused then Prime Minister John Howard's 2002 comments on pre-emptive military strikes in our region to be met with a chorus of opposition by commentators, and disquiet by regional leaders.[22] These comments came in the aftermath of the October 12 Bali bombing, during an interview with reporter Laurie Oakes on December 1, 2002. Oakes put the following question to the Prime Minister:[23]

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21 Steven J Barela, 'Preemptive or Preventive War: A Discussion of Legal and Moral Standards' (2004) 33(1) *Denver Journal of International Law and Policy* 31, 32. The criterion of inevitability is an important qualification: on many accounts, prevention is not simply a first strike where a nation state apprehends decline in military power, but 'the use of a military superiority against an enemy with whom war was inevitable before that superiority disappeared' Hew Strachan, 'Preemption and Prevention in Historical Perspective' in Henry Shue and David Rodin (eds), *Preemption: Military Action and Moral Justification* (Oxford University Press, 2007) 35.

22 Ross Cassin,'Howard takes the prix for pre-emption non-sense', *The Age* (Online), 8 December 2002. <http://www.theage.com.au/articles/2002/12/07/1038950235121.html>; For the response of leaders in the region, see Nicole Abadee and Donald R Rothwell, 'The Howard Doctrine: Australia and Anticipatory Self-Defence against Terrorist Attacks' (2007) 26 *Australian Year Book of International Law* 19; Amitav Acharya, 'The Bush Doctrine and Asian Regional Order: The Perils and Pitfalls of Preemption' (2003) 27(4) *Asian Perspective* 217.

23 Laurie Oakes, Interview with John Howard, Prime Minister of Australia (Television Interview, 1 December 2002) <http://sgp1.paddington.ninemsn.com.au/sunday/political_transcripts/article_1192.asp?s=1>.

> [n]ow, you've been arguing for a new approach to pre-emptive defence, you want the UN to change its charter, I think. Does that mean that you ... if you knew that, say, JI [*Jemaah Islamiyah*] people in another neighbouring country were planning an attack on Australia that you would be prepared to act?

The Prime Minister responded:[24]

> [o]h yes, I think any Australian Prime Minister would. I mean, it stands to reason that if you believed that somebody was going to launch an attack against your country, either of a conventional kind or of a terrorist kind, and you had a capacity to stop it and there was no alternative other than to use that capacity then of course you would have to use it...when the United Nations Charter was written the idea of attack was defined by the history that had gone before... that's different now... What you're getting is non-state terrorism, which is just as devastating and potentially even more so. And all I'm saying... is that maybe the body of international law has to catch up with that new reality, and that stands to reason.

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[24] Ibid. See also Nicole Abadee and Donald R Rothwell, 'The Howard Doctrine: Australia and Anticipatory Self-Defence against Terrorist Attacks' (2007) 26 *Australian Year Book of International Law* 19, 46.

It is unclear from Prime Minister Howard's statement whether he was advocating unilateral action, whether he was speaking of an imminent threat ('if you believed that somebody was going to launch an attack') or something more remote, and what knowledge and evidence would be required to found the belief that an attack was to be launched and that 'there was no alternative'.[25] Abadee and Rothwell argue that the language used by Prime Minister Howard—such as 'likely to be attacked', 'going to launch an attack'—indicates that he is in fact advocating anticipatory self-defence against an imminent terrorist attack rather than Bush pre-emption targeting 'emerging threats before they are fully formed'.[26] Nevertheless, this demonstrates the inconsistent, ambiguous and politically convenient way in which the language of pre-emption was engaged in policy pronouncements in the war on terror and the unease with which the term pre-emption migrated between governments.

Stern and Wiener argue that what is manifest in the Bush Administration's *National Security Strategy* is the precautionary principle against the risk of terrorism, or what they call 'precautionary

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25 While such ambiguity was a feature of Prime Minister Howard's earlier statements, it was qualified, piecemeal and over time, by Foreign Minister Downer and the Prime Minister himself: see Nicole Abadee and Donald R Rothwell, 'The Howard Doctrine: Australia and Anticipatory Self-Defence against Terrorist Attacks' (2007) 26 *Australian Year Book of International Law* 19, 62; however, this ambiguity did not extend to policy pronoucements—the 2004 White Paper referred to detecting and preventing 'any imminent threats to our security': Abadee and Rothwell, 50.

26 Ibid 50.

counterterrorism'.[27] The legal origin of the precautionary principle has been traced to Swedish environmental law in the late 1960s.[28] Since that time, the principle has taken a leading role in international environmental law, risk regulation and, increasingly, anti-terror and security studies.[29] As noted in Chapter One, there are many versions of the precautionary principle, yet it can be said that the animating idea behind all versions is that 'regulators should take steps to protect against potential harms, even if causal chains are unclear and even if we do not know that those harms will come to fruition'.[30] As Stern and Weiner explain, precautionary counterterrorism is evidenced by the dearth of an imminence requirement, and the shifting of the burden of proof:[31]

> [t]he traditional basis for the use of force in national self-defense is that the country has been attacked, or that an attack is imminent. The burden of proof is on the country exercising preemptive self-defense to show that its enemy is about to attack. There was no evidence that Iraq was about to attack the US or the UK, but there were intelligence claims that Iraq had capabilities—

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27 Jessica Stern and Jonathan B Wiener, 'Precaution Against Terrorism' (2006) 9(4) *Journal of Risk Research* 393.

28 Cass Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press, 2005) 16; *Contra* Fisher who traces the principle to German law in the 1970s: Elizabeth Fisher, 'Is the Precautionary Principle Justiciable?' (2001) 13(3) *Journal of Environmental Law* 315.

29 Ibid; see also Jessica Stern and Jonathan B Wiener, 'Precaution Against Terrorism' (2006) 9(4) *Journal of Risk Research* 393.

30 Cass Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press, 2005) 4.

31 Jessica Stern and Jonathan B Wiener, 'Precaution Against Terrorism' (2006) 9(4) *Journal of Risk Research* 393, 400.

> WMD—to attack without warning and with catastrophic consequences.

Some commentators have identified the influence of precaution in Australian anti-terror lawmaking.[32] The Australian government, while not expressly adopting the precautionary principle in relation to terrorism, has assumed a precautionary stance. For example, Senator Chris Ellison, then Minister for Justice and Customs, justified the introduction of preparatory offences in the Anti-Terrorism Bill 2005 (Cth) to the Senate as follows: [33]

> [i]n the security environment that we are dealing with, you may well have a situation where a number of people are doing things but you do not yet have the information which would lead you to identify a particular act ... When you are dealing with security, you have to keep an eye on prevention of the act itself as well as bringing those who are guilty of the act to justice.

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32 See, for example, Simon Bronitt, 'Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform' in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (ANU E Press, 2008) 65, 79; Andrew Goldsmith, 'The Governance of Terror: Precautionary Logic and Counterterrorist Law Reform After September 11' (2008) 30(2) *Law & Policy* 141; Edwina MacDonald and George Williams, 'Combating Terrorism: Australia's *Criminal Code* Since September 11, 2001' (2007) 16(1) *Griffith Law Review* 27.

33 Commonwealth of Australia, *Parliamentary Debates*, Senate, 3 November 2005, 43 extracted in Edwina MacDonald and George Williams, 'Combating Terrorism: Australia's *Criminal Code* Since September 11, 2001' (2007) 16(1) *Griffith Law Review* 27, 34–5.

Goldsmith, for example, has documented a 'precautionary mindset' in Australia's anti-terror law reform processes,[34] and Bronitt a 'subtle shift' from 'preventative to precautionary models of legal action' in amendments to the *Defence Act 1903* (Cth) that authorise the military to use lethal force to protect critical infrastructure.[35]

However, the role the precautionary principle plays in anti-terror efforts, what version is being or should be advocated, and how precaution fits with pre-emption and prevention is not settled. While commentators have increasingly attributed the logic of precaution to anti-terror policy making, and parliamentary and legislative processes,[36] no Western government has expressly announced the adoption of the precautionary principle against the risk of terrorism.[37] Even if so announced, the

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34 Andrew Goldsmith, 'The Governance of Terror: Precautionary Logic and Counterterrorist Law Reform After September 11' (2008) 30(2) *Law & Policy* 141.

35 Simon Bronitt, 'Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform' in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (ANU E Press, 2008) 65, 78–82.

36 See, for example, Claudia Aradau and Rens van Munster, 'The *dispositif* of risk in the war on terror' in Louise Amoore and Marieke de Goede (eds), *Risk and the War on Terror* (2008); Simon Bronitt, 'Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform' in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (ANU E Press, 2008) 65, 79; Marieke De Goede, 'The Politics of Preemption and the War on Terror in Europe' (2008) 14(1) *European Journal of International Relations* 161; Richard V Ericson, *Crime in an Insecure World* (Polity Press, 2007); Andrew Goldsmith, 'The Governance of Terror: Precautionary Logic and Counterterrorist Law Reform After September 11' (2008) 30(2) *Law & Policy* 141; Edwina MacDonald and George Williams, 'Combating Terrorism: Australia's *Criminal Code* Since September 11, 2001' (2007) 16(1) *Griffith Law Review* 27; Cass Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press, 2005); Lucia Zedner, *Security* (Routledge, 2009).

37 See Bronitt who reported this in 2008: Simon Bronitt, 'Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform' in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (ANU E Press, 2008) 65, 79.

principle would be a difficult standard against which to describe or evaluate state action. As Powell argues:[38]

> [i]t is somewhat misleading to refer to *the* precautionary principle, since it enjoys no canonical formulation. Instead, it amounts to a largely disconnected constellation of legal, political and academic articulations that fall within the rubric of what might be called the *precautionary approach.*

The vagueness of what the precautionary principle entails is compounded when the principle is adapted to apply to the risk of terrorism. For example, one of the more recognised formulations of the precautionary principle is Ewald's account that the principle provides a framework for decision making where two features exists: scientific uncertainty and 'the possibility of serious and irreversible damage'.[39] However, when applied to the anti-terror context, the harm requirement is relaxed and state intervention permitted where there is a possibility of harms of lesser severity than 'catastrophic and irreversible' harm.[40] In this context, the principle risks becoming so diluted as to render reference to it meaningless.

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38 Russell Powell, 'What's the Harm?: An Evolutionary Theoretical Critique of the Precautionary Principle' (2010) 20(2) *Kennedy Institute of Ethics Journal* 181, 183 (emphasis in original).

39 François Ewald, 'The Return of Descartes's Malicious Demon: An Outline of a Philosophy of Precaution' in Tom Baker and Jonathon Simon (eds), *Embracing Risk: The Changing Culture of Insurance and Responsibility* (Stephen Utz trans, 2002) 273, 283–4.

40 Lucia Zedner, *Security* (Routledge, 2009) 84.

The relationship of the precautionary principle to the other terms of prevention is also unclear. De Goede, for example, argues that the politics of pre-emption in the war on terror is an appropriation and reworking of the politics of precaution as developed in the environmental context.[41] De Goede identifies pre-emption in the European Union's counter terrorism policies, in particular those that make 'precautionary logic part of everyday life' such as asset freezing laws.[42] Zedner, however, finds that the rise of precaution in criminal justice is 'analogous to the concept of pre-emption which is well developed in the field of international relations'.[43] This again illustrates a source of fragmentation in the discourse, the difficulties in migrating terminology between jurisdictions and across disciplines.

While pre-emption featured prominently in foreign policy pronouncements after September 11, at the domestic level prevention has been invoked in Australia and overseas to describe and justify domestic legislation aimed at identifying terrorist threats and averting terrorist attacks. As noted in Chapter One, former United States Attorney-General John Ashcroft, for example, coined the phrase 'paradigm of prevention' to describe domestic anti-terror measures that permit coercive action against individuals and groups who it is

41 Marieke De Goede, 'The Politics of Preemption and the War on Terror in Europe' (2008) 14(1) *European Journal of International Relations* 161, 165.
42 Ibid 175.
43 Lucia Zedner, *Security* (Routledge, 2009) 85.

suspected might cause future harm.[44] In Australia, former Attorney-General Phillip Ruddock championed prevention as a key to Australia's anti-terror policy, and protective and proactive government practices.[45] In the 2010 Counter Terrorism White Paper, *Securing Australia, Protecting our Community*, prevention remains one of the identified purposes of the anti-terror regime.[46] The pervasion of the language of 'prevention' in Australia's anti-terror policy is demonstrated by the fact that 'prevent', and its permutations, appear 68 times in the 2010 Counter Terrorism White Paper. Interestingly, neither precaution nor pre-emption appears in the 2010 White Paper.

The use of the term prevention in this context has been challenged. Cole, for example, argues that although alleged to fall under the rubric of 'paradigm of prevention', the United States' justification of coercive action 'on the basis of speculation about future contingencies', without proof of past 'wrongdoing' or when 'the justification for punishing past acts is the speculation that they might facilitate bad acts in the future', falls foul of what may properly be called prevention.[47] Similarly,

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44 David Cole, 'Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror'' in Andrea Bianchi and Alexis Keller (eds), *Counterterrorism: Democracy's Challenge* (Hart Publishing, 2008) 233, 235; David Cole and Jules Lobel, *Less Safe, Less Free: Why America is Losing the War on Terror* (The New Press, 2009); Jude McCulloch and Sharon Pickering, 'Pre-Crime and Counter-Terrorism' (2009) 49 *British Journal of Criminology* 628, 630.

45 Phillip Ruddock, 'Law as a Preventative Weapon Against Terrorism' in Andrew Lynch, Edwina Macdonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 3, 4.

46 Department of Prime Minister and Cabinet, *Counter-terrorism White Paper—Securing Australia, protecting our community* (2010).

47 David Cole, 'Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror'' in Andrea Bianchi and Alexis Keller (eds),

McCulloch and Pickering argue that what many commentators describe as prevention in Australia's domestic anti-terror legislation is in fact pre-emption.[48] Pre-emption in domestic legislation, they argue, has the same logic as the Bush administration's 'doctrine of pre-emption', being to target threats before they materialise. For example, then Attorney-General Phillip Ruddock, when making his second reading speech to the 2005 package of anti-terror laws that introduced, amongst other things, control orders and preventive detentions orders, stated: 'this bill ensures we are in the strongest position possible to prevent new and emerging threats'.[49] McCulloch argues that this is properly classified as pre-emption in that 'it seeks to punish or apply coercive sanctions on the basis of what it is anticipated might happen in the future'.[50]

Interestingly, McCulloch and Pickering argue that there are other Australian laws, outside of the anti-terror context, which 'exemplify the pre-emptive framework'.[51] These include, in the criminal justice context, the post-sentence continuing detention and ongoing supervision of serious sex offenders, and beyond that context, the preventive detention

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Counterterrorism: Democracy's Challenge (Hart Publishing, 2008) 233, 235–6, 247–9.

48 Jude McCulloch and Sharon Pickering, 'Counter-Terrorism: The Law and Policing of Pre-emption' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 13.

49 This example was used by Bronitt: Simon Bronitt, 'Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform' in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (ANU E Press, 2008) 65, 77.

50 McCulloch quoted in Bronitt, ibid.

51 Jude McCulloch and Sharon Pickering, 'Counter-Terrorism: The Law and Policing of Pre-emption' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 13, 17.

of persons with mental illness and those quarantined to prevent harm to others.[52] This reflects how the different perspectives of those in government and academia involve different usages of and underlying assumptions about the terminology of prevention.

This point is reinforced by recent debates in the New South Wales Parliament surrounding the introduction of the Crimes (Serious Sex Offenders) Amendment Bill 2013 (NSW) during which the language of pre-emption was invoked. As will be further explored in Chapter Five, this Bill was introduced into Parliament to extend the regime of post-sentence preventive detention and supervision of serious sex offenders to high risk violent offenders, and to certain offences committed by children.[53] In debate in the upper house, Phelps remarked:[54]

> The reason it will do so is because we recognise that in society there is in certain limited instances a role for the power of the State to be used pre-emptively against individuals. If not in this case, when?

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52 Ibid 17–18.

53 The Bill had two stated objects:

(a) to provide for the continued supervision and detention of high risk violent offenders in appropriate cases (in addition to serious sex offenders, as is presently the case), and

(b) to permit orders to be made for the continued supervision and detention of an adult offender convicted of an offence as a child in appropriate cases.

See Explanatory Note, Crimes (Serious Sex Offenders) Amendment Bill 2013 (NSW) 1.

54 New South Wales, *Parliamentary Debates,* Legislative Council, 13 March 2013, 18442 (Phelps).

Phelps did not proffer a definition of pre-emption, although he invoked the term in relation to an individual's right to self-defence:[55]

> When we are in a society where self-defence is accepted but where it is difficult to give effect to one's right to self-defence, there is a role for the pre-emptive power of the State to say that these things should not happen.

The transdisciplinary nature of terrorism studies and the disciplinary heritage of the terms engaged provide another layer of fragmentation. McCulloch and Pickering, for example, present arguments *against* the use of the term prevention in the anti-terror context on the basis that it distorts how prevention is employed and theorised in criminology, assumes a connection to outcome and masks ulterior motivations.[56] They argue that pre-emption, which focuses on the legislative strategy, is preferable to prevention which is outcome focused.[57] They challenge the use of prevention to describe anti-terror legislation as it assumes, without empirical support, that such laws will prevent or minimise the risk of a terrorist attack.[58] Zedner makes a similar challenge to the appropriateness of prevention in the context of control orders when she argues that underlying prevention are the assumptions that is possible

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55 New South Wales, *Parliamentary Debates,* Legislative Council, 13 March 2013, 18441 (Phelps).

56 Jude McCulloch and Sharon Pickering, 'Counter-Terrorism: The Law and Policing of Pre-emption' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 13, 15–17.

57 Ibid 17.

58 Ibid.

to accurately assess the risk posed by an individual, and to design measures that are effective in averting that risk.[59]

This disjointed discourse reflects divergences between individual, disciplinary and policy conceptions and usages of prevention and pre-emption. Yet there are appealing arguments *for* adopting consistent terminology to describe international and domestic responses to terrorism. McCulloch and Carlton argue that employing consistent terminology to describe domestic and international efforts accounts for the blurring of the domestic and international in relation to security, governmental policy and law that has characterised the so-called war on terror.[60] At the same time, employing consistent terminology has normative advantage, allowing 'the insights of the notion of preemption in the international context, to be tested, developed and, where relevant, incorporated into critiques of domestic measures'.[61] The strength of this approach is that it provides an account of the terminology that is sensitive to the broader context of anti-terror law and governance, and that provides for reflexivity between the terms employed and the measures they represent.

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59 Lucia Zedner, 'Preventative Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems* 174, 191–2, 202–3.

60 Jude McCulloch and Bree Carlton, 'Preempting Justice: Suppression of Financing of Terrorism and the 'War on Terror'' (2006) 17(3) *Current Issues in Criminal Justice* 397.

61 Jude McCulloch and Bree Carlton, 'Preempting Justice: Suppression of Financing of Terrorism and the 'War on Terror'' (2006) 17(3) *Current Issues in Criminal Justice* 397, 401 and generally 399–402.

Some commentators have made strong inroads in distinguishing temporally between preventive measures in the criminal law. Zedner, for example, distinguishes between the preventive turn in criminal law, 'triggered in the main by acts "more than merely preparatory" to a specified offence', and pre-emption, which captures encroachments on individual liberty at earlier points in time 'often without the requirement of mens rea, still less actus reus'.[62] Others make a similar distinction but invoke solely the language of prevention. Janus, for example, argues that what is properly called prevention entails intervention by the state only after actual or attempted harm; whereas what he terms 'radical prevention' sanctions intervention where there exists a propensity for harm.[63]

This examination of the terminology illustrates how the proliferation of preventive measures since September 11 has been accompanied by a flourishing yet fragmented discourse. The state of the discourse is a reflection of the difficulties inherent in the blurring boundaries between international and national security, international and domestic law, and domestic and foreign policy that has so characterised the war on terror.[64] One such difficulty is the different conceptions and usages of

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62 Lucia Zedner, 'Preventative Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems* 174, 192.

63 Eric S Janus, 'The Preventive State, Terrorists and Sexual Preditors: Countering the Threat of a New Outsider Jurisprudence' (2004) 40 *Criminal Law Bulletin* 576, 577.

64 See, for example, Lucia Zedner, *Security* (Routledge, 2009). On the migration of law in the war on terror and the influence of the UN Security Council, and Britain, see Christopher Michaelson, 'The Security Council's Al Qaeda and Taliban Sanctions Regime: "Essential Tool" or Increasing Liability for the UN's

the terminology that each perspective adopts. The horizontal and vertical migration of terminology between jurisdictions and disciplines has given rise to inaccuracies, inconsistencies and anomalies in translation.

One of the key challenges to discussing the prevalence of prevention in contemporary lawmaking is describing it. To move the discourse in relation to Australia's preventive anti-terror regime forward, we can draw from the foregoing analysis the need for an account of the terminology that provides clear definitions and temporal distinctions, that explains the underlying assumptions and epistemological premises of terms, and is broad enough to capture diverse preventive practices. In Part III, it is suggested that such an account is possible, adopting consistent terminology to describe anticipatory action at the domestic and international levels. It is further suggested that 'anticipatory self-defence', 'prevention' and 'Bush pre-emption' as three registers of anticipatory action may provide a basis for distinguishing between preventive measures in domestic law. However, it remains to be seen whether 'anticipatory self-defence', 'prevention' and 'Bush pre-emption' constitute a sufficient and useful basis to distinguish between preventive measures in domestic law. This thesis will consider, in

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Counterterrorism Efforts?' (2010) 33 *Studies in Conflict & Terrorism* 448; Kent Roach, 'The Post-9/11 Migration of Britain's Terrorism Act 2000' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 374; Kent Roach, 'Sources and Trends in Post-9/11 Anti-terrorism Laws' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing, 2007) 227.

Chapter Seven, what the case studies reveal about the utility of comparing domestic preventive measures according to this register.

III A Framework for Distinguishing Anticipatory Action in Domestic Law

Following September 11, 'pre-emption', in the sense that the Bush administration invoked it to target threats before they emerge, was quickly seized upon and applied at the domestic level to indicate a pre-emptive turn in domestic criminal law, lawmaking and police practices.[65] However, this was done, in a large measure, without consideration of the history and meaning of pre-emption in the international sphere as the legitimate use of force in self-defence against an imminent attack. This has, arguably, not only contributed to the fractured discourse of prevention but also stymied efforts to employ consistent terminology at the domestic and international levels.

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65 Leanne Weber and Murray Lee, 'Preventing Indeterminate Threats: Fear, Terror and the Politics of Preemption' in Stephen Farrall and Murray Lee (eds), *Fear of Crime: Critical Voices in an Age of Anxiety* (Routledge, 2008) 61–81; Lucia Zedner, 'Preventative Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems* 174, 192; Jude McCulloch and Bree Carlton, 'Preempting Justice: Suppression of Financing of Terrorism and the "War on Terror"' (2006) 17(3) *Current Issues in Criminal Justice* 397; Jude McCulloch and Sharon Pickering, 'Pre-Crime and Counter-Terrorism: Imagining Future Crime in the War on Terror' (2009) 49(5) *British Journal of Criminology* 628; Jude McCulloch and Sharon Pickering, 'Counter-Terrorism: The Law and Policing of Pre-emption' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 13, 15–17; Nicola McGarrity and George Williams, 'When Extraordinary Measures Become Normal: Pre-emption in Counter-Terrorsim and Other Laws' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 131; Heidi Mork Lomell, 'Punishing the Uncommitted Crime: Prevention, Pre-emption, Precaution and the Transformation of the Criminal Law' in Barbara Hudson and Synnøve Ugelvik (eds), *Justice and Security in the 21st Century: Risks, Rights and the Rule of Law* (Routledge, 2012) 83; Christina Pantazis and Simon Pemberton, 'Trading Civil Liberties for Greater Security?: The Impact on Minority Communities' (2008) 73(1) *Criminal Justice Matters* 12, 13.

The adoption of consistent terminology to describe anticipatory action at the international and domestic levels has much advantage. It accounts for the blurring of the national and international in relation to security, governmental policy and law since September 11, while facilitating insights drawn in one sphere being harnessed to improve the other.[66] It also builds on scholarship that has sought to distinguish between pre-emption and prevention as registers of anticipatory action in domestic and international law. In doing so, it brings clarity to the terminology employed to describe domestic preventive measures by more accurately reflecting the meaning of the terms in the international sphere.

However, the adoption of consistent terminology also has a significant drawback—the framing of the persons subject to the law as the 'enemy'. Anticipatory military action is, obviously, taken against an enemy of the state; pre-emptive or preventive action or war is launched against an enemy force that is, or is perceived to be, taking action against the state. The adoption of the same language to describe domestic laws carries with it this construction of the person subject to the law, arguably framing suspected terrorists, persons with mental illness and high risk offenders as enemies, and contributes, albeit tacitly, to the perpetration of the 'war on' everything mentality in domestic policy. Whether the register of anticipatory military action provides a useful

66 Jude McCulloch and Bree Carlton, 'Preempting Justice: Suppression of Financing of Terrorism and the 'War on Terror'' (2006) 17(3) *Current Issues in Criminal Justice* 397, 401 and generally 399–402.

basis to compare domestic preventive measures, and whether its utility outweighs the potential detriment, will be examined in Chapter Seven.

For present purposes, it is suggested that the register of anticipatory military action—pre-emption as anticipatory self-defence, prevention and Bush pre-emption—may be adopted as a way to distinguish between domestic laws that are anticipatory. This typology will be used as the basis for comparing the preventive measures examined in the case studies and for testing whether control orders, as an example of a preventive anti-terror law, are exceptional. This thesis is principally concerned with the apparent trend towards legislating in respect of increasingly distant harms. As such, prevention and Bush pre-emption will be the two registers most relevant to the case studies. Nonetheless, it is useful to examine all three modes of anticipatory action.

In order to distinguish between these three modes of anticipatory action, this thesis draws upon the discussion in Part II, the work of Brian Massumi and other international relations scholars and utilises former United States Secretary of Defense Donald Rumsfeld's infamous system of distinguishing between the known and the unknown: 'known knowns', 'known unknowns', 'unknown unknowns'.[67] Massumi's analysis of prevention and, what I term, Bush pre-emption as military strategies furnishes key insights for distinguishing between these

[67] United States Department of Defense, 'DoD News Briefing - Secretary Rumsfeld and Gen. Myers' (News Transcript, 12 February 2002) <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636>.

concepts in domestic legislation.[68] For Massumi, both prevention and Bush pre-emption operate 'in the present on a future threat', but are distinguishable in terms of their ontological and epistemological premises.[69] As will be explored in Part III(B)–(C), Massumi argues that what links prevention and Bush pre-emption is a shared goal of neutralising threat, yet they differ, crucially for present purposes, in terms of epistemology or knowledge premise. What can be drawn from Massumi's work and applied to an analysis of domestic law is the distinction between prevention and Bush pre-emption in terms of the level of knowledge of the threat of harm upon which intervention is based.

Donald Rumsfeld's tripartite schema is an interesting way of conceiving of the relationship between the known and the unknown in domestic lawmaking, and assists in conceptualising the register of anticipatory action. In a February 2002 press briefing, a question was put to the then United States Secretary of Defense regarding whether there was any evidence linking Iraq to terrorist organisations and weapons of mass destruction, noting the existence of reports finding no evidence of a direct link. Rumsfeld responded as follows:[70]

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68 Brian Massumi, 'Potential Politics and the Primacy of Preemption' (2007) 10(2) *Theory & Event* <http://muse.jhu.edu/journals/theory_and_event/v010/10.2massumi.html>.

69 Ibid [13].

70 US Department of Defense, 'DoD News Briefing - Secretary Rumsfeld and Gen. Myers' (News Transcript, 12 February 2002) <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636>.

> [r]eports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones.

Zedner argues that Rumsfeld's schema is important for its articulation of the role that uncertainty plays in the security context.[71] Uncertainty, as opposed to risk-based perspectives that are predicated on the calculability of future threats, 'acknowledges that the future is unknowable'.[72]

The following sections examine the three registers of anticipatory military action and how they might be employed to compare preventive measures in domestic law. Examples are drawn from Australia's federal anti-terror laws to demonstrate how this typology of anticipatory action might work. These examples are brief but illustrative. The case studies undertaken in Chapters Four, Five and Six provide an in depth analysis

71 Lucia Zedner, *Security* (Routledge, 2009) 126.

72 Ibid. However, it is also noteworthy that Žižek has remarked that Rumsfeld's schema neglected the most important aspect of the relationship between the known and the unknown: the 'unknown known', the 'things we don't know that we know'. That is, the 'silent presuppositions' that we are unaware that we know or rely upon, but that inform and determine our actions, and 'background' our values: Slavoj Žižek, 'Philosophy, the "unknown knowns," and the public use of reason' (2006) 25 *Topoi* 137–8.

of whether and how the legislative regimes in question amount to anticipatory self-defence, prevention or Bush pre-emption. Where each regime studied falls on the spectrum of anticipatory action in domestic law will, as noted, go to whether control orders are novel when compared to preventive measures contained in the high risk offender and civil mental health regimes.

A *'Anticipatory Self-Defence' as Pre-emption*

In military and international relations scholarship, pre-emption as anticipatory self-defence and pre-emptive war have long been understood as 'a first strike against an enemy who has not yet attacked but whose attack is clearly imminent.'[73] Pre-emption, in this sense of anticipatory self-defence, is about '"anticipating" an aggressor who is literally poised to attack'.[74] At customary international law, anticipatory self-defence refers to action taken by a state in self-defence that is a proportionate response to an imminent threat.[75] As such, the threat in respect of which action is taken is perhaps as close to a 'known known' as is possible when discussing what might happen in the future.

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73 David Rodin, 'The Problem with Prevention' in Henry Shue and David Rodin (eds), *Preemption: Military Action and Moral Justification* (Oxford University Press, 2007) 144.

74 Ibid.

75 As noted in footnote 5 above, this is also known as the '*Caroline* doctrine' and the International Court of Justice has confirmed that both of these conditions must be met for the lawful exercise of anticipatory self-defence: Nicole Abadee and Donald R Rothwell, 'The Howard Doctrine: Australia and Anticipatory Self-Defence against Terrorist Attacks' (2007) 26 *Australian Year Book of International Law* 19, 23 (fn 27); see also RY Jennings, 'The Caroline and McLeod Cases' (1938) 32 *American Journal of International Law* 82, 89; Donald R Rothwell, 'Anticipatory self-defence in the age of international terrorism' (2005) 24(2) *University of Queensland Law Journal* 337, 339.

When applied to domestic legislation, pre-emption as anticipatory self-defence would capture state action that is both proportionate to the threat posed (meaning neither excessive nor unreasonable and limited by necessity) and necessary in response to an imminent threat. In the anti-terror context, the issuance of a preventative detention order under Division 105 of the *Criminal Code* to prevent an imminent terrorist act perhaps comes closest to pre-emption as anticipatory self-defence.

A preventative detention order is an executive order that prescribes the limited detention of a person who has neither been charged with nor previously convicted of a criminal offence. Two types of preventative detention order are provided for in Division 105 of the *Criminal Code*: the first is designed to be issued before a terrorist act to prevent it, the second after a terrorist act to preserve evidence.[76] This is reflected in the stated object of Division 105:[77]

> to allow a person to be taken into custody and detained for a short period of time in order to:
>
> (a) prevent an imminent terrorist attack occurring; or

[76] See for further discussion: Claire Macken, 'The Counter-Terrorism Purposes of an Australian Preventive Detention Order' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 30, 32–4.

[77] *Criminal Code* s 105.1.

(b) preserve evidence of, or relating to, a recent terrorist act.

The first type of preventative detention order—to prevent an imminent terrorist act—resembles anticipatory self-defence: a proportionate response to an imminent threat. A preventative detention order to prevent an imminent terrorist act may only be applied for and issued where the applicant and issuing authority are respectively satisfied that:[78]

(a) there are reasonable grounds to suspect that the subject:

(i) will engage in a terrorist act; or

(ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or

(iii) has done an act in preparation for, or planning, a terrorist act; and

(b) making the order would substantially assist in preventing a terrorist act occurring; and

(c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).

78 Ibid s 105.4(4).

The *Criminal Code* further stipulates that for the issuance of this type of preventative detention order, a terrorist act:[79]

> (a) must be one that is imminent; and
>
> (b) must be one that is expected to occur, in any event, at some time in the next 14 days.

This imminence requirement accords with the necessity limb of the anticipatory self-defence test. Arguably, the preventative detention regime is also proportionate, meaning neither excessive nor unreasonable and limited by necessity. The period of detention is statutorily limited and the applicant and issuing authority must be satisfied that the detention is 'reasonably necessary' for the purpose of preventing a terrorist act. A person may be detained for up to 24 hours pursuant to an 'initial' preventative detention order,[80] which may be extended pursuant to a 'continued' preventative detention order.[81] The duration of continued preventative detention order is also limited and may not exceed 48 hours from the time at which the person was first detained pursuant to the initial order.[82] A further extension is possible

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79 Ibid s 105.4(5).

80 *Criminal Code* s 105.8(5). An initial preventative detention order is issued by a senior member of the Australian Federal Police on the application of a member of the Australian Federal Police: ss 100.1(1), 105.8.

81 An issuing authority for a continued preventative detention order is a person appointed by the Minister under s 105.2, and includes serving judges acting in their personal capacity: see ibid ss 100.1(1), 105.2.

82 Ibid s 105.12(5).

pursuant to State or Territory preventative detention legislation.[83] The strict time limitations on detention and the requirement that the detention is 'reasonably necessary' for the purpose of preventing a terrorist act suggest that this type of detention is limited by necessity, whether or not it is excessive or unreasonable response to an imminent threat of terrorism.

That said, a significant question remains as to whether the level of knowledge of which the applicant and issuing authority need to be satisfied—'reasonable grounds to suspect'—is sufficient to found pre-emption as anticipatory self-defence. Whether this amounts to convincing evidence that an attack is imminent is highly doubtful. McSherry has sampled the case law on suspicion in criminal cases from which she has taken that suspicion 'has been interpreted as describing a mental state that need not be based on "proof", but is tempered by an objective gloss, that of "reasonableness"'.[84] This perhaps points to an inconsistency between the harm and knowledge thresholds in this legislative regime.

Nonetheless, preventative detention orders made for the purpose of preventing an imminent terrorist act resemble anticipatory self-defence

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83 See Claire Macken, 'The Counter-Terrorism Purposes of an Australian Preventive Detention Order' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 30, 33; Michael McHugh, 'Terrorism Legislation and the Constitution' (2006) 28 *Australian Bar Review* 117, 127–9.

84 Bernadette McSherry 'The Preventive Detention of Suspected Terrorists: Better Safe than Sorry?' in Bernadette McSherry and Patrick Keyzer (eds) *Dangerous People: Policy, Prediction, and Practice* (Routledge, 2011) 97, 103.

in domestic law. This is not, however, to suggest that preventative detention orders are unproblematic. Preventative detention orders remain highly contentious and raise important constitutional and human rights questions.[85] Rather this type of anti-terror preventative detention order best approximates anticipatory self-defence as a proportionate and necessary response to an imminent threat and is thus illustrative of this first register on the spectrum of anticipatory action.

B *Prevention*

Prevention, by contrast, captures more temporally distant threats. Prevention:[86]

> involves a first strike against a potential future aggressor who does not yet pose an imminent threat. In Michael Walzer's words it is '...an attack that responds to a distant danger, a matter of foresight and free choice'.

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85 See, for example, Claire Macken, 'The Counter-Terrorism Purposes of an Australian Preventive Detention Order' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 30; Michael McHugh, 'Terrorism Legislation and the Constitution' (2006) 28 *Australian Bar Review* 117; Penelope Mathew, 'Black Holes, White Holes and Worm Holes: Pre-emptive Detention in the 'War on Terror'' in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (ANU E Press, 2008) 159; Rebecca Welsh, 'Anti-Terror Preventive Detention and the Independent Judiciary' in Patrick Keyzer (ed), *Preventive Detention: Asking the Fundamental Questions* (Intersentia, 2013) 137; George Williams, 'Anti-terror legislation in Australia and New Zealand' in Victor V Ramraj, Michael Hor, Kent Roach and George Williams, *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd edition, 2012) 541.

86 David Rodin, 'The Problem with Prevention' in Henry Shue and David Rodin (eds), *Preemption: Military Action and Moral Justification* (Oxford University Press, 2007) 144.

Prevention resides, as Massumi puts it, in the realm of what Donald Rumsfeld famously quipped 'known unknowns'. For Rumsfeld, 'known unknowns' are those things we know that 'we do not know'.[87] Prevention operates on the basis that where a risk of harm exists, it is possible to assess the threat posed, identify its causes and adopt a method to neutralise it.[88] The epistemological premise of prevention is that the world is objectively knowable: uncertainty 'is a function of lack of information' and the trajectory of an event is predictable and linear 'from cause to effect'.[89] Prevention is operative where we know enough to know 'we know we don't know' and for which we need more information to claim that 'we know'.

Freeman argues that prevention is a composite of prediction and intervention, of foresight and action.[90] Prevention provides a framework for a decision maker to assess the likelihood and degree of a threat prior to acting.[91] To prevent the occurrence of harm, it is necessary to first predict the place and likelihood of its occurrence and to put in place

87 US Department of Defense, 'DoD News Briefing - Secretary Rumsfeld and Gen. Myers' (News Transcript, 12 February 2002) <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636> .

88 Brian Massumi, 'Potential Politics and the Primacy of Preemption' (2007) 10(2) *Theory & Event* [5] <http://muse.jhu.edu/journals/theory_and_event/v010/10.2massumi.html>.

89 Ibid.

90 Richard Freeman, 'The Idea of Prevention: A Critical Overview' in S Scott, G Williams, S Platt and H Thomas (eds), *Private Risks and Public Dangers* (Avebury, 1992) 34.

91 Lucia Zedner, 'Fixing the Future? The Pre-emptive Turn in Criminal Justice' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009) 35, 46.

appropriate interventions to avert it.[92] Prediction 'depends on a theory of causality',[93] and in the context of prevention it occurs on the basis of a risk assessment. Risk provides the logic or justification for intervention.[94] Prevention, as noted, assumes it is possible to assess with accuracy and objectivity the risk an individual poses. In this way, it presumes that the future is calculable, a premise underlying risk assessments.[95] Being temporally further from the risk of harm to be averted than pre-emption as anticipatory self-defense, intervention occurs on a lower threshold of knowledge.

The inchoate offence of attempting to engage in a terrorist act pursuant to ss 11.1 and 101.1 of the *Criminal Code* is a good example of prevention. As noted in Chapter One, the offence of attempt enables the state to intervene to prosecute and punish a person who intends to cause criminal harm but has not yet done so. The state determines that the risk of harm is sufficient to warrant intervention where an individual intends to commit a complete offence and takes certain acts in furtherance of this intention.

Section 101.1 of the *Criminal Code* provides that a person commits an offence, punishable by life imprisonment, 'if the person engages in a

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92 Daniel Gilling, *Crime Prevention: Theory, Policy and Practice* (Routledge, 1997, 2002) 1.

93 Ibid 2.

94 Lucia Zedner, 'Fixing the Future? The Pre-emptive Turn in Criminal Justice' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009) 35, 46.

95 Ibid.

terrorist act'.[96] It is an offence to attempt to commit the offence of engaging in a terrorist act under ss 11.1 and 101.1. This inchoate offence of attempt is publishable 'as if the offence attempted had been committed' and thus, in relation to the complete offence of engaging in a terrorist act, attracts a maximum penalty of life imprisonment.[97] The *Criminal Code* provides that to be found guilty of the inchoate offence of attempting to engage in a terrorist act:[98]

> the person's conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.

The Crown must establish that the accused intended to commit the offence of engaging in a terrorist attack,[99] and had begun executing that

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96 The *Criminal Code* defines a terrorist act as 'action or threat of action' that is done or made with the intention of 'advancing a political, religious or ideological cause' and 'coercing, or influencing by intimidation' an Australian or foreign government or part of a state or country, or 'intimidating the public' or a section thereof: s 100.1. Action to which the subsection refers includes action that causes serious physical harm to a person; endangers life or causes death; causes serious damage to property; creates a serious risk to the health or safety of the public or section thereof; seriously interferes with, disrupts or destroys an electronic system; It does not include advocacy, protest, dissent or industrial action that is not intended to cause serious physical harm, death or endanger life or 'to create a serious risk to the health or safety of the public' or section thereof: ss 100.1(2)–(3).

97 *Criminal Code* ss 11.1(1), 101.1.

98 Ibid s 11.1(2); Further, under the *Criminal Code*, an individual may be found guilty of attempting to engage in a terrorist act even if it is impossible to commit the offence of engaging in a terrorist act or the offence was actually committed. However, an individual found guilty of the offence of attempting to engage in a terrorist act cannot be subsequently charged with the completed offence: ss 11.1(4)–(5).

99 To estbalish this element of the offence of attempt, it must be shown that accused intended to commit the completed offence: *DPP v Stonehouse* [1978] AC

intention to the extent of engaging in acts 'more than merely preparatory.'[100] As Lord Diplock made clear in *DPP v Stonehouse*:[101]

> The constituent elements of the inchoate crime of an attempt are a physical act by the offender sufficiently proximate to the complete offence and an intention on the part of the offender to commit the complete offence.

The point at which intervention occurs, at which the risk of harm mandates intervention, is thus acts of perpetration: 'acts more than merely preparatory' to the offence of engaging in a terrorist attack. Intervention is mandated prior to the commission of the completed offence, but after the risk of harm—evidenced by the coalescing of intention and acts of perpetration—has arisen.

In line with prevention, it is assumed that it is possible to assess and determine the risk an individual poses at the point where intention and acts of perpetration coincide. This is sufficient to found and justify intervention to neutralise the threat. It is irrelevant, save in respect to

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55, 68 See, for example, in New South Wales: *R v Mai* (1992) 26 NSWLR 371; *Britten v Alpogut* (1986) 79 ALR 457.

100 Australia followed the United Kingdom's approach in the *Criminal Attempts Acts* 1981 (UK) by limiting inchoate liability of attempt to acts that are more than merely preparatory: see Bernadette McSherry, 'Expanding the Boundaries of Inchoate Crimes: The Growing Reliance on Preparatory Offences' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009) 141, 153.

101 [1978] AC 55, 68; cited with approval by members of the High Court, including in: *Knight v The Queen* (1992) 175 CLR 495, 501 (Mason CJ, Dawson, Toohey JJ); *Alister v The Queen* (1984) 154 CLR 404, 421 (Gibbs CJ).

sentence, that an individual changes their mind and determines not to engage in a terrorist act. The prior coinciding of intention and acts of perpetration are sufficient to establish the elements of the offence. As such the provisions align closest with prevention, conceiving of the harm to be averted as a 'known unknown'.

C *Bush Pre-emption*

Bush pre-emption, by contrast, operates on a vastly different knowledge premise: objective uncertainty. Massumi argues that Bush pre-emption, to further adopt the Rumsfeld classification system, resides in the sphere of 'unknown unknowns'. 'Unknown unknowns' comprise of those things 'we don't know we don't know'.[102] Uncertainty exists, not due to a lack of information, but because the threat has not yet emerged. The threat is thus indeterminate: neither the threat nor the enemy can be specified.[103] The risk of harm is not permitted to arise. Uncertainty about the nature of the threat is insurmountable, and the potential nature of threats gives rise to potential politics and the subjunctive: 'could have', if, 'would have'.[104] It is perhaps more aptly the realm of 'unknowable unknowns'.[105]

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102 US Department of Defense, 'DoD News Briefing - Secretary Rumsfeld and Gen. Myers' (News Transcript, 12 February 2002) <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636>.

103 Brian Massumi, 'Potential Politics and the Primacy of Preemption' (2007) 10(2) *Theory & Event* [13] <http://muse.jhu.edu/journals/theory_and_event/v010/10.2massumi.html>.

104 Ibid [17].

105 I thank Patrick Tomlin for this suggestion.

Bush pre-emption rests on the knowledge premise that the future is incalculable, and is organised around uncertainty. Intervention occurs when a threat of harm is emergent but not determinate. This translates, for example, into intervention not only prior to harm occurring, or the commission of a criminal act, but also prior to the formation of clear criminal intent.[106] Because pre-emption permits interventions that are so far removed from the anticipated harm, it has been suggested that the mental state, or level of knowledge, upon which intervention is based can only be suspicion.[107]

Another way to think about the distinction between prevention and Bush pre-emption is in terms of 'risk-thinking' and 'precautionary-thinking'. As outlined in Chapter One, Zedner has provided a useful distinction between these two ways of approaching the known and the unknown:[108]

> Precaution does not require that it is possible to calculate future risks before action is taken (Haggerty 2003). Rather than relying on the identification of risky individuals, the precautionary approach treats all as possible sources of suspicion or threat. So that whereas risk-thinking stimulated the development of profiling, targeted surveillance, categorization of suspect populations, and

106 Richard V Ericson, *Crime in an Insecure World* (Polity Press, 2007); Edwina MacDonald and George Williams, 'Combating Terrorism: Australia's *Criminal Code* Since September 11, 2001' (2007) 16(1) *Griffith Law Review* 27.

107 Richard V Ericson, *Crime in an Insecure World* (Polity Press, 2007).

108 Lucia Zedner, *Security* (Routledge, 2009) 84.

> other actuarial techniques for managing risky populations, precaution promotes pre-emptive action to avert potentially grave harms using undifferentiated measures that target everyone. Whereas risk made claims as to the possibility of calculating future harms and required therefore that officials assess the likelihood and degree of threat posed before taking preventive measures, precaution has the effect of licensing pre-emptive action even where it is impossible to know what precise threat is posed.

Preparatory anti-terror offences typify Bush pre-emption: they target acts so far removed from the commission of a terrorist act that it may not be possible to identify a specific terrorist threat or act in respect of which the preparatory acts are taken. The risk of harm has thus not arisen: the threat of harm is emergent, but not yet determinant. As noted in Chapter One, preparatory offences enable criminal liability to arise at points in time prior to inchoate liability. In contrast to the inchoate offence of attempt, preparatory offences criminalise preparatory acts: that is, acts that are 'merely preparatory' to the commission of the complete offence. Division 101 of the *Criminal Code* contains five anti-terror preparatory offences, each criminalising acts that are merely preparatory to the commission of the offence of engaging in a terrorist act.[109]

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109 *Criminal Code* ss 101.2–6.

Pursuant to s 101.4, for example, a person commits an offence if he or she 'possess a thing', the 'thing' is 'connected with the preparation for, the engagement of a person in, assistance in a terrorist act' and the person knows of, or is reckless to, the connection. The offence is made out even if 'a terrorist act does not occur', the thing is not connected with preparations for a specific terrorist act or is connected with preparations for 'more than one terrorist act'.[110] Further, and in contrast to inchoate offences, intention to commit the completed offence is not an element of preparatory offences. The offence is enlivened 'even where no decision has been made finally as to the ultimate target',[111] and it is not for the Crown to 'identify a particular terrorist act' in prosecuting a preparatory offence.[112]

Whealy J has articulated the elements required for proof of the offence of 'possessing things connected with terrorist acts' in s 101.4 of the *Criminal Code* as follows:[113]

(1) the accused intended to possess the 'thing' (intention read in by virtue of section 5.6(1);

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110 Ibid s 101.4(3).

111 *R v Lodhi* (2005) 199 FLR 236, 246 (Whealy J).

112 Press release of Prime Minister Howard extracted in Andrew Lynch, 'Legislating with Urgency: The Enactment of the *Anti-Terrorism Act [No 1] 2005'* (2006) 30 (3) *Melbourne University Law Review* 747, 751. See Lynch generally for a comprehensive overview of the 'the' to 'a' change and the *Anti-Terrorism Act 2005* (Cth).

113 The test as set out by McSherry in Bernadette McSherry, 'Expanding the Boundaries of Inchoate Crimes: The Growing Reliance on Preparatory Offences' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009) 141, 148. See *R v Lodhi* (2006) NSWSC 584, unreported, 14 February 2006, [77]–[88] (Whealy J).

(2) the possession of the thing is connected with preparation for, the engagement of a person in, or assistance with a terrorist act; and

(3) the accused knows of the connection between the document and the preparation of the terrorist act.

This species of offence creates pre-inchoate liability and enables intervention to occur prior to the risk of harm arising. The threat of an unspecified terrorist act is emergent, it is not yet determinate and the risk of a specific terrorist act occurring has not yet arisen. It evinces precautionary thinking—'licensing pre-emptive action even where it is impossible to know what precise threat is posed'.[114] As such anti-terror preparatory offences provide an example of Bush pre-emption. Interestingly, Australia's anti-terror preparatory offences are also subject to inchoate liability. For example, it is an offence to attempt to possess a thing connected with a terrorist act.[115] These offences are further examples of Bush pre-emption.

114 Lucia Zedner, *Security* (Routledge, 2009) 84.
115 *Criminal Code* ss 11.1, 101.4.

D *Comparing Domestic Legislation*

The above examples highlight how this typology of anticipatory action in domestic law might work. It is acknowledged that this is not a typology amenable to clear lines or neat distinctions. Rather, it is preferable to view the three registers of anticipatory action—pre-emption as anticipatory self-defence, prevention and Bush pre-emption—as forming part of a spectrum. It may be, for example, that some measures are viewed as clearly constituting prevention and others Bush pre-emption. Others may be shades of both prevention and Bush pre-emption or, indeed, cover all three categories—enabling intervention against an imminent as well as a potential threat. In this way, this typology of anticipatory action can account for the array of preventive measures in domestic law and variances between them.

The strength of this typology is that it adopts consistent language to describe state action that is anticipatory at the international and domestic levels and provides a way of comparing and categorising preventive measures in domestic law. As such it provides a basis from which to begin to answer the research questions of this thesis. In particular, this typology provides one way to assess whether and how prevention in Australian anti-terror law is novel when compared to prevention in other areas of Australian law. As noted in Chapter One, this thesis answers this research question in a narrow way, comparing three preventive measures in Australian law: federal anti-terror control

orders, post-sentence preventive detention and extended supervision of high risk offenders in New South Wales and civil mental health involuntary detention pursuant to the *Mental Health Act 2007* (NSW). In the following three chapters, each legislative regime will be examined and compared on the basis of where the provisions fall on the spectrum of anticipatory action.

IV Conclusion

This chapter has examined the many ways in which prevention in anti-terror law has been explained and described since September 11, 2001. It has argued that meaningful analysis of prevention in domestic anti-terror law has, to date, been hindered by the fragmented and unwieldy state of the discourse. Prevention, pre-emption and precaution are routinely invoked to describe legislative efforts to thwart terrorism, and yet their imprecise usage exposes a deeper lack of clarity regarding the meaning of the terms. This lack of clarity manifests in a variety of ways, including ambiguous and contested terminology, inconsistent use of terms and an uneasy migration of terminology between disciplines, governments and the domestic and international spheres. This chapter has suggested that the fractured state of the discourse reflects, more broadly, the difficulties inherent in the blurring of the boundaries between the national and international that has so characterised the war on terror.

A precondition to advancing the discourse in relation to Australia's preventive anti-terror regime is an account of the terminology that provides clarity of definition, of epistemological premises and underlying assumptions. The adoption of consistent terminology to describe both domestic and international responses to terrorism has the potential to account for the blurring of the national and international, whilst facilitating insights drawn in one sphere being harnessed to improve the other. However, this approach is not without detriment, including as to the conception it carries of the subject of the order.

This chapter has argued that the register of anticipatory military action, namely pre-emption as anticipatory self-defence, prevention and Bush pre-emption, may be used to distinguish between and compare preventive measures in domestic law. Part III of this chapter outlined how this typology might work. It suggested that pre-emption as anticipatory self-defence, prevention and Bush pre-emption are best understood as a spectrum of anticipatory action, rather than constituting rigid classifications. However, it is acknowledged that the utility and sufficiency of this typology as a basis for distinguishing between preventive measures in domestic law is untested. Part of the project of this thesis is to apply the register of anticipatory action to domestic preventive measures and to consider, in Chapter Seven, whether it provides a basis for meaningful comparison.

The thesis now turns to the practice of prevention. Chapters Four, Five and Six undertake three case studies of preventive measures in Australian law. The purpose of the case studies is to test whether control orders are exceptional when compared to the preventive measures contained in the high risk offender and civil mental health regimes. To do so, each case study considers where the provisions in question fall on the spectrum of anticipatory action as applied to domestic law. In order to assess where the provisions fall on the spectrum of anticipatory action, each case study will examine the key knowledge premise underlying the legislative regime, and the knowledge and harm thresholds for intervention. The case studies will also inform understandings of the utility of the preventive state concept as a way to read developments in Australian law following September 11. In Chapter Seven this thesis considers what the case studies reveal about the potential promise and limitations of the preventive state concept that were outlined in Chapter Two.

The first case study undertaken in this thesis is the federal control order legislative framework as an example of prevention in anti-terror law. The next chapter considers where the control order provisions fall on the spectrum of anticipatory action, providing a benchmark against which to test whether control orders are exceptional when compared, in Chapters Five and Six, to the preventive measures contained in the high risk offender and mental health regimes.

—CHAPTER FOUR—

ANTI-TERROR CONTROL ORDERS

I INTRODUCTION

This chapter considers the federal anti-terror control order legislative framework contained in Division 104 of Schedule 1 of the *Criminal Code Act 1995* (Cth) ('*Criminal Code*') as an example of prevention in the anti-terror context. Control orders enable restrictions, obligations and prohibitions to be imposed on an individual—the controlee—'for the purpose of protecting the public from a terrorist act'.[1] As noted in Chapter One, they are Australia's prime anti-terror example of a hybrid civil–criminal order: they are civil orders when made, but attract criminal liability on breach.

Control orders were a hallmark of the Howard government's proactive and preventive approach to countering terrorism, supplementing the traditional criminal justice model of responding to offences that have been committed by investigative policing and prosecution.[2] They were introduced as part of a package of anti-terror initiatives contained in the Anti-Terrorism Bill (No. 2) 2005 (Cth) that were designed to place

1 *Criminal Code Act 1995* (Cth) sch 1 s 104.1 ('*Criminal Code*').
2 Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 7 December 2005, 187 (Ruddock).

Australia in the 'strongest position possible' to anticipate terrorist threats and thwart the commission of terrorist acts.[3]

The inspiration for Australia's control order regime came from the United Kingdom: anti-terror control orders were first introduced in that jurisdiction in March 2005, and provided the legislative template from which Australia crafted its regime in the later part of that year.[4] Australia's federal anti-terror control order provisions commenced operation on 15 December 2005 and two control orders have since been issued, in respect of Jack Thomas and David Hicks.[5] The interim control order process withstood constitutional challenge in *Thomas v Mowbray*.[6]

Control orders are arguably one of the most visible manifestations of control and surveillance in the decade following September 11 and of the shift to a 'pre-crime', intelligence-led model in anti-terror law.[7] While

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3 Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 3 November 2005, 102 (Ruddock).

4 As will be dicsussed in Part IIA, in December 2011, the United Kingdom Parliament repealed and replaced the control order regime with a regime of Terrorism Prevention and Investigation Measures contained in the *Terrorism Prevention and Investigation Measures Act 2011* (UK).

5 See in respect of David Hicks (*Jabbour v Hicks* (2007) FCMA 2139; *Jabbour v Hicks* [2008] FMCA 178) and Jack Thomas (*Jabbour v Thomas* [2006] FMCA 1286).

6 (2007) 233 CLR 307.

7 This is not to discount linkages with executive security orders employed in the colonies, nor connections with contemporary civil preventive orders: Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 280. The significance of intelligence to efforts to thwart terrorism and protect national security has infused the 'preventive paradigm of intelligence' into domestic legal responses to terror: Kent Roach, 'The Eroding Distinction Between Intelligence and Evidence in Terrorism Investigations' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge 2010) 55. For

originally justified as exceptional measures to meet the threat posed by terrorism, control orders have been modelled by State and Territory governments in their responses to organised crime.[8] Control orders are also 'perhaps the most striking' of Australia's anti-terror laws, as the Independent National Security Legislation Monitor recently reported, as they enable liberty restraints to be imposed in the absence of criminal charge or conviction.[9] Control orders are therefore a useful anti-terror preventive measure through which to test whether and how prevention in anti-terror law is novel when compared to prevention in other areas of Australian law.

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the significance of intelligence in Australia, see Phillip Flood, *Report of the Inquiry into Australian Intelligence Agencies* (Department of the Prime Minister and Cabinet, *2004);* Department of the Prime Minister and Cabinet, *Securing Australia—Protecting our Community* (Counter-Terrorism White Paper 2010). In contrast to the criminal justice model in which the state reacts and responds to harm that has occurred by investigation and prosecution of criminal acts, intelligence-led approaches promote reliance on 'pre-crime' measures that seek to intervene and prevent a terrorist attack from occurring: Lucia Zedner 'Pre-crime and Post-criminology?' (2007) 11 *Theoretical Criminology* 261; Lucia Zedner, *Security* (Routledge 2009) 73.

8 As noted in Chapter One, serious organised crime control orders have been introduced in several Australian jurisdictions: *Criminal Organisation Act 2009* (Qld); *Serious Crime Control Act 2009* (NT); *Serious and Organised Crime (Control) Act 2008* (SA)—in 2010, the control order provisions of this Act, contained in s 14(1), were held to be constitutionally invalid by the High Court in *State of South Australia v Totani* (2010) 242 CLR 1. In 2012, the South Australian Parliament passed the *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act* 2012 (SA) which introduced an amended control order scheme in part 3 of the *Serious and Organised Crime (Control) Act 2008* (SA). In a recent decision, the High Court found the *Crimes (Criminal Organisations Control) Act 2009* (NSW), which provided for the declaration of criminal organisations and control of the members of declared organisations, to be invalid: *Wainohu v New South Wales* [2011] HCA 24. Following *Wainohu*, the O'Farrell government introduced into parliament the Crimes (Criminal Organisations Control) Bill 2012 (NSW), which received Royal Assent on 21 March 2012. In 2012, the Western Australian Parliament followed suit with the passage of the *Criminal Organisations Control Act 2012* (WA).

9 Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20 December 2012) 10.

In Part II this chapter provides a brief history of the federal anti-terror control order regime and outlines its key provisions. Building on Chapter Three, Part III considers where the control order provisions fall on the spectrum of anticipatory action in domestic law. This purpose of this inquiry is to provide a basis for comparing the three case studies and assessing whether control orders are exceptional and unprecedented measures, as originally justified, when compared to prevention in other areas of Australian law. This chapter argues that the control order regime is closest aligned with Bush pre-emption on the spectrum of anticipatory action in domestic law.

II THE ARCHETYPAL PRE-CRIME MEASURE: FEDERAL ANTI-TERROR CONTROL ORDERS

A *A Brief History of Control Orders*

In the wake of the London bombings of 7 July 2005, the Howard Government introduced into Parliament the Anti-Terrorism Bill (No. 2) 2005 (Cth), which contained a package of controversial anti-terror measures including control orders, preventative detention orders and sedition offences. These new anti-terror initiatives were heralded as 'extraordinary' and 'unprecedented',[10] precipitated by the threat of

[10] Commonwealth of Australia, *Parliamentary Debates,* House of Represenatives, 28 November 2005 88 (Moylan), 107 (Lawrence); Commonwealth of Australia, *Parliamentary Debates,* Senate, 5 December 2005, 9 (Stott Despoja), 124 (Mason), 125 (Fielding), 129 (Conroy); Commonwealth of Australia,

global terrorism following September 11 and its newest permutation, home-grown terrorism.[11] The 7 July London bombings cemented the emergence of home-grown terrorism as a formidable domestic threat in the so-called war on terror.[12] Members of Parliament and the Senate reflected that Australia was amidst 'extraordinary', 'unusual' and 'dangerous' times, and facing an extraordinary threat that necessitated a proactive approach to prevent terrorism and protect Australians.[13] The Anti-Terrorism Bill (No. 2) 2005 (Cth) was introduced to ensure that Australia was in the 'strongest position possible to prevent new and emerging threats, to stop terrorists carrying out their intended acts'.[14]

Parliamentary Debates, Senate, 6 December 2005, 9–10 (Stott Despoja), 15 (Faulkner).

11 Commonwealth of Australia, *Parliamentary Debates,* House of Represenatives, 28 November 2005, 95 (Hull), (118 (Jensen); Commonwealth of Australia, *Parliamentary Debates,* House of Represenatives, 29 November 2005 57 (Henry), 82 (Danby); Commonwealth of Australia, *Parliamentary Debates,* Senate, 5 December 2005, 129 (Conroy) 113–15 (Santoro) 119–20 (Bishop); Commonwealth of Australia, *Parliamentary Debates,* Senate, 6 December 2005 18-19 (Todd); For the opposing view, see: Commonwealth of Australia, *Parliamentary Debates,* House of Represenatives, 28 November 2005 105-6 (Lawrence) 120 (Garrett); Commonwealth of Australia, *Parliamentary Debates,* Senate, 5 December 2005, 88 (Nettle) 105 (Allison); Commonwealth of Australia, *Parliamentary Debates,* Senate, 6 December 2005, 15 (Faulkner).

12 Commonwealth of Australia, *Parliamentary Debates,* House of Represenatives, 28 November 2005 88 (Moylan); Commonwealth of Australia, *Parliamentary Debates,* House of Represenatives, 29 November 2005 57 (Henry), 82 (Danby), 89 (Ruddock); Commonwealth of Australia, *Parliamentary Debates,* Senate, 5 December 2005, 129 (Conroy); Commonwealth of Australia, *Parliamentary Debates,* Senate, 6 December 2005 18–19 (Todd).

13 Commonwealth of Australia, *Parliamentary Debates,* House of Represenatives, 28 November 2005, 82 (Turnbull) Commonwealth of Australia, *Parliamentary Debates,* House of Represenatives, 29 November 2005 48–9 (Baldwin); Commonwealth of Australia, *Parliamentary Debates,* Senate, 5 December 2005, 96–8 (Carol Brown), 124 (Mason), 125 (Fielding); see also Commonwealth of Australia, *Parliamentary Debates,* Senate, 6 December 2005, 15 (Faulkner). It is noteworthy that it was also argued that there is nothing excpetional about this, we always live in dangerous times: see for example, Commonwealth of Australia, *Parliamentary Debates,* Senate, 5 December 2005, 115 (Murray).

14 Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 3 November 2005, 102 (Ruddock).

The creation of a control order regime was a key initiative of the Anti-Terrorism Bill (No. 2) 2005 (Cth), and central to Australia's preventive response to terror. In crafting its regime, Australia drew heavily on the United Kingdom's anti-terror control order regime that had been introduced in that jurisdiction in March 2005.[15] However, Australia did so despite the absence of the circumstances that gave rise to the creation of control orders in the United Kingdom.

The United Kingdom Parliament introduced control orders as a legislative response to the decision of the House of Lords in *A v Secretary for the Home Department* (*Belmarsh*),[16] and the specific quandary the government faced in respect to foreign nationals suspected of involvement in terrorism. At that time, foreign nationals who were suspected of terrorism and incapable of being prosecuted or deported—due to a lack of evidence to support a criminal charge or the risk of persecution—were detained indefinitely without charge or trial.[17] In *Belmarsh*, the House of Lords found this regime of indefinite detention to be incompatible with the right to liberty and the prohibition

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15 See, for example, Lisa Burton and George Williams, 'What Future for Australia's Control Order Regime?' (2013) 24 *Public Law Review* 182; Andrew Lynch, 'Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law' (2008) 8 *Oxford University Commonwealth Law Journal* 159; Clive Walker, 'The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia!' (2013) 37(1) *Melbourne University Law Revivew* 143; For a discussion of the migration of anti-terror initiaitives following September 11: Kent Roach, 'The Post-9/11 Migration of Britain's Terrorism Act 2000' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 374; Kent Roach, *The 9/11 Effect: Comparative Counterterrorism* (Cambridge University Press, 2011).

16 [2004] UKHL 56; [2005] AC 68.

17 Purusant to Pt IV of the *Anti-Terrorism, Crime and Security Act 2001* (UK). This Act was enacted shortly after September 11, 2001 and provided for the indefinite detention without charge or trial of foreign nationals reasonably believed by the Home Secretary to be terrorists and a risk to national security.

against discrimination contained in the *European Convention on Human Rights,* and made a declaration of incompatibility under s 4 of the *Human Rights Act 1998* (UK).[18]

The United Kingdom government responded to the *Belmarsh* decision by repealing and replacing the impugned immigration detention scheme with a control order regime contained in the *Prevention of Terrorism Act 2005* (UK). Control orders applied to both British and foreign nationals and imposed obligations on a controlee for 'purposes connected with protecting members of the public from a risk of terrorism'.[19] The Act established two types of control orders: derogating and non-derogating. Derogating control orders were to be issued by the High Court on application of the Home Secretary and could impose obligations inconsistent with the right to liberty under the European Convention of Human Rights. No derogating control order was ever issued. Non-derogating control orders were executive orders made by the Home Secretary with prior permission of the High Court in non-urgent cases. The Home Secretary must have had 'reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity' and consider the imposition of a control order necessary to protect the public from a risk of terrorism.[20] Some 52 individuals were subject to non-derogating control orders during the currency of the regime.[21]

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18 The declaration of incompatibility was made in relation to Part IV of the *Anti-Terrorism, Crime and Security Act 2001* (UK).

19 *Prevention of Terrorism Act 2005* (UK) s 1.

20 Ibid s2(1). The court's role in a permission hearing was to determine, according to principles of judicial review, whether the decision of the Home Sectary was

In December 2011, the United Kingdom parliament repealed and replaced its control order regime with a system of Terrorism Prevention and Investigation Measures (TPIMs) contained in the *Terrorism Prevention and Investigation Measures Act* 2011(UK) (TPIM Act). This followed the Home Secretary's *Review of Counter-Terrorism and Security Powers,* from which she recommended, in January 2011, the replacement of control orders with a regime of TPIMs that are 'less intrusive, more clearly and tightly defined and more comparable to restrictions imposed under other powers in the civil justice system'.[22] These measures are, however, known colloquially as 'control orders lite' for their lack of significant distinction from the prior regime.

A TPIM in many ways reflects the non-derogating control order: it is made by the Home Secretary, with prior permission of the court in non-

'obviously flawed'. If the court granted permission at this hearing, which could proceed ex parte, directions were given regarding a further hearing, of which the controlee was obliged to be informed. The court's role at the further hearing again pertained to judicial review, to determine whether the Home Secretary's decision was flawed in relation to satisfying the criteria for the imposition of the control order or in respect to the obligations imposed: ss 3(2), (5), (10)–(11).

21 David Anderson, *Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005* (Stationery Office 2012) 29. A control order could be made for an initial term of 12 months and was renewable indefinitely.

22 Home Office, *Review of Counter-Terrorism and Security Powers,* Cm 8004 (2011), 41. The Home Secretary's review also highlighted the government's policy of prioritising prosecution for those engaged in terrorism-related activity, and that 'every effort should be made' whilst a TPIM is in place to gather evidence and enable prosecution: 41. In line with the policy objective of prioritising prosecution, the TPIM Act includes a new obligation on the Home Secretary to keep under review the ongoing necessity of each TPIM notice, as well as extended obligations on the chief officer of police in terms of review of investigation into prosecution of a TPIM subject: TPIM Act ss 10–11. For an excellent discussion of the priorisation of prosecution and the attendant danger of perverting the criminal justice process, see Lucia Zedner, 'Terrorizing Criminal Law' (2014) 8(1) *Criminal Law and Philosophy* 99.

urgent cases.[23] The TPIM Act introduces 12 'specified terrorism prevention and investigation measures' that the Home Secretary may impose where he or she 'reasonably believes that the individual is, or has been, involved in terrorism-related activity', some of which is *new*, and reasonably considers the measures necessary 'for purposes connected with protecting members of the public from a risk of terrorism'.[24] The measures that may be imposed by the Home Secretary include an overnight residency measure, an association measure and a monitoring measure.[25]

The TPIM Act thus restricts the powers of the Home Secretary to impose conditions of surveillance and control,[26] requires proof of 'new'

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23 The permission hearing may proceed ex parte: TPIM Act, s 6. The role of the court is that of judicial review; to determine whether the decision of the Home Secretary is 'obviously flawed'. Following the issuing of a TPIM notice, the court reviews the decision of the Home Secretary at a 'review hearing': s 9. The court's role is to 'review the decisions of the Secretary of State that the relevant conditions were met and continue to be met', applying the principles of judicial review: s 9(1)–(2).The TPIM Act does not provide for a measure that derogates from the ECHRs, as existed with a derogating control order. However, the government has prepared a draft bill containing 'enhanced' TPIM measures (i.e. greater restrictions) which, it is intended, would be passed as emergency legislation if needed: s 26 TPIM Act; Explanatory Notes, TPIM Act, paras 23–24.

24 TPIM Act ss 2–3.

25 TPIM Act Sch 1. The Act prohibits forced relocation and the imposition of a blanket ban on internet use, controverisal conditions impsed under the prior regime.

26 Under the prior regime, the Home Secretary had discretion to impose *any* obligations considered 'necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity': *Prevention of Terrorism Act 2005* (UK) s 1(3). The *Prevention of Terrorism Act 2005* (UK) did, however, enumerate particular obligations that may be imposed including controversial measures such as forced relocation and home detention, the limits of which led to significant litigation in the United Kingdom: s1; see for example *Secretary of State for the Home Department v JJ and others* [2006] EWHC 1623 (Admin); *Secretary for the Home Department v JJ and others* [2007] UKHL 45. For an extended discussion of the distinctions between control orders and TPIMs see Clive Walker and Alexander Horne, 'The Terrorism Prevention and Investigations Measures Act 2011: One Thing But Not Much the Other?'(2012) 6 *Criminal Law Review* 421; Helen Fenwick, 'Preventive Anti-

terrorism-related activity, and raises the standard of proof for involvement in terrorism-related activity from 'reasonable suspicion' to 'reasonable belief'.[27] TPIMs can be made for a period of 12 months, but may be extended by the Home Secretary for a further period of 12 months where conditions for issuing a notice are met.[28] As of 31 August 2013 nine TPIM notices were in force, eight of which were made against British nationals.[29]

Australia's importation of the United Kingdom's control order regime occurred in the unusually fertile climate for the migration of national security initiatives between nations after September 11.[30] The migration of domestic legislative responses to September 11 was 'promoted and accelerated', in large part, by the need to comply with international obligations, notably Security Council Resolutions.[31] This phenomenon

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Terrorist Strategies in the UK and ECHR: Control orders, TPIMs and the Role of Technology' (2011) 25 (3) *International Review of Law, Computers & Technology* 129; Lucia Zedner, 'Terrorizing Criminal Law' (2014) 8(1) *Criminal Law and Philosophy* 99.

27 Although not so far as to meet the standard of balance of probabilities recommended by the Joint Committee on Human Rights: Joint Committee on Human Rights, *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (second report)* (2010–12, HL 204, HC 1571) 7–8.

28 TPIM Act s 5. Extension beyond this period may only occur where evidence exists of new terrorism-related activity: s 3(6); Explanatory Notes, TPIM Act, para 22.

29 United Kingdom, *Parliamentary Debates,* House of Commons, 12 September 2013, vol 567, col 61WS (Teresa May).

30 Kent Roach, 'The Post-9/11 Migration of Britain's Terrorism Act 2000' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 374; Kent Roach, *The 9/11 Effect: Comparative Counterterrorism* (Cambridge University Press, 2011); Andrew Lynch, 'Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law' (2008) 8 *Oxford University Commonwealth Law Journal* 159.

31 Kent Roach, *The 9/11 Effect: Comparative Counterterrorism* (Cambridge University Press, 2011) 442-444; Kim Lane Scheppele 'The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the

was particularly evident in Australia's domestic legislative response to terrorism.[32] In the absence of domestic anti-terror legislation and with 'little direct experience of terrorism',[33] Australia drew heavily on the United Kingdom. Australia looked to the United Kingdom for guidance initially in crafting its definition of terrorism and terrorism offences, and also after the 2005 London Bombings when 'Australia adopted British innovations such as control orders, preventive arrests, and laws against the advocacy of terrorism'.[34]

In relation to the control order provisions, of note was the Australian government's selectivity in its legislative borrowing from the United Kingdom, and the Howard government's at best opaque justifications for introducing control orders into Australian law.[35] As Lynch has shown, the Australian government paid little attention to the legal, security and cultural context in which control orders arose in the United Kingdom.[36] Many of the safeguards of the United Kingdom regime were ignored or

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International State of Emergency' in Sujit Choudhry (ed) *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 347.

32 Andrew Lynch, 'Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law' (2008) 8 *Oxford University Commonwealth Law Journal* 159, 159–60; Kent Roach, *The 9/11 Effect: Comparative Counterterrorism* (Cambridge University Press, 2011) 309–314.

33 Kent Roach, *The 9/11 Effect: Comparative Counterterrorism* (Cambridge University Press, 2011) 309.

34 Ibid.

35 Kent Roach, *The 9/11 Effect: Comparative Counterterrorism* (Cambridge University Press, 2011) 358–360; Andrew Lynch, 'Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law' (2008) 8 *Oxford University Commonwealth Law Journal* 159, 181–194.

36 Andrew Lynch, 'Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law' (2008) 8 *Oxford University Commonwealth Law Journal* 159.

omitted.[37] Further, unlike the United Kingdom, the Australian government could subject foreign nationals to indefinite administrative detention,[38] and rely upon lawfully obtained intercept evidence in exempt proceedings, which include the prosecution of terrorism-related offences.[39]

The London bombings provided the impetus for the move to strengthen Australia's anti-terror laws, however precisely why it generated such legislative fervour is unclear. When announcing the proposal on 8

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37 Such as the priority of prosecution: ibid 181–194; Kent Roach, *The 9/11 Effect: Comparative Counterterrorism* (Cambridge University Press, 2011) 358–360.

38 *Al-Kateb v Godwin* (2004) 219 CLR 562; see also Lisa Burton and George Williams, 'What Future for Australia's Control Order Regime?' (2013) 24 *Public Law Review* 182, 184–5; Andrew Lynch, 'Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law' (2008) 8 *Oxford University Commonwealth Law Journal* 159, 179;

39 *Telecommunications (Interception and Access) Act 1979* (Cth), pts 2-6, s5B (definition of 'exempt proceeding'). See also Jessie Blackbourn and Nicola McGarrity, 'Listening and Hearings: Intercept Evidence in the Courtroom' (2012) 4 *Journal of Commonwealth Criminal Law* 257; Clive Walker, 'The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia!' (2013) 37(1) *Melbourne University Law Revivew* 143, 173–5. This is undoubtedly a critical factor in why preparatory offences have been put to greater use than control orders in Australia, albeit not a complete explanation. David Anderson QC, the United Kingdom's Independent Reviewer of Terrorism Legislation, while advocating the admissibility of intercept evidence in criminal proceedings, has stated that reversing the prohibition would not be 'the silver bullet that makes TPIMs unnecessary' as other reasons exist to stymie prosecution, such as where intercept evidence is insufficient to support criminal prosecution: David Anderson, *Corrected Transcript of Oral Evidence before the Joint Committee on the Draft Enhanced Terrorism Prevention and Investigations Measures Bill*, 11 July 2012 (HC 495–i) 9 <http://www.parliament.uk/documents/joint-committees/Draft%20ETPIMS%20Bill/HC%20495-i%2011%20July%202012%20corrected%20transcript%20FINAL%20Publication.pdf> accessed 10 January 2014; David Anderson, *Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005* (Stationery Office 2012) 17–18. Debate exists regarding whether the fact that Australia had in place anti-terror preparatory offences constituted a significant distinction between the circumstances giving rise to control orders in both jurisdictions: see Lisa Burton and George Williams, 'What Future for Australia's Control Order Regime?' (2013) 24 *Public Law Review* 182, 184–5; Clive Walker, 'The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia!' (2013) 37(1) *Melbourne University Law Review* 143, 172–3.

September 2005, the Prime Minister stated that the bombings 'raised new issues for Australia and highlighted the need for further amendments to our laws'.[40] At the special meeting of the Council of Australian Governments (COAG) shortly after this announcement, heads of Australian governments agreed that there was a 'clear case' for strengthening Australia's anti-terror laws, and unanimous agreement was reached on the proposed introduction of control orders.[41] This was despite the fact that the United Kingdom's control order regime did not stop the London bombings and, as noted, the reasons for introducing control orders in that jurisdiction did not exist in Australia.

Then Attorney-General Phillip Ruddock suggested that the 'lessons learned in London' further supported the introduction of the measures contained in the Bill.[42] The Attorney-General explained and justified control orders as follows:[43]

> yes, control orders are new; they are very different. The burden of proof is different. It is certainly not within the criminal code as we

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40 Prime Minister John Howard 'Counter-Terrorism Laws Stengthened' *Media Release* (8 September 2005). Prime Minister Howards' announcement came in advance of a special meeting of the Council of Australian Governments, at which approval was required by both a majority of the States and Territories, and at least 4 of the States, to enable the Commonwealth to amend Part 5.3 (Terrorism) of the *Criminal Code Act 1995 (*Cth). This approval was required as part of the arrangement established by the referral of State powers to the Commonwealth to secure the coverage of the legislation.

41 Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 3 November 2005, 102 (Ruddock).

42 Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 29 November 2005, 100–1 (Ruddock).

43 Ibid.

> would normally understand it, with the normal burdens of proof that follow, because what we are seeking to do is protect people's lives from possible terrorist acts. It is a question of whether or not the measures are reasonably likely to achieve that outcome—that relates to whether these measures can be imposed. Yes, we are dealing with something that is very different and that is not understood in the context of criminal law as we know it. But in our view the circumstances warrant it. That is the justification.

Perhaps more cynically, what the London bombings did provide was 'an opportunity for the Howard government dramatically to increase' Australia's anti-terror legislation at a time when, from 1 July 2005, it held a majority in both Houses of Parliament.[44] Indeed, the domestic political climate featured prominently in arguments against the Bill and its truncated parliamentary process. Members of both Houses of Parliament highlighted the Howard government's politicisation of fear, wedging of terrorism as an issue and arrogance buoyed by its newly acquired control of both Houses.[45] Nonetheless, this pretext formed part of Australia's 'hyper-legislative' response to the threat of terrorism

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44 Kent Roach, *The 9/11 Effect: Comparative Counterterrorism* (Cambridge University Press, 2011) 310, 335. An Australian government had not held a majority of the House of Representatives and Senate since 1981: John Uhr 'How Democratic is Parliament?A Case Study in Auditing the Performance of Parliaments' (2005) Democratic Audit of Australia Discussion Paper, 3 <http://apo.org.au/research/how-democratic-parliament-case-study-auditing-performance-parliaments> accessed 10 January 2014.

45 See, for example, Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 29 November 2005, 61 (Crean); Commonwealth of Australia, *Parliamentary Debates,* Senate, 6 December 2005, 2–3 (Brown), 4 (Ludwig), 9–10 (Stott Despoja), 15–16 (Faulkner).

following September 11.[46] The Anti-Terrorism Bill (No. 2) 2005 (Cth) received Royal Assent two months after the Howard government announced the need to strengthen federal anti-terror laws, and one month after the Bill was introduced into Parliament.

To date, two control orders have been issued in Australia. The first order was made some nine months after the control order provisions commenced operation. On 27 August 2006, Federal Magistrate Mowbray made an interim control order against Jack Thomas.[47] The Australian Federal Police (AFP) applied for the interim control order following the quashing of Thomas' conviction for terrorism offences by the Victorian Court of Appeal. Some six months earlier, on 26 February 2006, Thomas was found guilty of intentionally receiving funds from a terrorist organisation and possessing a falsified passport under s 102.7(1) of the *Criminal Code* and s 9A(1)(e) of the *Passport Acts 1938* (Cth).[48] Thomas appealed against his conviction. On 18 August 2006, the Victorian Court of Appeal set aside the conviction on the basis that admissions made by Thomas in an interview with the AFP while detained by Pakistani authorities were not voluntary, and therefore evidence of the interview—essential to his conviction—should not have been admitted at trial.[49] On 27 August 2006, just over a week after

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46 Kent Roach, *The 9/11 Effect: Comparative Counterterrorism* (Cambridge University Press, 2011) 310, 358–360.

47 *Jabbour v Thomas* [2006] FMCA 1286.

48 *Director of Public Prosecutions (Cth) v Thomas* [2006] VSC 120 (31 March 2006).

49 *R v Thomas* [2006] VSCA 165 [93]–[95] (Maxwell P, Buchanan and Vincent JJA). In 2008, Thomas was re-tried for the two counts on which he was convicted in the original criminal trial following a television interview in which he spoke of

Thomas' conviction was quashed, Federal Magistrate Mowbray made an interim control order against Thomas relying on the same evidence that was excluded by the Victorian Court of Appeal.[50]

Thomas commenced proceedings in the High Court to quash the interim control order on the basis that div 104 of the *Criminal Code* was invalid. Thomas' interim control order was, by agreement between the parties, extended to a term of 12 months to accommodate the resolution of the constitutional challenge prior to any confirmation hearing.[51] A majority of the High Court upheld the constitutional validity of subs B of div 104 (the interim control order provisions) on the basis that it was supported by a head of legislative power,[52] and did not require the exercise of judicial power in a manner incompatible with the principles contained in Chapter III of the Constitution.[53] Following this decision, the AFP did

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his involement with the Taliban and Al Qa'ida. The Victorian Court of Appeal directed the re-trial on the basis that statements made by Thomas in a media interview 'were capable of supporting a conviction on both counts': *R v Thomas (No 4)* [2008] VSCA 107 (16 June 2008) [3] (Maxwell ACJ, Buchanan and Vincent JJA). Thomas was found guilty of possessing a falsified passport but acquitted of the terrorism charge: see Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20 December 2012) 14–20; Andrew Lynch, 'Thomas v Mowbray: Australia's "War on Terror" Reaches the High Court' (2008) 32 *Melbourne University Law Review* 1182.

50 *Jabbour v Thomas* [2006] FMCA 1286.

51 Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20 December 2012) 19–20.

52 *Thomas v Mowbray* (2007) 233 CLR 307. A number of heads of power were identified as supporting subdiv B of div 4 of the *Criminal Code*—defence power (Gleeson CJ, Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ, Kirby J dissenting); the external affairs power (Gleeson CJ, Gummow and Crennan JJ); and the reference power (Hayne J).

53 *Thomas v Mowbray* (2007) 233 CLR 307 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, Hayne and Kirby JJ dissenting).

not seek to renew or confirm the interim order as Thomas entered into an enforceable undertaking on 27 August 2007.[54]

On 21 December 2007, Australia's second interim control order was issued against David Hicks days prior to his release from Yatala Prison in South Australia. Hicks had been detained for over 5 years in Guantánamo Bay before pleading guilty, by an Alford plea agreement, to material support for terrorism.[55] Hicks was sentenced by a United States Military Commission to 7 years imprisonment and served the last 9 months of that sentence in Yatala Prison. Hicks was due to be released on 29 December 2007.[56] On 21 December 2007, an interim control order was made against Hicks.[57] This control order was confirmed on 19 February 2008 and expired on 21 December 2008.[58]

While no other control order has been applied for or made since Hicks' order expired, the Independent National Security Legislation Monitor reported that the AFP had given consideration to control orders 'in

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54 Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20 December 2012) 20.

55 By an Alford plea, a defendant pleads guilty but maintains their innocence. That is, the defendant agrees that there is sufficient evidence to found a conviction but does not make any admissions, and in doing so gets the benefit of the plea agreement. On 5 November 2013, Hicks lodged an appeal against his conviction for material support for terrorism in in the US Court of Military Commission Review: see Natalie O'Brien, 'David Hicks lodges US military court bid to overturn terrorism charge', *The Sydney Morning Herald* (Online), 6 November 2013 <www.smh.com.au/national/david-hicks-lodges-us-military-court-bid-to-overturn-terrorism-charge-20131105-2wzqv.html#ixzz2jq8c57SS>.

56 Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20 December 2012) 20–25; David Hicks, *Guantanamo: My Journey* (Random House, 2010).

57 *Jabbour v Hicks* (2007) FCMA 2139 (Donald FM).

58 *Jabbour v Hicks* [2008] FMCA 178 (Donald FM).

relation to 25 individuals'.[59] There have also been predictions made of a rise in the need for and use of control orders. In May 2013, the Hon Anthony Whealy, Chair of the Committee responsible for the Report of the Review conducted by the Council of Australian Governments, predicted an increase in control orders in Australia in the coming years. He is reported as saying:[60]

> It was certainly our view that, as a consequence of what we were told confidentially, control orders were likely to be an important weapon in controlling people who may come back from overseas and who might pose a threat to the Australian community.

In 2012, two reviews were conducted of control order legislation: one by the Council of Australian Governments (COAG Review), and another by the Independent National Security Legislation Monitor.[61] Both reports were tabled in Parliament on 14 May 2013. These reviews constituted the first post enactment scrutiny of the regime.[62] The Independent

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59 Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20 December 2012) 13.

60 Paul Maley, 'Syria fighters to face control order surge', *The Australian* (online), 17 May 2013 <theaustralian.com.au/national-affairs/policy/syria-fighters-to-face-control-order-surge/story-e6frg8yo-1226644855730#>.

61 Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013); Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20 December 2012).

62 In 2005, the Council of Australian Governments (COAG) undertook to review the control order regime five years after its enactment: COAG, *Communiqué: Special Meeting on Counter-Terrorism* (COAG Archive, September 2005) 3 <archive.coag.gov.au/coag_meeting_outcomes/2005-09-27/index.cfm>. In 2006, COAG committed to commence the review in December 2010: George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 Melbourne University Law Review 1136, 1159, citing COAG, *Details and Process for Council of Australian Governments' (COAG) Review of Counter-Terrorism Legislation* (2006) 2; COAG, *Council of Australian Governments' Meeting: 10 February 2006*

National Security Legislation Monitor recommended the repeal of the control order legislation and that consideration be given to a post-sentence regime similar to the high risk offender regime that will be discussed in Chapter Five. Such a regime would be available where an individual has been convicted of a terrorism offence and, at the completion of that sentence, ongoing dangerousness is established.[63]

The COAG Review, in contrast, recommended the retention of the control order regime but with additional safeguards and protections.[64] These included: the provision of information regarding appeal rights to a controlee following the making of an interim control order; the use of special advocates in proceedings that are closed to avoid disclosure of national security information and a guaranteed minimum standard of disclosure to a controlee; and a requirement that the court consider the least restrictive alternative in imposing terms of a control order.[65] The Australian government has yet to respond to these reviews. However, the control order provisions are subject to a 10-year sunset clause that will apply in 2015.[66]

—*Communiqué* (2006). This did not occur. In August 2012, it was announced that this review would commence and be led by a former judge, Anthony Whealy, with its first report due to COAG within six months: ABC News, 'PM Announces Terrorism Laws Review' (*ABC News Online*, 9 August 2012) <abc.net.au/news/2012-08-09/gillard-announces-terrorism-laws-review/4187782>.

63 Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20 December 2012), recommendation 11/4, 6–44.

64 Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) recommendations 26–38, xiii-xv, 43–63.

65 Ibid.

66 *Criminal Code* s 104.32.

B *The Control Order Legislative Framework*

The *Criminal Code* prescribes a three-stage process for the issuance of a control order: first, a senior member of the AFP must obtain consent of the Attorney-General to request an interim control order; second, the senior AFP member must apply to an issuing court for an interim control order;[67] third, should the senior AFP member elect to confirm the interim control order, an issuing court determines whether to confirm the control order.[68] A confirmed control order may be in place for 12 months but may not be extended.

An interim control order is issued by a court on the request of a senior member of AFP.[69] In non-urgent cases, the AFP officer must first obtain consent of the Attorney-General after which he or she may make an ex parte application to an issuing court for an interim control order. The senior AFP member may only seek written consent where he or she:[70]

(a) considers on reasonable grounds that the order in the terms to be requested would substantially assist in preventing a terrorist act; or

(b) suspects on reasonable grounds that the person has

67 An 'issuing court' is defined as the Federal Court of Australia, the Family Court of Australia or the Federal Circuit Court of Australia: *Criminal Code* s 100.1.

68 Where an urgent control order is sought, the first two steps are reveresed: an AFP officer may apply directly to the issuing court but must seek approval from the Attorney-General within 4 hours of the interim control order being issued: ibid s 104.10.

69 Ibid ss 104.2–5.

70 Ibid ss 104.2(2).

provided training to, or received training from, a listed terrorist organisation.

In obtaining written consent, the senior AFP officer must provide the Attorney-General with certain background and supporting information including a summary of the grounds for making the interim order.[71] Information likely to prejudice national security within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (*NSIA*) may be excluded from this summary.[72] The *NSIA* defines 'likely to prejudice national security' as 'a real, and not merely a remote, possibility that the disclosure will prejudice national security'; 'national security' is broadly defined as Australia's defence, security, international relations or law enforcement interests.[73] In respect to both control orders issued in Australia, the applicant AFP officer first sought and obtained the consent of the Attorney-General to request an interim control order.[74]

The *Criminal Code* provides that interim control order proceedings are interlocutory and ex parte. In the proceedings in respect to Jack Thomas, the interlocutory nature of the interim control proceedings enabled the admission of evidence that had previously been excluded on

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71 Ibid s 104.2(3).
72 Ibid s 104.2(3A).
73 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 8, 17.
74 *Jabbour v Thomas* [2006] FMCA 1286, [4] (Mowbray FM); *Jabbour v Hicks* [2008] FMCA 178, [22] (Donald FM).

appeal in criminal proceedings. While interim proceedings typically proceed ex parte, this is not mandated. David Hicks, for example, was notified of the AFP's request to the court for an interim control order and his legal representatives attended the interim proceedings.[75]

Once an interim control order is issued, the senior AFP member may elect to confirm the control order.[76] If the officer so elects, he or she is obliged to personally serve the controlee with copies of the documents contained in the initial request to the Attorney-General and:[77]

> any other details required to enable the person to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order.

Documents may be excluded from service if their disclosure would be likely to prejudice national security.[78] This provision adopts the widest non-disclosure test, providing for the exclusion from service of material the disclosure of which is likely 'to be protected by public interest

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75 *Jabbour v Hicks* [2007] FCMA 2139, [2]–[3] (Donald FM).

76 Where an urgent control order is sought, the first two steps are reveresed: the applicant AFP officer may apply directly to the issuing court but must seek approval from the Attorney-General within 4 hours of the interim control order being issued: Criminal Code, s 104.10. If an interim control order is issued by a court, the order made must include, amongst other things, a summary of the grounds on which the order was made: s 104.5(1)(h). However, the summary is not required to include information likely to prejudice national security within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth): s 104.5(2A).

77 *Criminal Code* s 104.12A(2). The AFP member is also required to supply the controlee with a statement of any facts that he or she is aware of relating to why any of the obligations, prohibitions or restrictions should not be imposed on the controlee.

78 Ibid s 104.12A(3).

immunity', 'to put at risk ongoing operations by law enforcement agencies or intelligence agencies', or 'the safety of the community, law enforcement officers or intelligence officers'.[79]

In contrast to the interim proceedings, the *Criminal Code* provides that the confirmation proceedings are adversarial, conducted in open court and subject to the usual rules of evidence and procedure.[80] The proceedings are civil proceedings, and the standard of proof of which the court must be satisfied is the balance of probabilities. At a confirmation hearing, the court may confirm a control order, without variation, in the absence of the respondent or legal representative where 'satisfied on the balance of probabilities that the order was properly served on the person in relation to whom the order is made'.[81] Where the respondent or his or her representative attends the confirmation proceedings, the court is empowered to confirm the order, with or without variation, or revoke the interim order where satisfied the statutory criteria for the issuance of an order have not been met.[82]

The test for the making of a control order is identical at the interim and confirmation stages. There are two limbs to the test; two conditions of which the court must be satisfied before making an order. First, the

79 *Criminal Code* s 104.12A(3).
80 Ibid s 104.14.
81 Ibid s 104.14(4).
82 Ibid s 104.14(7).

court must be satisfied, to the balance of probabilities, of one of two alternative statutory grounds:[83]

- that the order would 'substantially assist in preventing a terrorist act'; or
- 'that the person has provided training to, or received training from, a listed terrorist organisation'.

This provision has retrospective operation; the organisation need not have been a listed terrorist organisation at the time the individual is alleged to have participated in training.[84] This was the case for both David Hicks and Jack Thomas. In issuing control orders against Thomas and Hicks, the presiding Federal Magistrates found both grounds to be made out.[85]

The second limb of the test requires that the court must be further satisfied on the balance of probabilities that each of the terms of the control order is 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act'.[86] In making this determination, the Court 'must take into account the

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83 *Criminal Code* s 104.4(1)(c) (interim proceedings), s 104.14 (confirmation proceedings).

84 *Thomas v Mowbray* (2007) 233 CLR 307, [96] (Gummow and Crennan JJ).

85 *Jabbour v Thomas* [2006] FMCA 1286; *Jabbour v Hicks* [2007] FCMA 2139; *Jabbour v Hicks* [2008] FMCA 178.

86 *Criminal Code* s 104.4(1)(d) (interim proceedings), s 104.14 (confirmation proceedings).

impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances)."[87] The *Criminal Code* prescribes an exhaustive list of terms that a control order may impose, which include that the controlee wear a tracking device and comply with reporting requirements, as well as prohibitions or restrictions on communication, association, and access to telecommunications or technology.[88]

While a control order is issued according to the civil standard of proof, the balance of probabilities, breach of a control order attracts criminal liability. As noted in Chapter One, a person who contravenes, without reasonable excuse, any of the terms of a control order to which he or she is subject commits an offence that carries a maximum penalty of five years imprisonment.[89]

III Anticipatory Action in Domestic Law: Control Orders

Building on Chapter Three, this section examines where the control order provisions fall on the spectrum of anticipatory action in domestic law. The purpose of this inquiry is to provide a basis from which to assess whether and how control orders are novel when compared to the other preventive measures studied in this thesis. This inquiry will also contribute to consideration, in Chapter Seven, of the utility of the

87 *Criminal Code* s 104.4(2).
88 Ibid s 104.5(3).
89 Ibid s 104.27.

preventive state concept as a way to read developments in Australian law and of whether the spectrum of anticipatory action is a useful way to distinguish between domestic laws.

Chapter Three canvassed the idea that laws purporting to restrain an individual's liberty to preclude future harm may be differentiated according to the register of anticipatory military action as applied to domestic law. It was suggested that domestic laws may be distinguished according to whether they amount to pre-emption as anticipatory self-defence, prevention or Bush pre-emption or comprise shades of categories on the spectrum of anticipatory action.

Chapter Three defined pre-emption as anticipatory self-defence as proportionate action that is taken in response to a threat of imminent harm. Anticipatory self-defence has the tightest nexus to harm and the highest knowledge threshold of the categories comprising the spectrum of anticipatory action in domestic law. Pre-emption as anticipatory self-defence was suggested to resemble Rumsfeld's 'known knowns': 'the things we know we know'.[90] This is because the immediacy of the threat and the requirement of proportionality imply that the nature of the threat is known.

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90 US Department of Defense, 'DoD News Briefing—Secretary Rumsfeld and Gen. Myers' (News Transcript, 12 February 2002) <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636>.

Prevention, in contrast, is less proximate to the threat of harm: targeting an identified but distant threat before it eventuates. Prevention may be understood as residing in the realm of Rumsfeld's 'known unknowns', relating to those things that we know that 'we do not know'.[91] Prevention evinces risk thinking and operates on the basis that where a risk of harm exists, it is possible to assess the threat posed, identify its causes and adopt a method to neutralise it.[92] The epistemological premise of prevention is that the world is objectively knowable: uncertainty arises due to the absence of information. Events are understood to be predictable and linear: moving 'from cause to effect'.[93] Prevention is operative where we know enough to know 'we know we don't know' and for which we need more information to claim that 'we know'.

Bush pre-emption is the furthest removed from the harm to be averted: targeting distant 'threats before they emerge'.[94] Pre-emption is perhaps best captured by Rumsfeld's 'unknown unknowns': those things 'we don't know we don't know'.[95] The knowledge premise underlying Bush pre-emption is objective uncertainty. Uncertainty exists as the threat

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91 Ibid.

92 Brian Massumi, 'Potential Politics and the Primacy of Preemption' (2007) 10 (2) *Theory & Event* [5] <http://muse.jhu.edu/journals/theory_and_event/v010/10.2massumi.html>.

93 Ibid.

94 Jude McCulloch and Sharon Pickering, 'Counter-terrorism: The Law and Policing of Preemption' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge, 2010) 15–17.

95 US Department of Defense, 'DoD News Briefing—Secretary Rumsfeld and Gen. Myers' (News Transcript, 12 February 2002) <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636>.

has not yet emerged: the threat is indeterminate and neither it, nor the enemy, can be specified. Intervention thus occurs before the risk of harm is permitted to arise. In contrast to prevention, Bush pre-emption evinces precautionary thinking.

In order to assess where the control order provisions fall on the spectrum of anticipatory action, the following sections of this part examine the key knowledge premise underlying the legislative regime, and the knowledge and harm thresholds for intervention.

A *Knowledge Premise*

The control order provisions are closest aligned with Bush pre-emption on the spectrum of anticipatory action in domestic law: they enable intervention on the basis of a potential or possible threat. This was averred to by then Attorney-General Phillip Ruddock when he explained that control orders were new and different 'because what we are seeking to do is protect people's lives from possible terrorist acts'.[96] As will be further explored in this section, this approach was adopted by the Federal Magistrates presiding over the two control orders issued in Australia. Both of these control orders facilitated intervention in respect of an 'unknown unknown'—where the threat had not emerged and the risk of harm had not yet arisen. However, an alternative stricter

[96] Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 29 November 2005, 100–1 (Ruddock).

interpretation is available and has been suggested by the Independent National Security Legislation Monitor. On this interpretation, intervention may only occur where the likelihood and degree of the threat can be assessed and the harm is more akin to a 'known unknown', restricting the ambit of the regime to prevention on the spectrum of anticipatory action.

In making the control orders against Hicks and Thomas, the Federal Magistrates proceeded on the basis that a potential threat was sufficient: the threat of harm did not need to be determinate or identified with precision. Each order was made in respect of a terrorist threat that had not yet emerged. For example, in making the interim order against Jack Thomas, Federal Magistrate Mowbray was satisfied that both grounds of the first limb of the test were made out. He was satisfied that the making of the order would 'substantially assist' in the prevention of a terrorist act on the basis of untested evidence of the applicant AFP officer that Thomas' experiences overseas suggested he was groomed to be a terrorist resource in possible future attacks, and had 'not revoked his sympathy for Al Qa'ida and affiliated terrorist groups'.[97] Further, the applicant had formed the view that:[98]

> there is a significant risk that he is currently prepared to be a resource for Al Qa'ida that could be utilised at any time in the

97 *Jabbour v Thomas* [2006] FMCA 1286, [41].
98 Ibid.

> future to assist in the execution of terrorist acts, whether in the form of providing intelligence, instructions or training to new recruits or actual planning or preparation of terrorist acts.

This was rather speculative—the threat was at best potential and conceivable, contingent on Thomas being prepared to be a 'sleeper cell' and, at an unspecified future time, contributing, however indirectly and based on the actions of unspecified third persons, to the commission of an unspecified terrorist act. His Honour substantially accepted these views and that therefore:[99]

> there are good reasons to believe that the respondent having received training with Al Qa'ida is now an available resource that can be tapped to assist commit terrorist acts on behalf of Al Qa'ida or related terrorist cells. Training has provided him with a capability to execute or assist in the execution—directly or indirectly—of terrorist acts.

Similarly, in the interim proceedings in respect to David Hicks, Federal Magistrate Donald noted that he had, during submissions, expressed:[100]

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99 Ibid [42].

100 *Jabbour v Hicks* [2007] FCMA 2139, [26].

> some doubt as to whether the court could be satisfied as to the first limb of paragraph (c) [substantially assist in preventing a terrorist act]. This view was based on the absence of any indication in the evidence…that the Respondent had at any time made any threat towards Australia or the Australian community.

Federal Magistrate Donald, accepted, however, that on reflection the letters Hicks wrote to his family whilst in Pakistan and Afghanistan (which, while dated, did concern 'Jihad and advancing the Islamic cause'),[101] when coupled with the evidence of his training with terrorist organisations, provided a sufficient basis to satisfy the criterion that the making of an order would 'substantially assist in preventing a terrorist act'.[102] His Honour did not, however, have the benefit of evidence from Hicks including as to 'his current views and beliefs' or to explain the letters.[103] He found that:[104]

> [w]hen the expressed views of the Respondent are coupled with the capacity to engage in such activities, I am satisfied on the balance of probabilities that there is a risk of the Respondent either

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101 *Jabbour v Hicks* [2007] FCMA 2139, [46].

102 Ibid [26]–[31].

103 Ibid [32]–[33]. I note that Hicks, in his book *Guantanamo: My Journey*, provided the following explanation: 'I did not contest the control order or defend myself in the proceedings for a number of reasons. First, I had just undergone six years of torture and solitary confinement; I was mentally and psychologically unprepared to face the world for the first time in a public courtroom…Second, I was advised that I should not make waves and just let the government get away with this one—if they applied again, then we would fight it. And finally, I was just tired….': David Hicks, *Guantanamo: My Journey* (Random House, 2010) 399–400.

104 *Jabbour v Hicks* [2007] FCMA 2139, [31].

> participating in a terrorist act or training others for that purpose. It then follows, having regard to the control order sought, that such order in the terms contemplated would substantially assist in preventing such an act.

In both cases, the threat is not specified; it relates to a possible or conceivable terrorist act that the controlees may directly or indirectly contribute to, through their actions or those of others, in the future. The precise threat posed is unknown: it is an unknowable unknown.

Although made in respect of a potential threat, the language of risk was invoked in both proceedings. However it was used in two ways: the risk posed by the controlee and the vulnerability of the controlee resulting in him being 'at risk' of exploitation by others. As noted above, Federal Magistrate Donald found that there was 'a risk' that Hicks would participate in a terrorist act or train others to do so. However, his Honour went further. He considered the risk posed by others—'aspirant and current extremists', 'terrorist groups'—who might seek out Hicks because of the knowledge, skills and experiences he acquired in training camps.[105] His Honour explained:[106]

> [t]he controls will protect the public and assist Mr Hicks to reintegrate into the community and adapt back into the Australian

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105 *Jabbour v Hicks* [2007] FCMA 2139, Sch 2, [4]–[5] 'summary of the grounds on which this order is made'.

106 Ibid, Sch 2, [5].

> society and culture. Without 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.

Federal Magistrate Mowbray similarly found Thomas to be 'at risk': he was vulnerable and therefore could be exposed by his links to extremists.[107] His Honour further considered that his training and association with senior Al Qa'ida members made Thomas attractive to 'aspirant extremists' who may seek him out for guidance.[108]

This leads to a further assumption that because the individual had, some years ago, trained with a terrorist organisation, restraining the individual would protect the public from a terrorist act. As the Independent National Security Legislation Monitor has put it:[109]

> This reasoning apparently proceeds on the dubious basis that once a person has trained with a terrorist organisation that person will always meet the requirements for a CO [control order] as they will, by reason of their training, always have the capability to execute plans for terrorist acts or to provide instruction to others in this regard. It would not appear to matter, on this approach, how long

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107 *Jabbour v Thomas* [2006] FMCA 1286 [43].

108 Ibid [44].

109 Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20 December 2012) 24.

ago such training was undertaken or how current the supposed skills were.

This fits with the precautionary logic that underpins the Bush pre-emption paradigm. A precautionary posture is adopted—that intervention should occur until it is proven that harm will not occur. Importantly, this happens in circumstances where, in the making of an interim control order, the proceedings are ex parte and 'there is no ability for the person to provide evidence against the assumption that they pose a threat because they have trained with a terrorist organisation'.[110]

That the individual is 'at risk' of exploitation is sufficient to found a control order arises because the regime does not require proof that the controlee is likely to participate in, commit or otherwise contribute to a terrorist act (albeit, as will be discussed below, this is the restrictive interpretation preferred by the Independent National Security Legislation Monitor). Rather, it simply requires that either preventing a terrorist act or participation in training is related to the controlee and the order is reasonably necessary, appropriate and adapted to the purpose of protecting the public from a terrorist act. In *South Australia v*

110 Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20 December 2012) 24.

Totani, Hayne J made the following observations regarding the control order provisions:[111]

> the provisions of the Criminal Code in issue in Thomas v Mowbray thus required the issuing court to be satisfied either that the person against whom the order was to be made had engaged in particular past conduct, or that the order would have an identified consequence. The past conduct in issue under the Criminal Code provisions was conduct which the Criminal Code made unlawful. The relevant consequence (of protecting the public from a terrorist act) had to be related directly to the defendant (as did the fact of past conduct), because a control order could be made only if each particular aspect of the proposed order (as it operated against the defendant) was both reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act.

The requirement that the statutory criteria are directed at the controlee does not mean that the conduct of the controlee must be directly related to a terrorist act: it may be concerned with what a third person might do. As Kirby J noted in *Thomas v Mowbray,* and as is made clear by the findings as to vulnerability in the making of the control orders against Thomas and Hicks, a control order may be issued on the basis of an

111 (2010) 242 CLR 1, 87. Hayne J was in the minority in *Thomas v Mowbray*, however his remarks regarding the operation of the control order regime—here reiterated in *Totani*—were not inconsistent with those of the majority regarding the operation of the regime.

estimated future act, and 'not necessarily one to be committed by the person subject to the proposed order'.[112]

The provisions therefore do not require a determination of the risk an individual poses or the likelihood of them engaging in certain conduct; it requires something very different. The control order regime requires a court to undertake a predictive exercise at two points: first, if the ground is relied upon, to determine whether a control order would substantially assist in the prevention of a terrorist act; second, in all cases, assessing whether a control order is necessary to protect the public from a terrorist act. There is, as Hayne J pointed out in *Thomas v Mowbray*, overlap between the requirement that the making of an order 'would substantially assist in preventing a terrorist act, and the requirement that the particular obligations imposed are both reasonably necessary, and reasonably appropriate and adapted, for the purpose of preventing a terrorist act'.[113] Indeed a control order made on this ground is purely predictive: there is no predicate or anchor in past conduct (such as involvement in training with a terrorist organisation).

The issuing court must engage in a predictive exercise to determine what is 'reasonably necessary, and reasonably appropriate and adapted

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112 (2007) 233 CLR 307, 432 [357]. Although Kirby J was in the minority, his remarks on the operation of the regime are consistent with those of members of the Majority: see, for example, Gummow and Crennan JJ at 352 [97].

113 (2007) 233 CLR 307, 470 [481].

for the purpose of protecting the public from a terrorist act'.[114] However, the basis for making the prediction is uncertain, unassisted by the potential nature of the threat and the fact that the likelihood of its occurrence is conditioned by global and local circumstances,[115] including the work of government agencies. Hayne J has made this difficulty clear:[116]

> [i]t is a criterion that seeks to require federal courts to decide whether and how a particular order against a named person will achieve or tend to achieve a future consequence: by contributing to whatever may be the steps taken by the Executive, through police, security, and other agencies, to protect the public from a terrorist act. It is a criterion that would require a federal court to consider future consequences the occurrence of which depend upon work done by police and intelligence services that is not known and cannot be known or predicted by the court.

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114 *Criminal Code* s 104.4(1)(d) (interim proceedings), s 104.14 (confirmation proceedings).

115 As Gleeson CJ made clear: 'The level of risk of the occurrence of a terrorist act, and the level of danger to the public from an apprehended terrorist act, will vary according to international or local circumstances': *Thomas v Mowbray* (2007) 233 CLR 307, 326 [9].

116 Ibid, 469 [476]. Hayne J, as noted, was in dissent in *Thomas v Mowbray*. However his comments regarding the adjudicative task undertaken pursuant to the provisions are relevant, despite his disagreement with the majority regarding the constitutional validity of the regime. As Bret Walker QC has remarked in relation to the judgment of Hayne J: '[t]he fact that his Honour was in dissent on what may be called the constitutional evaluative assessment that decided this issue as a matter of law detracts in no way from the force of those observations' regarding his conclusions about, characterisation of and implications of the control order legislation: Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20 December 2012) 36.

Thus, not only is the threat unknowable but also whether a control order could protect the public from it. Hayne J further points out:[117]

> [t]o decide what will (tend to) protect the public from a terrorist act it is necessary to know far more than the fact that there is a threat to commit such an act. Even assuming that a particular threat is well defined (and much more often than not in the case of threats of terrorist acts, it will not) the utility of making an order to restrain a person in one or more of the ways specified in s 104.5(3), and in particular the tendency of such an order to secure public protection, cannot be assessed without knowing what other measures are being taken to guard against the threat.

Evidence that the Executive provides to support the order and enable the court to engage in a predictive exercise will likely involve intelligence material.[118] To further draw on the judgement of Hayne J in *Thomas v Mowbray*:[119]

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117 Ibid 474 [502]. Bret Walker QC has argued, in relation to lines 3–7 of this quote, that 'it is no objection to the persuasive force of these observations that a majority of the court regarded them as appropriate for—even, better done by—the exercise of judicial power. Excepting that outcome of the constitutional legal argument, in terms of policy, the following observations by Hayne J have continued resonance': Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20 December 2012).

118 Intelligence may be understood as material gathered by intelligence agencies and, increasingly, police, whether by covert or other means, 'to provide background information and advance warning about people who are thought to be a risk to commit acts of terrorism or other threats to national security': Kent Roach, 'The Eroding Distinction Between Intelligence and Evidence in Terrorism Investigations' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge, 2010) 52. Intelligence is characteristically secret so as to maintain the confidentiality of intelligence gathering methods, sources, international relationships and ongoing operations. Secrecy, however, is not a defining

> [w]hen courts are required to predict the future, as they are in some cases, the prediction will usually be assisted by, and determined having regard to, expert evidence of a kind that the competing parties to the litigation can be expected to adduce if the point in issue is challenged. Intelligence information, gathered by government agencies, presents radically different problems. Rarely, if ever, would it be information about which expert evidence, independent of the relevant government agency, could be adduced. In cases where it could not be tested in that way (and such cases would be the norm rather than the exception) the court…would be left with little practical choice except to act upon the view that was proffered by the relevant agency.

This further supports the contention that the regime is closest aligned with Bush pre-emption and precautionary thinking: it operates in circumstances of objective uncertainty, a function of the fact that the threat is indeterminate and has not yet emerged.

However, a stricter interpretation of the control order provisions has been advocated by the Independent National Security Legislation Monitor. The Independent National Security Legislation Monitor has

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characteristic of intelligence. As Roach points out, '[a]lthough some forms of intelligence are public, the traditional essence of intelligence has been that it is secret': Kent Roach, 'Secret Evidence and its Alternatives' in Aniceto Masferrer (ed), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer, 2012) 180.

119 (2007) 233 CLR 307, 477 [511].

argued that, in light of the principle in *Briginshaw v Briginshaw* which, as will be discussed in Part III(C), requires in certain circumstances an elevated standard of evidence to meet the civil standard of proof, what is:[120]

> 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act' is virtually bound in all imaginable circumstances to involve a real apprehension based on available evidence that the respondent is set on a course that, but for the terms of the proposed CO [control order], would result in a terrorist offence being committed by the respondent.

This interpretation aligns more closely with prevention—where a risk of a terrorist act exists, it is possible to assess the risk posed by the individual, identify its causes and neutralise the threat by the imposition of a control order. Here the future consequence is not only related directly to the controlee; the controlee has put in motion action that would cause it occurrence.

Nonetheless, the application of the control order provisions by the issuing courts and the precautionary logic evident in the regime suggest

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120 Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20 December 2012) 30; Note 98 reads: 'This is how these provisions should be read and applied, given orthodox observance of the approach to proof in light of the principles classically stated in *Briginshaw v Briginshaw* (1939) 60 CLR 336 esp per Dixon J at 361-363.'

the regime is aligned with Bush pre-emption: the terrorist threat in respect of which the control order is directed may be indeterminate and incapable of specification. This is because the threat is potential—it relates to a possible terrorist act, the threat of which has not yet emerged. Indeed, it is arguable that the vague and indeterminate standards contained in the control order provisions that are capable of conflicting interpretations, such as the second limb of the test,[121] are a function of the influence of precautionary thinking on the regime. As Zedner has argued, and was outlined in Chapter One, precautionary logic—and attempts to 'govern at the limits of knowledge'—leads to broad, vague and indeterminate legal definitions and standards.[122]

B *Harm Threshold*

The harm threshold—the proximity of the harm to be averted before intervention may occur—goes to where the provisions fall on the spectrum of anticipatory action in domestic law. The harm a control order seeks to avert is clearly identified: a terrorist act. A 'terrorist act' is defined in s 101.1(1) of the *Criminal Code* as 'an action or threat of action where':

> (a) the action falls within subsection (2) and does not fall within subsection (3); and

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121 Kirby J described this as 'a vague, obscure and indeterminate criterion if there ever was one': *Thomas v Mowbray* (2007) 233 CLR 307, 430 [354].

122 Lucia Zedner, *Security* (Routlegde, 2009) 128–35.

(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and

(c) the action is done or the threat is made with the intention of:

(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or

(ii) intimidating the public or a section of the public.

Action that falls within subs (2) includes action that causes serious physical harm to a person, serious property damage, endangers life or causes death, risks health or safety of the public, or seriously interferes with or destroys electronic systems.[123] Action that falls within subs (3), and is therefore excluded from the definition, includes 'advocacy, protest, dissent or industrial action' that is not intended to endanger another's life, cause serious physical harm or death, or to 'create a serious risk to the health or safety of the public' or part thereof.[124] This is a broad definition that is attached to the predictive exercise in the second limb of the test.

The relationship between the threatened or anticipated terrorist act and the control order is not mandated: for a control order to be issued, the

123 *Criminal Code* s 101.1(2).
124 Ibid s 101.1(3).

presence of an imminent threat of a terrorist act is not required. Indeed, as mentioned in above, the terrorist threat need not be specified or identified: all that needs to be established is that the individual participated in training with a listed terrorist organisation or that restraining the individual would substantially assist in preventing a terrorist act, and that the terms are reasonably necessary, appropriate and adapted to protecting the public from a terrorist act.[125]

To make out either of the grounds in the first limb of the test, there does not need to be a current risk of harm to the community or even contemporaneous evidence. Indeed, in relation to the interim control order made against Hicks, the AFP submitted that:[126]

> even if there is a reasonably small chance of such a terrorist act occurring, nevertheless a control order could substantially assist in preventing such act.

In relation to both Hicks and Thomas, the evidence relied upon to establish that the individual had participated in training with a terrorist organisation was old. The training had occurred years before: Hicks was found to have trained with Lashkar-e-Tayyiba between March 2000 and

125 *Criminal Code* ss 104.2, 104.4, 104.14.
126 *Jabbour v Hicks* [2007] FCMA 2139, [25].

June 2002, and Al-Qa'ida between January 2001 and August 2001;[127] Thomas was found to have trained with Al-Qa'ida in 2001.[128]

In relation to satisfaction of the first ground—whether the making of an order would substantially assist in preventing a terrorist attack—the evidence against Hicks was also dated. It was comprised of letters written by Hicks to his family while in the training camps.[129] Federal Magistrate Donald found this historical evidence was sufficient to found a control order. His Honour did not, as the Independent National Security Legislation Monitor has pointed out, furnish reasons why the letters would support a finding that the making of a control order would substantially assist in preventing a terrorist act on Australian soil.[130]

The COAG Review, while not making any recommendation on this point, considered whether the training must be contemporaneous.[131] The Review noted that the Court could decline to make an order where not satisfied of the further requirement that the control order be reasonably necessary, appropriate and adapted to the purpose protecting the public from a terrorist act. However, it is worth noting that this occurred in neither case. Indeed the Independent National Security

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127 Ibid [12] (Donald FM); *Jabbour v Hicks* [2008] FMCA 178, [14] (Donald FM). See also Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) 56; Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20 December 2012) 21–2.

128 *Jabbour v Thomas* [2006] FMCA 1286, [46], [59] (Mowbray FM).

129 *Jabbour v Hicks* [2007] FCMA 2139, [16] (Donald FM).

130 Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20 December 2012) 22.

131 Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) 57.

Legislation Monitor argues that neither control order made in Australia was reasonably necessary for the protection of Australia from a terrorist act.[132] This perhaps points again to the broad definitions and indeterminate and vague standards contained in the control order provisions creating difficulties in interpretation and application. It also highlights a further point of concern with precautionary thinking and precautionary approaches—they are error prone. As noted in Chapter One, they generate false positives, resulting in the finding of harm where none exists.

For a control order to be made, there is no requirement that there be a real risk of a terrorist act or even a threat towards Australia. For example, the control order against Thomas was imposed not because Thomas posed an immediate threat of launching a terrorist attack, or that there existed an immediate terrorist threat to Australia that a control order over Thomas might 'substantially assist' in preventing. Rather, the control order was imposed in respect to a distant threat: a conceivable but not inevitable threat. Federal Magistrate Mowbray held that restraining Thomas would 'substantially assist' in preventing terrorist act because Thomas had the capacity to assist in or execute a terrorist attack, due to his having trained with Al Qa'ida, and thus was a potential resource in the commission of terrorist attacks.[133] Similarly, Federal Magistrate Donald, as noted, expressed concern in his reasons

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132 Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20 December 2012) 14.

133 *Jabbour v Thomas* [2006] FMCA 1286, [42].

that the court could be satisfied the order would substantially assist in preventing a terrorist act as Hicks had never made any threat towards Australia. As such, the regime accords with Bush pre-emption.

C *Knowledge Threshold*

The knowledge threshold upon which the application for and issuance of a control order is based is low, reflecting the future orientation of the law. This is necessary to permit the government to intervene early, well before a terrorist attack occurs or is attempted, in order to thwart an anticipated terrorist threat. The knowledge threshold further supports the alignment of the regime with Bush pre-emption.

Early intervention is facilitated by the hybrid civil–criminal design of control orders. The civil nature of a control order when it is issued enables the government to target 'pre-crime' acts and to restrain liberty well before that which traditionally occurs in the criminal justice system. As Senator Brandis made clear in debate in the Senate:[134]

> If we get to the stage of criminal law enforcement too often, the terrorist outrage will have been committed. The obligation of the government to protect its citizens will not have been discharged. So most of the provisions in this bill…are not about prosecuting

[134] Commonwealth of Australia, *Parliamentary Debates,* Senate, 5 December 2005, 19 (Brandis).

people for crimes; they are about prevention of terrorist conduct by interdiction and surveillance and equipping the security agencies and the Australian Federal Police as fully as they need to be equipped.

To facilitate such early intervention, the requisite knowledge threshold of the senior member of the AFP is low: reasonable consideration and reasonable suspicion. To seek consent of the Attorney-General to request an interim control order, the applicant AFP member must either:[135]

- consider 'on reasonable grounds' that the order would 'substantially assist in preventing a terrorist act'; or
- suspect 'on reasonable grounds' that the person has been involved in training with a listed terrorist organisation.

If consent is given, the AFP member can then apply to an issuing court for an interim control order on the same basis.[136] Suspicion and consideration, albeit on reasonable grounds, are vague and imprecise thresholds. Suspicion has been regarded as imputing neither well-founded nor factually correct grounds to suspect.[137] The High Court in

135 *Criminal Code* s 104.2.
136 Ibid s 104.3.
137 *Tucs v Manley* (1985) 62 ALR 460 (Jacobs J) extracted in Bernadette McSherry, 'The Preventive Detention of Suspected Terrorists' in Bernadette McSherry and

a unanimous decision in *George v Rocket* provided the following guidance on 'reasonable grounds' in the context of the issuance of search warrants but which has been approved a number of decisions:[138]

> [w]hen a statute prescribes that there must be "reasonable grounds" for a state of mind—including suspicion and belief—it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person.

Mere suspicion is a very low threshold and the COAG Review recommended it be heightened to consideration. The COAG Review argued that it is inconsistent to allow an order to be applied for on mere suspicion but issued on the balance of probabilities.[139] Nevertheless that consideration and suspicion are low thresholds enables intervention to occur on a conceivable but not inevitable threat aligning with Bush pre-emption.

At the interim and confirmation proceedings, the issuing court needs to be satisfied to the civil standard of proof: the balance of probabilities.

Patrick Keyzer (eds), *Dangerous People: Policy, Prediction, and Practice* (Routledge, 2011) 97, 103.

138 (1990) 170 CLR 104, 112 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) approved by Gummow J, Hayne J, Heydon J and Keifel J in *Gypsy Jokers Motor Cycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, [28], and adopted in a number of corporations law cases including *Androvitsaneas v Members First Broker Network* [2013] VSCA 212 (16 August 2013) [84] (Redlich and Priest JJA and Macaulay AJA).

139 Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) 58.

However, the standard of evidence required to prove the matter to the civil standard of proof is to be understood in line with the Briginshaw principle.[140] In *Briginshaw v Briginshaw,* Dixon J held that:[141]

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequence 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. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

The Briginshaw principle does not alter the standard of proof, but relates to the standard of evidence to prove the matter to the civil standard.[142] As Mason CJ, Brennan, Deane and Gaudron JJ made clear in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*:[143]

> The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the

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140 See, for example, *Thomas v Mowbray* (2007) 233 CLR 307, 355 [113] (Gummow and Crennan JJ).

141 New South Wales, *Parliamentary Debates,* Legislative Assembly, 22 March 1990, 891 (Collins).

142 Loretta de Plevitz, "Briginshaw 'Standard of Proof' in Anti-Discrimination Law: 'Pointing with a Wavering Finger'" (2003) 27(2) *Melbourne University Law Review* 308.

143 (1992) 110 ALR 449, 449–50 (citations removed).

> strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting 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.

Nonetheless, in its application in control order proceedings the evidence has, arguably, not been high. Intervention has occurred on the basis of a conceivable threat, without contemporaneous evidence, rather than a belief that the threat is inevitable. This aligns closest to Bush pre-emption.

IV Conclusion

This chapter has examined the federal control order regime contained in the *Criminal Code* as an example of prevention in the anti-terror context. In Part II, this chapter outlined the history of the regime, the use to which it has been put since its commencement in December

2005 and the legislative framework. It highlighted that Australia's control order regime was originally justified as extraordinary, unprecedented and necessary in response to the threat posed by transnational terrorism following September 11.

Building on Chapter Three, in Part III this chapter assessed where the control order provisions fell on the spectrum of anticipatory action in domestic law. It was argued that the control order provisions are closest aligned with Bush pre-emption—enabling intervention in respect of a distant, conceivable threat that is indeterminate and need not be specified. The threat is indeterminate because it has not emerged. The regime operates on the basis that the threat of harm is an unknowable unknown and evinces precautionary thinking. The way in which the two Australian control orders were issued supports the contention that the regime aligns with Bush pre-emption.

This chapter also noted that a stricter construction of the key provisions is available, aligning the regime more closely with prevention. However, it has been argued that a broader interpretation is also available and illustrates that the regime is more akin to Bush pre-emption. In Part III it was suggested that the availability of different interpretations may be understood as a function of the problems raised by governing 'at the limits of knowledge' and with precautionary thinking—indeterminate and vague provisions that risk misapplication and errors, such as the finding of, or assumption of, harm where none exists. The reasoning in

respect to training with a terrorist organisation is a good example—it proceeds on the basis that because a person has at some point trained with an organisation, perhaps not a listed terrorist organisation at the time, the individual is a resource to be 'tapped' by aspirant extremists.

This inquiry has been undertaken to establish a benchmark against which to assess whether the control order provisions are exceptional or go further than prevention as employed in other areas of Australian law. Building on the analysis in this chapter, Chapters Five and Six will assess where the high risk offenders and mental health involuntary detention regimes fall on the spectrum of anticipatory action and whether and how they differ from or exhibit continuities with anti-terror control orders. As will be further explored in Chapter Seven, whether continuities and discontinuities are discernable between the control order, civil mental health and high-risk offender post-sentence regimes has the potential to inform understandings of the utility of the preventive state concept as a way to read developments in Australian law.

—CHAPTER FIVE—

POST-SENTENCE PREVENTIVE DETENTION AND EXTENDED SUPERVISION OF HIGH RISK OFFENDERS

I INTRODUCTION

This chapter examines the legislative regime for the post-sentence preventive detention and ongoing supervision of high risk offenders in New South Wales as an example of prevention connected to the criminal justice system. This regime, contained in the *Crimes (High Risk Offenders) Act 2006* (NSW), enables a 'high risk' sex or violent offender to be preventively detained or supervised in the community upon the completion of a custodial sentence where a court determine the individual poses an unacceptable risk of committing a serious sex or violence offence if not supervised.

The post-sentence preventive detention and ongoing supervision of high risk offenders in New South Wales is the archetypal contemporary example of post-sentence preventive restraints on liberty. This form of preventive restraint is distinguished by the timing of the making of the order—at the end of the offender's sentence—and its comparatively recent origin. These types of restraints on liberty were first conceived in the 1990s by state governments seeking to preventively detain one named offender at the expiration of his sentence of imprisonment. It

was in the subsequent decade, in the 2000s, that state parliaments legislated to enable post-sentence restraints to be placed on the liberty of one category of offender: serious sex offenders.

This chapter concentrates on the regime that exists in New South Wales, being largely representative of like regimes in respect of serious sex offenders in Queensland, Victoria, Western Australia and the Northern Territory.[1] New South Wales was the fourth of the five Australian jurisdictions to introduce legislation to enable post-sentence preventive detention and ongoing supervision orders to be made in respect of serious sex offenders. However, in 2013, New South Wales became the first Australian jurisdiction to extend its legislative scheme

[1] Queensland was the first Australian jurisdiction to introduce post-sentence preventive detention and supervision, followed by Western Australia, New South Wales, Victoria and, in 2013, the Northern Territory: *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Dangerous Sexual Offenders Act 2006* (WA); *Crimes (Serious Sex Offenders) Act 2006* (NSW); *Sex Offenders Act 2013* (NT); Victoria first introduced extended supervision orders in March 2005 in the *Serious Sex Offenders Monitoring Act* 2005 (VIC). This was followed by the introduction of post-sentence preventive detention orders in the *Serious Sex Offenders (Detention and Supervision) Act 2009* (VIC) which commenced operation on 1 January 2010. In 2007, the Victorian Attorney-General requested the Victorian Sentencing Advisory Council advise on whether to introduce a scheme of post-sentence preventive detention of 'dangerous' offenders in Victoria. A majority of the Council concluded, with regard to the existing sentencing options available in Victoria, such as indefinite detention, 'that regardless of how a continuing detention scheme were to be structured, the inherent dangers involved outweigh its potential benefits, particularly taking into account the existence of less extreme approaches to achieving community protection, such as extended supervision': Victorian Sentencing Advisory Council, *High Risk Offenders: Post-Sentence Supervision and Detention*, Final Report (May 2007) 64, see generally 61–4; For a comparative study of the different regimes, see Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention* (Routledge 2014) 77–88, 132–6.

beyond serious sex offenders to a new category of offender: high risk violent offenders.[2]

This regime bears strong similarities to anti-terror control orders: each has a protective purpose, crime prevention rationale, enables the imposition of conditions of surveillance and control, and may be imposed post-sentence. Control orders and extended supervision orders are both hybrid civil–criminal orders: they are issued subsequent to civil proceedings, but attract criminal sanctions on breach. As noted in Chapter Three, some have described preventive measures in anti-terror and serious sex offender regimes as illustrative of the same 'pre-emptive framework'.[3] At the same time, the Independent National Security Legislation Monitor has suggested that while control orders are unjustified and should be repealed, consideration should instead be given to a regime of post-sentence restraints. The high risk offender regime is thus a useful comparator against which to assess the novelty and reach of anti-terror control orders.

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2 On 19 March 2013, the *Crimes (Serious Sex Offenders) Amendment Act* 2013 (NSW) received Royal Assent and commenced operation. It extends the regime of post-sentence preventive detention and supervision of serious sex offenders to high risk violent offenders. Consequently, the *Crimes (Serious Sex Offender) Act* 2006 (NSW) has undergone a name change and is now the *Crimes (High Risk Offenders*) *Act* 2006 (NSW). As will be discussed in Part II(A), other jurisdictions employ protective sentencing measures, such as indefinite sentencing schemes, to protect the community from 'dangerous' offenders. The NSW Sentencing Council recommended the extension of the serious sex offender regime and this was adopted by the Government: NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (May 2012) see Chapters 4 & 5.

3 See, for example, Jude McCulloch and Sharon Pickering, 'Counter-Terrorism: The Law and Policing of Pre-emption' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 13, 17.

Building on Chapter Three, this chapter investigates whether the provisions for preventive detention and ongoing supervision of high risk offenders amount to 'pre-emption as anticipatory self-defence', 'prevention' or 'Bush pre-emption'. In Chapter Four it was argued that control orders are closest aligned with Bush pre-emption—where the high risk offender provisions fall on the spectrum of anticipatory action in domestic law will go to whether control orders are novel or go further than the high risk offender regime. As will be discussed in Chapter Seven, whether the preventive measures studied exhibit continuities or discontinuities has the potential to inform understandings of the preventive state concept, and its utility as a way to read developments in Australian law.

This chapter begins, in Part II, by briefly outlining the history and key provisions of the high risk offender legislative framework in New South Wales. In Part III, this chapter addresses where the provisions fall on the spectrum of anticipatory action in domestic law. It argues that the high risk offender legislative framework exhibits features of both prevention and Bush pre-emption. Part IV examines what this case study contributes to consideration of the novelty and reach of anti-terror control orders. It argues that the continuities discernable between the control order and high risk offender regimes casts doubt on claims that control orders are exceptional, unprecedented and isolated measures in response to the exceptional threat of terrorism. Rather, as will be further explored in Chapter Seven, these continuities support

consideration of control orders as forming part of a broader pattern of preventive governance in Australia. However, this case study also illustrates that control orders go further than high risk offender provisions in a number of respects, demonstrating that control orders are exceptional in their reach when compared to the preventive measures contained in the high risk offender regime.

II Archetypal Post-Sentence Preventive Interventions: Post-Sentence Preventive Detention and Extended Supervision of High Risk Offenders

A *A Brief History of Post-Sentence Liberty Restraints*

Governments have long sought to protect the community from 'dangerous' offenders. Since the late 19th century this has chiefly occurred through indefinite detention ordered at sentence.[4] Pratt, for example, highlights how in the late 19th century the English speaking world was increasingly concerned with the 'dangerous', the threat they

[4] I use the term 'indefinite detention' as McSherry has defined it: 'to refer to legislation that enables an order to be made *at the time of sentence* for an offender to be detained indefinitely': Bernadette McSherry, 'Indefinite and preventive detention legislation: From caution to an open door' (2005) 29 *Criminal Law Journal* 94, 94.

posed and how best to incapacitate them.[5] At that time, 'dangerous' offenders were habitual offenders: their danger emanating from their recurrent breach of the law. Pratt explains:[6]

> it was as if habituality itself was a sign of incorrigibility, thus placing the habitual beyond any redemption that the existing criminal justice system could offer.

In Australia, legislation prescribing the indefinite detention of habitual criminals began to appear at the beginning of the 20th century.[7] The New South Wales regime, contained in the *Habitual Criminals Act 1905*

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5 John Pratt 'Dangerousness, Risk and Technologies of Power' (1995) 28 (3) *Australian and New Zealand Journal of Criminology* 3, 5; see also John Pratt, *Governing the Dangerous* (The Federation Press, 1997); John Pratt, 'Dangerousness and Modern Society' in Mark Brown and John Pratt, *Dangerous Offenders: Punishment and Social Order* (Routledge, 2000) 35; Floud looking at dangerous offenders in the United Kingdom reported that '[d]angerousness is a thoroughly ambiguous concept', it is 'prevalent but elusive. It is not used consistently or with any precision and the nature of the risk to which it refers is never clearly defined': Jean Floud, 'Dangerousness and Criminal Justice' (1982) 22 (3) *British Journal Of Criminology* 213, 214. Pratt suggests dangerousness now has a specific penological meaning: John Pratt, 'Dangerousness and Modern Society' in Mark Brown and John Pratt, *Dangerous Offenders: Punishment and Social Order* (Routledge, 2000) 35, 35; However, I note that Pratt's treatment of dangerousness has been critiqued for the lack of attention it paid to 'the discourses of dangerousness that originated in lunacy legislation': Mark Finnane and Susan Donkin, 'Fighting Terror with Law? Some Other Genealogies of Pre-emption' (2013) 2(1) *International Journal of Crime and Justice* 3, 13; Dangerousness it is also referred to in the literature on involuntary detention pursuant to civil mental health legislation to mean detention on the basis of a risk of harm to self or others: see, for example, M M Large, C J Ryan, O B Nielssen, R A Hayes, 'The Danger of Dangerousness: Why We Must Remove the Dangerousness Criterion From Our Mental Health Acts' (2008) 34 *Journal of Medical Ethics* 877; Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention* (Routledge 2014) 52–56;

6 John Pratt 'Dangerousness, Risk and Technologies of Power' (1995) 28 (3) *Australian and New Zealand Journal of Criminology* 3, 5.

7 See, for example, M W Daunton-Fear, 'Habitual Criminals and the Indeterminate Sentence' (1969) 3(3) *Adelaide Law Review* 335; see also for a discussion of the *Indeterminate Sentences Act 1907* (Vic): Bernadette McSherry, 'Indefinite and preventive detention legislation: From caution to an open door' (2005) 29 *Criminal Law Journal* 94, 94.

(NSW), empowered a judge, at sentence, to declare a person to be a 'habitual criminal' to be detained, in prison, at the completion of the sentence at His Majesty's pleasure.[8] A person could be declared a habitual criminal upon the third or subsequent conviction for an offence of the same nominated class, either poisoning, sexual offence or abortion, or upon the forth or subsequent conviction for an offence of a class scheduled to the Act.[9] The Governor could direct release if satisfied the habitual criminal was reformed.[10] If released, the offender was required to periodically report to the police for two years.[11]

Australian jurisdictions have continued to feature regimes enabling protective sentencing measures to be imposed on 'dangerous' offenders *at the time of sentence*. These include indefinite or indeterminate sentencing, mandatory sentencing and disproportionate sentencing regimes.[12] However, during this time who was regarded as 'dangerous'

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8 *Habitual Criminals Act 1905* (NSW) ss 3, 5, 13.

9 Ibid s 3. The scheduled classes of offences were:

Classification for the purposes of this Act of sections of the Crimes Act, 1900.

Class	(i)	Sections 33 to 37 inclusive—Wounding.
"	(ii)	Sections 38 to 41 inclusive—Poisoning.
"	(iii)	Sections 62 to 81 inclusive—Sexual offences.
"	(iv)	Sections 83 to 84 inclusive—Abortion.
"	(v)	Sections 94 to 98 inclusive—Robbery. Sections 99 to 105 inclusive—Extortion. Sections 106 to 114 inclusive—Burglary, &c. Sections 117 to 125, and 148 to 149 inclusive—Larceny. Sections 155 to 178 inclusive—Embezzlement. Sections 179 to 193 inclusive—False pretences.
"	(vi)	Sections 196 to 202 inclusive—Arson.
"	(vii)	Under any of the sections in Part V of the Crimes Act,1900—Forgery.
"	(viii)	Under any of the sections in Part VI of the Crimes Act,1900—Coinage.

10 *Habitual Criminals Act 1905* (NSW) s 7.

11 Ibid ss 7–8.

12 Victoria, Queensland, Northern Territory, South Australia, Tasmania and Western Australia, for example, each have indefinite sentencing regimes that

changed—expanding from habitual offenders in the late 1800s to include, at the turn of the 20th century, professional criminals and in particular property offenders,[13] to become, in the 1970s, 'almost exclusively confined to (repeat) violent/sexual' offenders.[14]

In contrast to measures imposed at sentence, post-sentence restraints on the liberty of 'dangerous' persons are of more recent origin. These types of regimes differ in that they enable liberty restraints to be imposed *at the end of an offender's sentence of imprisonment*. The preventive detention and ongoing supervision of a 'dangerous' offender is ordered not at the time of sentence, but proximate to its expiration. In three of the Australian regimes, for example, a Supreme Court may make an order upon an application made in the last six months of the offender's sentence.[15]

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target a category or categories of offender; Victoria and South Australia also have disproportionate sentencing regimes for certain types of offenders: see NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (May 2012) 67–81, 92–94; see also, Honor Figgis and Rachel Simpson, 'Dangerous Offenders Legislation: An Overview' (Briefing Paper No 14, Parliamentary Library, Parliament of New South Wales, 1997); Arie Freiberg, 'Guerrilas in our midst? Judicial responses to governing the dangerous' in Mark Brown and John Pratt, *Dangerous Offenders: Punishment and Social Order* (Routledge, 2000) 51; Bernadette McSherry, 'Indefinite and preventive detention legislation: From caution to an open door' (2005) 29 *Criminal Law Journal* 94; Bernadette McSherry, Patrick Keyzer and Arie Freiberg, 'Preventive Detention for 'Dangerous' Offenders in Australia: A Critical Analysis and Proposals for Policy Development', *Report to the Criminology Research Council* (December 2006); *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575, 590 (Gleeson CJ), 613 (Gummow J), 634 (Kirby J).

13 John Pratt 'Dangerousness, Risk and Technologies of Power' (1995) 28 (3) *Australian and New Zealand Journal of Criminology* 3, 7.

14 Ibid 13. It was also at this time, Pratt highlights, that questions of dangerousness began to adopt a future orientation. Habitually and public protection remained criterion upon which dangerous laws were based but they were accompanied by 'a growing interest in the kind of crime one might commit in the future' made possible by the growth of actuarialism and risk in the prediction of dangerousness: 14

15 In Queensland and New South Wales, the application is made by the Attorney-

State governments first enacted post-sentence preventive detention regimes in the 1990s. Crucially, however, these regimes were specifically targeted at a particular individual and only provided for preventive detention. Victoria was the first jurisdiction to enact a post-sentence preventive detention regime that related to one individual: Garry David. David was serving a custodial sentence for two counts of attempted murder and other offences, and his behaviour in prison raised concerns for the safety of the community on his release.[16] Attempts to have him detained under mental health legislation were unsuccessful. David was diagnosed as suffering from anti-social personality disorder and not a mental illness as defined by the *Mental Health Act 1986* (Vic).

In 1990 the Victorian Parliament passed the *Community Protection Act 1990* (Vic) which empowered the Supreme Court to order the preventive detention of Garry David on the expiration of his sentence where

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General in the last 6 months of the offender's sentence: *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ss 5, 13(5)(a), (b); *Crimes (High Risk Offenders) Offenders) Act 2006* (NSW) ss 5H–J, 6(2), 9, 13A–C, 17, 24A; In Western Australia, the Attorney-General or the Director of Public Prosecutions may apply to the Court in the last 6 months of the offender's sentence: *Dangerous Sexual Offenders Act 2006* (WA) ss 6, 8, 17; In Victoria, an application is not time limited and may be made during the term of a sentence. For a supervision order, the application is made by the Secretary to the Department of Justice or delegate to the relevant court (Supreme or County court), for a continuing detention order the application is made by the Director of Public Prosecutions to the Supreme Court: *Serious Sex Offenders (Detention and Supervision) Act 2009* (VIC) ss 4, 7–9, 33–4, 36, 38; In the Northern Territory the Attorney-General may make an application to the Supreme Court in the last 12 months of the offender's sentence: *Serious Sex Offender Act 2013* (NT), s 23.

16 This included 'prison disruption and broad-ranging threats to the community' and self-mutilation: Deidre Greig, *Neither Bad Nor Mad: The Competing Discourse of Psychiatry, Law and Politics* (Jessica Kingsley Publishers Ltd, 2002) 47 and generally 40–49; see also, Paul Ames Fairall, 'Violent Offenders and Community Protection in Victoria—The Gary David Experience' (1993) 17 *Criminal Law Journal* 40.

satisfied, on the balance of probabilities, that he posed a serious risk to public safety and was 'likely to commit an act of personal violence to another person'.[17] David was detained pursuant to the Act until his death, in prison, in 1993. The constitutional validity of the *Community Protection Act 1990* (Vic) was not challenged. The regime was repealed in 1993.[18]

The New South Wales Parliament followed Victoria's lead in 1994, passing the *Community Protection Act 1994* (NSW). This Act was also directed at a particular offender: Gregory Wayne Kable.[19] Kable was serving a sentence of imprisonment for the manslaughter of his wife. While in prison, Kable sent threatening letters to, amongst others, members of his deceased wife's family raising concerns for their safety on his release. The *Community Protection Act 1994* (NSW) provided for the preventive detention of Kable on the expiration of his sentence where the Supreme Court was satisfied, on reasonable grounds, that Kable was 'more likely than not to commit a serious act of violence', and his detention was appropriate to protect the community or part

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17 *Community Protection Act 1990* (Vic) s 8.

18 The Act was repealed following Garry David's death and the enactment of indefinite sentencing provisions, see: Bernadette McSherry, 'Indefinite and Preventive Detention Legislation: From Caution to an Open Door' (2005) 29 *Criminal Law Journal* 94, 99; For detailed discussion of the circumstances surrounding Garry David's imprisonment and detention, as well as the *Community Protection Act 1990* (Vic), see Paul Ames Fairall, 'Violent Offenders and Community Protection in Victoria—The Gary David Experience' (1993) 17 *Criminal Law Journal* 40; Deidre Greig, *Neither Bad Nor Mad: The Competing Discourse of Psychiatry, Law and Politics* (Jessica Kingsley Publishers Ltd, 2002).

19 The Bill was, however, originally presented as having general application but amended to apply only to Kable: see *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 62–3 (Brennan CJ).

thereof.[20] In February 1995 Kable was detained pursuant to the Act and, after being unsuccessful on appeal to the Court of Appeal, he appealed to the High Court. A majority of the High Court held the Act to be invalid as it required the Supreme Court to perform non-judicial functions that were incompatible with the exercise of federal judicial power.[21]

A decade later, in 2003, state parliaments again moved to create regimes of post-sentence preventive detention. However, this time they targeted a class of offender: serious sex offenders. In 2003 Queensland became the first Australian jurisdiction to introduce post-sentence preventive detention and supervision orders with the passage of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).[22] This Act

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20 *Community Protection Act 1994* (NSW) s 5.

21 The majority, Toohey, Gaudron, McHugh and Gummow JJ, with Brennan CJ and Dawson J in dissent, differed in their reasoning. For an analysis of the different judgments, see: Bernadette McSherry, 'Indefinite and preventive detention legislation: From caution to an open door' (2005) 29 *Criminal Law Journal* 94.

22 On 16 October 2013 the Queensland government introduced into Parliament the Criminal Law Amendment (Public Interest Declaration) Amendment Bill 2013 (Qld). The Bill was declared an urgent bill by 71 to 13 votes in Queensland's unicameral parliament: Queensland, *Parliamentary Debates,* Legislative Assembly, 16 October 2013, 3297–3302. The Bill passed on 17 October 2013: Queensland, *Parliamentary Debates,* Legislative Assembly, 17 October 2013, 3522–45. It received Royal Assent on 29 October 2013. The *Criminal Law Amendment (Public Interest Declaration) Amendment Act 2013* (Qld) creates a regime of indefinite detention of person subject to continuing detention or supervision orders (where imposed immediately after a continuing detention order) under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). The Act provides that this detention occurs upon the Governor making a public interest declaration on the recommendation of the responsible Minister: Div 2. To make a public interest declaration, the Governor must be satisfied that the detention is in the public interest. This regime thus exists alongside the post-sentence preventive detention and continued supervision scheme in the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). The Act provides for a person to be indefinitely detained, subject to annual examination by two psychiatrists and annual review by the Minister: ss 22C, 22E. If 'public interest' detention ceases, the order under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) revives unless it has expired: ss 22G, 22H. If a supervision order

empowers the Supreme Court to make a preventive detention or extended supervision order where satisfied to a high degree of probability that the offender poses a 'serious danger to the community', that is, there 'is an unacceptable risk that the prisoner will commit a serious sexual offence' if an order is not made.[23] The Queensland regime withstood constitutional challenge in *Fardon v Attorney-General (Qld),*[24] green lighting the introduction of similar regimes in Victoria, Western Australia, New South Wales and the Northern Territory.

In 2006, the New South Wales government moved to create its own legislative scheme for the post-sentence preventive detention and extended supervision of serious sex offenders. In March 2006 the Iemma Labor government introduced the Crimes (Serious Sex Offender) Bill 2006 (NSW). The Bill received bipartisan support and was viewed by various members of parliament as a necessary measure to protect the public from sex offenders and prevent the commission of future sex offences.[25] The Bill was directed at 'a handful of high-risk, hard-core offenders who have not made any attempt to rehabilitate whilst in prison'.[26] It passed each house of Parliament in one day.[27] This regime

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has expired, the Act provides for the Attorney-General to apply for a further order: s 22J.

23 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13.

24 (2004) 223 CLR 575. It was held that the powers conferred on the Supreme Court were not incompatible with that Court's exercise of federal jurisdiction under Chapter III of the Constitution.

25 See New South Wales, *Parliamentary Debates,* Legislative Assembly, 29 March 2006, 21730–2 (Sully), 21732 (Humpherson), 21735 (Brown); New South Wales, *Parliamentary Debates,* Legislative Council, 30 March 2006, 21801, 21819 (Kelly), 21804–5 (Clarke).

26 New South Wales, *Parliamentary Debates,* Legislative Assembly, 29 March 2006, 21729 (Sully).

was viewed by many parliamentarians as neither new nor novel,[28] neither 'extreme' nor 'unique'.[29] Rather, it was regarded as representative of new suite of initiatives undertaken by Australian and foreign governments. A Member of Parliament remarked that this legislative initiative formed:[30]

> part of a worldwide pattern to deal with a serious social problem… Governments around the world see this as a matter of high priority and legislation has moved in these new directions.

The *Crimes (Serious Sex Offender) Act* 2006 (NSW) commenced operation on 3 April 2006. At 1 September 2010, there were 27 offenders in New South Wales subject to extended supervision orders and 2 offenders detained pursuant to continuing detention orders.[31] Despite its initial focus on a small number of a specific category of offender, in March 2013, the New South Wales Parliament extended the *Crimes (Serious Sex Offender) Act* 2006 (NSW) to a new category of offender. The Crimes (Serious Sex Offenders) Amendment Bill 2013 (NSW) was introduced into Parliament to extend the regime of post-sentence preventive

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27 The Bill was introduced into and passed the Legislative Assembly on 29 March 2006. The following day, 30 March 2006, the Bill was introduced into the Legislative Council and passed without amendment.

28 New South Wales, *Parliamentary Debates,* Legislative Assembly, 29 March 2006, 21732 (Humpherson).

29 New South Wales, *Parliamentary Debates,* Legislative Council, 30 March 2006, 21809 (Nile).

30 Ibid.

31 NSW Department of Justice and Attorney-General, *Review of the Crimes (Serious Sex Offenders) Act 2006* (November 2010), 20.

detention and supervision of serious sex offenders to high risk violent offenders, and to certain offences committed by children.[32]

The O'Farrell government introduced the 2013 Bill following a 2012 report of the NSW Sentencing Council that recommended the extension of the serious sex offender regime to high risk violent offenders.[33] The NSW Sentencing Council had been tasked with advising the Attorney-General 'on the most appropriate way of responding to risks posed by serious violent offenders'.[34] A majority of the Council considered that a gap existed in the New South Wales legislative framework in respect to high risk violent offenders, and that the introduction of a sentencing or post-custody management option for high risk violent offenders was 'necessary to protect the community'.[35] A majority of the Council considered that a post-sentence regime was preferable to a regime of indefinite sentencing.[36] There were three reasons for the majority's view: first, a risk assessment undertaken closer to release is more likely to be accurate than one undertaken at sentence; second, it is therefore more

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32 The Bill had two stated objects:

(a) to provide for the continued supervision and detention of high risk violent offenders in appropriate cases (in addition to serious sex offenders, as is presently the case), and

(b) to permit orders to be made for the continued supervision and detention of an adult offender convicted of an offence as a child in appropriate cases.

See Explanatory Note, Crimes (Serious Sex Offenders) Amendment Bill 2013 (NSW) 1.

33 NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (May 2012) chs 4 & 5.

34 Its terms of reference included advising on 'options for and the need for post sentence management of serious violent offenders': NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (May 2012) [1.1].

35 Ibid 124–5.

36 Ibid 141.

likely that the regime will apply only to those who pose a high risk to the community prior to release; and, third, 'it is unsatisfactory' that New South Wales is the only Australian jurisdiction to lack a 'clear legislative mechanism to deal with' high risk violent offenders.[37]

The 2013 amendments were the subject of four days debate, two in each House.[38] The 2013 Bill passed Parliament in mid-March with bipartisan support, and commenced operation on 19 March 2013. Consequently, the *Crimes (Serious Sex Offender) Act* 2006 (NSW) has been renamed the *Crimes (High Risk Offenders*) *Act* 2006 (NSW). From the commencement of the regime to November 2013, three extended supervision orders have been made against high risk sex offenders,[39] and one high risk violent offender has been the subject of two interim extended supervision orders.[40]

B *The High Risk Offender Legislative Framework*

The *Crimes (High Risk Offenders) Act* 2006 (NSW) creates a comprehensive regime for the ongoing supervision and detention of high risk offenders at the completion of the term of a custodial sentence and,

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37 Ibid.

38 I have not counted the introduction and first reading of the Bill as these did not involve any debate.

39 *State of New South Wales v Fisk* [2013] NSWSC 364 (28 March 2013) (this was a further extended supervision order, Fisk was subject to a supervision order under the prior regime); *State of New South Wales v Stevenson* [2013] NSWSC 1070 (8 August 2013); *State of New South Wales v Green (Final)* [2013] NSWSC 1003 (26 July 2013).

40 *State of New South Wales v Lynn* [2013] NSWSC 1147 (15 August 2013); *State of New South Wales v Lynn* [2013] NSWSC 1346 (12 September 2013).

subsequently, at the completion of the term of an existing extended supervision or continuing detention order. The Act creates two categories of high risk offender, 'high risk sex offenders' and 'high risk violent offenders', in respect of whom two types of orders may be made: extended supervision orders and continuing detention orders.[41] An extended supervision order imposes obligations on an offender when released from custody, which may include electronic tagging and not residing in specific locations.[42] A continuing detention order requires a person to remain in custody at the completion of a term of imprisonment or of an existing detention order, and may be imposed upon breach of an extended supervision order or where altered circumstances mean that adequate supervision cannot be provided under an extended supervision order.

The Act establishes an identical three step process for the issuance of an extended supervision order and a continuing detention order: first, an application must be made by the Attorney-General to the Supreme Court;[43] second, the Supreme Court conducts a preliminary hearing within 28 days of the filing of the Attorney-General's application;[44] and third, the Supreme Court determines the application in a substantive hearing. The Court is empowered to make interim as well as final

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41 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5B(1), 5E(1).

42 The non-exclusive list of conditions that may be imposed pursuant to an extended supervision order are set out in s 11 of the *Crimes (High Risk Offenders) Act 2006* (NSW).

43 The Attorney-General is entitled to act on behalf of the State of New South Wales for the purposes of the Act: *Crimes (High Risk Offenders) Act 2006* (NSW) s 24A. No other person has been prescribed by the regulations to so Act.

44 Unless the Supreme Court allows further time: ibid ss 7(3), 15(3).

extended supervision and detention orders, and appeal lies to the Court of Appeal from any determination of the Supreme Court to make, or refuse to make, an extended supervision order or a continuing detention order.[45]

The Attorney-General may only apply to the Court for an extended supervision order in the last 6 months of the offender's current custody or supervision.[46] An application for a continuing detention order against an offender may only be made in the 6 months before the completion of the offender's total sentence or 'the expiry of an existing continuing detention order'.[47] The Attorney-General's application must be supported by prescribed documentation, which includes a report of a psychiatrist, psychologist or medical practitioner assessing 'the likelihood of the offender committing' a further serious sex offence, in the case of a high risk sex offender, or a further serious violence offence, in the case of a high risk violent offender.[48]

The Attorney-General may only apply for an extended supervision order in respect of a 'supervised sex offender' or a 'supervised violent offender'.[49] A 'supervised sex offender' is a sex offender who is in custody or under supervision:[50]

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45 Ibid s 22.
46 Ibid s 6(2).
47 Ibid ss 13B(3), 13C(3).
48 Ibid ss 6, 14.
49 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5H–5J, 24A.
50 Ibid s 5I.

(a) while serving a sentence of imprisonment:

(i) for a serious sex offence, or

(ii) for an offence of a sexual nature, or

(iii) for another offence which is being served concurrently or consecutively, or partly concurrently and partly consecutively, with one or more sentences of imprisonment referred to in subparagraph (i) or (ii), or

(b) pursuant to an existing extended supervision order or continuing detention order.

A 'supervised violent offender' is defined as a violent offender who is in custody or under supervision, serving a sentence of imprisonment for a serious violence offence, for breach of an extended supervision order or for another offence being served concurrently or consecutively, or partly thereof, with either of first two named offences, or is currently subject to an extended supervision or continuing detention order.[51] In respect of both categories of offenders, a person is taken to be serving a sentence of imprisonment whether it is being served by way of full-time detention, intensive correction in the community, home detention, whether the offender is in custody or released on parole.[52]

51 Ibid s 5J.

52 Ibid s 5I(3), s 5J(3).

The Act also defines 'sex offender', 'violent offender' and 'serious sex offences' and 'serious violence offences'. A sex offender is defined as a person who is 'over the age of 18 years who has at any time been sentenced to imprisonment following his or her conviction of a serious sex offence'.[53] The Act similarly defines a violent offender as a person over 18 years of age 'who has at any time been sentenced to imprisonment' following a conviction for a serious violence offence.[54] The only distinction between the two categories of offenders relates to the respective qualifying offences: whereas the Act defines serious sex offence according to a list of prescribed offences, a serious violence offence is defined according to the harm caused by the offence.

A 'serious sex offence' is defined as one that falls within a list of offences specified in s 5 of the Act. These include offences against an adult or child contained in Division 10 (Offences in the nature of rape, offences relating to other acts of sexual assault) of Part 3 of the *Crimes Act 1900* (NSW) that are punishable by imprisonment for 7 years, and where against an adult the offence is committed in circumstances of aggravation.[55] A serious sex offence includes, amongst other things,

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53 *Crimes (High Risk Offenders) Act 2006* (NSW) s 4.

54 Ibid.

55 Ibid s 5(1)(a)(i)–(ii); The further offences identified are: an offence under s 61K (Assault with intent to have sexual intercourse) or s 61EA (Persistent sexual abuse of a child) of the Crimes Act: s 5(1)(a1); any of the following offences, where committed with intent to commit an offence under Div 10, Pt 3 that is punishable by 7 years or more: using intoxicating substance to commit an indictable offence, s 38; kidnapping with the intention of committing a serious indictable offence, s 86 (1)(a1); enters any dwelling-house, with intent to commit a serious indictable offence there, s 111; breaking into a house and committing indictable offence, s 112; breaking into a house with intent to commit indictable offence, s 113; armed with any weapon, or instrument, with

offences committed outside of New South Wales that would be serious sex offences if committed in the jurisdiction.[56]

In contrast, the Act defines a 'serious violence offence' according to the harm caused by the offence. That is, a serious violence offence is a serious indictable offence 'that is constituted by a person':[57]

> (a) engaging in conduct that causes the death of another person or grievous bodily harm to another person, with the intention of causing, or while being reckless as to causing, the death of another person or grievous or actual bodily harm to another person, or
>
> (b) attempting to commit, or conspiring with or inciting another person to commit, an offence of a kind referred to in paragraph (a).

A serious indictable offence is an indictable offence punishable by life imprisonment or imprisonment for five or more years.[58] For the purposes of the *Crimes (High Risk Offenders) Act 2006* (NSW), this includes an offence committed outside of New South Wales that would be a serious indictable offence if committed in New South Wales.[59]

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intent to commit an indictable offence, s 114: s 5(1)(b).

56 *Crimes (High Risk Offenders) Act 2006* (NSW) s 5(1)(c)–(d).

57 Ibid s 5A (1).

58 *Crimes Act 1900* (NSW), s 4.

59 *Crimes (High Risk Offenders) Act 2006* (NSW) s 5A (3).

As noted above, an application for an extended supervision order may only be made in respect of a 'supervised sex offender'. A 'supervised sex offender' is defined to include a sex offender who is serving a sentence of imprisonment for a serious sex offence or an offence of sexual nature.[60] An offence of a sexual nature encompasses offences of lesser severity than serious sex offences, such as breach of an extended supervision order, loitering by convicted child sexual offenders near premises frequented by children, and any offences contained in Division 10 of Part 3 of the *Crimes Act 1900* (NSW).[61] Serious sex offences, by contrast, are only those contained in Division 10 of Part 3 that are punishable by imprisonment of 7 years or more and, if the offence is against an adult, committed in aggravated circumstances.

A continuing detention order may be applied for in respect of a 'detained' or 'supervised' sex offender or violent offender.[62] A 'detained' sex or violent offender is a sex or violent offender who is, at the time of the application, in custody in a correctional centre either pursuant to an existing continuing detention order or serving a sentence of imprisonment by way of full-time detention for, in the case of a sex offender, a serious sex offence or offence of a sexual nature or, for a violent offender, a serious violence offence or an offence for breach of a continuing supervision order.[63] For the purposes of continuing

60 Ibid s 5I.
61 Ibid s 5(2). Offences contained in division 10 of part 3 of the *Crimes Act 1900* (NSW) include: indecent assault (s 61L), act of indecency (s 61N).
62 Ibid s 13A–C.
63 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 13B(2), 13C(2).

detention orders, the definition of 'supervised sex offender' and 'supervised violent offender' differ from those provided in respect of extended supervision orders. A supervised sex or violent offender is here defined as a sex or violent offender subject to a supervision order who has been found guilty of the offence of breaching an extended supervision order or, 'because of altered circumstances, cannot be provided with adequate supervision under an existing' supervision order.[64]

At the preliminary hearing, if the Court is satisfied that 'the matters alleged in the supporting documentation would, if proved, justify the making of' an extended supervision or continuing detention order, the Court must appoint two psychiatrists or registered psychologists, or a combination of both, to undertake separate examinations of the offender.[65] If the Court is not satisfied that the matters alleged would justify the making of an order, the Court must dismiss the application.[66] This preliminary hearing does not involve the Court in 'weighing the documentation or predicting the ultimate result',[67] but is more akin to the 'prima facie case' test for committal proceedings in the Magistrates Court in New South Wales.[68]

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64 Ibid ss 13B (4), 13C (4).

65 Ibid ss 7(4), 15(4).

66 Ibid ss 7(5), 15(5).

67 *Attorney-General (NSW) v Tillman* [2007] NSWCA 119, [98]; NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (May 2012) [4.148].

68 *Attorney-General (NSW) v Hayter* [2007] NSWSC 983, [6]; NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (May 2012) [4.148].

Where an application is not dismissed at the preliminary hearing, the Supreme Court determines the application in a substantive hearing. The Court may only make an order for the extended supervision of an offender if he or she meets the statutory definition of 'high risk sex offender' or 'high risk violent offender'.[69] The Supreme Court may only make an order for continuing detention where the offender meets this definition and the Supreme Court is satisfied that adequate supervision will not be provided by an extended supervision order.[70] Thus, for the issuance of a continuing detention order, the applicant must further establish that a supervision order is insufficient to alleviate the risk posed by the offender.[71]

A 'high risk sex offender' is defined as a 'sex offender' in respect of whom:[72]

> the Supreme Court is satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a serious sex offence if he or she is not kept under supervision.

The Act similarly defines a 'high risk violent offender' as a 'violent offender' who the Supreme Court is satisfied, to a high degree of

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69 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5B(1), 5C, 5E(1), 5F.

70 Ibid ss 5D, 5G.

71 NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (May 2012) [4.152].

72 *Crimes (High Risk Offenders) Act 2006* (NSW) s 5B(2).

probability, poses an unacceptable risk to the community if not supervised.[73]

In determining whether the offender poses an unacceptable risk, the Act stipulates that the Court is not required to determine that 'the risk of a person committing a' serious sex or violence offence 'is more likely than not'.[74] The applicant bears the onus of establishing the offender poses an 'unacceptable risk' to the community.[75] The Act provides that the proceedings before the Supreme Court are civil proceedings and to be conducted according to the law and rules of evidence relating to civil proceedings, unless otherwise provided by the Act.[76]

At the substantive hearing for an extended supervision order, the Supreme Court may either make an extended supervision order or dismiss the application. In respect to continuing detention orders, the Supreme Court is empowered to determine an application by making an extended supervision order, a continuing detention order or by dismissing the application.[77] The Supreme Court may issue both a continuing detention order and extended supervision order in respect to the same person at the same time, with the latter commencing on the expiration of the former.[78] In determining whether or not to make a

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73 Ibid s 5E(2).
74 Ibid ss 5B(3), 5E(3).
75 NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (May 2012) [4.151].
76 *Crimes (High Risk Offenders) Act 2006* (NSW) s 21.
77 Ibid ss 9, 17.
78 Ibid s 25B.

continuing detention or extended supervision order, the Court must have regard to an enumerated list of prescribed matters as well as any other matter it considers relevant.[79] The prescribed matters include the safety of the community, medical reports and any other available information as to the likelihood of reoffending and the offender's criminal history.[80]

A Court may make an extended supervision order for a term of up to five years, and subsequent extended supervision orders may be made against the same offender.[81] The conditions that may be imposed pursuant to an extended supervision order include reporting to corrective services, participating in treatment, not engaging in specific conduct or specific employment, not residing in specific locations or associating with specified persons, electronic tagging and residing at a particular address.[82] It is an offence to fail to comply with the requirements of an interim or extended supervision order punishable by two years imprisonment or a fine or both.[83] A continuing detention order may be made for a term of up to five years and subsequent continuing detention orders may be made against the same offender.[84]

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79 Ibid ss 9(3), 17(4).
80 Ibid.
81 Ibid s 10.
82 Ibid s 11.
83 Ibid s 12.
84 Ibid s 18.

III Anticipatory Action in Domestic Law: The Post-Sentence Restraint of High Risk Offenders

Building on Chapter Three, this section examines where the high risk offender provisions fall on the spectrum of anticipatory action in domestic law. That is, whether they amount to pre-emption as anticipatory self-defence, prevention or Bush pre-emption. The purpose of this inquiry is to provide a basis from which to compare the preventive measures studied in this thesis and thereby to assess whether and how control orders are novel. This inquiry will also, as will be discussed in Chapter Seven, contribute to consideration of whether the spectrum of anticipatory action is a useful way to distinguish between domestic laws and what the case studies reveal about the utility of the preventive state concept as a way to read developments in Australian law.

In order to assess where the provisions of the high risk offender regime falls on the spectrum of anticipatory action, this following sections examine the knowledge premise underlying the high risk offender legislative regime, and the knowledge and harm thresholds for intervention. In exploring these different angles to the regime, this chapter argues that the post-sentence preventive detention and ongoing supervision of high risk offenders exhibits features of both prevention and Bush pre-emption.

A *Knowledge Premise*

The regime for the post-sentence preventive detention and ongoing supervision of high-risk offenders assumes that it is possible to assess the risk an individual poses, to intervene and adopt a method to neutralise the risk: incapacitation or supervision in the community. It evinces risk thinking, requiring the Court to assess the likelihood and degree of the threat posed by the individual before making an order. In this respect, this regime aligns with Massumi's account of prevention.

Assessment of risk is central to the *Crimes (High Risk Offenders) Act 2006* (NSW). On the one hand this is a function of the future orientation of the law. As Callaway AP remarked in *TSL v Secretary to Department of Justice* (Buchanan JA and Coldrey AJA concurring) in respect of the Victorian regime:[85]

> Because it was concerned with the future, Parliament could not require the court to be satisfied that the offender will commit a relevant offence. All that the Court could be satisfied of is that the offender is likely to do so or that there is a risk that the offender will do so.

The centrality of risk assessment is evident in the threshold test of 'high

[85] (2006) 166 A Crim R 69, [9] quoted in *Tillman v Attorney-General (NSW)* (2007) 178 A Crim R 133, 144 (Giles and Ipp JJA).

risk violent offender' and 'high risk sex offender'. In respect of each type of offender the Court must be satisfied to a high degree of probability that, if not supervised, the offender poses an 'unacceptable risk' of committing a future relevant offence.[86] As Mason P made clear in *Tillman* this predictive inquiry is 'specific to the particular offender', 'implicitly addresses the time frame within which the Court's order can operate' and is 'referable to a single future event'—reoffending.[87] The regime assumes that the cause of the anticipated harm—a further serious sex or violence offence—is identifiable, arising from the individual, their commission of a past qualifying offence and their lack of rehabilitation and ongoing dangerousness. Unlike the control order regime, the offender must directly cause the future consequence—reoffending. That a third person might offend is irrelevant. In the Second Reading Speech to the 2013 Bill in the Legislative Council, Clarke said:[88]

> This bill recognises that there are serious violent offenders in our prisons who are nearing the end of their sentence who have made no attempt to rehabilitate themselves, or who have made it very clear to authorities that they intend to re-offend when they are released. The bill responds to this very clear danger and ensures the protection of the community from a clear risk.

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86 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5B(2), 5E(2).

87 *Tillman v Attorney-General (NSW)* (2007) 178 A Crim R 133, 135–6.

88 New South Wales, *Parliamentary Debates,* Legislative Council, 12 March 2013, 18328–9 (Clarke).

The harm is thus conceived of as a 'known unknown', further supporting the contention that the regime aligns with prevention.

The regime is predicated on the assumption that it is possible to assess the risk an individual poses and adopt a method to neutralise that risk: incapacitation pursuant to a continuing detention order or appropriate supervision in the community. While rehabilitation is an object of the regime, it is secondary to incapacitation and supervision to protect the community. The *Crimes (High Risk Offenders) Act* 2006 (NSW) contains two ranked objects:[89]

> (1) The primary object of this Act is to provide for the extended supervision and continuing detention of high risk sex offenders and high risk violent offenders so as to ensure the safety and protection of the community.
>
> (2) Another object of this Act is to encourage high risk sex offenders and high risk violent offenders to undertake rehabilitation.

Interestingly, when enacted the *Crimes (Serious Sex Offenders) Act* 2006 (NSW) had the twin and equally weighted objectives: 'to ensure the safety and protection of the community' and 'to facilitate the rehabilitation of offenders'.[90] In 2007 amending legislation was passed

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89 *Crimes (High Risk Offenders) Act 2006* (NSW) s 3.

90 *Crimes (Serious Sex Offender) Act 2006* (NSW) s 3.

to clarify that the 'primary' object of the Act is to provide for the extended supervision and continuing detention of serious sex offenders to ensure community safety and protection and 'another object' is to encourage rehabilitation.[91]

The *Crimes (High Risk Offenders) Act 2006* (NSW) mandates that a risk assessment be conducted by nominated professionals and stipulates the types of risk assessment that may be taken into account by the Court. At the preliminary hearing stage, if satisfied that the matters alleged would justify an order the Court must appoint:[92]

> (i) 2 qualified psychiatrists, or
>
> (ii) 2 registered psychologists, or
>
> (iii) 1 qualified psychiatrist and 1 registered psychologist, or
>
> (iv) 2 qualified psychiatrists and 2 registered psychologists,
>
> to conduct separate psychiatric or psychological examinations (as the case requires) of the offender and to furnish reports to the Supreme Court on the results of those examinations.

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91 *Law Enforcement and Other Legislation Amendment Act* 2007 (NSW) sch 3; New South Wales, *Parliamentary Debates,* Legislative Assembly, 5 December 2007, 5192 (Campbell).

92 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 7(4), 15(4).

In determining an application for either type of order, the Court must have regard to these reports and a number of prescribed matters including:[93]

> (c) the results of any other assessment prepared by a qualified psychiatrist, registered psychologist or registered medical practitioner as to the likelihood of the offender committing a further relevant offence, the willingness of the offender to participate in any such assessment, and the level of the offender's participation in any such assessment,
>
> (d) the results of any statistical or other assessment as to the likelihood of persons with histories and characteristics similar to those of the offender committing a further relevant offence.

Similar to mental health involuntary detention, as will be discussed in Chapter Six, this occurs despite the impossibility of accurately determining the risk an individual poses.[94] Justice Kirby was emphatic in *Fardon v Attorney-General (Qld)*:[95]

> Experts in law, psychology and criminology have long recognized the unreliability of predictions of criminal dangerousness (189). In

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93 Ibid ss 9(3)(c)-(d), 17(4)(c)-(d).

94 See, for example, Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention* (Routledge 2014) 34-52; Bernadette McSherry, 'Risk Assessment by Mental Health Professionals and the Prevention of Future Violent Behaviour' *Trends and Issues in Crime and Criminal Justice No 281* (July 2004).

95 (2004) 223 CLR 575, 623 (footnotes omitted).

a recent comment, Professor Kate Warner remarked (190):

> "[A]n obstacle to preventive detention is the difficulty of prediction. Psychiatrists notoriously overpredict. Predictions of dangerousness have been shown to have only a one-third to 50% success rate (191). While actuarial predictions have been shown to be better than clinical predictions—an interesting point as psychiatric or clinical predictions are central to continuing detention orders—neither are accurate."

Judges of this Court have referred to such unreliability (192). Even with the procedures and criteria adopted, the Act ultimately deprives people such as the appellant of personal liberty, a most fundamental human right, on a prediction of dangerousness, based largely on the opinions of psychiatrists which can only be, at best, an educated or informed "guess" (193).

As noted in Chapter Three, scholars have argued that the impossibility of accurate predictions of future harm means that regimes based on predictions of future harm can only be aligned with Bush pre-emption.[96] However, the high risk offender regime nonetheless

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[96] See for example discussion in Part II of Chapter Three; Jude McCulloch and Sharon Pickering, 'Counter-Terrorism: The Law and Policing of Pre-emption' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 13;

assumes—however inaccurately—that the risk an individual poses of committing a further serious sex or violence offence is assessable by medical professionals and decision makers, aligning more with prevention and risk thinking than Bush pre-emption and precautionary thinking. Indeed, the regime assumes that the risk an individual poses can be assessed and predicted with sufficient accuracy to found an order—and it enlists professionals to provide such an assessment. It assumes the cause of the harm is identifiable and that it is possible to intervene and adopt a method to neutralise that risk: incapacitation pursuant to a continuing detention order or appropriate supervision in the community. As such the regime aligns with Massumi's account of prevention.

B *Harm Threshold*

The harm threshold that justifies intervention—how proximate the harm must be before action is taken—contributes to the assessment of whether the provisions amount to pre-emption as anticipatory self-defence, prevention or Bush pre-emption. The harm sought to be averted by a continuing detention order and extended supervision order is particularised: a serious sex offence or serious violence offence. As outlined in Part II(B), a serious sex offence is defined one falling within a prescribed list of offences and a serious violence offence according to

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Lucia Zedner, 'Preventative Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems* 174, 191–2, 202–3.

the harm caused by the offence. A serious sex offence includes sex offences committed against an adult or child punishable by 7 years imprisonment and, where against an adult, committed in circumstances of aggravation.[97] A serious violence offence is an indictable offence punishable by imprisonment of 5 years or more 'that is constituted by a person':[98]

(a) engaging in conduct that causes the death of another person or grievous bodily harm to another person, with the intention of causing, or while being reckless as to causing, the death of another person or grievous or actual bodily harm to another person, or

(b) attempting to commit, or conspiring with or inciting another person to commit, an offence of a kind referred to in paragraph (a).

While the type of harm to be prevented is clearly identified, a further serious sex or violence offence, just how proximate the threat must be before an order is issued is somewhat opaque.

To make either type of order, the Court must be satisfied to the standard of 'high degree of probability' that the offender is a sex or violent offender and poses an 'unacceptable risk' of reoffending if not

97 *Crimes (High Risk Offenders) Act 2006* (NSW) s 5(1)(a)(i)–(ii).

98 Ibid s 5A (1). That is, a serious indictable offence. The *Crimes Act 1900* (NSW) defines a serious indictable offence as an indictable offence punishable by life imprisonment or imprisonment for 5 or more years: s 4.

supervised.[99] The Act further provides, in respect to both type of offender, that:[100]

> [t]he Supreme Court is not required to determine that the risk of a person committing a serious violence [/sex] offence is more likely than not in order to determine that the person poses an unacceptable risk of committing a serious violence[/sex] offence.

The NSW Sentencing Council, in its 2012 Report, outlined what was required in New South Wales to meet the statutory test of unacceptable risk. The *Crimes (High Risk Offenders) Act 2006* (NSW) retains the same test as existed for serious sex offenders in the *Crimes (Serious Sex Offenders) Act 2006* (NSW), therefore the Council's remarks remain relevant.[101] The NSW Sentencing Council outlined that the combined effect of the provisions is that the Court:[102]

> (a) must assess the probability of re-offending, however, need not be satisfied that the offender is 'more likely than not' to commit further relevant offences (295);[103] and

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99 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5B(2), 5E(2).

100 Ibid ss 5B(3), 5E(3).

101 *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 9(2)–(2A), 17(2)–(3A).

102 NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (May 2012) [4.160]. The (a) refers to the qualification in ss 5B(3), 5E(3), (b) to ss 5B(2), s5E(2) in the *Crimes (Serious Sex Offenders) Act 2006* (NSW). The *High Risk Offender Act* replicates the test provided for serious sex offenders in the *Crimes (Serious Sex Offenders) Act 2006* (NSW) in ss 9(2)–(2A), 17(2)–(3A).

103 Note (295) reads: 'See *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 9(2A), 17(3A); *New South Wales v Thomas (Preliminary)* [2011] NSWSC 118, [16];

(b) must determine, to a 'high degree of probability', whether the risk of re-offending is 'unacceptable'.

What amounts to 'unacceptable' is not statutorily defined. The question of what test the Court should apply to determine what is an acceptable and unacceptable risk has, unsurprisingly, been the subject of considerable case law and remains unresolved.[104]

The test of 'unacceptable risk' was introduced into the regime in December 2010 in an effort to clarify the law.[105] Prior to this, the test for the issuance of an extended supervision or continuing detention order in respect of a serious sex offender was whether the Court was satisfied to a 'high degree of probability that the offender is likely to

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quoted with approval in *New South Wales v Richardson (No 2)* [2011] NSWSC 276, [30].'

104 In a study of the different approaches adopted to determining what amounts to 'unacceptable', the NSW Sentencing Council analysed the case law as follows:

> The cumulative result of these cases is:
>
> (a) Hulme J's early interpretation of an unacceptable risk as one that 'does not ensure the adequate protection of the community' has garnered some support in the context of preliminary hearings, although it has been criticized as 'glossing' the statutory language.
>
> (b) Despite the fact that RA Hulme J explicitly declined to express an opinion on the interpretation of 'unacceptable risk' in the final hearing of Thomas, his 'ordinary meaning' approach in that case was adopted by McCallum J in the preliminary hearing context and by Fullerton J in a final hearing.
>
> (c) The 'balancing' test adapted by Davies J from the WA jurisprudence has been rejected in the preliminary hearing context, however, adopted in the final hearing context by Hoeben J.

NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (May 2012) [4.170], see generally [4.160]-[4.170]; Following the commencement of the *Crimes (High Risk Offender) Act 2006* (NSW), the balancing test was applied by Beech-Jones J in relation to a final hearing of an extended supervision order: *State of New South Wales v Fisk* [2013] NSWSC 364 (28 March 2013), [20]–[21]. The adoption of the balancing test was not challenged by counsel.

105 *Crimes (Serious Sex Offenders) Amendment Act* 2010 (NSW).

commit a further serious sex offence if he or she is not kept under supervision'.[106] The meaning of 'likely' was considered by the Court of Appeal in *Tillman v Attorney-General (NSW)* in an appeal against a continuing detention order.[107] For reasons of comity, Giles and Ipp JJA adopted the construction given to a comparable Victorian provision by the Victorian Court of Appeal in *TSL v Secretary to Department of Justice*.[108] In *TSL* Callaway AP (Buchanan JA and Coldrey AJA concurring) remarked:[109]

> It is understandable that Parliamentary counsel would have chosen the word "likely" in relation to a future state of affairs but almost inconceivable that Parliament would have intended that word to bear its ordinary meaning. All too many offenders are likely, in that sense, to commit a relevant offence. A person subject to an extended supervision order is a prisoner in all but name. The threshold would be far too low, in a free society, if a Court had a discretion to make an extended supervision order simply because it was satisfied that there was "a substantial—'real and not remote'—

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106 Ibid ss 9(2), 17 (2). See also NSW Department of Justice and Attorney-General, *Review of the Crimes (Serious Sex Offenders) Act 2006* (November 2010) 34.

107 (2007) 178 A Crim R 133.

108 (2006) 166 A Crim R 69. The Victorian legislation was the *Serious Sex Offenders Monitoring Act 2005* (Vic). Section 11(1) provided that 'A Court may only make an extended supervision order in respect of an offender if it is satisfied, to a high degree of probability, that the offender is likely to commit a relevant offence if released…' See *Tillman v Attorney-General (NSW)* (2007) 178 A Crim R 133, 144, 147 (Giles and Ipp JAA). I note that Mason P dissented in *Tillman*, arguing that comity did not require the NSW Court of Appeal to follow the Victorian decision. Mason P also regarded 'likely' to mean 'more probable than not': 136–40.

109 Quoted in *Tillman v Attorney-General (NSW)* (2007) 178 A Crim R 133, 146 (Giles and Ipp JJA).

> chance" of his or her re-offending. That is why the word "likely" in s 11(1) is used in a sense of a high degree of probability.

That an offender is likely to reoffend—in the ordinary meaning of 'likely'—bears some similarity to the reasoning in the control order cases that created the assumption that because a person has participated in training with a terrorist organisation, they are a resource to be 'tapped' by others. However, as Callaway AP made clear in the above quote, the Court in *TSL* preferred a different construction of 'likely' to mean 'high degree of probability'. Callaway AP further construed:[110]

> "likely" to mean "probable" in the sense of "a high degree of probability", but not necessarily involving a degree of probability of more than 50%.

Following *TSL,* Giles and Ipp JJA held in *Tillman*:[111]

> that the word "likely" in s 17(2) and (3) denotes a degree of probability at the upper end of the scale, but not necessarily exceeding 50%.

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110 Quoted in ibid, 145 (Giles and Ipp JJA).

111 Ibid 147; see also NSW Department of Justice and Attorney-General, *Review of the Crimes (Serious Sex Offenders) Act 2006* (November 2010) 35; New South Wales, *Parliamentary Debates,* Legislative Council, 24 November 2010, 28043 (Hatzistergos); Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (Routledge, 2014) 157–8.

Interestingly, in the 2008 decision of *RJE v The Secretary to the Department of Justice* the Victorian Court of Appeal preferred yet a different construction: interpreting 'likely' to mean 'more likely than not'.[112] The Victorian government responded by providing statutory guidance on the word 'likely' in accordance with the interpretation of the Court in *TSL*.[113] In 2009, the Victorian test was changed to one of 'unacceptable risk' of reoffending, aligning it with the Queensland regime.[114]

In New South Wales, the 2010 Statutory Review recommended the replacement of the likelihood test with one of 'unacceptable risk' bringing the New South Wales scheme in line with the Victorian and Queensland equivalents.[115] In doing so, the authors of the 2010 Statutory Review cited the Victorian Sentencing Council's explanation for advocating the change from the likelihood to unacceptable risk test in that jurisdiction:[116]

> The Council continues to be concerned that couching the test in terms of "likelihood" runs the risk of blurring the legal and forensic test and will result in a test that may, in fact, be less transparent than one that recognises the true nature of the exercise—to assess

112 [2008] VSCA 265 (18 December 2008), [21], [26]–[53[Maxwell P and Weinberg JA, [97]–[120] Nettle JA.

113 NSW Department of Justice and Attorney-General, *Review of the Crimes (Serious Sex Offenders) Act 2006* (November 2010) 35–6.

114 *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 9(1).

115 NSW Department of Justice and Attorney-General, *Review of the Crimes (Serious Sex Offenders) Act 2006* (November 2010) 39.

116 Ibid 37.

> the danger a particular offender is believed to pose to the community. Mental health professionals have argued that it is never possible to determine that an individual is more likely than not to reoffend—only that the person falls into a "high-risk" group.

The *Crimes (Serious Sex Offenders) Amendment Act 2010* (NSW) also clarified 'the extent' to which the Court needed to be satisfied,[117] introducing the qualification that the Supreme Court is not required to determine that the risk of a person committing a further offence is 'more likely than not' to determine the person poses 'an unacceptable risk of committing a serious sex offence'.[118] This qualification is retained in the *Crimes (High Risk Offenders) Act* 2006 (NSW) in respect to both type of offender.[119]

While the test for what amounts to 'unacceptable' remains unresolved,[120] what is clear is that the probability of reoffending can be less than 50% and the risk remain unacceptable. As Davies J held in *State of NSW v Richardson (No. 2):* [121]

> I do not find that it is more likely than that that (sic) he will commit a further serious sex offence, but sub-s (3A) makes it

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117 New South Wales, *Parliamentary Debates,* Legislative Council, 24 November 2010, 28043 (Hatzistergos).

118 *Crimes (High Risk Offenders) Act 2006* (NSW) s 5B(3). This is a statutory version of the *Tillman* test.

119 Ibid ss 5B(3), 5E(3)

120 See footnote 104.

121 [2011] NSWSC 276, [93]–[94].

> unnecessary to find that it is more likely than not that he will do so before conclusion can be reached that he poses an unacceptable risk. Indeed, for reasons I will discuss, I think the likelihood of the defendant committing a further serious sex offence is low but that the risk remains unacceptable.

This reasoning is not dissimilar to that of the Federal Magistrates issuing control orders discussed in Chapter Four. While the language of risk is adopted, it moves closer to Bush pre-emption: intervention occurs on the basis of a distant threat that is conceivable or suspected. The risk that the individual poses may be low—the probability of reoffending less than 50%—and remain unacceptable, blurring the line between targeting an identified threat before it eventuates and targeting an emerging threat before it is fully formed. In this respect the regime is closer to Bush pre-emption, to intervening in respect of a threat that is emergent but not determinate, albeit that the source of the risk is known and the existence of the risk must be established to a high degree of probability.

C *Knowledge Threshold*

The knowledge threshold is contained in the statutory definition of high risk sex offender and high risk violent offender. The Court must be satisfied to a 'high degree of probability' that the offender is a sex or violent offender and poses an 'unacceptable risk' of reoffending if not

supervised.[122] The Act provides that the proceedings before the Supreme Court are civil,[123] and the applicant bears the onus of establishing to the satisfaction of the Court that the offender is poses an 'unacceptable risk'.

The Court must be satisfied to 'a high degree of probability'—a standard of proof between the criminal and civil standard. This is higher than the balance of probabilities standard that attaches to the interim and confirmed control order proceedings. The standard of high degree of probability is lower than the criminal standard of beyond reasonable doubt but higher than the civil standard of balance of probabilities.[124] In *Cornwall v Attorney-General (NSW)*, Mason P, Giles and Hodgson JJA found that:[125]

> The expression "a high degree of probability" indicates something "beyond more probably than not"; so that the existence of the risk, that is the likelihood of the offender committing a further serious sex offence, does have to be proved to a higher degree than the normal civil standard of proof, though not to the criminal standard of beyond reasonable doubt. On the other hand, the risk or likelihood itself does not have to be a probability to the civil standard of proof, but rather a sufficiently substantial probability

122 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5B(2), 5E(2).
123 Ibid s 21.
124 *Cornwall v Attorney-General (NSW)* [2007] NSWCA 374 [21]; see NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (May 2012) [4.171].
125 [2007] NSWCA 374, [21].

to satisfy the criterion 'likely' as explained in *TSL.*

Although the risk of reoffending can be less than 50%, the existence of the risk must be proved to the standard of more probable than not. In order to be satisfied to a high degree of probability, the Court considers a non-exhaustive list of factors which include community safety, actuarial risk assessments, medical reports assessing the offenders likelihood of re-offending, the offender's past participation in and current willingness to undertake treatment or rehabilitation programs, the offenders criminal history and views of the sentencing court. The Court is empowered to consider any other available information as to the likelihood 'that the offender will in future commit offences of a sexual nature…or serious violence offences'.[126]

The high risk offender scheme aligns in different respects with both prevention and Bush pre-emption. While an extended supervision or continuing detention order may be imposed where the threat of a sex or violence offence is considered inevitable as would satisfy prevention, the Court is not required to be satisfied that the offender is 'more likely than not' to commit further relevant offences. As such, it may relate to emergent and conceivable threats aligning with Bush pre-emption.

126 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 9(3)(i), 17(4)(i).

IV Contributions to Consideration of the Novelty and Reach of Australia's Anti-Terror Control Orders

The regime of post-sentence restraints of high risk offenders is an example of prevention that is connected to the criminal justice process that exhibits continuities with anti-terror control orders—both are pre-crime measures that share the purpose of protecting the public from an identified criminal harm and are issued in civil proceedings. Control orders and extended supervision orders also share the same design. They are both hybrid civil–criminal orders and they both enable the imposition of conditions of surveillance and control on the person against whom the order is made. The similarities evident between control orders and the orders available pursuant to the high risk offender regime casts doubt on claims that control orders are unprecedented and exceptional measures, suggesting instead that control orders, along with the high risk offender orders, fit within a pattern of preventive governance in Australia. However, this case study also illustrates that control orders nonetheless go further than the preventive measures available under the high risk offender regime and are exceptional in their reach.

This case study shows that in 2003, and prior the enactment of anti-terror control orders, extended supervision and continuing detention orders had already been introduced in Queensland. Like regimes were subsequently enacted in other Australian jurisdictions. The New South

Wales regime was by and large not viewed as novel or exceptional on enactment, nor was its extension to high risk violent offenders. These regimes form part of a long history of governmental action to protect the public from those deemed 'dangerous'. While the language of future harm and future law is of recent origin, the early dangerous offender laws were enacted to prevent the occurrence of future crime and thereby protect the community. They were also pre-crime measures, albeit imposed at sentence. What the brief history of dangerous offender laws illustrates is the variability, throughout history, of who is regarded as dangerous, of how dangerousness is assessed and of the best means to incapacitate 'the dangerous'.

Early dangerous offender laws targeted habitual offenders and sanctioned their indefinite detention at sentence. Who was regarded as 'dangerous' however quickly expanded to include professional criminals and, in particular, recidivist property offenders. It was not until the 1970s that 'dangerousness' came to be exclusively associated with repeat serious sex and violent offenders. It was also at this time, Pratt highlights, that questions of dangerousness began to adopt a future orientation. Habitually and public protection remained criterion upon which dangerous offender laws were based but they were accompanied by 'a growing interest in the kind of crime one might commit in the

future' made possible, significantly, by the growth of actuarialism and risk in the prediction of dangerousness.[127]

Post-sentence interventions can be understood as yet another variant on attempts to incapacitate and manage the dangerous, and one that is geared towards achieving the most accurate prediction of dangerousness and future offending. Rather than attempting to assess risk at the time of sentence, as do protective sentencing regimes, the post-sentence regimes enable the making of an order proximate to the expiration of the offender's sentence so as to facilitate the most reliable assessment of risk.

What is different about control orders is that they enable intervention in respect of potential threats, devoid of criminal conviction and with a greater emphasis on precaution than risk. These distinctions are no doubt a function of the aims of the regime and the context in which they operate—the high risk offender regime targets specific types of offenders, the control order regime does not. The high risk offender regime thus operates in a quasi-criminal justice context in which rehabilitation is emphasized, if not prioritised. To fall within the ambit of the regime, the offender must have been found guilty of a past relevant criminal offence and be serving a sentence. The Victorian Court of Appeal has remarked that a person subject to an extended

127 John Pratt, 'Dangerousness, Risk and Technologies of Power' (1995) 28 (3) *Australian and New Zealand Journal of Criminology* 3, 14.

supervision order remains 'a prisoner in all but name'.[128] Control orders, by contrast, operate in an intelligence context and, significantly, without an anchor in past criminal guilt.

While control orders do bear strong similarities to the post-sentence orders made against high risk offenders, this case study also reveals that there are a number ways in which control orders go further than the orders available under the high risk offender regime. While both measures target pre-crime acts, high risk offender orders may only be imposed post-sentence. The control order provisions are available at any point in the criminal process—before charge and after conviction and sentence. As noted in Chapter Four, the AFP considered control orders in relation to 25 individuals. The Independent National Security Legislation Monitor reported that the AFP 'considered and/or applied for' control orders in the following circumstances:[129]

post-conviction (2)

post-acquittal (1)

following withdrawal of criminal charges (1)

during a criminal trial against the contingency of acquittal (6)

where insufficient evidence existed to prosecute for terrorist offences (10)

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128 *TSL v Secretary of the Department of Justice* (2006) 14 VR 109, 113, 116 (Callaway AP, Buchanan JA and Coldrey AJA agreeing) quoted in *State of New South Wales* v *Tillman* [2008] NSWSC 1293, [57] (Johnson J).

129 Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20 December 2012) 13.

during a criminal investigation before charges had been brought

(5)

While both measures are hybrid civil–criminal orders, enabling the targeting of pre-crime acts, the control order provisions are issued on a lower standard of proof and attract a higher criminal sanction on breach. To make an extended supervision order the court must be satisfied to a high degree of probability that the offender is a high risk violent or sex offender. Failure to comply with the requirements of either an interim or extended supervision order is an offence punishable by two years imprisonment, a fine or both.[130] Control orders, by contrast, are issued on the balance of probabilities and carry a maximum penalty of five years imprisonment on breach.[131]

Further, the past conduct—the qualifying offence—that brings an offender within the high risk offender regime must have been proven to the criminal standard, beyond reasonable doubt, and with the enhanced procedural protections that apply to the criminal process. To fall within the *Crimes (High Risk Offenders) Act 2006* (NSW) and for an order to be made, the offender must have been found guilty of a qualifying offence and ongoing dangerousness must be established. Control orders require neither proof of a past criminal offence nor ongoing dangerousness. The past conduct to which a control order

130 *Crimes (High Risk Offenders) Act 2006* (NSW) s 12.

131 *Criminal Code* s 104.27.

refers—training with a terrorist organisation—need only be proved to the civil standard. This is despite the fact that this conduct may constitute a crime: it is an offence to provide or receive training connected with terrorist acts, irrespective of whether this training is related to a specific terrorist, under s 101.2 of the *Criminal Code*. A control order can also be made on a purely predictive basis, with no connection to past conduct, criminal or otherwise. In this respect the control order regime is distinct—and starkly so as it is imposed on a lower standard of proof and attracts a higher sanction on breach.

While both regimes seek to avoid the occurrence of an identified criminal harm—a serious sex or violence offence, or a terrorist act—the high risk offender regime is strictly limited to the anticipated future conduct of the person subject to the order. Control orders can be made on the basis of what a third person might do, and have been made where the controlee is regarded as vulnerable and 'at risk' of exploitation by others. While the high risk offender provisions may, like control orders, target a threat that has not emerged—the risk need not be more than 50% for it to be regarded as unacceptable—the source of the risk is clearly identified. The control order regime targets a *potential* threat; potential because the threat has not emerged and the source of the anticipated harm may be unknown.

While both regimes require the decision maker to undertake a predictive exercise, the nature of the assessment is different. This is largely a

function of the fact that for a control order to be issued, the anticipated harm need not be caused by or directly connected to the controlee. The predictive exercise undertaken by the issuing court involves consideration of what is 'reasonably necessary' to protect Australia from a terrorist act—not whether the individual is likely to commit a terrorist act. The high risk offender regime, in contrast, relies on professionals trained in psychiatry and psychology for an assessment of the risk the individual offender poses of committing a further relevant offence. It is interesting to note that this type of risk assessment has also been regarded as unusual as it is not anchored, for example, in symptoms of mental illness. Kirby J made clear in *Fardon v Attorney-General (Queensland)*:[132]

> These and related features of the Act illustrate the novelty of its provisions; their departure from the mental health exception for civil commitment deemed to fall short of "punishment"; and the free hand given to the psychiatric witnesses upon whose evidence the Act requires the State court to perform its function. In effect, the psychiatrists are allowed to estimate dangerousness without any accompanying requirement to anchor such estimations in an established mental illness, abnormality or infirmity (287).

Nonetheless, the assessment is still based on the risk posed by the offender of reoffending. Indeed, a key feature of the post-sentence

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132 (2004) 223 CLR 575, 639.

regime for high risk offenders is that it is geared towards achieving the most accurate prediction of future offending by imposing the order near the end of an offenders sentence. A control order, in contrast, can be made in the absence of contemporaneous evidence.

The similarities and continuities between the high risk offender and anti-terror control order regimes support consideration of control orders as forming part of a pattern of preventive governance practices, rather than as unprecedented and exceptional measures that may be isolated as a response to terrorism. This case study has also illustrated just how much further the control order provisions go—demonstrating the difference between Bush pre-emption and prevention on the spectrum of anticipatory action. In this way, control orders are exceptional in their reach when compared to the preventive measures contained in the high risk offender regime. There are, however, a number of differences between the two regimes that are a function of the different contexts and aims of the regimes. As will be discussed in Chapter Seven, these distinctions are important to understanding preventive governance and to consideration of the utility of the preventive state as a way to read developments in Australian law. They do not, however, undermine the insights that may be drawn from comparing preventive measures.

V CONCLUSION

This chapter has outlined the high risk offender legislative framework in New South Wales as an example of prevention connected to the criminal justice context. In Part II, this chapter provided a brief history of the preventive restraint of dangerous offenders, identifying that the concern with 'the dangerous' has occupied governments since the late 19th century. This chapter sketched the development of post-sentence regimes over the last two decades in a number of Australian jurisdictions. This type of post-sentence measure was first devised in relation to an individual offender, and subsequently revived in relation to a class of offender: serious sex offenders. New South Wales is the first jurisdiction to extend this type of liberty restraint beyond serious sex offenders to a new category of offender: high risk violent offenders. Part II provided an overview of the legislative framework in New South Wales that seeks to achieve protection of the community by restraining high risk offenders at the completion of their sentence where it is established they present an ongoing risk to the community.

This chapter assessed where the provisions for high risk offender post-sentence ongoing detention and supervision fell on the spectrum of anticipatory action in domestic law. In Part III, it was argued that the regime exhibits features of both prevention and Bush pre-emption. The regime evinces risk-thinking and assumes it is possible to assess with accuracy the risk an individual poses and adopt measures to neutralise

that risk typifying prevention. However, the Court is not required to be satisfied that it is 'more likely than not' that the offender will commit a further relevant offence, enabling the targeting of increasingly remote threats of harm and aligning closer to Bush pre-emption. However, it is important to note that the source of the threat of anticipated harm is identified. As such, it was argued in Part II that the regime exhibits features of both prevention and Bush pre-emption.

In Part IV, this chapter considered what the case study of the high risk offender regime contributes to consideration of whether control orders are novel or exceptional measures. Both regimes bear strong similarities—each involves the imposition of liberty restraints, consequent to civil proceedings, to preclude future harm; each has a crime prevention rationale and purpose of public protection. This chapter highlighted that the high risk offender regime is not a new development, but a contemporary variant of a long lineage of laws enabling preventive restraints to be imposed on dangerous offenders. Part IV also noted relevant distinctions between the regimes which will be further explored in Chapter Seven. Nonetheless, this chapter has argued that the continuities between the two regimes support viewing control orders as part of a pattern of preventive governance rather than as isolated and exceptional measures.

While fitting preventive governance practices in Australia, this case study has also shown that control orders are exceptional in their reach

when compared to the high risk offender regime—enabling restraints to be imposed in respect of a potential threat, by an unspecified other, and on a purely predictive basis. Further, while the past conduct—training with a terrorist organisation—does not need to be established to the criminal standard, or on the basis of contemporaneous evidence, control orders, issued on a lower standard of proof than an extended supervision order, attract a significantly higher maximum term of imprisonment on breach. In this way, control orders typify Bush pre-emption and precautionary thinking and go further than the orders available under the high risk offender regime.

This thesis now turns to the case study of involuntary detention of persons with mental illness in New South Wales as an example of prevention beyond the criminal justice system. Chapter Six investigates where the provisions for involuntary detention fall on the spectrum of anticipatory action in domestic law and what this contributes to consideration of the novelty and reach of anti-terror control orders.

—CHAPTER SIX—

INVOLUNTARY DETENTION OF PERSONS WITH MENTAL ILLNESS

I INTRODUCTION

This chapter examines the civil mental health legislative framework in New South Wales as an example of prevention beyond the anti-terror and criminal justice contexts.[1] The *Mental Health Act 2007* (NSW), and the *Mental Health Regulation 2007* (NSW) enacted pursuant to it, comprise the primary legislative framework for the care, treatment and control of persons with mental illness or disorder in mental health facilities and the community in New South Wales. The particular focus of this chapter is on the provisions of the *Mental Health Act 2007* (NSW) that provide for involuntary detention.

The involuntary detention of persons with mental illness is an archetypal example of the prevention of harm by the restraint of an individual's liberty, being both an historical and contemporary instance of preventive detention. The general rationale or strategy of prevention is present in legislative schemes that enable a person found to be mentally ill to be detained to protect themselves or others from serious harm. Etched over a long and at times tumultuous history, this form of

[1] Albeit, as noted in Chapter One, connections do exist between the civil mental health system and the criminal justice system. For example, s 22 of the *Mental Health Act 2007* (NSW) and ss 32 and 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) establish diversionary processes from the criminal justice system into the mental health system.

preventive detention has become a recognisable and largely accepted species of governmental intervention to prevent harm.

This chapter concentrates on the legislative framework in New South Wales, which is largely representative of provisions for involuntary detention available in all Australian states and territories,[2] and which has a lineage traceable to British settlement of Australia. As noted in Chapter One, these provisions are also heavily engaged in New South Wales. In 2011–12, 14 331 persons were involuntarily admitted to mental health facilities in New South Wales, and 3895 made the subject of an involuntary patient order pursuant to the *Mental Health Act 2007* (NSW).[3]

Involuntary detention thus provides a useful comparator against which to assess the novelty and reach of control orders: it has a long legislative history, is extensively used and stands outside of the criminal justice system. It has also, as was discussed in Chapter Three, been identified as forming part of the 'pre-emptive framework' that includes

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2 For a discussion of the different legislative regimes for the preventive detention of person with mental illness in Australian states and territories, see Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (Routledge, 2014) 65–77.

3 The figures for involuntary admission and involuntary patient orders include voluntary patients who were reclassified as involuntary: Mental Health Review Tribunal, *Annual Report of the Mental Health Review Tribunal for the period from 1 July 2011 to 30 June 2012,* Mental Health Review Tribunal (2012) 24, 36 <http://www.mhrt.nsw.gov.au/mhrt/pdf/Annualreportfinal2012.pdf>.

serious sex offender and anti-terror measures.[4] In Chapter Four it was argued that control orders are aligned with Bush pre-emption and, in Chapter Five, that the high risk offender regime exhibits features of both prevention and Bush pre-emption. Where the provisions for involuntary detention of persons with mental illness fall on the spectrum of anticipatory action will go to whether control orders are, by comparison, exceptional. Further, whether the civil mental health regime exhibits continuities with the anti-terror control order and high-risk offender regimes has the potential to inform understandings of the preventive state concept, and its utility as a way to read and understand developments in Australian law.

This chapter begins, in Part II, by briefly outlining the history and key provisions of the civil mental health legislative framework in New South Wales. In Part III this chapter draws on Chapter Three to assess where the provisions for involuntary detention fall on the spectrum of anticipatory action in domestic law. Building on Chapters Four and Five, Part V examines what the case study of involuntary detention of persons with mental illness contributes to consideration of the novelty and reach of anti-terror control orders.

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[4] See, for example, Jude McCulloch and Sharon Pickering, 'Counter-Terrorism: The Law and Policing of Pre-emption' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 13, 17.

II ARCHETYPAL PREVENTION: INVOLUNTARY DETENTION OF PERSONS WITH MENTAL ILLNESS

A *A Brief Historical Background to the Mental Health Act 2007 (NSW)*

The detention of persons with mental illness dates to the founding of the colony of New South Wales, drawing upon legal arrangements for the care and commitment of the mentally ill in the United Kingdom.[5] Governor Phillip was granted power, delegated from the Royal Prerogative, in respect of the custody and commitment of persons deemed to be mentally ill.[6] It was not until 1843, with the passage of the *Dangerous Lunatics Act 1843* (7 Vic No 14), that the colonial Parliament legislated in respect of persons with mental illness. This Act received Royal Assent on 12 December 1843 and was 'to make provision for the safe custody of and prevention of offences by persons

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5 For an account of the practice and laws of the United Kingdom in respect to persons with mental illness, see JH McClemens and JM Bennett, 'Comment: Historical Notes on the Law of Mental Illness in New South Wales' (1962) 4 *Sydney Law Review* 49, 50-53; Phillip Powell, *The Origins and Development of the Protective Jurisdiction of The Supreme Court of New South Wales* (The Francis Forbes Society for Australian Legal History, 2003), 1, 7; *Harry v Mental Health Review Tribunal* (1994) 33 NSWLR 315, 316-7 (Kirby P); *David by her Tutor the Protective Commissioner v David* (1993) 30 NSW LR 417, 421.

6 Phillip Powell, *The Origins and Development of the Protective Jurisdiction of The Supreme Court of New South Wales* (The Francis Forbes Society for Australian Legal History, 2003) 10; McClemens and Bennett assert that the law relating to persons with mentally illness in the infant colony was located in the Royal Prerogative and its statutory representations, common law writs, the decisions of the Court of Chancellery and one procedural law which can be said to be indisputably in force in the colony: JH McClemens and JM Bennett, 'Comment: Historical Notes on the Law of Mental Illness in New South Wales' (1962) 4 *Sydney Law Review* 49, 53.

dangerously Insane and for the care and maintenance of persons of unsound mind."[7]

The *Dangerous Lunatics Act 1843* (7 Vic No 14) drew upon the United Kingdom's *Criminal Lunatics Act of 1800* (39 & 40 Geo 3).[8] The *Criminal Lunatics Act of 1800* (39 & 40 Geo 3) was enacted in response to the attempted assassination of King George III by James Hadfield and was specifically designed to prevent crime.[9] Hadfield was acquitted by a jury on grounds of insanity. This Act was the first to statutorily prescribe the preventive detention of persons found not guilty by reason of mental illness at His or Her Majesty's pleasure,[10] a feature replicated in the *Dangerous Lunatics Act 1843* (7 Vic No 14).[11] The *Criminal Lunatics Act*

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7 *Dangerous Lunatics Act 1843* (7 Vic No 14).

8 See, for example: Mark Finnane, 'From Dangerous Lunatic to Human Rights?: The Law and Mental Illness in Australian History' in Catharine Coleborne and Dolly MacKinnon (eds), *'Madness' in Australia: Histories, Heritage and the Asylum* (University of Queensland Press, 2003) 23, 26–7; JH McClemens and JM Bennett, 'Comment: Historical Notes on the Law of Mental Illness in New South Wales' (1962) 4 *Sydney Law Review* 49, 60-61; Phillip Powell, *The Origins and Development of the Protective Jurisdiction of The Supreme Court of New South Wales* (The Francis Forbes Society for Australian Legal History, 2003) 15.

9 Richard Moran, 'The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800)' (1985) 19 (3) *Law & Society Review* 487; Gregory D Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900* (The Federation Press, 2002), ch 10; Mark Finnane and Susan Donkin, 'Fighting Terror with Law? Some Other Genealogies of Pre-emption' (2013) 2(1) *International Journal of Crime and Justice* 3, 5–7.

10 Richard Moran, 'The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800)' (1985) 19 (3) *Law & Society Review* 487, 513–4; *Criminal Lunatics Act of 1800* (39 & 40 Geo 3) c 94 ss 1-2.

11 *Dangerous Lunatics Act 1843* (7 Vic No 14) s 3; See also JH McClemens and JM Bennett, 'Comment: Historical Notes on the Law of Mental Illness in New South Wales' (1962) 4 *Sydney Law Review* 49, 60; Mark Finnane and Susan Donkin, 'Fighting Terror with Law? Some Other Genealogies of Pre-emption' (2013) 2(1) *International Journal of Crime and Justice* 3, 5–6; New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: an overview*, Consultation Paper No 5 (2010) 2 [1.1]–[1.12]; For discussion of the relationship between *Dangerous Lunatics Act 1843* (7 Vic No 14) and the McNaghten case, see Gregory D Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900* (The Federation Press, 2002), ch 10. In New South Wales, persons who are detained as a consequence of

of 1800 (39 & 40 Geo 3) also provided for the preventive confinement of a person prior to the commission of an offence, a feature also retained by the colonial Parliament in the *Dangerous Lunatics Act 1843* (7 Vic No 14).

The *Dangerous Lunatics Act 1843* (7 Vic No 14) provided that two Justices of the Peace could commit a person who was apprehended exhibiting a 'derangement of mind and a purpose of committing suicide or some crime' to a 'gaol house of correction' or public hospital upon two medical practitioners examining the person and forming an opinion that the person was 'a dangerous lunatic or a dangerous idiot'.[12] Discharge could only occur upon the order of two Justices, a Judge of the Supreme Court or upon transfer to a public asylum on the order of the Governor.[13] The *Dangerous Lunatics Act 1843* (7 Vic No 14) also provided for persons found to be insane, 'but not dangerously so', and in need of 'care and maintenance' to be sent to a 'lunatic asylum'.[14] The Governor could order this detention on the application of a relative or guardian, confirmed by a Supreme Court Judge and with the

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being found unfit to be tried or not guilty by reason of mental illness are currently provided for by a separate but related legislative regime contained in the *Mental Health (Forensic Provisions) Act 1990* (NSW). This Act also provides for the care, treatment and control of serving prisoners found to be suffering from mental illness: div 4.

12 *Dangerous Lunatics Act 1843* (7 Vic No 14) s 1.

13 Ibid; see also JH McClemens and JM Bennett, 'Comment: Historical Notes on the Law of Mental Illness in New South Wales' (1962) 4 *Sydney Law Review* 49, 61.

14 *Dangerous Lunatics Act 1843* (7 Vic No 14) s 11; see also Peter Shea, *Defining Madness* (Hawkins Press, 1999) 35.

certification of two medical practitioners that the person was of 'unsound mind'.[15]

It is from this Act that a lineage may be drawn to provisions for the involuntary detention of persons found to be mentally ill under civil mental health laws in New South Wales.[16] As Finnane has made clear:[17]

> The influence of the dangerous lunatics laws can be found beyond their significance as an early instance of preventive detention…The establishment of mandatory detention through medical certification in a judicial process defined what a lunatic was for a century or more—a person imprisoned rather than hospitalised. In spite of the inability of science then or now to predict dangerousness, the retention of compulsory confinement continued in what became known as 'involuntary admission'.

This lineage is, of course, punctuated by key changes to the process of involuntary admission and detention over the last century. These

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15 *Dangerous Lunatics Act 1843* (7 Vic No 14) s 11.

16 See, for example: Mark Finnane, 'From Dangerous Lunatic to Human Rights?: The Law and Mental Illness in Australian History' in Catharine Coleborne and Dolly MacKinnon (eds), *'Madness' in Australia: Histories, Heritage and the Asylum* (University of Queensland Press, 2003) 23; For detailed accounts of various aspects of the legislative history of mental health law in New South Wales, see Peter Shea, *Defining Madness* (Hawkins Press, 1999); Phillip Powell, *The Origins and Development of the Protective Jurisdiction of The Supreme Court of New South Wales* (The Francis Forbes Society for Australian Legal History, 2003); JH McClemens and JM Bennett, 'Comment: Historical Notes on the Law of Mental Illness in New South Wales' (1962) 4 *Sydney Law Review* 49.

17 Mark Finnane, 'From Dangerous Lunatic to Human Rights?: The Law and Mental Illness in Australian History' in Catharine Coleborne and Dolly MacKinnon (eds), *'Madness' in Australia: Histories, Heritage and the Asylum* (University of Queensland Press, 2003) 23, 27.

include: the removal of the distinction between the 'dangerously insane' and insane but 'not dangerously so' in 1878,[18] and the replacement of references to lunacy and insanity with mental illness in the 1950s;[19] changes to the legal model for mental health inquiries, with the movement from a formal 'Lunacy Court' to an informal Magistrate model in 1958,[20] and its replacement with a Tribunal model in 2010;[21] the introduction of the guarantee of legal representation in the *Mental Health Act* 1983 (NSW);[22] the introduction of a statutory definition of 'mental illness' by symptoms and excluded behaviour in 1990;[23] and the adoption of *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* by the United Nations in December 1991.[24]

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18 *Lunacy Act 1878* (NSW); Peter Shea, *Defining Madness* (Hawkins Press, 1999) 36–8.

19 References to 'lunacy' and 'insane' were removed from mental health legislative framework by the *Mental Health Act* 1958 (NSW).

20 *Lunacy Act 1898* (NSW), s 6(1); *Mental Health Act* 1958 (NSW) ss 12(6), (9).

21 From 21 June 2010 the Mental Health Review Tribunal acquired jurisdiction to conduct mental health inquiries by an amendment to the *Mental Health Act 2007* (NSW) by the *Courts and Crimes Legislation Further Amendment Act 2008* (NSW).

22 New South Wales, *Parliamentary Debates,* Legislative Assembly, 29 November 1983, 3853 (Foot). The Act provides that at mental health inquiries before the MHRT, a person must be represented by a legal practitioner unless he or she does not wish to have legal representation: *Mental Health Act* 2007 (NSW), s 154(2A). For a discussion of the role and experiences of lawyers in mental health hearings, see Terry Carney, Fleur Beaupert, Julia Perry, and David Tait, Advocacy and Participation in Mental Health Cases: Realisable Rights or Pipe-Dreams? (2008) 26 (2) *Law in Context* 125.

23 The introduction of this definition was a recommendation of the Deveson Committee, a steering committee formed in 1988 to report on the Mental Health Act: New South Wales, *Parliamentary Debates,* Legislative Assembly, 22 March 1990, 888 (Collins).

24 *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care,* GA Res 46/119, UN GAOR, 3rd Comm, 46th sess, 75th plen mtg, Agenda Item 98, Supp No 49, UN Doc A/RES/46/119 (17 December 1991); see also Peter Shea, *Defining Madness* (Hawkins Press, 1999) 17, 132–3.

There are further themes that distinguish the history of the detention and treatment of persons with mental illness in New South Wales and its current regime: the significant role played by, and complicity of, families and the community in the use of mental health law;[25] the introduction of voluntary patients in 1934 and the rise of a treatment model,[26] and the recognition of the rights of carers and persons subject to involuntary detention.[27] Further, while compulsory confinement remains a feature of the current New South Wales regime, it has moved from the preferred approach to one of last resort.[28] Involuntary admission and detention is now based on the principle of the least restrictive alternative: medical practitioners in New South Wales must not involuntarily admit, detain or continue to detain a person who is mentally ill if 'care of a less restrictive kind, that is consistent with safe

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25 Finnane, for example, has shown how in the 19th century the asylum was used in a number of ways, including to protect the person admitted, such as where the asylum served as a place of refuge for women suffering from domestic violence; and to protect others through a person's admission, such as where a violent husband's detention served to protect his family, or a child's admission served to hide family shame and to reform wayward children: Mark Finnane, 'Asylums, Families and the State' (1985) 20 *History Workshop* 134. See also Catharine Coleborne, 'Families, Insanity, and the Psychiatric Institution in Australia and New Zealand 1860–1914' (2009) 11 (1) *Health and History* 65.

26 In New South Wales voluntary patients were first introduced as a legislative category in 1934 by the enactment of the *Lunacy (Amendment) Act 1934* (NSW) which amended the *Lunacy Act of 1898* (NSW). Provision for voluntary patients as part of the legislative framework was chiefly driven by the second Inspector-General of the Insane, Dr Eric Sinclair, and subsequently by Inspector-General of Mental Hospitals, Dr Hogg: see Peter Shea, *Defining Madness* (Hawkins Press, 1999) 51, 53.

27 The *Mental Health Act 2007* (NSW) first introduced 'primary carer' into the mental health legislative framework, along with a package of rights and responsibilities of patients and carers, in response to recommendations made in a review of the 1990 legislation.

28 Mark Finnane, 'From Dangerous Lunatic to Human Rights?: The Law and Mental Illness in Australian History' in Catharine Coleborne and Dolly MacKinnon (eds), *'Madness' in Australia: Histories, Heritage and the Asylum* (University of Queensland Press, 2003) 23.

and effective care, is appropriate and reasonably available to the person'.[29]

The development of civil mental health legislation in New South Wales has also occurred against the backdrop of substantial changes in the mental health system over the course of the 20th century: deinstitutionalisation,[30] a shift in emphasis to patients' rights from therapeutic needs,[31] and what Allan identifies as a movement away from danger to society to risk of harm to self or others as the criterion for involuntary detention.[32] Legislation providing for the detention and treatment of the mentally ill in New South Wales has maintained, at

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29 *Mental Health Act* 2007 (NSW) s 12. In 2008, following the James review, the least restrictive alternative formulation was amended to include a requirement of consistency with safe and effective care. This applies to each stage of admission and ongoing detention. As the explanatory memorandum to the amending Bill made clear: 'it is a requirement to be satisfied that no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available': Explanatory Memorandum, Mental Health Legislation Amendment (Forensic Provisions) Bill 2008 (NSW) 7. In *S v South Eastern Sydney & Illawarra* (2010) NSWSC 178, a matter which raised the question of the meaning of least restrictive alternative in respect of a community treatment order, Brereton J held, at 40, that: '"Appropriate and reasonably available" treatment does not connote the very best treatment. So long as the alternative is appropriate and reasonably available and is consistent with safe and effective care, it matters not that it may not be the most desirable course of treatment'.

30 That is, 'the shift from hospital-based to community-based treatment': Alfred Allan 'The Past, Present and Future of Mental Health Law: A Therapeutic Jurisprudence Analysis' (2002) 20(2) *Law in Context* 24, 27. See also Mark Finnane, 'Opening Up and Closing Down: Notes on the End of the Asylum' (2009) 11(1) *Health & History* 9. The *Mental Health Act 2007* (NSW) currently provides for involuntary treatment in the community by a regime of Community Treatment Orders contained in Part 3. See also John Dawson, 'Community Treatment Orders and Human Rights' in Bernadette McSherry (ed), *International Trends in Mental Health Law* (Federation Press, 2008) 148; Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (Routledge, 2014) 143–146; Paddy Power, 'Community Treatment Orders: The Australian Experience' (1999) 10(1) *Journal of Forensic Psychiatry* 9.

31 Alfred Allan 'The Past, Present and Future of Mental Health Law: A Therapeutic Jurisprudence Analysis' (2002) 20(2) *Law in Context* 24, 27.

32 Ibid.

times, an uneasy combination of clinical and legal processes. It has charted changes in ideology towards persons with mental illness, which often preceded legislative change,[33] and has seesawed between a therapeutic or clinical model and a rights based or legal model of regulation.[34] In *Harry v Mental Health Review Tribunal* Kirby P, as he then was, stated:[35]

> [t]he history of mental health legislation...has often evinced a vacillation between a paternalistic "treatment" model, and a "due process" model, strictly protective of individual rights... The present Act [Mental Health Act 1990 (NSW)] contains features of each model.

This context informs the extent to which the *Mental Health Act 2007* (NSW) enables preventive restraints to be placed on the liberty of persons suffering from mental illness on the basis of predictions of future harm.[36]

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33 For example, legislative provision for voluntary patients was first introduced by the *Lunacy (Amendment) Act 1934* (NSW) which amended the *Lunacy Act of 1898* (NSW). This brought the legislative framework in line with practice at the time. For instance, between 1921–1934 Broughton Hall at Rozelle, a proclaimed hospital for the insane under the *Lunacy Act of 1898* (NSW), only admitted voluntary patients thereby operating outside of the Act: Peter Shea, *Defining Madness* (Hawkins Press, 1999) 51–57.

34 For a discussion of the issues relating to 'rights-based legalism' in the mental health context, and in the context of domestic and international human rights instruments including the United Nations Convention on the Rights of Persons with Disabilities, see the contributions to the edited collection: Bernadette McSherry and Penelope Weller (eds), *Rethinking Rights-Based Mental Health Laws* (Hart Publishing Ltd, 2010).

35 (1994) 33 NSWLR 315, 322.

36 See, for example: EC Fistein, AJ Holland, ICH Clare, MJ Gunn, 'A comparison of mental health legislation from diverse Commonwealth jurisdictions' (2009) 32(3) *International Journal of Law and Psychiatry* 147. The authors conduct a

B *The Civil Mental Health Legislative Framework*

The *Mental Health Act 2007* (NSW) establishes a comprehensive regime regulating the care, treatment and control of persons with mental illness or disorder. It provides for the admission of voluntary and involuntary patients, the detention and review of involuntary patients, coercive treatment in the community,[37] and the conduct of special medical treatments.[38] The Act also accords rights to patients in respect to treatment, appeals and access to information, and to their primary carers in respect to being informed and notified of certain information and events.[39] The Act prescribes two types of admission to a mental health facility: voluntary and involuntary.[40] The former, as the name

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comparative study of 32 mental health laws employed in jurisdictions in Commonwealth countries and find that 'differences in value judgments regarding underlying principles, attitudes to mental disorder, and resource availability may all contribute to variation in criteria for involuntary treatment': 153.

37 In Part 3, *Mental Health Act 2007* (NSW) provides for the issuance of Community Treatment Orders (CTOs) that mandate involuntary treatment in the community. The Tribunal may make a CTO at a mental health inquiry, upon review of an involuntary patient or on an application being made to the Tribunal: s 51. CTOs may be made for up to 12 months, and are renewable indefinitely subject to the legislative criteria being met: ss 51, 56. A CTO may be made in the absence of the affected person where the notification requirements of the Act have been met. A finding of mental illness is not a condition precedent to the imposition of a CTO by the MHRT upon review of an involuntary patient or application for a CTO: see *Harry v Mental Health Review Tribunal* (1994) 33 NSWLR 315; *S v South Eastern Sydney & Illawarra* (2010) NSWSC 178; *Mental Health Act* 2007 (NSW) ch 3, pt 3, in particular ss 50–56. Breach of a CTO may result in the person being detained involuntarily for the remainder of the duration of the CTO: s 58–61.

38 Such as electro convulsive treatment and special medical treatments: see *Mental Health Act* 2007 (NSW) ch 4 pts 2–3.

39 For example, all reasonable steps must be taken to notify the primary carer of a mental health inquiry: ibid note to s 34(1), s 76. Failure to do so may constitute grounds for an adjournment of an inquiry: s 36(2). A patient may nominate a primary carer, and exclude persons from notification or information, for the purpose of the Act: s 72.

40 A mental health facility means a 'declared mental health facility' or a 'private mental health facility': *Mental Health Act* 2007 (NSW) s 4. Part 2 of the Act

suggests, is not coercive. A person may, for example, request to be admitted to a mental health facility and, if assessed as 'likely to benefit from care and treatment', may be admitted voluntarily.[41] A voluntary patient can discharge him or herself at any time, leave the facility and refuse treatment.[42] Involuntary admission, by contrast, is coercive: a person who is admitted involuntarily may be detained and administered appropriate medical treatment against their will.[43]

Only those persons assessed to be mentally ill or mentally disordered may be involuntarily admitted and detained in a mental health facility. Distinct procedures exist in respect to mentally ill and mentally disordered persons. The former may be detained indefinitely subject to review and ongoing satisfaction of the criteria for detention, the latter for up to three days at a time and on no more than three occasions in a calendar month.[44] A 'mentally ill person' is defined in s 14 as follows:

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regulates declared and private mental health facilities. Private mental health facilities are licensed under the Act, and may only admit voluntary patients.

41 *Mental Health Act* 2007 (NSW) s 5(2). A person may be admitted by an authorised medical officer as a voluntary patient irrespective of whether or not the person is a mentally ill or mentally disordered person under the Act: s 5(3).

42 Ibid s 8. If a person is under guardianship, notice must be given to the guardian prior to discharge. A voluntary patient may be detained involuntarily if an authorised medical officer considers the person to be either mentally ill or mentally disordered within the meaning of the Act: s10.

43 Ibid ss 29, 85. This is exceptional, the normal rule being that a patient must consent prior to medical treatment being administered: *Harry v Mental Health Review Tribunal* (1994) 33 NSWLR 315, 323 (Kirby P); *Rogers v Whitaker* (1992) 175 CLR 479, 489 (Mason CJ, Brennan, Dawson, Toohey, McHugh JJ). For a discussion of 'coercive care' see the contributions to Bernadette McSherry and Ian Freckelton (eds) *Coercive Care: Rights, Law and Policy* (Routledge, 2013).

44 *Mental Health Act* 2007 (NSW) s 31. A mentally disordered patient must be examined by an authorised medical officer 'at least once every 24 hours', and must be discharged if the officer forms the opinion that the person is neither mentally disordered nor mentally ill, or 'that other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the person': s 31(4).

(1) A person is a mentally ill person if the person is suffering from mental illness, and owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary:

(a) for the person's own protection from serious harm, or

(b) for the protection of others from serious harm.

(2) In considering whether a person is a mentally ill person, the continuing condition of the person, including any likely deterioration in the person's condition and the likely effects of such deterioration, are to be taken into account.

The *Mental Health Act 2007* (NSW) defines mental illness as:[45]

a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms:

(a) delusions,

(b) hallucinations,

(c) serious disorder of thought form,

(d) a severe disturbance of mood,

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45 Ibid s 4.

(e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)–(d).

The Act prescribes words and conduct that must not be taken as indicating mental illness or disorder, including that the person does or does not express a particular political or religious opinion.[46]

A 'mentally disordered person', by contrast, is defined as a person whose behaviour 'for the time being is so irrational as to justify a conclusion on reasonable grounds that temporary care, treatment or control of the person is necessary' either for the protection of the person or others from 'serious physical harm'.[47] Persons deemed to be mentally ill or disordered may only be detained in 'declared mental health facilities',[48] and an ongoing obligation exists on the authorised medical officer to refuse to admit or, if admitted and detained, discharge a mentally ill or disordered person if a less restrictive alterative is available and consistent with safe and effective care.[49]

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46 *Mental Health Act* 2007 (NSW) s 16. The exclusionary grounds further include that the person has a particular sexual preference or orientation, or engages in illegal, immoral or anti-social conduct.

47 Ibid s 15.

48 Ibid s 18. The Director-General of NSW Department of Health can, by an order published in the Gazette, establish declared mental health facilities: s 109; Declared mental health facilities come in different classes, see s 109; In 2009, for example, the Emergency Departments of most NSW hospitals were gazetted as declared mental health facilities of the 'mental health emergency assessment' class, which meant that they could receive involuntary patients under the Act prior to transfer to a mental health facility, or prior to discharge: Acting Director-General of the NSW Department of Health, '*Mental Health Act 2007* — Section 109 — Declaration of Mental Health Facilities' in New South Wales, *New South Wales Government Gazette*, No. 166, 13 November 2009, 5675–7.

49 *Mental Health Act* 2007 (NSW) s 12.

Involuntary admission and detention is a three-stage process: first, the person must be taken to and detained in a declared mental health facility in accordance with the *Mental Health Act* 2007 (NSW);[50] second, the person must be examined by two authorised medical officers, one of whom is a psychiatrist;[51] third, if found to be mentally ill by both examining medical officers, the person must be brought before the Mental Health Review Tribunal 'as soon as practicable' for a mental health inquiry.[52] If the two medical officers disagree as to whether the person is mentally ill, a psychiatrist is required to review the person 'as soon as practicable'.[53] If this psychiatrist finds the person to be a mentally ill person, the person must go before the Tribunal for an inquiry.[54]

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50 Pursuant to *Mental Health Act* 2007 (NSW) ss 18–26.

51 Ibid s 27.

52 Ibid s 27(d). As noted in Part IIA, prior to 21 June 2010, mental health inquiries were conducted by Magistrates. Following this date, the Mental Health Review Tribunal acquired jurisdiction to conduct inquiries. An important change that occurred with the transfer of jurisdiction was a reinterpretation of 'as soon as practicable' in s27(d). Under the magistrate model, assessable persons were brought before a magistrate within 7-10 days. Under the Mental Health Review Tribunal model, this requirement has been interpreted as extending to some 3-4 weeks. In the first 6 months of 2011, almost half of all assessable persons were brought before the Mental Health Review Tribunal within 15–21 days: Communio, *Evaluation of Efficacy and Cost of the Mental Health Inquiry System - Final Report* (30 January 2012) NSW Health, 33 <http://www0.health.nsw.gov.au/resources/whatsnew/pdf/communio_report.pdf>. Following the Communico report, which independently evaluated the mental health inquiry process, NSW Ministry of Health increased funding to the Tribunal to enable assessable persons to be brought before the Tribunal within 7–21 days from 1 July 2012: Mental Health Review Tribunal, *Annual Report of the Mental Health Review Tribunal for the period from 1 July 2011 to 30 June 2012,* Mental Health Review Tribunal (2012), 1, 8–9 <http://www.mhrt.nsw.gov.au/mhrt/pdf/Annualreportfinal2012.pdf>.

53 *Mental Health Act* 2007 (NSW) s 27(c).

54 Ibid s 27(d).

A mental health inquiry is conducted by a single legal member of the Mental Health Review Tribunal.[55] At an inquiry, the Tribunal member is to first 'determine whether or not, on the balance of probabilities,' the person is a mentally ill person.[56] The Tribunal must consider, amongst other things, the 'reports and recommendations' of the clinicians who examined the person on admission.[57] Where satisfied, on the balance of probabilities, that the person is a mentally ill person, the Tribunal member may make one of three orders:[58]

(a) an order that the person be discharged into the care of the person's primary carer,

(b) a community treatment order,

(c) an order that the person be detained in or admitted to and detained in a specified mental health facility for further observation or treatment, or both, as an involuntary patient, for a specified period of up to 3 months, if the Tribunal is of the opinion that no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and

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55 Section 150(2A) requires that a legal member determining a mental health inquiry be either President or Deputy President of the Mental Health Review Tribunal, or a person qualified to be Deputy President. The later is satisfied if the member is a serving or retired judge, or an Australian lawyer with seven years standing: *Mental Health Act* 2007 (NSW) sch 5 s 1; *Supreme Court Act* 1970 (NSW) s 26.

56 *Mental Health Act* 2007 (NSW) s 35(1).

57 Ibid s 35(2)(a). The Mental Health Review Tribunal is also required to ask the assessable person, as soon as practicable after commencing the inquiry, whether they received a 'statement of rights' and were informed of the notification requirements upon the doctor pursuant to s 76: s 35(2A). A statement of rights is required by s 74. The Tribunal is obliged to ask like questions of the medical officer. Non-receipt and non-notification may form grounds for an adjournment of the inquiry.

58 Ibid s 35(5)(c).

reasonably available or that for any other reason it is not appropriate to make any other order under this subsection.

The Act requires that persons detained as involuntary patients are reviewed at the completion of the term of the initial order and periodically thereafter by a full panel of the Mental Health Review Tribunal.[59] The Tribunal must, considering any information before it, determine 'whether the patient is a mentally ill person for whom no other care (other than care in a mental health facility) is appropriate and reasonably available'.[60] Appeal lies to the Supreme Court.[61]

The *Mental Health Act 2007* (NSW) provides that hearings before the Tribunal are to be informal and open, and conducted with 'little formality and technicality, and with as much expedition as the requirements of this Act… the regulations and as the proper consideration of the matters before the Tribunal permit.'[62] The Tribunal is:[63]

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59 Ibid s 37.

60 Ibid s 38(1). The Mental Health Review Tribunal is to consider any information before it, make inquiries about medication and 'take account of its effect on the patient's ability to communicate': s 38(2).

61 Appeals to the Supreme Court pursuant to ss 163–4, and s 67 in respect of Community Treatment Orders, are by way of hearing de novo: *S v South Eastern Sydney & Illawarra Area Health Service* [2010] NSWSC 178, [22] (Brereton J).

62 *Mental Health Act 2007* (NSW) s 151 (1). The Tribunal is empowered, under s 151(4), to make the following orders where satisfied it is in the interests of the person before the Tribunal's welfare or for any other reason:

(a) an order that the hearing be conducted wholly or partly in private,
(b) an order prohibiting or restricting the publication or broadcasting of any report of proceedings before the Tribunal,
(c) an order prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence before the Tribunal,

not bound by the rules of evidence but may inform itself of any matter in such manner as it thinks appropriate and as the proper consideration of the matter before the Tribunal permits.

III ANTICIPATORY ACTION IN DOMESTIC LAW: INVOLUNTARY DETENTION PURSUANT TO THE *MENTAL HEALTH ACT 2007* (NSW)

This part examines where the provisions for the involuntary detention of persons with mental illness fall on the spectrum of anticipatory action in domestic law. That is, whether they amount to pre-emption as anticipatory self-defense, prevention or Bush pre-emption, or shades of two or more categories. In order to assess where the provisions for involuntary detention fall on the spectrum of anticipatory action, the following sections of this part will examine the knowledge premise underlying the legislative regime, and the knowledge and harm thresholds for intervention. In doing so, it argues that the involuntary detention of person with mental illness most approximates prevention.

(d) an order prohibiting or restricting the disclosure to some or all of the parties to the proceedings of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceedings.

63 Ibid s 151(2).

A *Knowledge Premise*

The tenor of the legislative framework is that it is possible to accurately assess the risk of serious harm posed and to intervene—by restricting that individual's liberty—and adopt measures to neutralise the risk: care, treatment or control. This falls squarely within Massumi's definition of prevention. For a person to be lawfully detained under the Act, the decision maker must be satisfied there a risk of 'serious harm' to the individual or others.[64] Importantly, this risk of serious harm must be caused by or related to the person's mental illness, for which treatment, care or control is necessary.[65] Involuntary detention thus protects the individual or others from serious harm by precluding or hindering its occurrence through care, treatment or control.

Assessment of the risk of harm is central to the legislative scheme, arising at admission and initial detention, ongoing detention and review. At each stage, the threshold definition of a mentally ill person must be met and the decision maker satisfied that the person is suffering from a mental illness and that there are reasonable grounds for believing that, consequent to that illness, the person requires care, treatment or control for protection of self or others from serious harm.[66]

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64 *Mental Health Act* 2007 (NSW) s 151(2).

65 Ibid ss 4, 14.

66 Ibid s 14. See, for example, where a person is taken to and initially detained in a mental health facility upon the certificate of a medical practitioner: s19, sch1; for ongoing detention, two authorised medical officers must examine the person and certify they are a mentally ill person: s 27; for the Tribunal at a mental health inquiry and on review: ss 35, 37.

The definition of mentally ill person is, obviously, anchored in current symptomology: to satisfy this definition, the person must first be shown to be 'suffering from mental illness' as defined in s 4 of the Act.[67] However, once this precondition is met, the definition of a mentally ill person requires an assessment of the risk of future harm: that 'care, treatment or control' is necessary for the protection of the person or others from serious harm.[68] The definition of a mentally ill person requires the establishment of a causal link between the individual's mental illness and need for care, treatment or control for the protection of self or others. It is not sufficient to show that the person may present a risk of harm to self or others, or that treatment is required in the absence of a risk of serious harm to the individual or others. Rather, it assumes that the cause of the harm is identifiable: the risk of harm must be caused by or related to present symptoms of mental illness. The decision maker must also assess the person's continuing condition, considering whether the person's condition is likely to deteriorate without intervention.[69] At each stage the legislative regime proceeds on the assumption that a risk of harm may be assessed with accuracy and precision sufficient to found detention, and that the cause of the threat of harm is identifiable. As such it resembles prevention.

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67 A definition of 'mental illness' was, remarkably, not legislatively prescribed until the *Mental Health Act 1990* (NSW).

68 *Mental Health Act* 2007 (NSW) s 14.

69 Ibid s 14.

The legislative framework assumes that it is possible not only to accurately assess the risk of harm posed, but adopt a method to neutralise it, further aligning with Massumi's account of prevention. The methods to achieve neutralisation of risk are statutorily prescribed: one or more of 'care, treatment or control'. While care and treatment are significant considerations in the involuntary detention of an individual, and the purposes to which the legislative regime is directed,[70] they are not determinative. 'Control' to prevent harm is sufficient to satisfy the requirements of the definition of a mentally ill person. It is insufficient to establish, for example, that a person suffers from a mental illness, or that there exists a 'bona fide belief that the detention is for the person's benefit'.[71] Carney, Twait and Beaupert argue that the meaning of 'care, treatment or control' in the Act's definition of mental illness is:[72]

> more emblematic of the dangerousness standard in its requirement that 'care, treatment *or control* of the person' [emphasis added.] must be necessary in order to prevent 'serious harm' likely to flow from their mental illness. This formulation suggests that need for control alone to avert dangerousness without a baseline element of need for treatment satisfies these prerequisites.

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70 Ibid s 3 (Objects) and s 68 (Principles for care and treatment).

71 *Re Hawke; Hawke v Hawke* (1923) 40 WN (NSW) 58.

72 Terry Carney, David Tait and Fleur Beaupert, 'Pushing the Boundaries: Realising Rights Through Mental Health Tribunal Processes?' (2008) 30 *Sydney Law Review* 329, 339 (emphasis in original).

While the methods to achieve neutralisation of risk are statutorily prescribed, these are contingent upon the circumstances of each patient and changes in ideology towards persons with mentally illness. For example, there has been shift towards treatment, and away from control, as the best means to neutralise risk. Former President of the Mental Health Review Tribunal, the Hon Greg James QC remarked in the President's Report to the Mental Health Review Tribunal's Annual Report for 2010–11: [73]

> The Mental Health Act, 2007, passed after a decade of consultation changed the focus of mental health care in NSW from a reliance on detention to obviate risk, to a focus on, and a requirement for, treatment, where possible in the community and in all cases, in the least restrictive safe and effective regime. The proper application of the new principles requires patients to have a sufficient therapeutic opportunity for treatment with as little legal intervention as possible.

This supports the assumption that future harm may be prevented by appropriate treatment administered to that person. However, as noted, 'control' to prevent harm remains sufficient to satisfy the requirements of the definition of a mentally ill person, and thereby neutralise risk.

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73 Mental Health Review Tribunal, *Annual Report of the Mental Health Review Tribunal for the period from 1 July 2010 to 30 June 2011,* Mental Health Review Tribunal (2011) 4 <http://www.mhrt.nsw.gov.au/mhrt/pdf/Annualreport201011final.pdf>.

Although the regime assumes that it is possible to assess the risk of harm, it does not mandate the type of risk assessment to be undertaken. There is no requirement that the medical officers assess the risk of harm using actuarial instruments, clinical methods or a combination of both in what is known as structured professional judgement.[74] Rather, as McSherry highlights:[75]

> Any evidence relating to the potential harm to others is generally presented to the tribunal by treating clinicians and their opinions are often based upon their "observations and experiences…which have not been scientifically tested and validated" (Winick 2003: 28). Such evidence may not be rigorously examined, but accepted by the tribunal without question. Any evidence based on actuarial risk assessment instruments is exceedingly rare in this jurisdiction.

This assessment is borne out in the New South Wales. In determining whether a person is a mentally ill person at an inquiry, the Tribunal must consider, amongst other things, the 'reports and

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74 For a critical discussion of the different methods of risk assessment, see Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (Routledge, 2014) ch 3; Mike Doyle and Mairead Dolan 'Understanding and Managing Risk' in Keith Soothill, Paul Rogers and Mairead Dolan (eds), *Handbook of Forensic Mental Health* (Willian Publishing, 2008) 244; Christopher Slobogin, *Proving the Unprovable: The Role of Law, Science and Speculation in Adjudicating Culpability and Dangerousness* (Oxford University Press, 2007).

75 Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (Routledge, 2014), 55.

recommendations' of the examining doctors.[76] In these reports the authorised medical officer may take into account his or her own observations and 'any other available evidence' they consider 'reliable and relevant' in forming an opinion whether a person is a mentally ill or disordered person.[77] It is rare for a respondent to adduce independent psychiatric evidence. The Tribunal has been more prescriptive about the documents it requires at inquiries and review hearings. The Civil Hearing Kit provides:[78]

> **Reports and documents required**
>
> The Tribunal needs to see the following reports and documents before the mental health inquiry or review:
>
> - All forms (including schedules) and certificates that led to the person being detained in the facility;
> - All certificates and medical reports (Form1s) from the examinations of the person when detained in the facility;
> - Evidence that notice of the mental health inquiry or hearing has been given to the person and where appropriate their primary carer;
> - A completed application form (for hearings);
> - Report from treating psychiatrist or delegate;
> - Reports from other involved professionals, for example nursing report, social worker report, occupational therapist report,

76 *Mental Health Act* 2007 (NSW) s 35(2)(a).
77 Ibid s 28(1).
78 Mental Health Review Tribunal, *Civil Hearing Kit* (updated June 2010) 1.8 <http://www.mhrt.nsw.gov.au/civil_patients/hearingkit.htm>.

psychological report;

- Copy of recent progress notes from the person's mental health facility file including details of any medication administered to the person;
- Reports that give a longitudinal view of the patient's condition and response to treatment, for example discharge summaries, previous assessments.

The reports must address the legal criteria on which the Tribunal will base its decision.

- Is the patient/person suffering from a mental illness as defined by the Act?
- Is there a risk of serious harm to themselves or others?
- Are they able to be cared for in a less restrictive environment?

The procedural latitude afforded the Tribunal further supports the potential for evidence of assessment of risk to lack rigorous examination or scientific validation.[79] As noted in Part II(B), tribunal proceedings are to be informal and open, and not bound by the rules of evidence.[80] As

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79 Ian Freckelton, 'Distractors and Distressors in Involuntary Status Decision-Making' (2005) 12 (1) *Psychiatry, Psychology and Law* 88, 89–90. Freckelton has made clear, in discussing the informal approach taken by tribunals, that 'procedural latitude should not constitute a licence for unstructured and paternalistic decision-making in what form time to time is regarded as the best interests of a patient'.

80 *Mental Health Act* 2007 (NSW) s 151(1)–(2).

such there is a risk that hearsay and unsubstantiated evidence may form the basis for an order for detention.[81]

Further, and in line with the high risk offender regime, while the legislative scheme assumes risk can be assessed and predicted with accuracy, uncertainty exists as to the ability to do so. Assessments of risk of harm to self or others are notoriously unreliable.[82] A number of studies have demonstrated that risk assessment is at best guess work. Ryan, Nielssen, Paton and Large, for example, are of the view that 'an accurate prediction of future violence or self harm is impossible'.[83] While, as noted in Chapters Three and Five, this might support the contention that the regime better fits Bush pre-emption,[84] the provisions for involuntary detention nonetheless assume—however inaccurately—that risk is assessable, aligning more with prevention.

In line with Massumi's account of prevention, the regime views events as linear and predicable, assuming that the risk an individual poses to self or others may be identified and predicted with sufficient accuracy to

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81 See, for a discussion of this in the United Kingdom, Amar Shah, 'Is the Mental Health Review Tribunal Inherently Unfair to Patients? (2010) 17(1) *Psychiatry, Psychology and Law* 25, 28. In New South Wales, the statutory guarantee of legal representation in s 154(2A) serves as something of a check on this.

82 See Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (Routledge, 2014) 52–56.

83 Christopher Ryan, Olav Nielssen, Michael Paton and Matthew Large, 'Clinical decisions in psychiatry should not be based on risk assessment' (2010) 18 (5) *Australian Psychiatry* 398.

84 See, for example, Jude McCulloch and Sharon Pickering, 'Counter-Terrorism: The Law and Policing of Pre-emption' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 13; Lucia Zedner, 'Preventative Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems* 174, 191–2, 202–3.

satisfy a decision maker. It proceeds on the basis that the cause of harm is identifiable: there must be a causal link between the illness and need for care, treatment or control for the protection of self or others. It is not sufficient to show that the person may present a risk of harm to self or others. The risk of harm must be caused by mental illness, for which treatment, care or control is necessary and effective to neutralise the risk posed. In doing so, the regime assumes that the harm is a 'known unknown' and is closest aligned with prevention on the spectrum of anticipatory action in domestic law.

B *Harm Threshold*

The point at which intervention occurs, and the harm threshold that justifies intervention, further goes to whether the provision amounts to anticipatory self-defence, prevention or Bush pre-emption. The *Mental Health Act 2007* (NSW) provides that a risk of 'serious harm' must be established before detention occurs. However, what constitutes harm, let alone serious harm, is not defined by the Act, and has been interpreted broadly. The Mental Health Review Tribunal, in its Civil Hearing Kit, states that serious harm:[85]

> is interpreted to include: physical harm, financial harm, harm to reputation or relationships, neglect of self, neglect of others

[85] Mental Health Review Tribunal, *Civil Hearing Kit* (updated June 2010) 1.4 <http://www.mhrt.nsw.gov.au/civil_patients/hearingkit.htm>.

(including children). The risk of harm must be both serious and related to the person's mental illness.

Protection of self or others from harm was first introduced into the definition of a mentally ill person in the *Mental Health Act 1990* (NSW). However, prior to this, the *Mental Health Act 1958* (NSW) had included the formulation 'for his own good or in the public interest'.[86] This standard had been considered 'vague and ambiguous',[87] however it was interpreted to mean something quite similar to what is captured by the current test of serious harm to others. In *CF v TCML*, Powell J construed 'care treatment or control…in the public interest' as follows:[88]

> A person "requires care treatment or control … in the public interest" if it appears that there is a real risk that, unless such care treatment or control be given or exercised, the person could so conduct himself or herself as to inflict significant injury on some person, or cause significant damage to property, or otherwise commit or cause the commission of some significant breach of the peace; it would not, however, be sufficient, in my view, that the person's conduct or probable conduct constituted or would constitute a mere nuisance and annoyance.

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86 *Mental Health Act 1958* (NSW) s 4.

87 See, for example, the view of the Edwards Committee in its 1974 report: Peter Shea, *Defining Madness* (Hawkins Press, 1999) 79–80.

88 *CF v TCML* [1983] 1 NSWLR 138, 141 (Powell J).

The *Mental Health Act 1990* (NSW) first introduced the formulation of harm to self or others, however it was then more tightly conscribed. At that time, detention could only occur upon proof of 'serious physical harm',[89] except where a person exhibited symptoms of mania for which proof of 'serious financial harm' or 'serious damage to the person's reputation' was sufficient.[90] The requirement of 'serious physical harm' was broadened, in 1997, to 'serious harm'. Dr Refshauge, in the Second Reading Speech in the Legislative Assembly to the Mental Health Legislation Amendment Bill 1997 (NSW), which removed the requirement that harm be 'physical', stated that: [91]

> I am aware of substantial public concern that the requirement that a person represents a risk of "serious physical harm" to himself or to others is too restrictive and can hinder preventative action being taken at the time a person presents to a medical practitioner or hospital.

Former Minster Dyer further explained: [92]

> Health providers will be aware of the gradual decline in their patient's condition due to this "self-neglect", but will be unable to

89 *Mental Health Act 1990* (NSW) s9(1)(a)–(b).

90 That is, where the person suffered a severe disturbance of mood or sustained and irrational behaviour: *Mental Health Act 1990* (NSW) s 9(1).

91 New South Wales, *Parliamentary Debates,* Legislative Assembly, 9 April 1997, 7287 (Refshauge).

92 New South Wales, *Parliamentary Debates,* Legislative Council, 20 May 1997, 8773 (Dyer).

step in and take preventative action until the deterioration is very serious.

While the harm requirement was enlarged in this respect, a proposal in mid-1995 to amend the Act to remove the requirement that harm be 'serious' was unsuccessful.[93]

While it is clear that there must be a 'real risk' that without care, treatment or control a person could cause harm to self or others,[94] there has never been a requirement that the harm be imminent. The *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* (UN Principles), adopted by the United Nations in December 1991, provide two grounds for involuntary admission.[95] The first is that, as a result of mental illness, 'there is a serious likelihood of immediate or imminent harm to that person or to other persons'. This, however, has not been adopted in New South Wales. In *DAW v Medical Superintendent of Rozelle Hospital,* Hodgson J was of the opinion that proof of an imminent risk was not required to satisfy the definition of mental illness.[96] His Honour said:[97]

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93 Mental Health Amendment Bill s 9(1). The Mental Health Amendment Bill was introduced into the Legislative Assembly in 1995 and 1996; New South Wales, *Parliamentary Debates,* Legislative Assembly, 26 October 1995, 2426 (Macdonald); New South Wales, *Parliamentary Debates,* Legislative Assembly, 18 April 1996, 229–30 (Macdonald).

94 *PY v RJS* [1982] 2 NSWLR 700; *CF v TCML* [1983] 1 NSWLR 138, 141 (Powell J).

95 *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care,* GA Res 46/119, UN GAOR, 3rd Comm, 46th sess, 75th plen mtg, Agenda Item 98, Supp No 49, UN Doc A/RES/46/119 (17 December 1991)**,** Principle 16 (UN Principles); see also Peter Shea, *Defining Madness* (Hawkins Press, 1999) 17, 132–3.

96 [1996] NSWSC 319, [10].

> a person may be a mentally ill person where there are reasonable grounds for believing that the non-continuance of that programme would, within a reasonable time, bring about a situation where there is a real danger of serious physical harm.

A requirement of imminence would provide a tighter temporal nexus to harm, moving it closer on the spectrum of anticipatory action to anticipatory self-defence.

Hodgson J's view is supported by the inclusion of continuing condition in the definition of mentally ill person. The *Mental Health Legislation Amendment Act* 1997 (NSW) expressly provided for consideration of the continuing condition of a person, which requires 'any likely deterioration in the person's condition and the likely effects of any such deterioration' to be taken into account in determining if a person is a mentally ill person. This accords with the second ground for involuntary admission set out in the United Nations' Principles:[98]

> That, in the case of a person whose mental illness is severe and whose judgment is impaired, failure to admit or retain that person is likely to lead to a serious deterioration in his or her condition or

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97 Ibid.

98 *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care,* GA Res 46/119, UN GAOR, 3rd Comm, 46th sess, 75th plen mtg, Agenda Item 98, Supp No 49, UN Doc A/RES/46/119 (17 December 1991)**,** Principle 16(1)(b).

will prevent the giving of appropriate treatment that can only be given by admission to a mental health facility in accordance with the principle of the least restrictive alternative.

The broadening of the harm requirement—the excising of 'physical' from the test—and the inclusion of continuing condition are compounded by the lack of a clear temporal nexus between harm and risk: there must be a real risk, but the harm need not be immediate or imminent. While the provisions for involuntary detention may be understood as an example of prevention, they also illustrate attempts to find the best balance between prevention of harm, individual rights and care and treatment. While the harm threshold has broadened, and the provisions for involuntary detention thereby capturing more people—or the same people earlier—this move is not entirely new or novel. Rather it brings the current Act closer to the interpretation given to the 1958 Act.

C *Knowledge Threshold*

The knowledge threshold upon which involuntary admission and ongoing detention is based is low, reflective of the civil nature of the Tribunal proceedings and the predictive, future-focus of the law. The knowledge threshold enables intervention to occur on a risk of harm, aligning closest to prevention. Upon admission to a mental health facility, initial detention occurs on the basis of the examining medical officers having 'reasonable grounds to believe' that the person is a

mentally ill person. 'Reasonable grounds to believe' has elsewhere been explained as requiring a person to 'form the requisite belief and the belief must be based on reasonable grounds'.[99] For ongoing detention to be ordered, the Mental Health Review Tribunal, at the mental health inquiry and upon review, must be satisfied on the balance of probabilities that the person is a mentally ill person. Interestingly, this has not always been the case: the standard of proof required to satisfy the decision maker at a mental health inquiry has proved vexing for New South Wales legislatures, with attempts made, in the eighties, to heighten the standard of proof.

In 1982, the Mental Health Bill 1982 (NSW) sought to raise the standard of proof that attached to a mental health inquiry to the criminal standard of beyond reasonable doubt. This Bill was chastised as 'biased towards protecting civil liberties' at the expense of treatment and protection of people with mental illness and 'society's right to security'.[100] The attempt, however, was unsuccessful; the criminal standard was viewed as too restrictive, with the potential to prevent involuntary detention and treatment of those in need.[101] The *Mental Health Act* 1983 (NSW), in an effort to curb the perceived excesses of the civil liberties approach of the 1982 Bill, introduced a middle ground

99 *Stuart v Kirkland–Veenstra* (2009) 237 CLR 215, 240 [56] (French CJ).

100 New South Wales, *Parliamentary Debates,* Legislative Assembly, 22 March 1990, 885 (Collins); New South Wales, *Parliamentary Debates,* Legislative Council, 20 May 1997, 8776 (Pezzutti).

101 New South Wales, *Parliamentary Debates,* Legislative Assembly, 22 March 1990, 886 (Collins).

standard of 'very highly probable'.[102] At that time, in relation to forensic patients, the standard proved unworkable—without legal precedent, and being viewed as 'intrinsically vague', it generated uncertainty in the operation of the Act.[103]

In a remarkable feat of legislative complication, key provisions of the *Mental Health Act* 1983 (NSW), including the definition of a mentally ill person and the standard of proof in respect to the involuntary detention of non-forensic patients in a mental health facility, never commenced.[104] Nonetheless, one of the commenced provisions made use of both 'mentally ill person' and 'very highly probable'. Section 139 empowered the Supreme Court to discharge a person where the medical superintendent was 'unable to prove that it is very highly probable that the person is a mentally ill person'.[105] It was in relation to this provision that the NSW Court of Appeal, in *B v Medical Superintendent of Macquarie Hospital,* held that very highly probable equates to a standard between balance of probabilities and beyond reasonable doubt.[106]

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102 New South Wales, *Parliamentary Debates,* Legislative Assembly, 22 March 1990, 885–6 (Collins); *Mental Health Act* 1983 (NSW) s 44(1).

103 New South Wales, *Parliamentary Debates,* Legislative Assembly, 22 March 1990, 891, 886 (Collins).

104 New South Wales, *Parliamentary Debates,* Legislative Assembly, 22 March 1990, 891 (Collins); *B v Medical Superintendent of Macquarie Hospital* (1987) 10 NSWLR 440; Phillip Powell, *The Origins and Development of the Protective Jurisdiction of The Supreme Court of New South Wales* (The Francis Forbes Society for Australian Legal History, 2003).

105 *Mental Health Act 1983* (NSW) s139; *B v Medical Superintendent of Macquarie Hospital* (1987) 10 NSWLR 440, 446–450 (Kirby P).

106 (1987) 10 NSWLR 440.

The *Mental Health Act* 1990 (NSW) clarified that the standard of proof in respect to a mental health inquiry was the balance of probabilities, as it had been in the *Mental Health Act* 1958 (NSW) and as is currently retained in the *Mental Health Act* 2007 (NSW).[107] In the Second Reading speech to the Bill, then Minister for Health Peter Collins said of the balance of probabilities standard, 'it is expected that it will be interpreted in accordance with judicially established rules such as those enunciated in *Briginshaw v. Briginshaw*'.[108] As noted in Chapter Four, the Briginshaw principle relates to the standard of evidence required to meet the civil standard of proof. Having referred to the principle, Collins stated that:[109]

> It is considered that the gravity of the consequences flowing from the decision of finding a person a mentally ill person—that is, possible involuntary detention in a mental hospital—would be sufficient to ensure that the matter was not proved on inexact proofs, indefinite testimony, or indirect inferences.

The jostling of the standard of proof illustrates the conflicting legal and clinical models of mental health regulation and the difficulties faced by legislatures seeking to strike an appropriate balance between the two. The standard of proof further supports the aligning of this regime with

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107 New South Wales, *Parliamentary Debates,* Legislative Assembly, 22 March 1990, 889 (Collins); *Mental Health Act* 1990 (NSW) ss 51–2, 268; *Mental Health Act* 2007 (NSW) s 35(5).

108 New South Wales, *Parliamentary Debates,* Legislative Assembly, 22 March 1990, 891 (Collins).

109 Ibid.

prevention. It enables intervention on the basis of an identified harm that is probable or expected, but does not require proof of anything more than that.

This Part has shown that the legislative regime for the involuntary detention of persons with mental illness best approximates prevention on the spectrum of anticipatory action. The next section will build on the discussion in Chapters Four and Five and assess what this reveals about the novelty and reach of anti-terror control orders.

IV Contribution to Consideration of the Novelty and Reach of Anti-Terror Control Orders

The case study of the civil mental health legislative framework in New South Wales supports consideration of control orders as part of a picture of preventive governance in Australia, rather than as unprecedented, exceptional and isolated measures. It is another example of the state acting, by legislation, to enable restraints to be imposed on an individual's liberty to protect the public from harm. The involuntary detention of persons with mental illness is a strong historical marker of a domestic preventive measure that has its origins in a statutory regime enacted in response to a security threat against the sovereign. While it exhibits continuities with the control order regime, there are, as there were with the high risk offender regime, a number of relevant distinctions that distinguish the mental health

regime. Nonetheless, the continuities discernable between control orders and mental health involuntary detention provides further support for the argument that control orders are best understood not as exceptional and isolated measures but as part of broader pattern of preventive governance in Australia. However, this case study also demonstrates that control orders, while fitting preventive governance practices in Australia, are exceptional in their reach and go further than the involuntary detention provisions. This is illustrated by the alignment of the control order provisions with Bush pre-emption and precautionary thinking.

Involuntary detention of persons with mentally illness is an example of a preventive measure beyond the criminal justice system that exhibits continuities with anti-terror control orders. Both preventive measures enable a person to be restrained to prevent the occurrence of a future harm, which includes criminal harm. Both have a protective purpose and are issued in civil proceedings. As with anti-terror control orders, mental health involuntary detention is not predicated upon the commission of a criminal offence, although a person who has or is about to commit an offence may be diverted into the civil mental health system.

It is the shared crime prevention rationale that is perhaps the most interesting continuity between mental health involuntary detention and anti-terror control orders. As with control orders, mental health

involuntary detention may be imposed pre-crime, however the temporal nexus to the anticipated crime is much tighter. As noted in Part II(A), New South Wales' first mental health legislation drew heavily on the United Kingdom's *Criminal Lunatics Act of 1800* (39 & 40 Geo 3) which was a legislative response to the attempted assassination of King George III.[110] The Act provided for the detention of persons apprehended with a 'derangement of mind' and a 'purpose of committing some crime' 'for the better Prevention of Crimes being committed by Persons insane'.[111] These feature were retained in *Dangerous Lunatics Act 1843* (7 Vic No 14),[112] and remain part of the current New South Wales regime—in s 22 of the *Mental Health Act 2007* (NSW) and the dangerousness criterion in the definition of a mentally ill person.

Section 22 of the *Mental Health Act 2007* (NSW) resembles s 1 of the *Dangerous Lunatics Act 1843* (7 Vic No 14). Section 22 empowers a police officer to apprehend a person, without a warrant, and take them to a declared mental health facility where the person appears to be mentally ill or disorders and the officer believes on reasonable grounds that:

> (a) the person is committing or has recently committed an offence or that the person has recently attempted to kill himself or herself or that it is probable that the person will attempt to kill himself or

110 *Criminal Lunatics Act of 1800* (39 & 40 Geo 3) c 94 ss 1–2.
111 Ibid s 3.
112 *Dangerous Lunatics Act 1843* (7 Vic No 14) s 1.

herself or any other person or attempt to cause serious physical harm to himself or herself or any other person, and

(b) it would be beneficial to the person's welfare to be dealt with in accordance with this Act, rather than otherwise in accordance with law.

Interestingly, while s 22 enables pre-crime intervention, it is very closely connected to the commission of a crime—permitting intervention only where the person is committing an offence or it is probable they will attempt to cause serious physical harm to others. The serious harm to others formulation in the definition of mentally ill person also prevents crime that would otherwise be constituted by 'serious harm' to others.

Mental health involuntary detention has thus long authorised, as part of a civil process, the preventive detention of persons to avoid, amongst other things, the occurrence of criminal harm. These continuities call into question assertions that control orders are exceptional, unprecedented and isolated measures. However, it is important to note that mental health involuntary detention occurs in a vastly different setting. While control to prevent harm is, of itself, sufficient to found detention under the Act, the Act is predicated upon the provision of care and treatment to persons with mental illness. A person detained under the *Mental Health Act 2007* (NSW) is detained in a 'declared mental health facility', save where detention in a health facility is necessary to

provide medical treatment or care unrelated to mental illness or condition.[113] Declared mental health facilities are predominantly psychiatric hospitals,[114] and thus a clinical not penal setting. Albeit that this is not a bright line: the setting is coercive and there are links to the criminal justice system, including through diversionary process in s 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW). Section 33 empowers a Magistrate to divert a defendant with symptoms of mental illness from the criminal justice system to the civil mental health system.

Importantly, a person who is involuntarily detained pursuant to the *Mental Health Act 2007* (NSW) may be given appropriate medical treatment against their will.[115] The incapacitation occurs in a clinical setting and in the context of a therapeutic relationship between the doctor and person being detained. The *Mental Health Act 2007* (NSW) thus combines clinical and legal processes, a feature common to efforts to regulate the care, treatment and control of persons with mental illness or disorder. While obviously occurring in a very different context, it is worth noting that participation in counselling may be imposed as a term of a control order, although this is conditioned on the agreement of the controlee.[116]

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113 Ibid ss 17, 18(2); The Act distinguishes between and regulates declared and private mental health facilities. Private mental health facilities are licensed under the Act, and may only admit voluntary patients.

114 Although the *Mental Health Act 2007* (NSW) provides for more than this, see s 109.

115 *Mental Health Act 2007* (NSW) ss 29, 84.

116 *Criminal Code* s 104.5(3)(l), (6).

While these distinctions are relevant to understanding the regime and its operation, the continuities identified support the comparison and indeed illustrate how control orders extend further in their reach than the provisions for mental health involuntary detention. For a person to be involuntarily detained, they must be found to be 'suffering from a mental illness'. This is a precondition to the enlivening of the definition of 'mentally ill person' and distinguishes it—and they type of risk assessment conducted—from the control order regime. Unlike a control order that can be made on a purely predictive basis, mental health involuntary detention is only available upon proof that the person is suffering from a mental illness for which care, treatment or control is necessary. The risk must be real and connected to the individual's mental illness. Mental health involuntary detention is thus predicated upon an assessment of the risk conducted by medical professionals. Unlike a control order, involuntary detention may not be ordered on the basis of an estimation 'of some future act, not necessarily one to be committed by the person subject to the proposed order'.[117] The risk of harm must be related to the person's mental illness.

While both regimes enable the imposition of restraints on liberty where that person subject to the order is regarded to be 'at risk', again control orders go further. For mental health involuntary detention, the risk of harm to self must be caused by mental illness. While the person may be

117 *Thomas v Mowbray* (2007) 233 CLR 307, [357] (Kirby J).

vulnerable to—or 'at risk' of—'serious harm' or deterioration in their condition, this must be because of the person's mental illness. Vulnerability to exploitation that formed a basis for the making of control orders against Hicks and Thomas related to the actions of third persons seeking to tap into, or exploit, their knowledge and skills. These findings were based on the controlees' past participation in training with a terrorist organisation, however the evidence relied upon was not contemporaneous and the findings speculative. To found involuntary detention, evidence of current symptoms of mental illness or likely deterioration in a person's condition is required.

Mental health involuntary detention does provide a strong historical and contemporary marker of a preventive detention regime that, amongst other things, provides for a person to be detained to avoid the occurrence of a criminal offence. Finnane and Donkin argue that the changes wrought by deinstitutionalisation and the advent of rights protection for those with mental illness:[118]

> cannot disguise the longer history of the use of compulsory confinement in modern liberal states of a significant portion of the population, a confinement that is preventive detention and that has its origins as an exercise in crime prevention.

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118 Mark Finnane and Susan Donkin, 'Fighting Terror with Law? Some Other Genealogies of Pre-emption' (2013) 2(1) *International Journal of Crime and Justice* 3, 7.

The continuities between mental health involuntary detention and control orders support the contention that control orders are best understood as part of a broader picture of preventive governance in Australia, rather than as isolated and exceptional measures. However, there are significant differences in the operation of the regime that, as will be discussed in the Chapter Seven, may be argued to militate against its strength as a comparator. Nonetheless, this case study illustrates that for a century prior to the introduction of control orders, preventive mental health measures had featured on Australian statute books that enabled the prevention of criminal harm by the restraint of individual liberty outside of the criminal process. Prevention in the mental health context falls squarely in line with Massumi's prevention, illustrating that control orders, typifying Bush pre-emption, go further. While control orders fit a broader picture of preventive governance in Australia, they are nonetheless exceptional in their extent or reach—targeting a potential threat and not necessarily one posed by the controlee.

V CONCLUSION

This chapter undertook a case study of involuntary detention pursuant to the civil mental health legislative framework in New South Wales. In Part II this chapter briefly examined the history of the involuntary detention of persons with mental illness in New South Wales and the legislative framework contained in the *Mental Health Act 2007* (NSW).

The provisions for involuntary detention constitute an historical and contemporary example of preventive detention beyond the anti-terror and criminal justice contexts, and one that originated as a legislative response to an assassination attempt on the sovereign.

Building on Chapter Three, Part III of this chapter assessed where the provisions for involuntary detention of persons with mental illness fell on the spectrum of anticipatory action in domestic law. It explored the knowledge premise underlying the regime, and its harm and knowledge thresholds. It argued that involuntary detention approximates prevention, evinces risk-thinking and conceives of the anticipated harm as a 'known unknown'. The regime assumes that the risk of harm an individual poses can be assessed, the cause of the anticipated harm identified, and measures adopted to neutralise the risk. The risk of harm need not be immediate, but must be real and related to the person's mental illness.

In Part IV, this chapter examined what the provisions for involuntary detention contribute to consideration of the novelty and reach of anti-terror control orders. A number of continuities and similarities were identified between the provisions for involuntary detention of persons with mental illness and anti-terror control orders, most notably a crime prevention rationale and the facilitation of pre-crime interventions. While key differences exist between the two regimes, it was argued that the continuities identified support that argument that control orders are

best understood as part of a broader picture of preventive governance in Australia, rather than as an exceptional and unprecedented measures that may be isolated as a response to the threat of transnational terrorism. While finding that control orders fit preventive governance practices in Australia, this case study also demonstrates that control orders—as an example of Bush pre-emption—are exceptional in their reach when compared to mental health involuntary detention, a historical and contemporary marker of prevention in Australian law.

This thesis now turns to consider what the case studies reveal about the utility of the preventive state concept as a way to read developments in Australian law, with particular emphasis on the key limitations identified in Chapter Two. Chapter Seven will also consider what insights can be drawn from the three case studies about the utility of adopting the international register of anticipatory military action as a basis for distinguishing between domestic laws.

—CHAPTER SEVEN—

THE PREVENTIVE STATE?

I INTRODUCTION

This chapter draws together the three case studies and theoretical framework to consider whether the preventive state concept provides a useful way to read and understand developments in Australian law following September 11, 2001. Whether this is so has implications for how Australia's preventive anti-terror laws should be understood and situated within the Australian legal system—as exceptional measures that may be isolated as a specific response to the threat of terrorism, or as forming part of a pattern of preventive governance that preceded the events of September 11, yet took its most visible form thereafter.

The preventive state concept was, as outlined in Chapters One and Two, first coined by Steiker in 1998 to draw attention to the accumulation of measures employed by governments to prevent the occurrence of harm by incapacitating or treating individuals deemed 'dangerous'.[1] It is a normative concept—designed to highlight the need for the cohesive treatment of the diverse preventive practices employed by governments and for the articulation of principles to guide and constrain preventive governmental action. However, despite gaining influence following

[1] Carol S Steiker, 'Forward: The Limits of the Preventive State' (1998) 88(3) *Journal of Criminal Law and Criminology* 771.

September 11, just how much work the preventive state concept can do remains untested. The central project of this thesis has been to understand whether the preventive state concept is, in fact, a useful way to read developments in Australian law following September 11 and, in doing so, to test assumptions regarding the exceptionality and reach of preventive anti-terror laws. This thesis has approached this task in a narrow way—by exploring the potential and limitations of the preventive state concept and undertaking three case studies of preventive measures in Australian law to test whether control orders, as an example of prevention in anti-terror law, are exceptional when compared to the other preventive measures studied.

To begin this task, this thesis explored, in Chapter Two, the potential promise and pitfalls of the preventive state concept. It argued that the preventive state concept has much to offer, with the potential to promote critical engagement with contemporary and historical preventive practices, engender a broader preventive jurisprudence, expose common issues and dangers and thereby avoid their reproduction. However, Chapter Two argued that the promise of the preventive state is matched by its limitations. These include: uncertainty regarding the scope of the conceptual framework and whether preventive measures are sufficiently similar to warrant consideration as part of a 'unified project'; the potential breadth of the concept undermining its critical purchase and normative project; and the lack of a mechanism to compare preventive practices.

This thesis considered, in Chapter Three, how to compare preventive measures in law. It argued for the adoption of consistent terminology to describe and compare governmental efforts to prevent harm at the domestic and international levels. This thesis then turned to the practice of prevention. It undertook three case studies of preventive measures drawn from within and beyond the anti-terror and criminal justice contexts—federal anti-terror control orders contained in the *Criminal Code;* post-sentence continuing detention and ongoing supervision of high risk offenders in New South Wales; and involuntary detention of persons with mental illness pursuant to the *Mental Health Act 2007* (NSW). Building on Chapter Three, each case study assessed where the provisions fell on the spectrum of anticipatory military action as applied to domestic law. It was argued that control orders typify Bush pre-emption, the high risk offender regime exhibits features of prevention and Bush pre-emption, and the mental health involuntary detention provisions are closest aligned with prevention.

This thesis now considers, in Part II, what the case studies reveal about the utility of the preventive state concept as a way to read developments in Australian law following September 11, with particular emphasis on the key limitations identified in Chapter Two. Drawing on the case studies, it argues that the preventive state concept is a useful way to read developments in Australian law. This chapter further argues that the continuities discernable between the preventive measures studied

demonstrate that control orders are best understood as part of a picture of preventive governance that long preceded the events of September 11. Building on the findings in Chapters Four, Five and Six, it suggests, however, that control orders are nonetheless exceptional in their reach when compared to the preventive measures studied in this thesis—typifying Bush pre-emption rather than prevention. Part III concludes this thesis by considering the broader implications of this study and its findings for how we understand, more broadly, preventive anti-terror measures and preventive governance in Australia, and for the future directions of preventive scholarship.

II Contributions to Understandings of The Preventive State Concept and its Utility

The case studies undertaken in this thesis contribute to understandings of the promise and limitations of the preventive state concept, and therefore its utility as a way to read and understand developments in Australian law. In order to assess what the case studies reveal about the utility of the preventive state, this section is broken into four parts. The first three parts examine limitations of the preventive state concept identified in Chapter Two. Part II(A) considers whether the continuities and discontinuities identified between the preventive measures examined in the case studies support or negate the assumption that preventive practices are amendable to classification as a 'unified problem'. Part II(B) examines what the case studies reveal

about the conceptual limits of the preventive state and whether its potential breadth undermines its critical purchase. Part II(C) considers the project of comparing preventive measures and queries whether the register of anticipatory action as applied to domestic law is a useful way to compare domestic preventive measures. The final section, Part II(D), draws together this analysis to consider what the case studies reveal about the promise of the preventive state concept and how preventive anti-terror laws should be understood and situated within the Australian legal system.

A *Continuities, Discontinuities and the Characterisation of Preventive Policies and Practices as a 'Unified Problem'*

A key assumption upon which the preventive state concept is premised is that preventive practices and policies are capable of categorisation as part of a 'unified problem'—'a facet of a larger question in need of a more general conceptual framework.'[2] The treatment of preventive practices as discrete and isolated had, Steiker argued, precluded the identification of similarities and distinctions that would enhance and inform preventive jurisprudence.[3] However, as indicated in Chapter Two, whether divergent preventive practices can, in fact, be categorised as part of a unified problem, or if relevant distinctions negate such a classification, remains untested. This goes, more broadly, to the

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2 Carol Steiker, 'Forward: The Limits of the Preventive State' (1998) 88(3) *Journal of Criminal Law and Criminology* 771, 778.

3 Ibid 779.

soundness of the assumptions underlying the preventive state concept and therefore its utility as a way to read governmental initiatives that seek to prevent future harm.

There are a number of relevant similarities and continuities between preventive measures examined in the civil mental health, anti-terror control order and high risk offender legislative frameworks. Each preventive measure is functionally equivalent—restraining an individual's liberty to preclude the occurrence of an anticipated future harm. Each is issued in civil proceedings. Each legislative regime has a protective purpose and features a crime prevention rationale—the anti-terror control order and high risk offender regimes seek to prevent, respectively, acts of terrorism and serious sex or violence offences, and, while not often recognised, the mental health regime has, since its inception, retained a crime prevention purpose. Further, as discussed in Chapters Four and Five, anti-terror control orders and high risk offender extended supervision orders are also alike in design, both being hybrid civil–criminal orders. A person subject to either order may be placed under conditions of surveillance and control.

Each of the regimes, however, operates in a vastly different context: anti-terror control orders operate in a national security context which relies upon intelligence-based predictions of future threats to national security; the high risk offender regime operates in a quasi-criminal justice context which emphasises rehabilitation and relies on risk

assessments conducted by psychiatrists and psychologists; civil mental health involuntary detention operates in a clinical and treatment context governed by psychiatric knowledge. These different contexts inform the predicate to the legal test, the nature of the threat of harm to be averted, the evidence upon which a prediction of future harm is made, and the purpose(s) to which the liberty restraint is directed.

The anti-terror control order regime is distinguished by the national security and intelligence context in which it operates. A control order may be made where it is established that the controlee has participated in training with a terrorist organisation or that the order would 'substantially assist' in the prevention of a terrorist act and the terms are reasonably necessary, appropriate and adapted 'for the purpose of protecting the public from a terrorist act'.[4] The control order regime has one stated purpose: 'to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act.'[5] The threat of harm—of a terrorist act—is internationalised.[6] The threat of harm may, for example, be anticipated to emanate from a transnational terrorist organisation, such as Al Qa'ida. However, the source of the threat may be unspecified and a control order thereby imposed to stop a controlee

4 *Criminal Code* s 104.4(1)(c)-(d) (interim proceedings), s 104.14 (confirmation proceedings).

5 Ibid s 104.1.

6 Fergal F Davis and Fiona de Londras 'Counter-Terrorist Judicial Review: Beyond Dichotomies' in Fergal F Davis and Fiona de Londras (eds) *Critical Debates on Counter-Terrorist Judicial Review* (Cambridge University Press, forthcoming 2014) Part III(d).

who has previously trained with a terrorist organisation from being used as a resource by transnational terrorist groups or aspirant extremists. Terrorism also has an 'irreducibly political nature',[7] distinguishing it from the nature of the harm to be averted under the other two regimes.

As noted in Chapter Four, the control order regime draws on a preventive, intelligence-led model, a function of the significance of intelligence to efforts to counter terrorism. The focus of the intelligence model on suspicion, risk and the prevention of anticipated harm means that control orders are supported by intelligence 'about future threats to security' gathered through surveillance practices and 'pre-crime' policing.[8] This has implications for the nature of the prediction undertaken by the Court which requires a determination of what is 'reasonably necessary' to protect the public from a terrorist act. Hayne J made clear in *Thomas v Mowbray* that this requires consideration of 'what other measures are being taken to guard against the threat'.[9] It also impacts the type of the evidence relied upon—evidence based on intelligence will often be kept secret for reasons of national security.

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7 Kim Lane Scheppele 'The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency' in Sujit Choudhry (ed) *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 347, 362.

8 Kent Roach, 'The Eroding Distinction Between Intelligence and Evidence in Terrorism Investigations' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge 2010) 52; See also Clive Walker, *Terrorism and the Law* (Oxford University Press 2011) 56.

9 (2007) 233 CLR 307, 474 [502]. Hayne J, as noted in Chapter Four, was dissented in *Thomas v Mowbray,* however his remarks on the operation of the regime are not inconsistent with the Majority.

Intelligence relied upon as evidence is also difficult to challenge. As outlined in Chapter Four, Hayne J further made clear in *Thomas v Mowbray* that intelligence would 'rarely, if ever…be information about which expert evidence, independent of the relevant governmental agency, could be adduced'.[10] This leaves the court 'with little practical choice except to act upon the view that was proffered by the relevant agency.'[11]

In contrast, the high risk offender regime operates in a quasi-criminal justice context. An offender must have committed a past relevant offence and be serving a sentence of imprisonment to fall within the *Crimes (High Risk Offenders) Act 2006* (NSW). It must then be shown that the offender poses an 'unacceptable risk' of committing a future relevant offence.[12] This assessment relies, as outlined in Chapter Five, on psychiatric and psychological assessments of the likelihood that the individual will reoffend. The threat of harm is individualised and local. It is not relevant that the offender is vulnerable to actions of unspecified others—the threat of harm must emanate from the offender and the harm to be averted must be directly caused by the offender.

The high risk offender regime has two stated aims: to protect the community from high risk offenders and, as a secondary purpose, to

10 Ibid 477 [511].
11 Ibid.
12 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5B(2), 5E(2).

encourage rehabilitation of offenders.[13] In this respect it also differs from the control order regime. The NSW Sentencing Council recognised, in recommending the extension of the post-sentence serious sex offender regime to high risk violent offenders, that rehabilitation:[14]

> should form part of a broader management framework for HRVOs [High Risk Violent Offenders], which includes targeted rehabilitation. In extraordinary cases, lifelong detention or supervision may be justified; however, the aim of any new scheme should be to protect the community, not only by detaining or supervising the offender but also by endeavouring to resolve the risk. Detention alone without treatment is akin to a lifelong sentence. It does nothing to reduce the risk that the offender poses to the community and may do no more than defer that risk to a later time.

In line with this, an extended supervision order may, for example, impose a condition that the individual participate in treatment and rehabilitation programs.[15] An offender subject to a continuing detention order will remain in custody in a correctional centre in circumstances indistinguishable from a prisoner serving a custodial sentence.[16]

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13 Ibid s 3.

14 NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (May 2012) 128.

15 *Crimes (High Risk Offenders) Act 2006* (NSW) s 11(d).

16 McSherry has observed 'deprivation of liberty through imprisonment does not magically change from punishment to rehabilitation because a section of a statute says so': Bernadette McSherry, 'Indefinite and preventive detention

Mental health involuntary detention differs from the other two regimes in the nature and purpose of detention, and the clinical and therapeutic setting in which it occurs. It is further distinguished by its predicate—a person must be found to be suffering from symptoms of mental illness to fall within the *Mental Health Act 2007* (NSW). As noted in Chapter Six, it must also be shown that the person requires care, treatment or control to protect themselves or others from serious harm.[17] This harm must be caused by or related to the person's mental illness. The threat of harm is thus connected to the individual subject to the order and local. The risk of serious harm, and the existence of current symptoms of mental illness, are assessed by the doctors comprising the treating team. A member of the treating team then provides evidence to the Tribunal at a mental health inquiry or review.

While the need for control to prevent harm is, of itself, sufficient to found detention under the *Mental Health Act 2007* (NSW), the Act is predicated upon the provision of care and treatment to persons with mental illness. This is reflected in the objects of the Act and the principles of care and treatment that it contains.[18] Indeed, efforts have been made in recent years to further emphasise care and treatment. It bears repeating the remarks, extracted in Chapter Six, of the former

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legislation: From caution to an open door' (2005) 29 *Criminal Law Journal* 94, 110.

17 *Mental Health Act 2007* (NSW) s 15.

18 Ibid ss 3, 68.

President of the Tribunal, Greg James QC, that the *Mental Health Act 2007* (NSW):[19]

> changed the focus of mental health care in NSW from a reliance on detention to obviate risk, to a focus on, and a requirement for treatment, where possible in the community and in all cases, in the least restrictive safe and effective regime.

A key feature of the mental health regime is that a person who is involuntarily detained may be treated against their will, further distinguishing it from the other two regimes.

These liberty restraints are all imposed in different contexts, in respect to different types of anticipated harm, and involve different degrees of liberty restriction—from a deprivation of liberty to a restraint of liberty. However, the experience of them has been similar, and likened to punishment.[20] For example, the experience of involuntary detention was recently described by a mental health consumer as 'overwhelming. You feel as if you've done something wrong…if feels like a prison sentence'.[21] David Hicks recounts of his control order: 'I was still effectively in

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19 Mental Health Review Tribunal, *Annual Report of the Mental Health Review Tribunal for the period from 1 July 2010 to 30 June 2011,* Mental Health Review Tribunal (2011) 4 <http://www.mhrt.nsw.gov.au/mhrt/pdf/Annualreport201011final.pdf>.

20 See also Bernadette McSherry, 'Sex, Drugs and 'Evil' Souls: The Growing Reliance on Preventive Detention Regimes' (2006) 32 (2) *Monash University Law Review* 237, 271–2.

21 Communio, *Evaluation of Efficacy and Cost of the Mental Health Inquiry System - Final Report* (30 January 2012) NSW Health, 55 <http://www0.health.nsw.gov.au/resources/whatsnew/pdf/communio_report.pdf>.

custody; it was an extension of my trauma and interfered with my psychological rehabilitation'.[22] In the high risk offender context, the New South Wales Supreme Court, as outlined in Chapter Five, has noted:[23]

> where a detention order is made under the Act, a person will be detained in a correctional centre, and it would not appear that the detainee's custody is distinguishable from that of a prisoner serving a sentence for a crime.

The case studies also illustrate how the mental health, high risk offender and anti-terror control order regimes give rise to similar issues and concerns despite their contextual differences. Chapter Four discussed the COAG Review of Australia's anti-terror legislation. The Review recommended the retention of the control order regime but with additional safeguards and protections. Many of the protections recommended, such as the provision of appeal rights and consideration of least restrictive alternative, are already in place in the civil mental health regime.[24] It was also noted in Chapter Four that the Independent National Security Legislation Monitor has recommended the repeal of the control order regime and called for consideration instead of a post-sentence regime for terrorist offenders similar to the high risk offender

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22 David Hicks, *Guantanamo: My Journey* (Random House, 2010) 401.

23 *State of New South Wales* v *Tillman* [2008] NSWSC 1293, [59] (Johnson J) citing observations made by Grove J in *State of NSW v Brookes* [2008] NSWSC 473, [1].

24 Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) recommendations 26-38, xiii-xv, 43–63; *Mental Health Act 2007* (NSW) s73, Sch 3 (statement of rights), ss 35(5)(c), 38(4).

regime.[25] This supports Steiker's point that concerns raised in respect of 'certain preventive practices may shed light on what may (or may not) be cause for concern about other preventive practices'.[26] Importantly, it further highlights that innovations or protections in respect of one preventive practice may be used to improve others.

At the same time, the case studies reveal that issues such as the appropriate harm and knowledge thresholds have long vexed legislatures in crafting preventive measures. The recent experience of the New South Wales mental health regime, discussed in Chapter Six, illustrates how successive New South Wales governments have jostled with the standard of proof and expanded and contracted the harm threshold to best address the competing needs of public protection, individual liberty and, in this case, care and treatment. Preventive measures have long been a battleground for the competing concerns of individual liberty and public protection, within and beyond the criminal justice context. This supports the comparative project of the preventive state and how consideration of what has, and indeed has not, proved workable may not only inform other preventive practices but also aid the development of appropriate principles and standards to guide and constrain preventive governmental action.

While a number of important distinctions may be drawn between the

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25 Bret Walker SC, *Declassified Annual Report of the Independent National Security Legislation Monitor* (20 December 2012) 37.

26 Carol S Steiker, 'Forward: The Limits of the Preventive State' (1998) 88(3) *Journal of Criminal Law and Criminology* 771, 779.

three case studies, the continuities between them warrant conceptualisation as part of a 'unified problem'—they are functionally equivalent, share a crime prevention rationale and purpose of public protection, they give rise to related issues and are similarly experienced. The different contexts in which preventive regimes operate no doubt forms part of the reason why preventive practices have often been treated as sui generis—hindering, Steiker contends, rather than aiding understandings of preventive governance. Arguably the presence of distinctions furthers, rather than undermines, the project of the preventive state concept—illustrating the need for comparative accounts of preventive practices to draw out these distinctions and thereby create a fuller picture of preventive interventions. In this way, it may engender a constructive dialogue about the proper limits of preventive state action.[27] Zedner has identified, as was mentioned in Chapter Two, that recognising 'there are similar issues at stake in respect of' various preventive measures, from pre-trial, mental health and immigration detention to preparatory offences:[28]

> might also permit the articulation of larger principles and values by which preventive justice might legitimately be pursued without the need for reference back to the entrenched and often inappropriate provisions of civil and criminal procedure.

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27 In particular, Steiker suggested, without needing to refer back to, or construct arguments in terms of, the punitive state: ibid, 779.

28 Lucia Zedner, 'Preventative Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems* 174, 190.

In this way, recognising continuities and discontinues between different preventive practices might assist in the articulation of principles to guide and constrain preventive action, unshackled by the strictures of civil and criminal procedure. For example, the principle of the least restrictive alternative may be broadly applicable to preventive measures, guiding their imposition. This principle forms a significant part of the civil mental health regime, prohibiting authorised medical officers under the *Mental Health Act 2007* (NSW) from involuntarily admitting, detaining or continuing to detain a person who is mentally ill if 'care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the person'.[29] Similarly, the Mental Health Review Tribunal must be satisfied prior to ordering a person be involuntarily detained that 'no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available'.[30] The COAG Review of Counter Terrorism Legislation recently recommended that a similar principle be introduced

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29 *Mental Health Act* 2007 (NSW) s 12. As noted in Chapter Four, the least restrictive alternative formulation was amended, in 2008, to include a requirement of consistency with safe and effective care. This applies to each stage of admission and ongoing detention. As the explanatory memorandum to the amending Bill made clear: 'it is a requirement to be satisfied that no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available': Explanatory Memorandum, Mental Health Legislation Amendment (Forensic Provisions) Bill 2008 (NSW) 7. In *S v South Eastern Sydney & Illawarra* (2010) NSWSC 178, a matter which raised the question of the meaning of least restrictive alternative in respect to a community treatment order, Brereton J held that: '"[a]ppropriate and reasonably available" treatment does not connote the very best treatment. So long as the alternative is appropriate and reasonably available and is consistent with safe and effective care, it matters not that it may not be the most desirable course of treatment': 40.

30 S35(5)(c)

into the control order regime. The COAG Review reported:[31]

> [i[t should be an additional requirement throughout the legislation designed to ensure that the court which imposes a control order is satisfied that the specific obligations and restrictions to be imposed constitute the least interference with the person's liberty, privacy and freedom of movement that is necessary in all the circumstances. It will require a court to consider alternatives to those that are initially proposed.

The principle of the least restrictive alternative or of least interference, however formulated to address the specific circumstances in which it is invoked, requires the decision maker to consider—to turn their mind to—what constitutes the least restriction or inference with liberty. As such, the least restrictive alternative may constitute a guiding principle in the imposition of preventive restraints on liberty.

This is not, however, to suggest that it is desirable or possible to enunciate principles to guide all preventive interventions or that civil and criminal procedure will never be appropriate reference points. Rather, that being alive to distinctions provides a more textured understanding of preventive practices and, in doing so, aids the difficult task of devising appropriate principles and values to delimit and guide

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31 Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) 63 (Recommendation 37).

preventive governmental action.

B *The Conceptual Limits of the Preventive State Concept*

The preventive state concept is often invoked by scholars to draw attention to governmental initiatives that incapacitate and treat rather than punish. However, as outlined in Chapter Two, the precise contours of the concept have largely escaped attention. Following September 11, preventive scholarship has predominantly focused on prevention in anti-terror law and, to a lesser extent, sex offender regimes. Preventive scholarship has also, in a large measure, concentrated on the relationship between prevention and the criminal law and on the influence of prevention on the role of the state and the criminal justice system. Scholars have, for example, identified concerns about the imperative of prevention driving the unprincipled development of the criminal law and undermining its protections.[32] This raises for consideration whether the preventive state concept should be limited to measures within the criminal justice system and preventive measures judged against criminal law norms.

The case studies undertaken in Chapters Four, Five and Six support the inclusion of measures beyond the criminal justice context. Each of the case studies undertaken share a crime prevention rationale,

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32 See, for example, Andrew Ashworth and Lucia Zedner 'Just Prevention: Preventive Rationales and the Limits of the Criminal Law' in Antony Duff and Stuart Green (eds) *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 279.

demonstrating that concerns to avert future criminal harm are neither new nor unique to the criminal justice context. Preventive measures that restrain liberty to avert anticipated criminal harm have long been employed by governments, both connected with and outside of the criminal justice system. The existence of relevant continuities between the measures studied that are drawn from within and beyond the criminal justice context supports the argument that the preventive state concept should not be conceptually limited to—or preventive measures necessarily measured against—the criminal law or criminal justice context. What this does expose, however, is how preventive scholarship has been diverted, by its focus on anti-terror initiatives and the relationship of these measures to the criminal justice system, from the broader comparative project outlined by Steiker.

It is worth recalling that the preventive state concept was first devised by Steiker in 1998 to draw attention to the accumulation of prophylactic measures in the United States that sought to prevent future harm from occurring by incapacitating or treating wrongdoers.[33] Steiker deliberately pitched the preventive state at a high 'level of conceptual generalization' so that it could serve as a general framework through which to collate and investigate the diverse set of preventive measures employed by governments.[34] The preventive state was invoked to illuminate the lack of cohesive treatment of the diverse preventive

33 Carol Steiker, 'Forward: The Limits of the Preventive State' (1998) 88(3) *Journal of Criminal Law and Criminology* 771, 776–80.

34 Ibid.

practices undertaken by governments, eliding investigation of similarities and distinctions between preventive practices and sidelining questions of the limitations that ought to attach to preventive interventions. However, following September 11 much of the currency of the preventive state has related to anti-terror laws, diverting attention from the broader project of investigating and comparing preventive measures and tying questions of prevention to the criminal justice system. This has obscured inquiry into prevention beyond the criminal justice system, and thus the broader utility of the preventive state as a way to read and understand prevention in lawmaking. Preventive scholarship has thereby continued, in large part, to elide a comparative approach to preventive measures and preventive jurisprudence has remained somewhat underdeveloped.[35]

At the same time, as noted in Chapter Two, the potentially broad ambit of the preventive state concept risks rendering it meaningless as a critical tool: allowing it to represent everything and thereby nothing, and lacking a measure against which to judge action. The case studies undertaken in this thesis illustrate important continuities between preventive measures within and beyond the anti-terror and criminal justice contexts that strengthen its purchase as a critical tool and reinforce—rather than undermine—the comparative project of preventive state scholarship. These continuities illustrate the merit in exploring preventive practices beyond the criminal law, and of

[35] As outlined in Chapters One and Two there are, however, notable exceptions.

relinquishing the criminal law as the norm against which preventive practices are judged. This is not to suggest that the preventive state concept should encompass everything deemed or labelled 'preventive', or that criminal law principles are not important reference points. The conceptual contours of the preventive state will undoubtedly be drawn through the piecemeal examination of different preventive practices. Rather, it suggests that the yoking of preventive practices to the anti-terror and criminal justice contexts is unwarranted, overlooks important continuities with preventive practices beyond these contexts and thereby stymies the development of a broader preventive jurisprudence in Australia.

C *Comparing Preventive Measures: The Utility of the Register of Anticipatory Military Action to Distinguish Between Domestic Laws*

A further limitation identified in Chapter Two was the want of a means to compare preventive measures. A key strength of the preventive state concept, and preventive justice inquiries that have succeeded it, is that it suggests a way forward to alleviate the problems identified as arising out of the current use of preventive practices. It proposes the comparative study of preventive policies and practices to engender the development of a jurisprudence to guide and constrain the use of state interventions to prevent harm. However, it does not offer guidance on how to conduct the comparative study. This is not to suggest that there is only one way to compare and analyse preventive practices and

policies, and this should be followed in all preventive scholarship. Nor is it to suggest that the provision of analytical tools is a requirement of a normative conceptual framework. Rather, it is to point out that the absence of a means to compare preventive practices goes to the achievability of the broader comparative project and thereby to the utility of the preventive state concept.

In order to assess the utility of the preventive state concept and to bring some clarity to the terminology used to describe and compare prevention in domestic lawmaking following September 11, Chapter Three suggested that laws that enable the restraint of a person's liberty to prevent an anticipated harm may be differentiated according to the register of anticipatory military action as applied to domestic law. That is, where the measures fall on the spectrum of anticipatory action in domestic law: 'pre-emption as anticipatory self-defence', 'prevention' and 'Bush pre-emption'. However, it was acknowledged that while this might provide a basis for distinguishing between preventive measures in domestic law, it was unclear whether it would provide a sufficient or useful basis of distinction—this was to be tested through the case studies.

The case studies demonstrate that there is some merit to distinguishing between domestic laws on the basis of the spectrum of anticipatory action. The utility of this basis of distinction is its simplicity: it focuses on the formal aspects of the law in question and when and on what

basis the law permits preventive intervention. It draws attention to the timing of intervention and the harm and knowledge thresholds upon which intervention is based. It also focuses attention on the way in which the regime conceives of the relationship between the known and the unknown, which provides a fuller assessment of the intervention enabled by the regime. It provides a streamlined way to compare and contrast domestic preventive measures according to when and on what basis they sanction intervention to restrain liberty to preclude harm.

However, this basis of distinction is also narrow. It does not promote consideration of broader historical and contextual issues that inform, colour and contribute to the operation of the legislative regimes in question. Testing whether the provisions for involuntary detention amount to 'pre-emption as anticipatory self-defence', 'prevention' and 'Bush pre-emption' does not, for example, stress other significant aspects of the regime, such as the therapeutic relationship between the applicant and respondent in the mental health context. Contextual factors, as discussed in Part II(A), facilitate a nuanced account of the similarities and distinctions between preventive measures in law and therefore generate a more accurate picture of the values and principles that might guide them.

Nonetheless, the adoption of consistent terminology in relation to domestic and international efforts does bring clarity to the terms invoked to describe preventive measures in domestic law. Chapter Three

identified that one of the key challenges to discussing the prevalence of prevention in contemporary lawmaking has been describing it. The adoption of the international register clarifies the meaning of these terms in the domestic context. It also, in its application to this context, reveals that 'pre-emption as anticipatory self-defence', 'prevention' and 'Bush pre-emption' are not static categories—rather, a regime may reflect different categories at the same time and two regimes may emphasise different aspects of the same category.

The case studies do, however, raise some doubt about whether the adoption of consistent terminology between the national and the international is desirable. Chapter Three canvassed reasons for adopting consistent terminology, including that it can account for the blurring of the domestic and international in relation to security, governmental policy and law that has characterised the 'war on terror',[36] and allow 'the insights of the notion of preemption in the international context, to be tested, developed and, where relevant, incorporated into critiques of domestic measures'.[37] However, there are very real differences between anticipatory military action and preventive measures in domestic law which have implications for the construction of the individual subject to the law.

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36 Jude McCulloch and Bree Carlton, 'Preempting Justice: Suppression of Financing of Terrorism and the 'War on Terror'' (2006) 17(3) *Current Issues in Criminal Justice* 397.

37 Ibid 401 and generally 399–402.

In Chapter Three it was noted that anticipatory military action is, obviously, taken against an enemy of the state. The adoption of the same language to describe domestic laws carries with it this construction of the person subject to the law, arguably framing those subject to preventive measures as the 'enemy'. It does so when the subject of the preventive measure at the domestic level may not be an enemy of the state, even in the anti-terror context. A control order may be made where the controlee is not suspected of direct involvement in an anticipated terrorist act. In this way, the adoption of consistent terminology contributes, albeit tacitly, to the perpetration of the 'war on' everything mentality in domestic policymaking and to the construction of the other targeted by domestic preventive measures so labelled.

Distinguishing between preventive measures in domestic law on the basis of the spectrum of anticipatory action has some merit—it has provided a useful basis in this thesis for distinguishing between preventive measures and testing whether and how control orders are different. As such, it provides a basis for comparing preventive measures in law more generally to see whether and how the measures in question deviate from accepted practices. This analysis could, for example, be applied to other preventive anti-terror measures to assess whether and how these measures differ from measures in other areas of Australian law. However, while noting the potential of this typology, it is important to recognise the concerns raised about its application to domestic measures. For example, it is important to acknowledge the

distinctions between anticipatory military action and domestic legislative action and, in particular, the implicit construction of the other as the enemy that is part of the register of anticipatory military action. This does not, however, cast any real doubt on the utility or achievability of the comparative project of preventive state scholarship. Rather, it urges caution in the adoption of terms devised in the international sphere to describe and compare preventive measures in domestic law.

D *The Utility of the Preventive State as a Way to Read Developments in Australian Law*

There are a number of contributions that the civil mental health, high risk offender and ant-terror control order case studies make to understandings of the preventive state concept and its utility in reading developments in Australian law. First and foremost, the case studies reaffirm the need to explore and compare preventive measures as part of a broader picture of preventive action undertaken by governments. These studies illustrate that common issues exist between preventive measures, past and present, that support the project of preventive state scholarship in promoting the development of a preventive jurisprudence and in the articulation of principles to guide and constrain preventive governmental action. The case studies demonstrate that consideration of preventive practices beyond the criminal justice context illuminates interesting continuities that—despite contextual differences—support

the categorising of preventive measures as part of a 'unified problem' and contribute to understandings of the conceptual limits of the preventive state concept. It also reveals the importance of studies that are historically sensitive and detached from the criminal justice context to the project of understanding divergent preventive practices employed by governments.

The case studies demonstrate that the preventive state concept is a useful way to read and understand developments in Australian law following September 11. Pitched at a high level of conceptual generalisation, the preventive state concept provides a way to read developments in lawmaking that captures the range of governmental responses that seek to preclude future harm whether couched in terms of risk, security, uncertainty or dangerousness. What the preventive state concept and preventive justice inquiries provide is a way forward in the face of the apparent rise in prevention—the comparative study of preventive practices to engender a jurisprudence to guide and constrain the use of state interventions to prevent harm. The case studies reinforce the significance of this project, illuminating common issues and continuities between different preventive measures that support the development of a preventive jurisprudence in Australia.

Indeed, the continuities between the preventive measures studied warrant the viewing of control orders as part of a pattern of preventive governmental practices employed by Australian governments. Control

orders are best understood not as extraordinary measures that may be isolated as a specific response to the threat of terrorism following September 11 but as part of a picture of preventive governance that preceded the events of that day, yet took its most visible form thereafter. Viewed this way, control orders do deviate from accepted principles of the criminal law; however, they are not exceptional for doing so. Preventive measures have long existed as part of, and outside of, the criminal law that deviate from its principles and protections. The case studies of civil mental health involuntary detention and the high risk offender post-sentence interventions reinforce the point made by Finnane and Donkin that 'in combating security threats, the liberal state has long adopted means that sidestep, avoid or are indifferent to the operations and concerns of the criminal law'.[38] This goes some way to explaining the relative ease with which control orders have endured and indeed been replicated in other areas of the law, despite garnering significant criticism for their deviation from criminal law principles and protections. Similar practices have long been relied upon by the state in its pursuit of security.

While demonstrating that control orders fit a pattern of preventive governance practices in Australia, importantly the case studies also show that control orders are exceptional in their reach, going further than the orders available under the high risk offenders and civil mental

[38] Mark Finnane and Susan Donkin, 'Fighting Terror with Law? Some Other Genealogies of Pre-emption' (2013) 2(1) *International Journal of Crime and Justice* 3, 13.

health legislative regimes in a number of respects. This is evidenced by the control order regime aligning closest with Bush pre-emption. In contrast to the other regimes, the control order regime targets a potential threat—potential because it has not emerged and its source is unknown. While an order made under the high risk offenders regime may also target a threat that has not emerged—the risk need not be more than 50% for it to be regarded as unacceptable—the source of the anticipated harm is identified. This is not the case with control orders. For a control order to be made, the controlee does not need to be the source of, or directly connected to, the possible terrorist threat. As such, anti-terror control orders can be made on the basis of what a third (unspecified) person might do.

In further contrast to the other two regimes, a control order can be made on a purely predictive basis, without any anchor in past conduct or a predicate such as symptoms of mental illness. Where past conduct is alleged—training with a terrorist organisation—it does not need to be established to the criminal standard, or on the basis of contemporaneous evidence. Control orders, although hybrid civil–criminal orders like the high risk offender extended supervision order, go further—they are issued on a lower standard of proof and attract a significantly higher maximum term of imprisonment on breach.

What is different about the control orders regime is that it evinces precautionary as opposed to risk thinking. One of the dangers of

precautionary thinking in lawmaking is that it leads to vague and indeterminate standards. In Chapter Four it was suggested that this has given rise to the availability of different interpretations of the control order provisions, leading the Independent National Security Legislation Monitor to argue that Australia's two control orders should not have been made. This links to a further consequence of precautionary thinking in domestic lawmaking—it is error prone, generating false positives or the finding of harm where none exists. Precautionary thinking in domestic lawmaking illustrates the very real difficulties of attempts to govern and legislate, as Zedner has aptly put it, 'at the limits of knowledge'.[39]

While the preventive state concept provides a useful way to read and understand developments in Australian law, the concept is limited. It does not—nor can it, as a normative conceptual framework—explain why a greater reliance has been placed on precautionary thinking or what it means, more broadly, for governance practices. Arguably, it does not have to. It is broad enough to encompass governmental responses that may be described in terms of precaution or risk thinking and the theoretical explanations on which these descriptions rely. What the preventive state concept does provide is a response to the current use of preventive measures—the engendering of a preventive jurisprudence and the development of principles to guide and constrain preventive action taken by governments.

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[39] Lucia Zedner, *Security* (Routledge, 2009) 130.

The preventive state concept is a useful way to read developments in Australian law. It provides an important normative project to develop principles to constrain and guide preventive governmental practices. The finding that control orders are best understood as part of a pattern of preventive governance in Australia, but are nonetheless exceptional in their reach when compared to the other measures studied, has a number of implications that will be explored in the next section.

III Conclusion & Implications

Following the terrorist attacks of September 11, 2001, the Australian government embarked on an anti-terror legislative agenda that prioritised the prevention of terrorism. This was in line with the obligations imposed on Member States by the Security Council and in keeping with the responses of other nations.[40] The Australian government justified the enactment of many of its preventive anti-terror laws, such as control orders, as exceptional and temporary measures that were necessary to meet the exceptional threat posed by transnational terrorism. Despite this, state and territory governments have been quick to model anti-terror control orders in their legislative responses to organised crime.[41] This thesis was motivated by a desire to

40 Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 2, 447.

41 Serious organised crime control orders have been introduced in several Australian jurisdictions: *Criminal Organisation Act 2009* (Qld); *Serious Crime Control Act 2009* (NT); *Serious and Organised Crime (Control) Act 2008* (SA);

better understand prevention in Australia's anti-terror lawmaking and, in particular, how preventive anti-terror laws should be understood and situated in the Australian legal system. This thesis has approached this task in a limited way—testing whether control orders, as an example of prevention in anti-terror law, are exceptional and unprecedented when compared to preventive measures contained in the civil mental health and high risk offender regimes. Drawing on the case studies undertaken in Chapters Four, Five and Six, this thesis has argued that the preventive state concept provides a useful way to read developments in Australian law. It has argued that control orders are best understood as part of a picture of preventive governance in Australia, rather than as exceptional and isolated measures. However, this thesis has also found that control orders are exceptional in their reach when compared to the other preventive measures studied—typifying Bush pre-emption rather than prevention.

At its highest, this thesis demonstrates that detailed scholarship is warranted to investigate past and present preventive measures employed by Australian governments, and to consider what principles and values ought to constrain and guide preventive action. This thesis has argued that the continuities discernible between the preventive measures examined in the case studies demonstrate the merit in exploring and comparing preventive practices, both within and beyond

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Crimes (Criminal Organisations Control) Act 2012 (NSW); *Criminal Organisations Control Act 2012* (WA).

the criminal justice context. The recent focus of preventive scholarship on the anti-terror and criminal justice contexts overlooks important continuities with other preventive practices, including historical measures, and stymies the development of a broader preventive jurisprudence in Australia.

This focus of scholarship on the anti-terror and criminal justice contexts also has implications for how we conceive and evaluate anti-terror law. Finnane and Donkin argue that:[42]

> the necessarily limited focus of criminal law and criminology on criminal justice per se has also become a straightjacket when it comes to assessing the generation and function of contemporary counter-terrorist law.

Indeed, the finding that preventive anti-terror measures are best understood as part of a picture of preventive governance explains to some extent the ongoing acceptance of preventive anti-terror measures and the ease with which their innovations have been modelled by state legislatures—similar preventive practices are currently, and have long been, employed by governments seeking security.

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42 Mark Finnane and Susan Donkin, 'Fighting Terror with Law? Some Other Genealogies of Pre-emption' (2013) 2(1) *International Journal of Crime and Justice* 3, 12.

Further, while important concerns can be raised about the creep of preventive measures, the use of preventive measures in relation to a number of different groups designated as 'dangerous' is not new and has fluctuated throughout history. On the Second Reading of the 2006 Bill that introduced the post-sentence regime for serious sex offenders in the New South Wales Legislative Council, Peter Breen raised concerns about the potential for the unjustified extension of preventive measures. He remarked:[43]

> The bill says, "You are an offender who has committed a particularly heinous crime. It is such a bad crime and you are so unreformed and so in denial about what you have done that if you are released you might do it again." If we allow the legislation to go through in this form—and we have done it in relation to terrorists and now we are doing it in relation to sex offenders—why stop there? Let's move on to armed robbers, and after armed robbers let's find some other category of offender who causes particular damage to the victims and also causes a particular concern to the Government.

These concerns are important and properly raised. However, they cannot be overstated. Legislation in similar form—albeit imposed at sentence—has long graced the statute books. Those deemed 'dangerous'

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43 New South Wales, *Parliamentary Debates,* Legislative Council, 30 March 2006, 21814 (Breen)

have long preoccupied Australian parliaments. However, who is regarded as dangerous, the best way to assess dangerousness and what measures should be preferred to incapacitate them has changed over time—and will no doubt continue to do so.

Similarly, concerns raised about the deviation of contemporary anti-terror measures from the criminal justice system and the normalisation of anti-terror measures—the creep of the exceptional into the normal—are, perhaps, overstated. Finnane and Donkin argue that:[44]

> [r]ather than counter-terrorist measures having the potential to leach into the normal criminal process, we suggest, instead, that it makes as much sense, if not more, to consider that the counter-terrorist measures enact strategies that have long been pursued by the modern liberal state's vision of securing its citizens in the interests of order and security, very often at the cost of individual liberty.

This again contributes to explaining the relative ease with which control orders have endured and been replicated in other areas of the law—similar practices have long been employed by the state in its pursuit of security.

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44 Mark Finnane and Susan Donkin, 'Fighting Terror with Law? Some Other Genealogies of Pre-emption' (2013) (2)1 *International Journal of Crime and Justice* 3, 13.

In finding that control orders are best understood as part of a picture of preventive governance that preceded the events of September 11, this thesis has implications for how we conceive of preventive anti-terror measures and preventive governance practices more broadly. The case studies of the civil mental health and the high risk offender regimes demonstrate that pre-crime measures and the concern with the prevention of future harm by liberty restraint are not new, albeit that 'future harm', 'future law' and 'future governance' are new ways of describing it. There have long been measures connected to, and outside of, the criminal justice system and criminal law that seek to prevent crime and harm by imposing restraints on liberty. Contemporary preventive measures may be understood as yet another attempt to incapacitate those deemed dangerous—albeit now labelled as 'risky'—rather than indicative of a radical shift towards pre-crime preventive governmental practices. However, the case studies also reveal that control orders, while fitting preventive governance practices in Australia, do go further than the other measures studied. Control orders typify Bush pre-emption—they evince precautionary thinking and target potential threats. In this respect, control orders are exceptional.

Without doubt, as noted in Chapter Two, the imperative of prevention of terrorism following September 11—and the intensity and breadth of the preventive response to terrorism—has brought to the fore questions of

preventive governance.[45] It has also brought with it new ways to label attempts to avert future harm, and those deemed likely to cause it. McSherry has argued, and as was pointed out in Chapter One, that:[46]

> [w]hat *is* new is the growing reliance upon preventive detention and supervision regimes at both the pre-crime and post-sentence ends of the spectrum *in conjunction with* a growing emphasis on risk and precaution.

McSherry argues that this 'growing reliance' is a 'product of different, but coalescing trends' that include the risk society, the new penology and precautionary action.[47] The control order case study illustrates the move to precautionary action and attempts to 'govern at the limits of knowledge',[48] and the problems this raises.

The growing emphasis on risk and precaution also has implications for how those subject to the law are conceived. In each case study, the

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45 Carol S Steiker, 'Proportionality as a Limit on Preventive Justice' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) 194; see also Alan M Dershowitz, 'The Preventive State: Uncharted Waters after 9/11' in Matthew J Morgan (ed), *The Impact of 9/11 and the New Legal Landscape: The Day that Changed Everything?* (Macmillan, 2009) 7, 8; Eric S Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Cornell University Press, 2006) 94; Jude McCulloch and Sharon Pickering, 'Counter-Terrorism: The Law and Policing of Pre-emption' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routlegde, 2010) 13, 18; Lucia Zedner, 'Seeking Security by Eroding Rights: The Side-Stepping of Due Process' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart 2007) 257, 260

46 Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention* (Routledge, 2014) 29–30 (emphasis in original).

47 Ibid 30, 229.

48 Lucia Zedner, *Security* (Routledge, 2009) 130.

language of risk was co-opted, whether the regime exhibits risk thinking or precautionary thinking, as a way to label—or rather pre-label—those viewed as dangerous. The rebadging of the 'serious' sex offender regime to one of 'high risk' offenders is a good example. Chapter Five outlined the 2013 amendments to the New South Wales regime that included a change to the legislative label given to an offender subject to the regime from 'serious' to 'high risk'. An offender can be labelled 'high risk' where a court is satisfied, to a high degree of probability, that they pose an 'unacceptable risk' of committing a serious sex or violence offence.[49] However, the court can be satisfied the offender poses an 'unacceptable risk' where there is a low risk of reoffending.[50] In the control order context, it was enough that Hicks was 'a risk'—and 'at risk'—for an order to be issued. Similarly mental health involuntary detention is facilitated by the establishment that the person poses a risk of serious harm to themselves or others.

Janus, as noted in Chapter Two, has argued that risk is becoming the new marker of otherness, having replaced 'race, gender, sexual orientation and disability', and constituting the 'foundation of outsider jurisprudence'.[51] He argues that the anti-terror and sex offender legislative schemes in the United States 'reintroduce and relegitimise the concept of the degraded other' and create an alternative system of justice devoid of, or containing an attenuated version of, the normal

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49 *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5B(2), 5E(2).

50 Ibid ss 5B(3), 5E(3).

51 Eric S Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Cornell University Press, 2006) 103–4.

civil liberties protections afforded.[52] In similar vein, Ericson, as noted in Chapter One, has argued that in the context of precautionary practices risk is increasingly being used as a stigmatic label for those deemed threatening to security—who then become the target of counter-law.[53] This is particularly concerning, Sunstein reminds us, as when faced with security threats governments 'often impose selective rather than broad restriction on liberty'.[54] The case studies bear these concerns out in the Australian context—risk is fast becoming the marker of otherness as it is deployed in domestic preventive measures.

The reliance on preventive measures in anti-terror law has raised the visibility of prevention in domestic lawmaking and with it an appreciation of the growing outsider jurisprudence. This again reaffirms the project of preventive state and the need for further preventive scholarship in Australia—by drawing attention to the use of preventive measures and the problems they create, constraining principles may be developed and the dangers of 'future law' can be identified, addressed and abated.

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52 Ibid 94.

53 Richard V Ericson, *Crime in an Insecure World* (Polity Press, 2007) 157, 159.

54 Cass Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press, 2005) 204.

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