SUNSET CLAUSES IN AUSTRALIAN ANTI-TERROR LAWS

ABSTRACT

A sunset clause is a legislative provision that provides for the expiry of legislation at a fixed point in time. The use of such clauses is controversial. Some argue that sunset clauses are appropriate where legislation makes significant inroads into fundamental human rights, for example, in the anti-terrorism context. Others argue that sunset clauses are the ‘spoonful of sugar’ that enables bad legislation to be passed by the Parliament. This article examines the Australian experience with sunset clauses in the anti-terrorism context. Only two pieces of federal anti-terrorism legislation have incorporated a sunset clause. The question that this article asks is how effective these clauses have been. It will consider their impact upon pre-enactment scrutiny of legislation, as well as the extent to which they have led to rigorous and meaningful post-enactment review.

I INTRODUCTION

A ‘sunset clause’ typically provides that all or part of a piece of legislation expires at a fixed point in time. This leaves Parliament with the choice of passing new legislation renewing the relevant provisions (either in their entirety or in part), amending the provisions, or allowing them to terminate. In many instances, a sunset clause also specifies that a review, whether by a parliamentary or independent body, must be conducted to inform the debate over the legislation.
This article concentrates on the sunset clauses adopted in anti-terrorism legislation at the federal level in Australia. Two other commentators — Finn and Ip — have examined the use and effectiveness of sunset clauses in the United States, United Kingdom and Canada. However, little has been written about the Australian experience. This article fills this gap by asking whether sunset clauses adopted in the Australian anti-terrorism context have been effective.

This is not an easy question to resolve, in large part because it is unclear what it means for a sunset clause to be ‘effective’. It might be said that the purpose of a sunset clause is to ensure that the relevant legislation is merely temporary in nature. Therefore, a sunset clause would be considered effective if it results in the expiration of the legislation. However, this is too narrow and simplistic a yardstick. There may be many cases in which a reconsideration of legislation leads to the conclusion that its continued, and possibly even permanent, operation is warranted. Instead, we propose that two separate investigations need to be undertaken to determine whether a sunset clause is effective. These investigations focus upon the role played by a sunset clause in the pre-enactment and post-enactment review of the relevant legislation.

The first investigation focuses on the role played by sunset clauses in the passage of legislation through parliament. A frequent criticism of sunset clauses is that they provide a convenient political excuse for shortcutting initial parliamentary debate about controversial legislation, thereby postponing the substantive debate until the legislation comes up for expiry or renewal. Of even greater concern is the suggestion that a sunset clause operates as the ‘spoonful of sugar that helps controversial legislation go down’. That is, legislation which would otherwise have been blocked by the parliament is allowed to pass on the basis that it has a limited life span. These criticisms will be tested in relation to Australia’s anti-terrorism sunset clauses. We consider whether the adoption of these sunset clauses has undermined the parliamentary process or whether, in the alternative, the knowledge that legislation will have to be revisited and re-justified operates as a check on legislative overreaction.

1 There has also been limited use of sunset clauses in state and territory anti-terror legislation. See, eg, Crimes Act 1900 (NSW) s 310L. This section provides that pt 6B, which contains the offence of membership of a terrorist organisation, will expire on 13 September 2013.
4 See further, ibid 9–10, 15.
5 The same view was expressed by Finn, above n 2, 496.
7 Ip, above n 3, 17.
In conducting this investigation, it is important to view sunset clauses in light of Australia’s passage of anti-terrorism legislation generally. The atmosphere of public fear surrounding terrorist attacks has often — in Australia as well as overseas — resulted in the making of anti-terrorism legislation with inordinate haste and insufficient parliamentary scrutiny. Overall, there has often been ‘an unwillingness to see the legislative process as something beyond merely a political obstacle course’ (emphasis in original). This has been so regardless of whether a sunset clause has been included in the legislation. Hence, it should not be assumed at the outset that any failings in the passage of sunsetted legislation are due to the inclusion of a sunset clause. The causes of any such failings must be carefully examined.

The second investigation is forward-looking. It examines how successful sunset clauses are in countering legislative inertia. This will be tested by asking whether the Australian anti-terrorism sunset clauses have resulted in genuine and rigorous reconsideration of the content and necessity of the relevant legislation. Periodic reconsideration of legislation is extremely important in the anti-terrorism context, especially where the pre-enactment scrutiny of anti-terrorism legislation has been of a poor standard.

Given the significant inroads that such legislation may make into fundamental human rights, such as the rights to privacy and liberty, and the freedoms of speech and association, it is important to periodically consider whether this is justified by the ongoing threat of terrorism. International human rights law creates some space for the suspension of rights in genuine emergencies. However, this cannot justify the blanket suspension of rights. Restrictive measures must be appropriate to achieve their protective function, be the least intrusive instrument amongst those that might achieve the desired result, and be proportionate to the interest to be protected. An important aspect of the proportionality principle is that the


10 See Ip, above n 3, 16–19.


13 For a brief discussion of the concept of proportionality, see R v Secretary of State for the Home Department, Ex parte Daly [2001] 2 AC 532, 547–8 [27]–[28] (Lord Steyn).
suspension of human rights must be ‘temporary’,\(^{14}\) with any suspension only being justified during the period of genuine emergency. The threat of terrorism is not static. As the threat level waxes and wanes, ongoing consideration should be given to whether the legislative measures continue to accord with this proportionality principle. The International Commission of Jurists’ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights noted that in the absence of such consideration, there was a disturbing pattern of anti-terrorism measures which ‘were presumably intended to be temporary, [but] gradually became the norm’. It continued:

\[\text{[M]uch of the evidence suggested that these ‘temporary’ and ‘emergency’ responses tend to seep into other areas of law, and negatively influence the institutional culture of the police, the legal system, and the judiciary.}\(^{15}\)

In light of these two investigations, this article evaluates the effectiveness of sunset clauses in the Australian anti-terrorism context. We then analyse how sunset clauses should be drafted in the future so as to maximise their effectiveness. This involves examining factors such as the consequences of expiry, the term of the sunset clause, whether there should be a mandatory pre-expiry review, and which body (parliamentary or otherwise) should conduct the review.

II Sunset Clauses in Australian Federal Anti-Terrorism Legislation

Sunset clauses have been enacted in two sets of federal Australian anti-terrorism legislation.\(^{16}\) Given that more than 50 pieces of anti-terrorism legislation have been enacted by the Australian Parliament to date,\(^{17}\) sunset clauses have clearly been used sparingly in the anti-terrorism context. The first piece of anti-terrorism legislation with a sunset clause was pt III div 3 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*\(^{\text{C}}\)). This division was introduced by the *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth) (*ASIO Amendment Act 2003*\(^{\text{C}}\)). It created a new system of warrants which, when issued, empower the Australian Security Intelligence Organisation (‘ASIO’) to question and detain individuals for the purposes of gathering intelligence about terrorism offences (‘Special Powers Regime’). When originally enacted, the regime was subject to a

\(^{14}\) International Commission of Jurists’ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, above n 12, 19.

\(^{15}\) Ibid 29.

\(^{16}\) This only refers to primary legislation. It does not include regulations that have a limited life. For example, div 102 of the *Criminal Code Act 1995* sch 1 (Cth) provides that a regulation proscribing an organisation as a terrorist organisation expires after three years. See also s 102.1(3) of this Act; ss 15, 15A of the *Charter of the United Nations Act 1945* (Cth).

sunset clause and was set to expire in 2006. The regime was then reviewed and renewed for a further 10 years, and is now set to expire in 2016.¹⁸

The Special Powers Regime provides that the Director-General of ASIO may apply to an ‘issuing authority’,¹⁹ after obtaining the permission of the Attorney-General, for a questioning or a questioning and detention warrant. Under these warrants, a person may be questioned for up to 24 hours for the purpose of gathering intelligence which ‘is important in relation to a terrorism offence’.²⁰ In addition, a person may be detained for up to a week for the purpose of questioning if there are reasonable grounds to believe that he or she will alert another person involved in a terrorism offence to ASIO’s investigations, not appear for questioning when required, or destroy a record or thing that may be requested during the course of questioning.²¹ It is an offence punishable by five years’ imprisonment to refuse to answer ASIO’s questions, or to give false or misleading information.²² A total of 16 questioning warrants have been applied for and issued.²³ To date, ASIO has not applied for a detention warrant.

The second set of anti-terrorism legislation subject to a sunset clause are provisions inserted into Australia’s federal criminal laws by the Anti-Terrorism Act (No 2) 2005 (Cth) (‘ATA (No 2) 2005’): namely, pt 5.3 divs 104 and 105 of the Criminal Code Act 1995 (Cth) (‘Criminal Code’) and div 3A of the Crimes Act 1914 (Cth) (‘Crimes Act’). All are subject to a 10 year sunset clause.²⁴ The changes to the Crimes Act enable members of the Australian Federal Police (‘AFP’) to stop, question and search people and to seize personal items, without a warrant, in Commonwealth places.²⁵

¹⁸ ASIO Act s 34ZZ.
¹⁹ An issuing authority is a Federal Magistrate or Judge who has been appointed in his or her personal capacity by the Attorney-General: ibid s 34ZM.
²⁰ Ibid ss 34D, 34E, 34F, 34G, 34R, 34S.
²¹ Ibid s 34F(4)(d). The seven day limit on detention is found in ss 34G(4)(c), 34S.
²² See ibid s 34L.
²⁴ Criminal Code ss 104.32, 105.53; Crimes Act s 3UK.
²⁵ Crimes Act div 3A.
The control order and preventative detention order regimes enable significant restrictions to be placed on an individual’s liberty, even to the point of home detention or detention in custody, without a finding of criminal guilt by an Australian court. A control order may be made where a court is satisfied on the balance of probabilities that making such an order would ‘substantially assist in preventing a terrorist act’ or that ‘the person [to be subject to the order] has provided training to, or received training from, a listed terrorist organisation’.\textsuperscript{26} The court must also be satisfied to the same standard that each of the obligations and restrictions to be imposed pursuant to the control order are ‘reasonably necessary, and reasonably appropriate and adapted’ for the purpose of protecting the public from a terrorist act.\textsuperscript{27}

To date, only two control orders have been issued.\textsuperscript{28} The first was issued in August 2006 against Joseph ‘Jihad Jack’ Thomas, after the Victorian Court of Criminal Appeal quashed his conviction for terrorism offences.\textsuperscript{29} The second control order was issued against David Hicks, one of the two Australians detained at Guantanamo Bay. Hicks was made the subject of a control order in 2007, after pleading guilty before a United States Military Commission to providing material support to terrorism and serving the final nine months of his sentence in an Adelaide prison.\textsuperscript{30}

A preventative detention order may be made to prevent a terrorist act from occurring in the next 14 days or to preserve evidence of a recent terrorist act.\textsuperscript{31} An order can be made either by a senior member of the AFP (for an initial period of 24 hours) or by a federal magistrate or judge (for up to a total period of 48 hours). To date, no preventative detention orders have been issued.\textsuperscript{32}

III FIRST INVESTIGATION: THE IMPACT OF SUNSET CLAUSES ON THE PASSAGE OF ANTI-TERRORISM LEGISLATION

A Special Powers Regime

The Special Powers Regime created by the \textit{ASIO Amendment Act 2003} is one of the most controversial pieces of legislation ever passed by the Commonwealth Parliament. Despite ongoing concerns about the vesting of ‘policing’ powers

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  \item \textsuperscript{26} \textit{Criminal Code} s 104.2(2).
  \item \textsuperscript{27} Ibid s 104.4(1)(c)–(d); see ss 104.14, 104.16 in relation to the confirmation of interim control orders.
  \item \textsuperscript{29} \textit{R v Thomas} (2006) 14 VR 475. Thomas was subsequently retried and acquitted of the terrorism offences.
  \item \textsuperscript{30} \textit{Jabbour v Hicks} [2007] FMCA 2139 (21 December 2007).
  \item \textsuperscript{31} \textit{Criminal Code} s 105.1.
  \item \textsuperscript{32} Attorney-General’s Department (Cth), \textit{National Human Rights Action Plan: Baseline Study Consultation Draft} (June 2011) 11.
\end{itemize}
of questioning and detention in a domestic intelligence agency, there can be no doubt that the passage of the ASIO Legislation Amendment (Terrorism) Bill was amongst the more rigorous processes of anti-terrorism law-making in Australia. Three parliamentary committees considered drafts of the legislation and more than 15 months elapsed between the introduction of the Bill into the Commonwealth Parliament and its passage.

The question of whether the Special Powers Regime should be subject to a sunset clause — and, if so, of what length — was a key point of contention in the parliamentary debates and committee reports. When introduced into the Commonwealth Parliament on 21 March 2002, the ASIO Legislation Amendment (Terrorism) Bill 2002 did not contain a sunset clause. The Bill was referred to both the Parliamentary Joint Committee on ASIO, ASIS and DSD (now the Parliamentary Joint Committee on Intelligence and Security) (‘Joint Committee’) and the Senate Legal and Constitutional Legislation Committee (‘Senate Legislation Committee’). In June 2002, these committees delivered their reports and recommended that extensive changes be made to the Bill. The Senate Legislation Committee’s report focused upon the constitutional issues arising from the detention of persons without a judicial finding of criminal guilt, whereas the Joint Committee dealt in considerable detail with the operation of the scheme. Like many of the people and organisations who made submissions to the two committees (580 in total), the Joint Committee criticised the fact that the Special Powers Regime could be used against children and the significant limitations on the right to legal representation. It also criticised the lack of accountability mechanisms attaching to the Regime. The Joint Committee specifically recommended that the Bill be amended to include a sunset clause, which would cause the legislation to expire after three years unless renewed. The recommendation was based on the following reasons:

A sunset clause … terminat[es] an Act when it is considered that the purpose of an Act will expire and not be necessary. In addition, a sunset clause can serve as a significant accountability mechanism. A controversial piece of legislation which has a sunset clause will need to be publicly debated and the Government will need to defend its continuation.

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36 Joint Committee, above n 34, 48–51.

37 Ibid 33–6.

38 Ibid 58.

39 Ibid 57.
The ensuing parliamentary debate about the Joint Committee’s recommendation sheds light on what Australian parliamentarians believed to be the advantages and disadvantages of sunset clauses. The Opposition strongly supported the insertion of a sunset clause. Senator John Faulkner stated that a sunset clause would require the Coalition government ‘to account for, and argue the case for, the continuation of these unprecedented laws’.\footnote{Commonwealth, \textit{Parliamentary Debates}, Senate, 10 December 2002, 7601 (John Faulkner).} Tanya Plibersek MP argued that a sunset clause was necessary because it was impossible to tell ‘what kind of government’ would be in place and how the powers would be used (or misused) in the future.\footnote{Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 19 September 2002, 6716 (Tanya Plibersek).} In equally strong terms, the Coalition government opposed the Joint Committee’s recommendation that a sunset clause be included. The government argued that the ‘war on terror’ did not have an expiry date and there was no way of knowing for how long the new powers would be required. Attorney-General Daryl Williams QC MP stated:

\begin{quote}
The opposition have criticised the government for not agreeing to include a three year sunset clause in the bill. They want the bill to automatically expire after three years. Do the opposition think that the threat of terrorism will have disappeared after three years? Do they think terrorists are just going to give up? … Just because they have not acted in the past year does not mean that they do not have the capability or intent to do so.\footnote{Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 23 September 2002, 7039 (Daryl Williams QC).}
\end{quote}

An amended Bill (which incorporated 10 of the Joint Committee’s 15 recommendations) was passed by the House of Representatives on 24 September 2002. However, the progress of the Bill was hampered by the Senate, in which the Coalition government did not have a majority. The Labor Opposition and other smaller political parties did not regard the amendments as going far enough. It is clear from the debates in both Houses of Parliament that the Opposition was prepared to vest extensive questioning and detention powers in ASIO, however, only if safeguards along the lines of those recommended by the committees were incorporated. For example, Daryl Melham MP stated that:

\begin{quote}
Labor is not soft on terrorists. A number of such pieces of legislation have passed this parliament with Labor support. … We effectively amended those bills to remove what we believed were excessive powers, powers that were not necessary to combat a terrorist threat.\footnote{Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 19 September 2002, 6690 (Daryl Melham).}
\end{quote}
On 21 October 2002, the Senate referred the amended Bill to the Senate Legal and Constitutional References Committee (‘Senate References Committee’).[44] The decision to refer the Bill was made less than two weeks after the terrorist bombings in Bali in which 88 Australians were killed. This decision reveals much about the rigorous nature of parliamentary debate on the Special Powers Regime. Unsurprisingly, the Coalition government used the occasion of the bombings as an opportunity to urge the Opposition and other political parties in the Senate to pass the legislation. On 21 October 2002, Senator Ross Lightfoot stated:

> It is not time for the fashionable Left, or the limp-wristed academics, part of the visible fifth column in Australia, to be listened to. Nor is it time for the Left of politics in this place to withhold their support for essential legislation to give ASIO more teeth at the beginning of this the third millennium. … The ASIO amendment bill gives the ALP, the Greens, the Australian Democrats and the Independents the opportunity to show their abhorrence of the Bali atrocities.[45]

Nevertheless, in sharp contrast to what might have been expected, the Senate continued to insist upon considered debate of the Special Powers Regime. Opposition Senator Nick Bolkus, for example, stated on 21 October 2002:

> [W]e need to ensure that [ASIO] can work effectively to meet the new challenges that may have been thrown up by the Bali terrorism act. We have to get the balance right and in that context we have to ensure that ASIO can be effective, but effective within the democratic structure and values that Australians treasure so much.[46]

On 3 December 2002, the Senate References Committee tabled its report (containing a further 27 recommendations) in the Commonwealth Parliament. On the last sitting day of the Commonwealth Parliament for 2002, there was extensive to-ing and fro-ing between the Senate and the House of Representatives regarding the acceptable amendments to the Bill. The inclusion of a sunset clause was one of three final ‘sticking points’ on which the Coalition government refused to compromise. The other two such points were the limitations on a detainee’s access to legal representation and the ability of ASIO to question and detain minors. In a similar vein to his earlier comments, Daryl Williams MP stated:

> The international and domestic environment has changed forever. There is no way of saying for certain when, if ever, the provisions … will be


[46] Ibid 5458 (Nick Bolkus).
unnecessary … We simply cannot say that these laws will no longer be required in two, three or four years.\(^{47}\)

Instead of a sunset clause that would lead to the automatic expiration of the legislation, the government advocated a process of parliamentary review which would ‘allow the legislation to be reviewed without subjecting it to arbitrary time pressures’. It was argued that this would create ‘an appropriate level of scrutiny of the operation of the laws without the possibility that we will face a situation where we do not have these vital tools when we need them’.\(^{48}\) Its unwillingness to concede a sunset clause was the subject of particularly pointed criticism from then leader of the Opposition, Simon Crean MP. He argued that the Opposition had offered the government a three year ‘test run’ to see how the powers functioned.\(^{49}\) He cast the government’s refusal to accept this compromise as ‘political game playing’, rather than a principled objection to the sunset clause itself.\(^{50}\)

On the morning of 13 December 2002, the Bill was laid aside by the House of Representatives. However, a new version of the Bill, the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No 2], was re-introduced into the House of Representatives on 20 March 2003. This Bill was substantially in the same terms. A compromise was finally reached between the House of Representatives and the Senate on 26 June 2003. The ASIO Legislation Amendment (Terrorism) Act 2003 (Cth) was enacted — and it included a sunset clause.

This process reveals two points. First, the concern expressed by some commentators that the inclusion of a sunset clause may result in the postponing of substantive parliamentary debate is clearly not borne out by the experience in connection with the Special Powers Regime. Despite the heightened atmosphere of fear in which the Bill was debated, several different drafts of the legislation were prepared, parliamentary debate extended over more than 15 months, and the reports of three separate parliamentary committees recommended substantial changes to the legislation. Of course, this may simply have been an aberration resulting from the obviously controversial nature of the legislation and the public’s interest in it.

Secondly, we need to consider the more complicated question of whether the inclusion of a sunset clause was the ‘spoonful of sugar’ that ultimately led to the passage of the legislation through the Senate. The insertion of the sunset clause was mentioned by several parliamentarians as one of the most significant improvements to the original Bill.\(^{51}\) It is therefore undeniable that the inclusion of a sunset clause


\(^{48}\) Ibid.


\(^{50}\) Ibid.

was a factor leading to the passage of the legislation in the Senate. Government Senator Sandy Macdonald stated:

[I]n an effort to achieve opposition support for the bill we have agreed to a three-year sunset clause, despite the fact that we definitely do not believe that a sunset clause is appropriate. But in the interests of getting the legislation through we listened to the opposition’s concern about this and provided a sunset clause. It is messy, but it was provided because it is in the interests of the community that the bill be passed.\(^{52}\)

However, the procedural history of the Special Powers Regime does not support the claim that the inclusion of a sunset clause was the only reason why the legislation was enacted. As noted above, it was never the case that the Opposition objected to the Special Powers Regime in its entirety. It simply insisted on additional safeguards being attached to the legislation. It is important to remember that there was more than one ‘sticking point’ — three in fact — that led to the Bill being laid aside in December 2002. Without agreement being reached on all of these issues, the Bill would not have been passed by the Commonwealth Parliament.

On 17 June 2003, shortly before the Bill was finally passed by the Commonwealth Parliament, Senator John Faulkner described the Bill as ‘a massive improvement on the bill that was proposed in March 2002’.\(^{53}\) In fact, he said ‘[i]t is a radically different bill’.\(^{54}\) By this stage, all three of the issues had been addressed through a process of compromise between the major political parties. First, as already noted, a sunset clause was included. Secondly, the Special Powers Regime no longer applied to persons under 16 years (as opposed to the original proposal of 10 years) and a warrant could only be issued in relation to a person between the ages of 16 and 18 if it is likely that person will commit, is committing or has committed a terrorism offence.\(^{55}\) Finally, in relation to a detainee’s access to legal representation, Faulkner commented:

[A]s the ASIO bill stood in March 2003, only three months ago, the government still did not want people being questioned by ASIO to have access to legal advice for the first two days of their detention. It still wanted to keep them in secret. This approach would compromise one of the fundamental principles of our system of justice: the right to legal advice of choice when being questioned. We are glad the government has now come to its senses on this matter.\(^{56}\)

\(^{52}\) Ibid 11678 (Sandy Macdonald).


\(^{54}\) Ibid.

\(^{55}\) *ASIO Act s 34ZE*(4).

These were only a few of the amendments made to the Bill between March and June 2003. Another significant amendment was the setting of a 24-hour time limit for questioning (in three blocks of eight hours)\(^{57}\) and a seven day time limit for detention.\(^{58}\) Given this, the most accurate characterisation of the sunset clause is to say that it was a necessary — but by no means sufficient — factor leading to the enactment of the legislation.

**B Control Orders, Preventative Detention Orders and Search and Seizure Powers**

The Anti-Terrorism Bill (No 2) 2005 (Cth) (‘A-T Bill’) was prepared by the Coalition government in the wake of the terrorist attacks in London in July 2005. Australia’s constitutional framework made it necessary to obtain the support of the states and territories for new anti-terrorism legislation.\(^{59}\) At a meeting on 27 September 2005, the Council of Australian Governments (‘COAG’) agreed that Australia’s anti-terrorism framework needed to be strengthened to prevent a similar terrorist attack occurring on Australian soil. However, it would only support the new regime if two accountability measures were incorporated. First, the legislation would expire in 10 years, and would then be subject to renewal by the Commonwealth Parliament. Secondly, COAG would conduct its review of the new provisions in December 2010.\(^{60}\) The commencement of this review was announced in August 2012, and the Review Committee is required to report within six months.\(^{61}\)

The terms of the COAG agreement meant that sunset clauses attaching to the control order and preventative detention order regimes and the search and seizure powers were included in the A-T Bill from the outset, that is, when it was introduced into the Commonwealth Parliament on 3 November 2005. It is therefore unsurprising that the role and effectiveness of sunset clauses was not a major focus during the parliamentary debates. The only real point of discussion in relation to the inclusion of a sunset clause was when the legislation would expire. This will be discussed in more detail in Part V when we come to consider the ideal length of a sunset clause.

The provisions of the A-T Bill were deserving of rigorous scrutiny. It was over 130 pages, contained 10 schedules and amended a ‘much wider spectrum of laws’ than

\(^{57}\) *ASIO Act* s 34R.

\(^{58}\) Ibid s 34S.


did the ASIO legislation. Further, as Zifcak notes, ‘its provisions were among the most politically controversial in many years’. The control order and preventative detention regimes, in particular, represented a substantial deviation from traditional principles of criminal justice. As Lynch and Williams commented in 2006:

Under neither order is there a need for a person to have been found guilty of, or even be suspected of committing, a crime. Yet both orders enable significant restrictions on individual liberty. This is more than a breach of the old ‘innocent until proven guilty’ maxim: it ignores the question of guilt altogether.

In light of this, the parliamentary process was very disappointing. The Coalition government proceeded in a manner that ensured the A-T Bill received only minimal scrutiny. It announced an outline of the changes on 8 September 2005, but the A-T Bill was not introduced into Parliament until 3 November 2005. Attorney-General Phillip Ruddock began his second reading speech on this date with a comment that ‘the government would like all elements of the anti-terrorism legislation package to become law before Christmas’. In support of this ‘paradigm of urgency’, Ruddock cited the events leading up to the introduction of the A-T Bill, including the July 2005 London bombings, the terrorism raids which were currently taking place in New South Wales and Victoria, and the fact that the draft legislation had already been ‘the subject of extensive consultation’ between the political parties and with the states and territories.

The time constraints imposed by the Coalition government meant that there was very little opportunity for scrutiny and deliberation by the Commonwealth Parliament (let alone by its committees). An inquiry was conducted by the Senate Legislation Committee, which had time only for a six-day period of calling for submissions, three days of hearings and 10 more days to prepare the final report.

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65 A ‘Draft-in-Confidence’ version of the Bill was made public on 14 October 2005 by ACT Chief Minister Jon Stanhope, thereby providing an extra opportunity for public debate, but also attracting an angry response from the Coalition government.
67 Greg Carne, above n 8, 65–72, 92.
The legislation was passed on 7 December 2005.\textsuperscript{70} In light of the speed with which it passed through the Commonwealth Parliament, it is unsurprising that only a small number of relatively minor amendments were made to it during the course of parliamentary debate.\textsuperscript{71} This stands in sharp contrast to the broad-ranging amendments made to the Special Powers Regime.

The question must be asked whether the inclusion of sunset clauses in the legislation was to blame for the deficiencies in the parliamentary process. In our opinion, the contribution made by the sunset clauses was minimal (at most). At the October 2004 federal election, the Coalition government achieved a majority of seats in both Houses of Parliament. Therefore, the government was not required, as it had been in relation to the Special Powers Regime, to negotiate with the other political parties in the Commonwealth Parliament in order to secure the passage of the A-T Bill. This meant that there was very little opportunity for non-government members of the parliament to have any meaningful input into the development of the legislation. Prior to the introduction of the A-T Bill into the Commonwealth Parliament, the Opposition indicated that it would support the general thrust of the legislation, but would argue for the incorporation of additional safeguards.\textsuperscript{72} It was ultimately unsuccessful in this regard. In conclusion, the inclusion of sunset clauses cannot in this case be described as a ‘spoonful of sugar’. The Coalition government’s dominance in the Commonwealth Parliament meant that this was not necessary.

\textbf{IV Second Investigation: The Quality of Post-enactment Review of Anti-terrorism Legislation}

There is limited material upon which to draw in assessing the impact of sunset clauses on the post-enactment review of Australia’s federal anti-terrorism legislation. The provisions introduced by the \textit{ATA (No 2) 2005} are not due to expire until 14 December 2015. Therefore, the only case study that we can draw upon is the post-enactment review of the Special Powers Regime. The sunset clause in the \textit{ASIO Legislation Amendment Act 2003 (Cth)} provided that the Special Powers Regime would expire on 23 July 2006 and charged the Joint Committee with the task of reviewing the legislation prior to its expiry.\textsuperscript{73} The final report of the Joint Committee was tabled in the Commonwealth Parliament on 30 November 2005.\textsuperscript{74}

As noted in the Introduction, one simplistic test of the success of a sunset clause is whether or not it results in the expiry of the legislation to which it is attached. If we are to adopt this test, then the Australian experience is that sunset clauses have been ineffective. After conducting its review of the Special Powers Regime, the

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\item days of hearings were held in Sydney — on Monday 14, Thursday 17 and Friday 18 November 2005.
\item See also Lynch, above n 9.
\item Dominique Dalla-Pozza, above n 62, 373.
\item Ibid 389 (n 116).
\item \textit{Intelligence Services Act 2001 (Cth)} s 29(1)(bb).
\item Joint Committee, above n 11.
\end{itemize}
\end{footnotesize}
Joint Committee recommended that the legislation be renewed and a sunset clause of five and a half years — significantly longer than the original sunset clause — be adopted.\textsuperscript{75} This recommendation was accepted in part by the government; another sunset clause was imposed, but it was 10 rather than five and a half years in length.\textsuperscript{76} The experience of sunsetting legislation being renewed is not unique to Australia. As noted by Finn in his international study, the expiry of anti-terrorism legislation is extremely rare.\textsuperscript{77} More often than not, legislation has been renewed for a longer period of time than the original sunset clause or even made permanent.

The Canadian \textit{Anti-Terrorism Act}, SC 2001, c 41 might be regarded as an exception to this trend. This Act required Senate and House of Commons committees to conduct a comprehensive review of its provisions and operation after three years. The most controversial provisions — ‘those concerning the power to compel reluctant witnesses to reveal information relevant to terrorism investigations in investigative hearings and the power to make preventive arrests in terrorism cases’\textsuperscript{78} — were also made subject to a five year sunset clause. After the parliamentary review was completed (albeit late) in early 2007, the investigative hearing and preventative detention provisions were allowed to expire in March 2007. However, there are two difficulties with relying on this case as a demonstration of the ability of sunset clauses to result in the expiry of legislation. First, it is questionable whether the sunset clause, and the post-enactment review mandated by it, was the real catalyst for the expiry of the provisions. Roach described the parliamentary debate of the legislation as:

\begin{quote}
[N]asty and partisan. What quickly got lost in the debate was a discussion of the merits or dangers of investigative hearings and preventive arrests or of the interim report of the Common’s Committee.\textsuperscript{79}
\end{quote}

Second, after one unsuccessful attempt in 2008, the Conservative government announced in September 2011 that it would reintroduce the expired investigatory hearing and preventative detention provisions.\textsuperscript{80} As the Conservative government

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\begin{enumerate}
\item Ibid Recommendation 19.
\item Finn, above n 2, 495. See also Ip, above n 3, 15.
\item Ibid 27. Ip makes similar comments on the poor quality of the renewal debate: above n 3, 18, 19.
\end{enumerate}
\end{footnotesize}
currently has a majority in both houses of Parliament, the provisions will likely be enacted, perhaps without a sunset clause attached.81

The renewal of legislation does not necessarily mean that a sunset clause has been ineffective. It is unrealistic to expect that sunset clauses will always result in the expiry of legislation and indeed, in some cases, the most appropriate decision will be to renew the legislation. Instead, it is necessary in assessing the effectiveness of a particular sunset clause to carefully examine whether there has been a meaningful post-enactment review of legislation or whether the review process has merely operated as a rubber-stamp for the renewal of the legislation. In the Australian context, this requires a consideration of both the quality of the review conducted by the Joint Committee and of the extent to which the Joint Committee’s recommendations were taken up in subsequent parliamentary debate and implemented into legislation.

The Joint Committee was a bipartisan committee. It was comprised of members of the Coalition Government and the Opposition. It made considerable attempts to engage the public and interested groups in the review process. In January 2005 (more than 10 months before the report of the Joint Committee was tabled), information about the review and a public call for submissions were advertised in a national Australian newspaper.82 The Joint Committee also prepared a background paper detailing some of the issues for consideration.83 A total of 113 submissions were received from a wide range of interested persons and bodies.84 The Joint Committee held four public hearings in Canberra, Sydney and Melbourne, and invited key witnesses from academia, government, independent agencies, community organisations and the legal profession to provide evidence in relation to the terms and operation of the legislation.

The review process was effective in making details about the operation of the Special Powers Regime publicly available. Although some hearings (or parts of hearings) were held in camera — such as those involving evidence from issuing and prescribed authorities — the Joint Committee emphasised that:

[T]his process of review, without impinging on sensitive matters of national security, should make public as much information as possible about the operations of the Act. It is vital if public understanding of the processes is to be accurate and public confidence is to be maintained. It was clear to the Committee during the course of the inquiry that the secrecy surrounding the operation of the Act has sometimes been counterproductive to these aims.85

81 Ibid.
82 Joint Committee, above n 11, viii.
84 Joint Committee, above n 11, 109.
85 Ibid 4.
Ultimately, the Joint Committee concluded that the Special Powers Regime should remain in force. However, it made 19 recommendations for amendments to the legislation. Some of these recommendations merely clarified areas of confusion in the legislation — for example, amending the Act to achieve a clear understanding of the connection between the period of detention and the allowable period of questioning. However, the vast majority addressed the overreach and substantial human rights failings of the legislation. These recommendations included: (a) the issuing authority be satisfied that other methods of intelligence gathering would not be effective (Recommendation 1); (b) greater access by persons subject to a warrant to effective legal representation (Recommendations 4, 5, 7 and 9); and (c) increasing the transparency surrounding the Special Powers Regime, such as by narrowing the definition of ‘operational information’ and repealing the offence of disclosing the existence of a warrant (Recommendations 16 and 17).86

The prevailing political situation must be taken into account when considering the influence of the Joint Committee’s review on the parliamentary process in respect of the renewal of the Special Powers Regime.87 As already noted above in the discussion of the A-T Bill, the Coalition government in 2005 had a majority in both houses of the Commonwealth Parliament. It was thus unnecessary for the government to make any compromises to ensure the continuation of the Special Powers Regime. It could simply have ignored the recommendations of the Joint Committee and renewed the legislation unamended. This would not have been surprising given the reaction of the Coalition government to the five major post-enactment reviews of Australia’s anti-terrorism legislation conducted in 2006 and 2007.88 As at November 2007, when the Coalition lost government, not a single amendment had been made to Australia’s anti-terrorism legislation in response to these reviews.89

86 Ibid xiv–xvii.
87 For further discussion of the way prevailing political dynamics can influence and be influenced by sunset clauses and renewal debates, see Finn, above n 2, 448–9, 492–5 and Ip, above n 3, 19.
However, in contrast to what might have been expected, the Coalition responded positively to the Joint Committee’s report. It agreed in full with six recommendations\(^90\) and in part with a further six.\(^91\) The amendments, as incorporated into the *ASIO Amendment Act 2006* (Cth), clarified aspects of the operation of the powers as well as adding safeguards for individuals subjected to a warrant. The latter included the creation of explicit rights for the subject of a questioning warrant to contact a lawyer and to apply for financial assistance, and better facilitated the ability of the subject to make complaints in relation to the conduct of ASIO officers.\(^92\) The decision to amend the Special Powers Regime reveals the potential force of sunset clauses. The imminent expiry of the legislation meant that the Coalition government was forced to make a decision in relation to the legislation — to decide whether to renew the legislation, repeal it or make amendments. The need to make a decision, combined with the public spotlight shone on the legislation by the Joint Committee’s review, placed pressure on the government to address problems with the legislation in a meaningful way.

Despite this positive impact of the post-enactment review, it is important to keep in mind that other (and just as important) recommendations of the Joint Committee were rejected by the Coalition government.\(^93\) The government refused, for example, to repeal the secrecy provisions which make it a criminal offence to disclose the fact of a warrant. It also refused to make it a requirement for the issue of a warrant that the issuing authority be satisfied that other methods of intelligence gathering would not be effective. However, far from being a result of the inclusion of a sunset clause, this was in large part due to the make-up of the Commonwealth Parliament at the time.

V Drafting of Sunset Clauses

A Length of Sunset Clauses

All of the sunset clauses currently in place — in respect of the Special Powers Regime, control orders and preventative detention orders, and stop and search powers — are 10 years in length.\(^94\) It is true that there may be some circumstances in which a 10 year sunset clause is appropriate, for example, where it is only possible to assess the impact of legislation over a long period of time.\(^95\) However,

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\(^90\) Recommendations 2, 3, 6, 8, 11 and 12: see Australian Government, above n 76.

\(^91\) Recommendations 4, 5, 7, 10, 13 and 19: ibid.

\(^92\) Now contained in ss 34D(5), 34ZX and 34ZF of the *ASIO Act 1979* (Cth).

\(^93\) See Australian Government, above n 76.

\(^94\) *Criminal Code* ss 104.32, 105.53; *Crimes Act* s 3UK.

\(^95\) As Finn states, a useful feature of sunset clauses is that they provide windows of opportunity for policy makers to incorporate a greater quantity and quality of information into legislative judgments … by redistributing the decision costs of producing legislation over a longer period of time: above n 2, 448.
the arguments made by the Coalition government to support such long sunset clauses in the anti-terrorism context were weak to say the least.

In relation to the Special Powers Regime, the government argued that a 10 year sunset clause was necessary for two reasons: first, to ensure that ASIO is distracted from its operations as infrequently as possible; and secondly, to ensure that Australia is not placed in a position where it is unable to respond to a terrorist threat because the requisite powers have expired.96 These arguments are a weak basis for a 10 year sunset clause. The anti-terrorism legislation discussed in this article confers extraordinary, and even unprecedented, powers on ASIO and the AFP. These powers, and the human rights restrictions they allow, were justified on the basis that they were an emergency response to a terrorist threat. Therefore, the legislation should be subject to a regular renewal process. Indeed, such measures are only justified as long as they remain a proportionate response to the threat posed by terrorism.97 Such a review may require ASIO to prepare a submission and arrange the appearance of ASIO officers before the review body. However, to suggest that any review process would render ASIO incapable of performing its security functions is a clear exaggeration. Similarly, the argument that a short sunset clause may leave us unprotected at the crucial moment misses the point: these are extraordinary measures justified only on the basis that they will only be needed for a short period of time. If it is thought that the security environment has changed to such an extent that the terrorist threat is no longer extraordinary, and these measures should be made permanent, then this must be made clear and a parliamentary debate held to address this issue.

The Coalition government also stated:

The 10 year sunset period will ensure that the legislation can be used over a period the Government assesses there is likely to be a need for these powers … [T]he Government is continuously reviewing the effectiveness of legislation … It is always open to the Parliament to repeal laws at any time if they regard them as no longer necessary.98

Such comments do not contain a clear justification for a sunset clause of 10 years. Rather, they seem directed at opposing the existence of sunset clauses entirely. They suggest that the government can (and should) be relied upon to regularly assess the threat level, the effectiveness and necessity of the legislation and make a decision whether to repeal the legislation. If this was really the case, sunset clauses would be redundant. As we know from the response of Australian governments to the reviews of anti-terrorism legislation over the last decade (discussed in Part IV above), legislative inertia can mean that meaningful reconsideration only occurs when the legislation is set to expire and positive action is then required in order to

96 Australian Government, above n 76, 8.
98 Australian Government, above n 76, 8.
renew it. Therefore, in assessing the appropriate length of sunset clauses in the anti-terrorism context, it must be remembered that it is very likely that governments will not decide of their own initiative to review the legislation.

In 2005, the Senate Legislation Committee, in examining the A-T Bill, noted that a 10 year sunset clause was unprecedented in the Western democratic world. It recommended that the sunset period be reduced to five years ‘in light of the stated purpose of the Bill as a specific and exceptional response to the threat of terrorism’. A minority report prepared by the Australian Democrats recommended a further reduction to three years. The recommendation of both the Senate Legislation Committee and the minority report were based on the view that a 10 year lifespan was ‘grossly disproportionate to any “emergency” that Australia may be facing’. A submission from the Gilbert + Tobin Centre of Public Law quoted by the Senate Legislation Committee argued:

The nature and extent of the terrorist threat cannot possibly be predicted over the forthcoming ten year period, and the government has not presented evidence to suggest that the threat to Australia will be remain constant or will increase over that period. The uncertainty and speculation involved in such predictions point to the need for sunset clauses of reasonably short periods.

These concerns were reflected in the parliamentary debates. Labor parliamentarians noted that the sunset period was far longer than that which had been included in other comparable pieces of legislation (including the Special Powers Regime). Arch Bevis MP claimed that a 10 year clause was ‘absolutely unacceptable — if not offensive — in a democracy like ours’, but did not explain exactly why. The claim was made that 10 years was a political lifetime, and not a sunset clause.

The strong opposition to a 10 year sunset clause does not mean that the shorter the sunset clause, the better. There are dangers associated with sunset clauses of too short a length. In particular, an assessment of legislation over a period of only a year or two is likely to be based on limited information about the operation of the legislation, and will therefore tend to understate its practical effects upon fundamental human rights. As a result, the Commonwealth Parliament may decide to renew the legislation and possibly even to repeal the sunset clause altogether. For example, as a former Canadian legislator, Irwin Cutler, commented in relation to the \textit{Anti-Terrorism Act}, SC 2001, c 41:

\begin{itemize}
  \item[99] Senate Legislation Committee, above n 69, 147.
  \item[100] Ibid 10.
  \item[103] Ibid 73 (Arch Bevis).
  \item[104] Ibid.
\end{itemize}
You can argue as many in my caucus have done that since the provision has effectively not been used, therefore, they are not needed and you should sunset them. Or you should take the position that I’ve taken, the fact that they’ve not been used means they’ve not been abused but they are still needed and should be extended.105

Comments to the same effect have also been made in the Australian context. Both the Joint Committee and the Senate References Committee, in scrutinising the Special Powers Regime powers prior to enactment, recommended that these powers be subject to a three year sunset clause.106 However, the Joint Committee came to a different conclusion when it conducted its post-enactment review in 2005. It noted that the powers had been in existence for ‘only a very short time’ and the ‘whole range of the powers has not yet been exercised’. Therefore, ‘there is no basis to judge whether those powers not yet used are workable, whether they are reasonable, whether they would be used wisely, whether they are constitutionally valid’.107 The Joint Committee concluded:

three years is a brief period of time for consideration of the operation of any legislation, particularly legislation that is to be used only as a last resort; therefore, the period of the sunset clause should be increased [to five and a half years].108

We believe that there is a strong case for sunset clauses attaching to anti-terrorism legislation to be more than three years in length. The exact length should depend upon the subject matter the legislation addresses, and selecting a length will necessarily involve some element of judgment. However, we suggest that five years would be a good starting point. There are three reasons for this. First, a review will ideally be conducted and completed months in advance of the expiry of the legislation, and the extraordinary measures contained in anti-terrorism legislation are not likely to be used on a frequent basis. In the case of the three year sunset clause attaching to the Special Powers Regime, a review was conducted after the legislation had been in existence for just two years. During this period, only three questioning warrants had been sought and issued,109 and ASIO had considered requesting a questioning and detention warrant on only one occasion (although it did not ultimately do so).110 Therefore, there was limited information upon which the Joint Committee could base its conclusions about the continuing necessity for the legislation. Secondly, from a practical perspective, post-enactment reviews are resource-intensive and consequently should only be conducted when the legislation has been in existence for a sufficient period of time to enable a meaningful review. Finally, Australian federal parliamentary terms are three years and therefore,

105 CBC, Newsworld, 27 February 2007 (Irwin Cotler), quoted in Finn, above n 2, 489.
106 Joint Committee, above n 34, 58–9; Senate References Committee, above n 44, 127–8.
107 Joint Committee, above n 11, 107.
110 Ibid 6.
if sunset clauses are more than three years in length, an election will have occurred before the reconsideration of the legislation. This makes it more likely that the people who review the legislation will differ from those who enacted the legislation, and thus a fresh perspective may be brought to the re-examination of the law.

### B Expiry of the Legislation

Sunset clauses typically provide that legislation will expire at a fixed point in time. For example, the current sunset clause attaching to the Special Powers Regime provides that the legislation will expire on 22 July 2016.\(^\text{111}\) If Parliament wishes the provisions to extend beyond that date, it must enact new legislation. However, the sunset clauses attaching the control order, preventative detention and search and seizure powers provide that, after 10 years, the powers become non-operational. Any control orders and preventative detention orders that have previously been issued will cease to have effect. However, the legislation conferring the powers does not in fact expire. That is, the powers ‘remain in legislation, yet [are] unable to be exercised.’\(^\text{112}\) They will remain in this dormant state until Parliament repeals the sunset provisions or, alternatively, passes legislation reactivating them.

The justification given in the Explanatory Memorandum to the A-T Bill for the unusual approach taken in relation to the sunset clause attaching to the control order, preventative detention and search and seizure regimes was that it was necessary that ‘a number of machinery type provisions’ continue in operation.\(^\text{113}\) No clear definition was given as to what the Australian government meant by ‘machinery type provisions’, although one example could be provisions setting out how seized items are to be dealt with beyond the end of the 10 year period. This reasoning is unsustainable. The sunset clause could have been more carefully drafted so as to specifically preserve those provisions regarded as machinery type provisions. Alternatively, the provisions could have been allowed to expire in their entirety and the machinery type provisions re-enacted by parliament if it believed that it was necessary to do so. Given that only two control orders have ever been issued — neither of which is currently in effect — and no preventative detention orders have been issued, this second approach would seem to have been the most appropriate for the parliament to adopt.

The control order and preventative detention order regimes significantly affect basic human rights by allowing for the detention of a person in the absence of a finding of criminal guilt by a court. In 2005, they were explained by the Coalition government as necessary to respond to the serious threat of terrorism.\(^\text{114}\) However, if these provisions are allowed to lapse in 2016, the only conclusion to be drawn is that the Commonwealth Parliament believes that the threat of terrorism has decreased and

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\(^{111}\) ASIO Act s 34ZZ.

\(^{112}\) Senate Legislation Committee, above n 69, 132.

\(^{113}\) Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth) 36.

\(^{114}\) Commonwealth, Parliamentary Debates, House of Representatives 10 November 2005, 68–9 (Wilson Tuckey), 86 (Alan Cadman).
the regimes are no longer required. It is clearly inappropriate to allow the regimes to remain on the statute books (inoperative or otherwise). Of particular concern in relation to this form of drafting is the potential for the legislative provisions to be reactivated without adequate debate. As Peter Andren MP stated:

[I]n 10 years those sleeping powers will remain on statute where any future government can simply repeal the three sunset provisions to bring them back into operation. There should at least be an automatic repealing of the bill, properly amended, under a true sunset clause in five years so any continuation of these provisions are first evaluated, debated and refined.115

We would therefore suggest that sunset clauses should provide for the expiry of legislation at a fixed point in time.

C Primary Legislation

Ordinarily, sunsetted legislation must be renewed by a new statute enacted by parliament. The United Kingdom experience reveals an alternative approach.116 The control order regime in that jurisdiction was introduced by the Prevention of Terrorism Act 2005 (UK) (‘POTA 2005’). The sunset clause originally attached to the POTA 2005 provided that the regime would expire in 2006. However, it also enabled the Secretary of State for the Home Department (‘Secretary of State’), by order made by statutory instrument, to extend the regime on an annual basis.117

There are two safeguards attaching to this regime. First, the Secretary of State is not permitted to make an order unless he or she has consulted with the Independent Reviewer of Terrorism Legislation, the Intelligence Services Commissioner and the Director-General of the Security Service.118 Secondly, a draft of the order must be laid before the United Kingdom Parliament and approved by a resolution of each house.119 In spite of these safeguards, however, the United Kingdom Parliament’s Joint Committee on Human Rights (‘JCHR’) has been critical of the renewal process. It noted that ‘it is very rare for the House of Lords to move fatal amendments to Government motions to approve affirmative resolution statutory instruments’.120 It is also extremely rare for there to be any significant discussion by the parliament of the necessity for renewing the legislation. The JCHR has said

116 See also John E Finn’s discussion of the various forms that a sunset clause may take: Finn, above n 2, 445.
117 Ip, above n 3, 20; Prevention of Terrorism (Temporary Provisions) Act 1984 (UK) s 17(3).
118 POTA 2005 (UK) s 13(3).
119 Ibid s 13(4).
that a sunset clause should provide for statutory provisions to lapse altogether at a fixed period (a suggestion we have already expressed our support for), thereby requiring the government to introduce primary legislation to renew the control order regime.\footnote{Ibid. See also Ip, above n 3, 21.} A requirement to introduce primary legislation as a renewal mechanism places a stronger onus on the government to justify the continuation of the powers. In 2001, during parliamentary debates in relation to the sunset clause applying to the indefinite detention regime,\footnote{The control order regime was introduced after the United Kingdom House of Lords determined that s 23 of the \textit{Anti-Terrorism, Crime and Security Act 2001} (UK) c 24, providing for indefinite detention of non-citizens, was incompatible with arts 5 and 14 of the \textit{Convention for the Protection of Human Rights and Fundamental Freedoms}, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by \textit{Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms}, opened for signature 11 May 1994, ETS No 155 (entered into force 1 November 1998), on the basis that it discriminated against non-citizens: \textit{A v Secretary of State for the Home Department} [2005] 2 AC 68.} Baroness Williams endorsed the view that primary legislation should be required for renewal:

If there is no requirement that primary legislation must be introduced again on an annual basis, it is all too probable that this measure will remain on the statute book and gradually will be taken for granted, which is exactly how liberties disappear.\footnote{United Kingdom, \textit{Parliamentary Debates}, House of Lords, 29 November 2001, vol 556, col 556 (Baroness Williams).}

In light of the United Kingdom experience, the traditional sunset clause model, whereby renewing legislation must be passed by the parliament, seems preferable. A clause in this form is more likely to bring about meaningful post-enactment review.

\section*{D Review by a Separate Body}

Post-enactment review should not be limited to debate within the houses of parliament. At any one time, the parliament will have a number of important issues requiring its attention. The consequence is that a decision about the renewal of legislation already on the statute books may be accorded secondary status, and signed off on quickly in order that the issue can be removed from the agenda. It is therefore important that a separate body — whether it be a parliamentary committee, such as the Joint Committee, or an independent body or reviewer established specifically for the purpose — be given the task of gathering
There are two key advantages to a system which requires review by a separate body. First, when it comes time for the parliament to make a decision about repealing or renewing the legislation, all the information it needs to make this decision will have been collated and analysed for it by the body. This was acknowledged by the Joint Committee when reporting on the Special Powers Regime in 2005:

The debate on the legislation will necessarily be more extensive if it must go through a Committee review, such as the current one, and then be debated as legislation in the chambers of the House of Representatives and the Senate.125

Secondly, a separate review may assist in holding the government accountable. The public as well as non-government parliamentarians will be able to test the decision to renew or repeal the law against the recommendations made by the review body. The onus will then be on parliament to explain and justify any departures from these recommendations. This was the case in 2006, when the Coalition government was criticised for failing to implement all the recommendations made by the Joint Committee in its review of the Special Warrants Regime.126

These advantages will, however, only be achieved if two other conditions are satisfied. First, the review itself must be a meaningful one, and the reviewers must not simply rubber-stamp the renewal of the legislation. To ensure this is done, the sunset clause should set out the procedures the review must follow. If the review body is one established specifically for the purpose of reviewing the legislation, as opposed to a standing parliamentary committee, its members should be appointed by a process of consultation between the major parties in Parliament. The report of the review body must also be prepared well in advance of the expiry of the legislation, so that members of parliament have sufficient time to consider any recommendations and schedule parliamentary debates. To enable this to occur, the review body must be given adequate financial and human resources to conduct a thorough review. Depending upon the subject matter with which the particular piece of legislation deals, it may be necessary to give the body the power to compel agencies and individuals to provide it with the information it requires. This would, for example, be appropriate for a review of the ASIO warrants regime, given the level of secrecy surrounding the activities of ASIO and the need for the review body to consider whether any misuses of power have occurred.

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124 See also Ip’s discussion of independent review bodies in the UK and Canada: Ip, above n 3, 23–5.
125 Joint Committee, above n 11, 106.
Secondly, the recommendations made by the independent reviewer must be respected by Parliament. If the reviewer raises serious concerns about the impact of the powers on, for example, human rights or the rule of law, then those concerns must be given proper consideration and not dismissed out of hand as a hindrance to national security. As already discussed above, the response of the Commonwealth Parliament to the recommendations of parliamentary committees has been selective. However, the Coalition government’s adoption of many of the Joint Committee’s recommendations about the Special Powers Regime in 2005 suggests that post-enactment reviews mandated by sunset clauses can have a level of political force. This example provides some hope for the future in this regard.

VI CONCLUSION

Sunset clauses have only rarely been inserted into Australia’s federal anti-terrorism legislation. To date, the Australian Parliament has enacted more than 50 pieces of such legislation. Of these, only two have included sunset clauses. Greater use of sunset clauses might have been expected given the controversial nature of the anti-terrorism legislation and the powerful argument that this legislation should, in many cases, only have a temporary operation. The limited use of sunset clauses reflects a resistance on the part of Australian governments to see anti-terrorism legislation sponsored by them expire at a fixed point in time.

If the utility of sunset clauses is judged by whether they lead to the expiry of legislation, then the Australian experience reflects the disappointing trend in comparable foreign jurisdictions.127 The one piece of federal anti-terrorism legislation subject to a sunset clause that has come up for expiry has (far from being allowed to expire) been renewed for an even longer period than was initially the case. However, expiry is not the only indicator of the effectiveness of such clauses. A more considered assessment requires an examination of the extent to which a sunset clause has produced meaningful post-enactment review of the primary legislation. In Australia’s case, there has only been one occasion to date on which sunsetting legislation has been the subject of a post-enactment review. This review produced a substantial reassessment of the legislation, with the Coalition government making a number of significant amendments. The moderate success of this review stands in marked contrast to the failure over a long period of time for Australian governments to implement the findings of other major reviews not prompted by a sunset clause and the imminent expiry of anti-terrorism legislation. This view of the ‘effectiveness’ of sunset clauses is undoubtedly more modest than an expectation that such clauses will (or, at least, should) result in the expiry of legislation. It is nevertheless a significant outcome in a field where effective review has been difficult to bring about, and implementation of the findings of such reviews even more exceptional. This suggests that sunset clauses should be considered for inclusion in Australia’s anti-terrorism legislation more generally.

Australia’s experience with sunset clauses in federal anti-terrorism legislation provides an insight into how like clauses should be drafted in the future. It is

127 Ip, above n 3, 15; Finn, above n 2, 495.
important that the expiry date stipulated by the clause be neither too short nor too long. Too short, and meaningful review is not possible. Too long, and the sunset clause loses its impact. Our analysis suggests that five years is a good starting point for the length of an anti-terrorism sunset clause, although the precise length will necessarily be affected by the specific nature and context of the legislation. We also believe that a sunset clause should lead to the expiry of the legislation rather than merely rendering provisions ineffective while remaining on the statute book. Further, a sunset clause should require renewal by primary legislation (not, for example, by executive order), and this should not occur until there has been a mandated review by a parliamentary committee or other designated body. Collectively, these factors would lead to the enactment of sunset clauses with the capacity to make a valuable contribution to the ongoing development of Australia’s federal anti-terrorism framework.