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MAXIMISING THE DRAMA: 'JIHAD JACK', THE COURT OF APPEAL AND THE AUSTRALIAN MEDIA[†]

I INTRODUCTION

In recent years, Australian courts have become used to incurring political and public wrath on occasion. Ever since the High Court's determination of the native title claim in *Mabo v Queensland [No 2]*[1] the judiciary have been on notice that they may attract strident and even personal criticism from those who disagree with their decisions. The fact that particular judgments are often misunderstood or subject to crude simplification by those who rail against them provides little solace to a court which is under fire.[2]

While native title cases have tended to provoke a rich seam of discontent with the Australian judiciary,[3] at the State level there is frequently community disquiet about matters of criminal justice. But the Victorian Court of Appeal's quashing of the conviction of Jack Thomas on two terrorism charges in August 2006 is properly understood as more than just another case where the media and public feel a criminal has managed to wriggle out of facing justice. With national security having dominated the public agenda for the last five years, the stakes in the 'war on terror' are seen as much higher.

So a degree of public interest and even concern over the Court of Appeal's decision was to be expected. What followed though was nothing less than a virulent media attack on the Court, its President in particular, and the reliability of the Australian judiciary to protect us against terrorism.[4] While the Court certainly had its

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[†] The title to this paper is inspired by the assessment made by a staffer in the Australian High Commission in Pakistan that the Pakistani officials appeared willing to hand Jack Thomas 'over to Australia so that we can maximise the drama of punishing home-grown terrorists': see *R v Thomas* [2006] VSCA 165, [47] (Maxwell P, Buchanan and Vincent JJA).

1 (1992) 175 CLR 1 ('*Mabo*').

2 See Justice Michael Kirby, 'Shocking level of civics ignorance' *Sydney Morning Herald* (Sydney), 16 August 1997, 17.

3 Even more spectacular than the criticisms to which *Mabo* gave rise, was the political condemnation which followed the decision in *Wik Peoples v Commonwealth* (1996) 187 CLR 1. More recently, Justice Wilcox's opinion in *Bennell v Western Australia* [2006] FCA 1243 (19 September 2006) caused consternation.

4 As to the last of these, see particularly, Andrew Bolt, 'The courts are no protection' *The Sunday Mail* (Brisbane), 27 August 2006, 58.

defenders, the wild objections launched against its decision were striking. Commendably, political figures abstained from passing comment on the case.[5]

The purpose of this article is firstly to examine the Court of Appeal's decision in *Director of Public Prosecutions v Thomas*.[6] It then looks at the debate which occurred through the Australian media about that decision. This reveals a division in Australia's public community over the proper role of the judicial arm of government at a time when fears of terrorist activity fuel calls for uncompromising responses. Politically, to be seen as 'soft on terror' has marginalised voices in debates over legislative and executive responses to the terrorist threat. The *Thomas* case is the first occasion where this charge has been levelled at the courts.

Public perception – as shaped by media commentary – of the role which courts should play in cases relevant to national security is something about which the judiciary should be extremely concerned. The Chief Justice of the High Court, Murray Gleeson, has since demonstrated this with an uncharacteristically pointed speech to his colleagues at the Judicial Conference of Australia.[7] In drawing on recent overseas cases to support a principled response to those who would urge Australian courts to discard centuries old safeguards,[8] the Chief Justice sought to defend a position for the judicial arm which might not sit well with some in the community but which accords with the most basic appreciation of the rule of law.

Thus, the significance of the case of 'Jihad Jack' is that it has stimulated a new dimension to a now familiar debate – how far do we go in protecting the community from terrorism? Specifically, the Court of Appeal's unanimous judgment and the reception it met with requires us to ponder the proper function of the judiciary in the post-9/11 world.

II THE FACTS – THOMAS IN PAKISTAN

Jack Thomas was apprehended by Pakistani immigration officials on 4 January 2003 at the airport in Karachi on his way home to Australia. He was detained by Pakistani authorities for five months until he was released and returned to Australia on 6 June 2003. During this time, he was kept in various cells, including a kennel-like cell for approximately two weeks where he was without food for about three

5 Kate Lahey, ' "Jihad Jack" prison sentence quashed' *The Advertiser* (Adelaide), 19 August 2006, 2; Ben Ruse, 'Terror war to last 50 years but will be won: Costello' *The West Australian* (Perth), 21 August 2006, 12. See also Matt Price's tongue in cheek use of the Prime Minister's call to support [cricket] umpires who 'make decisions people don't like': Matt Price, 'The umpire got it right', *Sun Herald* (Sydney), 27 August 2006, 86.

6 [2006] VSCA 165.

7 Murray Gleeson, 'A Core Value' (Paper presented at the Judicial Conference of Australia Annual Colloquium, Canberra, 6 October 2006).

8 Ibid 14-8.

days. He was interrogated numerous times by Pakistani, American and Australian officials, often whilst blindfolded, hooded and shackled. Initially Thomas maintained that he had been a student travelling and staying in Pakistan, but after the second questioning session he decided that it would be best for him to cooperate. After he started cooperating, he was given food and the circumstances of his detention changed.

Thomas was questioned many times before the interview by the Australian Federal Police (AFP) which the Crown relied upon at his later trial. The initial sessions over the first two weeks of his detention were conducted by the Pakistani Inter-Service Intelligence (ISI) and two Americans, mainly at a mansion in Karachi. He was first interviewed by a joint team of Australian ASIO and AFP officers on 25 January 2003. Four interviews took place between that date and 29 January. After the last of those interviews, Thomas was flown to Lahore where he was held for three weeks and interrogated on a daily basis by Pakistani officials and an American called 'Joe', whom Thomas believed to be from the Central Intelligence Agency ('CIA'). Upon returning from Lahore, Thomas was again interviewed by the joint team of Australians on 24 and 26 February. The interview by the AFP which was admitted as evidence at Thomas' trial took place ten days later on 8 March 2003.

In the course of questioning Thomas, American and Pakistani officials frequently resorted to threats. This was accepted and condemned by the trial judge, who noted however that Thomas had been treated properly at all times by Australian officers.[9] In the first questioning session, the Pakistanis threatened to pour water on him, electrocute him and execute him. They told him: 'We're outside the law. No-one will hear you scream.'[10] Thomas reported that in the next questioning session:

> …the short Pakistani officer grabbed my hood by the collar and strangled my hood so that I was suffocating and being strangled with my hood and the heat and the stress was unbearable and I felt they were not going to stop until I screamed out and they released me.[11]

In later interviews the American referred to as 'Joe', threatened to send Thomas to Afghanistan where he would be tortured and to arrange for his wife to be raped when Thomas would not give him the information he wanted. Thomas later testified that:

> Joe kept insisting that I knew the next operation or next target and I kept insisting I did not get involved in that kind of discussion, and had no knowledge of such things. He wasn't believing me so he was ratcheting up the pressure. He said I would be sent back over the border into Afghanistan, where the latest technique to extract information was twisting testicles. 'I love

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9 *DPP v Thomas* [2006] VSC 243, [40] (Cummins J).

10 [2006] VSCA 165 [14].

11 Ibid [15].

> to hear the sound', he said, 'when they twist their testicles. They just scream.' He said the guards would not treat me like that here. I would be bashed and beaten every day. He said: 'You're just going to have to prove it once you get there.' I felt sure I was being sent there and no matter what I said wouldn't console him. I just got to a stage when I broke down because of what he was saying, especially about my wife and sending agents to Australia to rape my wife.[12]

Officials from all three countries also repeatedly offered Thomas inducements for his cooperation. For example, in an early interview with American and Pakistani officials, Thomas' questioners indicated that they would pass on their favourable impressions of his cooperation so that he could return home to his family. When the joint team of Australians interviewed Thomas in late January, they also indicated that his fate would be determined by the extent of his cooperation:

> …I would encourage you to be completely open and honest with us and then down the track, down the track once we've prepared our reports then our analytical people back in Canberra can then look at other information they hold and then we can determine whether you've been co-operative.[13]

In another interview, he was told:

> About all we can do for you is reflect back to our Pakistani colleagues and to our Government as to whether we consider that you've been co-operative or not. ...Now whether that does you any good is something that I can't comment on either. It's some-thing you need to decide in your own mind, would I rather be perceived as being co-operative or would I rather be perceived as being obstructionist and difficult and potentially malicious in coming out with stories...[14]

In separate interviews, the Australian officials engaged in techniques labelled by the Court of Appeal as 'emotional manipulation'.[15] Officers showed Thomas a letter from home and a photograph of himself with his family implying that Thomas' responsiveness to questions would affect the likelihood of his being reunited with his family.[16] After showing Thomas the photo of his family, the Australian questioner said twice to Thomas that he/they 'might give you another look at that later'.[17]

The purpose of the AFP's interview with Thomas on 8 March was to gather evidence in a form and by a process that would be admissible in an Australian court

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12 Ibid [33].
13 Ibid [24].
14 Ibid.
15 Ibid [78].
16 Ibid [25], [26], [77] and [78].
17 Ibid [78].

(hereafter the 'AFP interview'). AFP case notes and correspondence between itself and the Australian High Commission and the Pakistani (ISI) show that the AFP was well aware of the relevant requirements, including s 23G of the *Crimes Act 1914* (Cth) which requires the interviewer to inform a suspect that he or she may communicate with a legal practitioner of the suspect's choice and arrange for them to be present during questioning.[18] The AFP wrote to the ISI requesting that the necessary Australian requirements be met for the AFP interview but the ISI would not allow Thomas to have access to a legal representative.

On 8 March 2003, the AFP interview went ahead in the absence of legal representation. The interview took place in the same room as the previous ASIO-AFP interviews and the interviewers were Federal Agents Lancaster and Williams (the former had been present at the two February ASIO-AFP interviews, while the latter had been present during all six). Thomas was not given any advance notice of when the interview would occur and was taken there hooded, handcuffed and shackled, just as on earlier occasions. Only once he had arrived did the AFP tell him that the interview was a 'record of interview' and was 'different' to his previous interviews. The AFP officers explained that Thomas had a right to silence and sought to confirm that he understood this. Thomas responded in the affirmative but also added 'Your [*sic*] urging me to tell you everything',[19] to which one officer tried to clarify with 'I'm not urging you anything – it's your choice of whether you participate in this interview or not?'.[20]

The officers also informed Thomas that under Australian law he was entitled to consult with a legal practitioner but that this right would not be available to him for the interview. Thomas indicated that he understood this, expressed his desire to be helpful and return to his family and, after some confused talk about what he should do, agreed to continue with the interview. In evidence on the voir dire about the AFP interview at his subsequent trial Thomas indicated that he decided to cooperate because he believed it would assist his return to Australia.[21]

After the interview, the AFP complained to the ISI that due to the limited time allowed for interview and the denial of access to a legal representative 'in addition to other factors, the admissibility of that [record of interview] in Australian Courts has been seriously compromised.'[22]

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18 Ibid [36]-[43].
19 Ibid [51]
20 Ibid [51].
21 Ibid [52].
22 Ibid [42] (emphasis removed).

III THOMAS ON TRIAL

On 18 November 2004, Thomas was arrested at his home in Melbourne 17 months after his return. He was charged in Victoria with offences under sections 102.6 (intentionally receiving funds from a terrorist organisation) and 102.7 (intentionally providing support to a terrorist organisation) of the *Criminal Code* (Cth) ('the Code'), and section 9A of the *Passports Act 1938* (Cth) (possession of a falsified passport), since replaced by *Australian Passports Act 2005* (Cth).

At trial, the prosecution's case was based on evidence concerning Thomas' activities in Pakistan from 2001 to 2003, and the self-inculpatory statements made by Thomas in the AFP interview were crucial to his conviction. It was alleged that he had trained at an al Qaeda camp – though he was not charged with the offence in section 102.5 of the Code which relates to such activities since his training pre-dated the enactment of that provision – and then made himself available as a 'human resource' prepared to engage in a terrorist act. Thus, the main charge against Thomas was that he had provided support to a terrorist organisation in breach of section 102.7 of the Code. On this the Victorian Supreme Court jury acquitted him. He was, however, convicted on the other two charges. The prosecution satisfied the jury that Thomas had received money from al Qaeda to pay for his airfare back to Australia and that he fraudulently altered his passport to conceal the length of his stay in Pakistan. In March 2006, Justice Cummins sentenced Thomas to five years imprisonment for the former and two years for the latter, to be served concurrently.[23]

During the trial, Thomas sought to challenge the prosecution's reliance on the admissions obtained during the AFP interview. Justice Cummins conducted a hearing on the voir dire and concluded that the interview was admissible in evidence. His Honour found that Thomas' answers had been made voluntarily and without inducement.[24]

On the issue of whether the admissions were voluntary, Justice Cummins crucially found that Thomas had a choice as to whether to answer the AFP officers' questions and made an informed decision to do so:

> I do not accept Mr Thomas' evidence that he 'had no choice' but to answer the AFP questions in the 8 March 2003 interview. Mr Thomas had a choice and he was acutely aware of that choice. He knew he could decline to answer questions. That knowledge is articulated in the answers to the AFP questions quoted in paragraph 14 above.[25] He also believed that he was at risk of indefinite detention in Pakistan or of removal to the United States or Cuba. He decided to seek to minimise the chance of indefinite detention in Pakistan or

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23 *DPP v Thomas* [2006] VSC 120 (Cummins J).

24 [2006] VSC 243 [52].

25 Ibid [14], Specifically questions 3, 13-23, 506-7 and 574-578.

> of removal to the United States or Cuba, and to seek to maximise the chances of return to Australia, by answering the questions. That was not a set of alternatives put to him by the AFP interviewers, or by the ASIO officers hitherto, either expressly or implicitly. It was a set of alternatives conceived by Mr Thomas himself. His decision to answer the AFP questions was an informed decision – that is, informed by his knowledge of his right to silence. It also was a rational decision in the circumstances as he perceived them. It was voluntary.[26]

Justice Cummins, as this passage reveals, relied heavily upon the responses which Thomas gave to a number of questions by the AFP officers as to both his understanding of his rights and the way in which the interview was conducted. Certainly, there was no suggestion of anything untoward in the officers' methods during the interview. Justice Cummins rejected evidence from Thomas as to remarks made off tape prior to the interview,[27] and concluded that the interview was conducted 'properly and fairly'.[28] On this, the Court of Appeal later agreed, describing the interview as having been 'conducted in what can be reasonably described as a conventional fashion'.[29]

Central to his finding of no defect in the AFP interview, Cummins J assessed Thomas as being able to distinguish it from the earlier AFP-ASIO interviews and divorce it from the inducements offered in previous interviews. Thus, these could not be seen to have influenced Thomas' decision to answer questions in the AFP interview on 8 March:

> I do not consider that the puttage of antecedent material [gathered from the AFP-ASIO interviews] or the antecedent ASIO interviewing process, or the antecedent events, contaminated the AFP interview. The AFP interview was conducted fairly. There was no inducement proffered. There was a clear bifurcation in purpose, function and form between the ASIO interviews and the AFP interview. Mr Thomas fully understood it… The purpose and function of the AFP interview was stated to Mr Thomas at the outset and he understood it. [30]

It was primarily on this issue that the Court of Appeal disagreed and overturned Thomas' conviction.

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26 Ibid [42].
27 Ibid [45].
28 Ibid [51].
29 [2006] VSCA 165 [51].
30 [2006] VSC 243 [50].

IV THE COURT OF APPEAL DECISION

A *Basis For Decision – the Admissions Were Not Voluntary*

On 18 August 2006, the Victorian Court of Appeal unanimously allowed Thomas' appeal against the convictions and quashed them on the grounds that the admissions made in the AFP interview were not voluntary. The Court cited 'the imperative rules of law requiring the rejection of confessional statements unless made voluntarily' set out by Justice Dixon in *McDermott v R*[31] (and adopted unanimously by the High Court in *R v Lee*[32]):

> At common law a confessional statement made out of court by an accused person may not be admitted in evidence against him upon his trial for the crime to which it relates unless it is shown to have been voluntarily made. This means substantially that it has been made in the exercise of his free choice. If he speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement is made…The expression 'person in authority' includes officers of police and the like, the prosecutor, and others concerned in preferring the charge. An inducement may take the form of some fear of prejudice or hope of advantage exercised or held out by the person in authority…That is the classical ground for the rejection of confessions and looms largest in a consideration of the subject.[33]

The Court found that inducements had been held out to Thomas by persons in authority. Thomas had been repeatedly told by Pakistani interrogators that 'his fate would to a very substantial extent be determined by the extent of his co-operation' and that '[t]his was also emphasised by members of the Australian joint team'.[34] And the Pakistani and Australian officials present during the interviews 'were clearly *persons in authority*' – a term that should not be viewed narrowly despite the lack of an exhaustive definition.[35] The repeated statements suggesting cooperation would be in Thomas' best interest led to his perception that the officials were '"able to influence the course of events" favourably to him'.[36] The Court commented that it was not clear from Justice Cummins' ruling whether he believed that the inducements were held out to Thomas by persons in authority and that they

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31 (1948) 76 CLR 501.
32 (1950) 82 CLR 133.
33 (1948) 76 CLR 501, 511-2; cited at [2006] VSCA 165 [66].
34 [2006] VSCA 165 [71].
35 Ibid [72], referring to *R v Dixon; R v Smith* (1992) 28 NSWLR 215, 225 (Wood J).
36 Ibid [73].

impacted on his decision to speak because his Honour made no reference to the general common law principles or the concepts of 'inducement' and 'persons in authority'.[37]

Justice Cummins was satisfied that Thomas' admissions were voluntary because he was not in a position where he 'had no choice',[38] but rather he had 'conceived'[39] the set of alternatives – between the likely consequences of cooperation or obstruction – and he made a rational decision 'in the circumstances as [he] perceived them'.[40] The Court of Appeal drew on passages from the various interviews and Thomas' overall circumstances to reject the simplicity of this reasoning:

> …these "alternatives" were not simply "conceived" by the applicant. Rather, they were inherent in his situation and were presented to him, directly and indirectly, by the officials on more than one occasion. It was not to the point that these clearly powerful inducements were not held out at the time of the AFP interview nor that the interview itself was directed to a different objective from that of the interviews in which the inducements were held out. What was important was whether the inducements were held out by persons in authority and whether they were likely to have been operating upon the mind of the applicant at the time he was interviewed on 8 March 2003.[41]

Instead, it found that Thomas believed on objectively reasonable grounds that 'insistence upon his rights might well antagonise those in control of his fate'[42] and that it was apparent to him that cooperation was more important than reliance on his rights if he was to change his situation of detention in Pakistan and reduce the risk of indefinite detention.[43]

In admitting the evidence, Justice Cummins had relied heavily upon his finding that Thomas 'fully knew the difference between the intelligence interviews and the AFP interview'.[44] But the Court of Appeal said that whether Thomas appreciated the different purposes of the AFP interview was 'immaterial'.[45] That was overwhelmed by the significant continuity between the interviews: 'same place, same AFP personnel, same topics.'[46] Cummins J had recognised these factors produced 'an interface between the ASIO interviews and the AFP interview'.[47] But while acknowledging the need to 'view the events holistically and the affective state of

37 Ibid [79].
38 Ibid [82].
39 Ibid.
40 Ibid.
41 Ibid [83].
42 Ibid [85].
43 Ibid.
44 [2006] VSC 243 [44].
45 [2006] VSCA 165 [84].
46 Ibid.
47 [2006] VSC 243 [47].

the accused contextually',[48] ultimately his Honour appeared to assess the AFP interview on its own terms.

The Court of Appeal found that Justice Cummins erred in 'divorcing the interview from the context in which it occurred, a context which his Honour found operated on the will of the applicant'.[49] The Court argued that a person's perception of the situation in which he or she is placed will inevitably impact on that person's decision 'to speak or remain silent, and the content and form of any statement made'.[50] The Court found that at the time of the interview Thomas was subject to external pressure that restricted his choices:

> Obviously, the fact and circumstances of his detention, the various inducements held out and threats made to him, and the prospect that he would remain detained indefinitely, can be seen to have operated upon the mind of the applicant when he decided to participate in the 8 March interview. Whilst nothing occurred in the interview itself that could be seen to overbear the will of the applicant, there can be little doubt he was, at that time, subject to externally-imposed pressure of a kind calculated to overbear his will and thereby restrict, in a practical sense, his available choices and the manner of their exercise. His endeavours to persuade the interviewers of his good faith and the extent of his co-operation up to that point indicate that he was, as the trial judge found, seriously concerned about what would befall him if he failed to do so.[51]

In particular, the earlier inducements 'remained operative, their power undiminished'.[52] The Court was of the view that attempts by the AFP officers to make it clear to Thomas that he was not to expect repatriation to Australia in return for participating in the interview could not have 'dispelled the "hope of advantage" created by the earlier exhortations to co-operate'.[53]

Similarly, it was hardly realistic to accept that although Thomas knew of the existence of his right to silence he would, under the circumstances, feel able to exercise that right.[54] Officers Lancaster and Williams had some difficulty even getting Thomas to meaningfully acknowledge his understanding of their caution. But while they were express in refuting his initial view that they were 'urging' him to tell them everything, the fact remains that throughout his several interviews, Thomas regularly expressed the fear that he would be indefinitely detained in a

48 Ibid [51].
49 [2006] VSCA 165 [91].
50 Ibid.
51 Ibid [92].
52 Ibid [88].
53 Ibid.
54 Ibid [89].

foreign country if he did not co-operate.[55] By 8 March, he would have placed little store in his right to remain silent, especially since the persons to whom he was talking had been present at earlier interviews when he had disclosed his activities and at which he had not been afforded that same right.

B *Other Grounds of Appeal*

In addition Thomas argued several other grounds of appeal. The Court addressed the first of these – whether the trial Judge erred in not exercising his discretion to exclude the interview on the grounds of public policy or fairness – in some detail. Thomas argued that his inability to obtain legal advice as envisaged by Part 1C of the *Crimes Act 1914* (Cth) ('*Crimes Act')* in particular should have led Cummins J to rule against admission. The Court of Appeal stated that if, contrary to its view, Thomas' admissions were found to be voluntary, then it would have upheld this ground of appeal also.[56]

It began this part of the judgment with an analysis of the nature and rationale of the unfairness discretion, as set out by the High Court in several powerful passages from *R v Swaffield; Pavic v The Queen*[57] and *Bunning v Cross*.[58] For example, remarks of Stephen and Aickin JJ in the latter case were described by the Court as being as relevant today as when they were made almost 30 years earlier:

> The liberty of the subject is in increasing need of protection as governments, in response to the demand for more active regulatory intervention in the affairs of their citizens, enact a continuing flood of measures affecting day-to-day conduct, much of it hedged about with safeguards for the individual. These safeguards the executive, and, of course, the police forces, should not be free to disregard. Were there to occur wholesale and deliberate disregard of these safeguards its toleration by the courts would result in the effective abrogation of the legislature's safeguards of individual liberties, subordinating it to the executive arm. This would not be excusable however desirable might be the immediate end in view, that of convicting the guilty…[59]

Their Honours had acknowledged that where the illegality arose only from mistake, and was 'neither deliberate nor reckless', then that should affect the exercise of discretion to exclude the evidence given the importance of the competing policy

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55 Justice Cummins acknowledged this but insisted it did not deprive Thomas of a real choice: 'He had the right to choose not to answer, and wait for the legal bus which might never arrive, or to answer, in the legitimate aim of ultimate return to Australia. To say such a choice is no choice at all is revisionism.': *DPP v Thomas* [2006] VSC 243 [20].

56 [2006] VSCA 165 [115].

57 (1998) 192 CLR 159.

58 (1978) 141 CLR 54.

59 Ibid 77-8.

consideration of the 'desirability of bringing wrongdoers to conviction'.[60] The matter of a knowing disregard of statutorily recognised safeguards of the individual was obviously central to the circumstances of Thomas' interview by the AFP in the absence of a legal representative.

The Court found error with Cummins J's assertion that the right to legal representation under s 23G of the *Crimes Act* is not absolute. Justice Cummins had been prepared to read down section 23G so as to accommodate the situation faced by the AFP in Pakistan where the local authorities refused to permit Thomas to have access to legal representation.[61] While the right is certainly subject to the exceptions created by s 23L, Cummins J made no reference to that provision and appeared to be speaking more generally. But the Court insisted that the requirement of legal counsel was only lawfully excused when the conditions outlined in s 23L were met and that was not the case on these facts.[62]

Justice Cummins in his judgment had offered a rather curious explanation as to why the AFP had to interview Thomas at that time, rather than at some future date when a lawyer could be provided – say, upon his eventual return to Australia which occurred three months later. His Honour said that to postpone the interview would have constituted 'poor investigative practice' and added that 'trails go cold'.[63] In a judgment which is much occupied with the distinction between the AFP interview and those which had preceded it, this is a strange justification indeed – a point seized upon by the Court of Appeal which said the denial of a lawyer:

> had presented no obstacle in the way of the intelligence-gathering interviews which had been taking place, the product of which was as we have said of obvious interest to Australian intelligence, as well as to Pakistani and American intelligence agencies.[64]

While Cummins J was clearly sympathetic to the AFP's position and emphasised that the officers in question had not been opportunistic and had 'acted fairly and properly',[65] the Court of Appeal took a stricter line and said that the only course

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60 Ibid 79.

61 VSCA 165 [110].

62 Ibid [106]-[107]. Section 23L of the *Crimes Act* allows the investigating official to not comply with s 23G when he or she believes on reasonable grounds that:
(a) compliance with the requirement is likely to result in:
(i) an accomplice of the person taking steps to avoid apprehension; or
(ii) the concealment, fabrication or destruction of evidence or the intimidation of a witness; or
(b) if the requirement relates to the deferral of questioning – the questioning is so urgent, having regard to the safety of other people, that it should not be delayed by compliance with that requirement.

63 [2006] VSC 243 [20].

64 [2006] VSCA 165, [112].

65 [2006] VSC 243 [22].

open to the officers was 'to acknowledge that no formal record of interview could be conducted so long as the applicant was in Pakistan since, as the investigating officials appreciated, any such interview would be unlawful'.[66] Echoing the High Court precedents, the Court of Appeal found that 'it would be contrary to public policy for this Court to condone what was a knowing non-compliance with the legal protection afforded by Australian law'.[67]

In doing so, the bench expressly adopted statements from Justices Deane and McHugh in *Pollard v R*[68] concerning the interpretation of an equivalent Victorian provision about access to legal representation. Justice McHugh stressed the need for the courts to be guided by the legislature as to what would constitute unfairness, when he said:

> …it is not for the courts to disregard a breach of [the provision] by analysing the circumstances of the case by reference to general notions of fairness. The rules which [the provision] enacts express the legislature's judgment as to what is required if a confession or admission made by a person in custody is to be regarded as fairly obtained.[69]

The passage quoted from Justice Deane's opinion in the same case illuminated the strength of the public policy grounds beyond the position of any one accused:

> It is the duty of the courts to be vigilant to ensure that unlawful conduct on the part of the police is not encouraged by an appearance of judicial acquiescence. In some circumstances, the discharge of that duty requires the discretionary exclusion, in the public interest, of evidence obtained by such unlawful conduct. In part, this is necessary to prevent statements of judicial disapproval appearing hollow and insincere in a context where curial advantage is seen to be obtained from the unlawful conduct. In part it is necessary to ensure that the courts are not themselves demeaned by the uncontrolled use of the fruits of illegality in the judicial process.[70]

The Court also briefly discussed the other three grounds of appeal. On whether particular passages in the record of interview should not have been admitted into evidence because they were the product of cross-examination and/or grounded in reference to earlier but inadmissible interviews, the Court stated that there was nothing about the passages that suggested their probative value 'might have been outweighed by their possible prejudicial impact in the circumstances'.[71] The fourth ground related in two respects to the evidence of a witness named Goba. The Court stated that in its view neither the complaint regarding Justice Cummins' directions

66 [2006] VSCA 165 [111].
67 Ibid [109].
68 (1992) 176 CLR 177.
69 Ibid 236; cited at [2006] VSCA 165 [113].
70 Ibid 202-203; cited at [2006] VSCA 165 [114].
71 [2006] VSCA 165 [116].

on the standard of proof nor that regarding his statement about the prosecution's reliance upon Goba's evidence were of substance.[72] On the final ground of appeal – that the trial judge should have left open the alternative verdict of an offence of recklessly receiving funds from a terrorist organisation – the Court stated that 'it would have been quite unrealistic to put before the jury the possibility of a verdict based upon a factual scenario for which neither side contended and which was simply not supported by evidence'.[73]

C *Retrial*

The Court ordered that the appeal against conviction be allowed and that the two convictions be quashed and the sentences set aside. Rather than directing that verdicts of acquittal be entered, the Court adjourned for hearing on a later date to determine whether there should be an order for a retrial or a direction that verdicts of acquittal be entered.[74]

The need for the adjournment arose when, after the Court published the judgment but before it pronounced the final orders, the Director of Public Prosecutions sought leave to address the Court as to why a retrial should be ordered on the basis of statements made by Thomas in a media interview.[75] The interview in question was with Sally Neighbour on ABC's *Four Corners* though there seems to have been quite different understandings between the ABC and Thomas' lawyers as to when the interview was to be aired.[76] In the interview, Thomas discussed his time at the Taliban training camp *Camp Faroq*, his contact with al Qaeda leaders and the money and plane ticket given to him when he left Afghanistan to return home to Australia.[77] Thomas' counsel urged the Court to proceed with an order of acquittal, describing the DPP's application for a retrial as 'bloody-minded'.[78]

V MEDIA REACTION

The reporting of the Court of Appeal's judgment, and subsequent commentary, was marked by hostility as to the result it produced. In this respect, the *Four Corners* interview certainly played a significant part. Although not included in the evidence in Thomas' trial by jury before the Supreme Court and thus not considered by the

72 Ibid [117].
73 Ibid [119].
74 *R v Joseph Terrence Thomas (No 2)* [2006] VSCA 166 (Maxwell P, Buchanan and Vincent JJA) [8].
75 Ibid [3]-[4].
76 Natasha Robinson, 'Jihad Jack's ABC interview a mistake: lawyer' *The Australian* (Sydney), 22 August 2006, 6.
77 ABC Television, *'The Convert'* (2006) Four Corners, 27 February 2006, <http://www.abc.net.au/4corners/content/2006/s1580223.htm> at 1 November 2006.
78 *R v Joseph Terrence Thomas (No 2)* [2006] VSCA 166 (Maxwell P, Buchanan and Vincent JJA) [5].

Court of Appeal, it enabled critics to point to a disjuncture between the Court's application of the rules of evidence and the facts as Thomas himself had admitted to Sally Neighbour.[79] There was almost no attempt to appreciate that the Court could have no recourse to the transcript of that interview – and indeed to even consider it as a factor would have been not just improper but in contradiction to the Court's insistence upon the rules relating to admissibility of evidence.

Instead, *The Australian's* Legal Affairs editor, Chris Merritt, in a front page opinion piece alongside that paper's news story asked why could the judges of the Court of Appeal not 'find a reason to protect society from this man'.[80] The suggestion that the Court's essential function was to keep Thomas imprisoned was an opening salvo in commentary on the case, which saw traditional understandings of the rule of law as a negotiable item in our response to terrorism. It set the tone for others.

For example, the *Gold Coast Bulletin* asserted that 'our courts must hold the line and bring down decisions that protect the public, not the perpetrators of terror. After all, this is a war'.[81] Jeff Corbett in the *Newcastle Herald* seemed to suggest that the court had no business extending to Thomas the benefit of values which those he had associated with were openly attempting to destroy:

> It's head-shaking stuff when such blind adherence to a rule book sees a suspected criminal walk free with his guilt or innocence untested, but it is something worse when a person convicted of terrorism-related offences is freed by the very same rule of law terrorism hopes to obliterate.[82]

As this passage also demonstrates, there was a great willingness, described by Richard Ackland as 'so much speciousness',[83] to paint the Court's decision as one based on a 'legal technicality'. That expression was first employed, and perhaps understandably so, by Peter Illiffe, the father of a man killed in the 2002 Bali bombing, who had been contacted by *The Australian* for comment on the decision on the day it was handed down.[84] While Illiffe's reaction might well be expected

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79 Almost every commentator on the case made this point, exemplified by one who stated with incredulity: 'We're meant to pretend those admissions [to the ABC] didn't happen': Paul Murray, 'A victory for the enemy within' *The West Australian* (Perth), 26 August 2006, 19.

80 Chris Merritt, 'Legal system releases the enemy' *The Weekend Australian* (Sydney), 19-20 August 2006, 1.

81 'Law must be hard on terrorists' *The Gold Coast Bulletin* (Gold Coast), 24 August 2006, 24.

82 Jeff Corbett, 'Why court terrorism' *The Newcastle Herald* (Newcastle), 23 August 2006, 8. Essentially the same point was made by Paul Murray, 'A victory for the enemy within' *The West Australian* (Perth), 26 August 2006, 19.

83 Richard Ackland, 'Wrong target in hue and cry over terrorist suspect' *Sydney Morning Herald* (Sydney), 25 August 2006, 13.

84 Natasha Robinson, 'Fury after Jihad Jack walks free' *The Australian* (Sydney), 19 August 2006, 1.

given his personal loss,[85] it hardly constitutes informed comment since it was apparent that he had not had the opportunity to fully consider the reasons which the Court gave for their decision. The unanimous judgment goes to great pains to explain that the inadmissibility of involuntary statements is a fundamental protection of civil society.

It is not, however, the passionate responses of victims' families which should be held up for criticism. What was far more worrying was the refusal by many professional commentators to understand the principles which underpinned the Court's decision. The careful and considered judgment was reduced to being described as not just a 'legal technicality',[86] but also 'the blackest of black-letter law',[87] a 'legalistic excuse',[88] and 'legal nonsense'.[89]

Lending some veneer of credibility to these interpretations were opinions proffered by those with legal qualifications and experience. Leading the charge from this group was Peter Faris QC, who said the Court's decision was 'bad law and should be appealed to the High Court'.[90] Elsewhere he opined that it was 'a sad day for Australian justice' and gave a blunt political assessment of the result as a 'victory for civil liberties over national security'.[91] The implication of this being that Australian courts should clearly prioritise the latter over the former. Professor David Flint meanwhile was content to express an opinion that juries should generally 'be allowed to hear and see more' while happily admitting he had no idea whether the Court of Appeal had correctly applied the law or not.[92]

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85 Brian Deegan, who also lost a son in Bali, accepted the correctness of the decision and defended the Court from criticism: Greg Hoy, 'Thomas decision sparks furious debate' *7:30 Report*, ABC Television, 21 August 2006, at <http://www.abc.net.au/7.30/content/2006/s1720397.htm> at 9 November 2006. His comments were sought by *The Australian* but not included in their coverage: Media Watch, 'Full of Sound and Fury', ABC Television, 28 August 2006, <http://www.abc.net.au/mediawatch/transcripts/s1726434.htm> at 9 November 2006.

86 'Lucky Jihad Jack' *The Daily Telegraph* (Sydney), 19 August 2006, 1; and Gerard Henderson, 'Unanimous verdict in democracy divided' *The Sydney Morning Herald* (Sydney), 22 August 2006, 11.

87 'A Battle Lost in War on Terror' *The Australian* (Sydney), 21 August 2006, 11.

88 Piers Ackerman, 'Why terrorism loves justice in the West' *The Daily Telegraph* (Sydney), 22 August 2006, 14.

89 Paul Murray, 'A victory for the enemy within' *The West Australian* (Perth), 26 August 2006, 19.

90 Kelvin Healey, 'Anger on Thomas Lawyer blames 'bad law' for shock release' *Sunday Herald Sun* (Sydney), 20 August 2006, 9.

91 Greg Hoy, 'Thomas decision sparks furious debate' *7:30 Report*, ABC Television, 21 August 2006, at <http://www.abc.net.au/7.30/content/2006/s1720397.htm> at 9 November 2006.

92 Flint said: 'His [Thomas'] interview in Pakistan was crucial. But the appeals court says the jury should not have been told of the interview. This is ridiculous, and if it is

Professor Mirko Bagaric attacked the result, but at least conceded that 'the Court reached the correct decision on the basis of the law as it stands'.[93] However, his call for legislative reform so that irregularities in the obtainment of evidence are addressed by punishing the investigating officers while 'not compound[ing] the harm by allowing the guilty to walk free' showed he also failed to understand the basic principle behind the rules governing admissibility of evidence. If the statements have been given involuntarily and amount to what Bagaric himself described as a 'tainted confession' then one has to ask how the interests of justice are served in allowing a court to have recourse to it. Imposing a penalty upon those responsible for gathering the evidence improperly, yet using it all the same seems an illogical suggestion.

In the course of making this argument, Bagaric expressed agreement with the statement by Peter Illiffe in *The Australian* that the case showed how 'disconnected the Australian judiciary was from reality'.[94] Illiffe also said, 'I'd like to know how one of these judges would feel if they lost one of their own'.[95] This emotive coverage appeared to encourage others to resort to direct personal criticism of the three Justices who decided the appeal. Despite the judgment being unanimous, it was the recently appointed President Maxwell who was singled out for particular attention.

Gerard Henderson was the first to strike out in this direction with the following passages:

> These days it is fashionable in civil liberties circles to analyse the background of High Court judges. Let's try the same practice with the Victorian Supreme Court, for a change. Take the Court of Appeal president, Maxwell, for example. According to Who's Who in Australia, he is a former staffer to a federal Labor attorney-general and a past president of Liberty Victoria. Maxwell was appointed to his present position by Steve Bracks's Labor Government, which has good relations with the civil liberties lobby.
>
> The Thomas case outlines the division between civil libertarian types (trial lawyers, artists, humanities academics, comedians and the like) who focus on legal process and others who take terrorists at their word and regard them as a genuine threat to democratic societies.[96]

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a correct application of the law, then the law should be changed': David Flint, 'Let the facts be known' *The Australian* (Sydney), 21 August 2006, 10.

93 Mirko Bagaric, 'Keep Jihad Jack inside', *Herald Sun* (Melbourne), 22 August 2006, 19.

94 Natasha Robinson, 'Fury after Jihad Jack walks free' *The Australian* (Sydney), 19 August 2006, 1.

95 Ibid 8.

96 Gerard Henderson, 'Unanimous verdict in democracy divided' *The Sydney Morning Herald* (Sydney), 22 August 2006, 11.

There is much here to which we might object. Firstly, as Terry Sweetman asked with incredulity in Brisbane's *Courier-Mail*, 'when did "civil libertarian" become a pejorative term when applied to a judge charged with protecting us through the rule of law?'.[97] Henderson's brief biography of President Maxwell is not in any way inaccurate, but in the absence of any analysis of the Court's reasons for its decision, amounts to nothing more than an attempt to politicise the case by reference to his Honour's 'good relations with the civil liberties lobby' or the government which appointed him. Indeed, what is clear from these paragraphs is Henderson's lack of interest in the law which the Court applied – his energy is directed towards presentation of the case as evidencing a division of opinion about national security and civil liberties in Australian society. He may be quite right on that last point, but it is a crude simplification to portray the Thomas result in this way without more.

While others were content to parrot Henderson's objection,[98] Peter Faris took it to a new level in asking whether the President should have been disqualified for apprehension of bias. Faris first raised this in a column for the online news service 'Crikey',[99] and cited as grounds for disqualification Maxwell P's family membership of Amnesty International, his role in establishing the Human Rights Legal Resource Centre ('HRLRC') and his public opposition, as head of Liberty Victoria before his judicial appointment, to the Commonwealth government's anti-terrorism laws.[100] The column was linked to a much longer paper considering the matter in detail, but essentially relying on the same material. Faris drew a parallel to the House of Lords' unanimous overturning of its earlier decision to extradite former Chilean dictator General Pinochet on the basis that one of the majority, Lord Hoffmann, had connections to Amnesty International which had appeared as an amicus curiae in the case and made submissions supporting Pinochet's extradition.[101]

A fortnight later, Faris took his complaint to *The Australian* saying there 'is an arguable case…that Maxwell should not be sitting on Thomas' appeal at all because there is a perception (though not the reality) of bias'.[102] This article was presumably directed towards the President's involvement in hearing the application by the

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97 Terry Sweetman, 'Bushwhacked by freedom' *Courier-Mail* (Brisbane), 1 September 2006, 37.

98 Alan Jones, 'Breakfast Show', Radio 2GB, 23 August 2006 quoted at Media Watch, 'Full of Sound and Fury', ABC Television, 29 August 2006, available at http://www.abc.net.au/mediawatch/transcripts/s1726434.htm (date accessed 9 November 2006).

99 <www.crikey.com.au>.

100 Peter Faris, 'Should the judge in the Jihad Jack appeal be disqualified?' available at <http://www.farisqc.observationdeck.org/?cat=81> (date accessed 8 November 2006).

101 *R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.2)* [2000] 1 AC 119.

102 Peter Faris, 'Jihad judge opposed the anti-terror laws' *The Australian* (Sydney), 1 September 2006, 27.

Commonwealth for a retrial. Faris suggested that if the Court failed to address the concern over bias itself, then intervention by the federal government was appropriate.

These criticisms are certainly answerable. Had the Court of Appeal accepted amici submissions from Amnesty International or the HRLRC then undoubtedly Faris' arguments about the propriety of President Maxwell sitting on the case would have substance. However, as he admitted, the Court rejected the applications from both organisations[103] – so it is not clear what basis for concern remains. What is more, the Court expressly indicated that it had not made its decision with reference to any of the supplementary material lodged by Thomas' counsel which substantially mirrored those which the amici applicants had sought to bring before it.[104] The further suggestion that Maxwell P's earlier criticism of the anti-terrorism legislation and also the legality of Australia's involvement in the Iraq war provided grounds for disqualification failed to acknowledge that the Court's decision turns not at all on either of these matters. The judgment directly draws on the text of the governing statute and statements of High Court precedent which pertain to the admission of interview evidence. President Maxwell and his colleagues were not required to apply, much less decide the validity of, the Commonwealth's new counter-terrorism laws.

It was interesting that President Maxwell attracted the lion's share of opprobrium for the Court's decision. In their enthusiasm to link the result with his Honour's personal history, Faris and Henderson did not allow themselves to be inconvenienced by the fact that Maxwell P was only one of three judges who authored the unanimous opinion. The suggestion that his personal or political preferences were brought to bear on two colleagues – Buchanan JA (appointed by the Kennett Liberal government in 1997) and Vincent JA (appointed to the Supreme Court by the Cain Labor government in 1985; and to the Court of Appeal by the Bracks Labor government in 2001) – of many years' experience was, to be blunt, extremely insulting to all three Justices.

Lastly, it should be noted that the flurry of condemnation of the Court of Appeal did not go unanswered by other commentators in the media. There were a number of persons prepared to defend the Court's reasoning despite their distaste for Thomas and the activities he had admitted to in his *Four Corners* interview. In doing so, they could point to the roughly simultaneous verdict of guilt and sentencing of Faheen Khalid Lodhi by the New South Wales Supreme Court for terrorism crimes

103 [2006] VSCA 165 [121]-[126].
104 Ibid [127]-[128].

to demonstrate that panic about our courts offering us 'no protection from terrorism' was a beat-up.[105]

VI THE ROLE OF COURTS IN THE AGE OF TERRORISM

What is particularly striking about much of the outrage directed at the Court of Appeal's decision is its hypocrisy. Many of its critics are the same people who regularly chastise the judiciary for displaying 'activist' tendencies. In suggesting that the Court should have upheld Cummins J's decision to allow the AFP interview to be admitted, despite it not coming within the statutory exceptions of section 23L of the *Crimes Act* and the clear case authorities against the admission of involuntary statements, they seemed unaware of the irony of complaining that the judges had not simply delivered the result which they claimed the public wanted – Jack Thomas to be kept behind bars. As Attwood said, it was a 'curious response…to decry the fact that [the verdict] was made on the basis of points of law. Sorry, but isn't that what courts are meant to do?'.[106]

The *Thomas* case exposed a worrying ambiguity towards the rule of law amongst powerful voices in the Australian community. The suggestion that the primary responsibility of courts is to support the national security agenda of the other arms of government or to decide cases in a way consistent with community fears about terrorists demonstrate the extent of this problem. Australians have long asserted that the rule of law is one of the essential values which defines our society, but our stable and peaceful history has not really put our commitment to this ideal under much pressure. The advent of terrorism as a prominent feature on our political and legal landscape means this is about to change.

Thus, it is notable that Chief Justice Gleeson, without mentioning the Thomas case directly but just weeks after the explosive reaction to the Court of Appeal's determination, acknowledged that 'issues of terrorism and public safety present great challenges to the law, and to courts which are obliged to uphold the law in the face of public impatience, and fear'.[107] His Honour's speech to the Judicial Conference of Australia attracted attention mainly for its clear condemnation of torture at a time when the Attorney-General was advocating an understanding of the concept which would still allow governments to subject prisoners to treatment such as sleep deprivation.[108] Those remarks, and endorsement of the recent House of Lords decision in *A v Secretary of State for the Home Department [No 2]*[109] that

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105 Mike Steketee, 'Rules of evidence protect us all' *The Australian* (Sydney), 24 August 2006, 10.

106 Alan Attwood, 'A triumph for Australia, not a failure' *The Age* (Melbourne), 25 August 2006, 17.

107 Gleeson, above n 7, 10.

108 Chris Merritt, 'Defend rule of law: top judge' *The Australian* (Sydney), 7 October 2006, 8.

109 [2006] 2 AC 221.

evidence tainted by torture had no place in English courts, were certainly a valuable judicial contribution to a debate which gathered steam in Australia in 2005.

But it was the Chief Justice's comments about admissibility of evidence more generally and the role of the courts in acting as a check on government power which are of particular importance. As to the former, his Honour said:

> The rule against the admissibility of involuntary confessions is no doubt an inconvenience for those who enforce the criminal law. It is an inconvenience they are obliged to accept. The alternative, that is to say, receiving evidence of forced confessions, is a price we are not willing to pay in order to secure convictions.[110]

In going on to acknowledge that judicial discretion often rests on contestable normative judgments, Gleeson CJ maintained that the public seemed to accept this as a 'necessary feature of a rational system of justice'.[111] He did, however, stress that public understanding of the inevitable uncertainty on some legal questions and the scope for a diversity of judicial opinion, were important to securing that acceptance.[112] The fact that, in the context of the Thomas case, the Court of Appeal's disagreement with the way Justice Cummins had exercised his discretion was based upon statutory provisions and case precedent should, one would think, invest its decision with greater community confidence than if the Court's justification was flimsy or capricious.

More broadly, the Chief Justice offered a clear assertion of the role of the courts in the present conflict:

> The political branches of government formulate and implement the means adopted to protect citizens against the threat of terrorism. They may do so only by lawful means; and the ultimate responsibility of deciding issues of lawfulness rests with the judicial branch of government.[113]

Chief Justice Gleeson acknowledged that in doing so – and as the members of the Court of Appeal would surely attest – courts were likely to attract 'executive frustration, political criticism and public alarm'.[114] But, his Honour concluded, judicial work was not a 'popularity contest' and judges needed to persevere with the job of exercising their powers 'independently and confidently'.[115]

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110 Gleeson, above n 7, 12.
111 Ibid.
112 Ibid 19.
113 Ibid 14.
114 Ibid 20.
115 Ibid 21.

If proof was needed that the Chief Justice's speech was a timely reminder to the community as to what a commitment to the rule of law entails, one need look no further than the attack his remarks elicited from Professor Mirko Bagaric. Beginning with the charge that Gleeson CJ 'is not a big fan of parliamentary sovereignty' Bagaric took particular exception to the last passage from the speech quoted above, saying:

> This grossly overstates the Australian courts' role in securing the balance between common good and individual rights. Properly understood, the law is the means by which the Government balances public safety and individual rights – it facilitates the Government in this important task. It does not restrict it to any meaningful extent.[116]

This is an astonishing position to adopt – even for a lawyer who has argued that the *Australian Constitution* is 'largely irrelevant'.[117] Those tempted to be dismissive of it as the view of a lone individual who likes to court controversy[118] should realise that it is, in fact, merely the articulation of the opinion held by many critics of the Court of Appeal's decision in *Thomas* – and those voices are significant ones in shaping public opinion.

The suggestion that law should not operate as a check on government power is a dangerous, yet highly seductive one, to promote at a time when the executive and legislature are naturally drawn to novel policies designed to increase security but which may diminish individual freedoms. In the United States, arguments of exactly this sort have underpinned the Bush administration's claim for a virtually unlimited concentration of power in the executive – with highly questionable outcomes.[119] It strikes at the heart of what Gleeson CJ called the 'hard-core value'

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116 Mirko Bagaric, 'Judicial objectivity is a con' *The Australian* (Sydney), 3 November 2006, 24.

117 Mirko Bagaric and James McConvill, 'The *Australian Constitution* – A Century of Irrelevance' (2002) 21 *University of Tasmania Law Review* 89, 89. The authors (at 103) do concede that the separation of powers doctrine is a 'potentially important feature of the Constitution'.

118 In 2005, Bagaric generated heated public debate over the acceptability of torture: Mirko Bagaric and Julie Clarke, 'Not Enough Official Torture in the World? The Circumstances in which Torture is Morally Justifiable' (2005) 39 *University San Francisco Law Review* 581; and Mirko Bagaric and Julie Clarke, 'The Yes Case Can Outweigh the No' *Sydney Morning Herald* (Sydney), 17 May 2005, 13. Bagaric attracted the support of Peter Faris: Angela O'Connor, 'QC uses Dirty Harry to defend torture' *The Age* (Melbourne), 23 May 2005, 3.

119 Cole has labelled these legal justifications 'the Bush doctrine' and outlined what they have permitted in David Cole, 'Why the Court Said No' *The New York Review*, 10 August 2006, 41. In analysing the decision of the United States Supreme Court in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) he writes, 'The notion that government must abide by law is hardly radical. Its implications for the 'war on terror' are radical,

of the rule of law. If commentators, particularly those speaking from positions of seniority in the legal academy and profession, are going to espouse arguments of this sort in the popular media, then it is imperative that others offer a serious rejoinder – and in that same forum.

A week after the Bagaric article, *The Australian* published a damning response from Greg Barns of the Tasmanian Bar.[120] Barns rejected Bagaric's attempt to portray Gleeson CJ as a 'dangerous judicial activist who likes dabbling in the realm of politics' and defended his Honour's speech as a 'plain vanilla, unexceptional recitation of the fundamental principles which have governed relations between the three arms of government'.[121] Strong as Barns' piece was, the very fact that it is necessary to defend the remarks which the Chief Justice made should put the legal community on notice that these are critical times. In that respect, it is particularly important that the recent call by the Attorney-General for lawyer's professional associations to silence themselves go unheeded.[122]

VII CONCLUSION

The Jack Thomas drama has moved on since the Court of Appeal overturned his conviction. In August 2006 Thomas was the first Australian placed under one of the Commonwealth's new control orders under Division 104 of the Code.[123] His legal representatives commenced an action before the High Court so as to challenge the constitutionality of this order made against him, and the matter was heard across several days of oral argument in December 2006 and February 2007.

Additionally, on 20 December 2006, the Victorian Court of Appeal acceded to the Commonwealth's request for a retrial of Thomas of the two offences for which he had originally been convicted.[124] Thomas will return to the Supreme Court later this year for a fresh trial on these counts, with the Commonwealth relying upon his *Four Corners* interview as well as other information he gave to the media in order to establish his guilt.

But regardless of what transpires in either of these new cases involving Thomas, two issues remain ones of ongoing importance from the litigation up to this point. First, is the problem of obtaining quality evidence for the prosecution of persons

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however, precisely because the Bush doctrine has so fundamentally challenged that very idea'.

120 Greg Barns, 'Gleeson no activist in judicial robes' *The Australian* (Sydney), 10 November 2006, 27.

121 Ibid.

122 Phillip Ruddock, 'A Return to Traditional Ethics – the Role of the Modern Lawyer' (Paper presented at Australian Corporate Lawyers Association Conference, Sydney, 10 November 2006).

123 *Jabbour v Thomas* [2006] FMCA 1286 (Mowbray FM) (27 August 2006).

124 *R v Thomas [No 3]* [2006] VSCA 300 (Maxwell P, Buchanan and Vincent JJA).

charged with terrorism offences. The AFP tried in vain to secure permission from the Pakistani authorities to conduct Thomas' interview in accordance with Australian standards. There is also the difficulty of delineating such interviews from intelligence gathering interrogations. The comments by the Court of Appeal about use of the same locations and personnel may assist authorities devise future practice, but inevitably challenges remain given the dual purposes of questioning terrorism suspects. These may be addressed by the development by courts of clear guidelines – as the House of Lords attempted to do in respect of evidence possibly tainted by torture in *A v Secretary of State for the Home Department [No 2]*[125] – but legislative action also cannot be ruled out.[126]

Secondly, if the public response to the Court of Appeal's decision in August 2006 is anything to go by, both the High Court and the Victorian Supreme Court should expect a clamour of interest and commentary of the matters they are yet to rule on with respect to Thomas. In light of his own serious admissions and his demonisation by sections of the media, it may too much to expect the community to readily understand any judicial decisions which go in favour of Thomas. This will surely be the case with others charged with terrorism crimes. It is vital then that the courts themselves – but almost as importantly, the wider legal community also – impress upon the public debate the complex, sometimes unpalatable, yet essential role of courts in upholding the rule of law.

125 [2006] 2 AC 221.

126 The Commonwealth has already made significant changes to the processes governing a court's discretion to admit foreign evidence or testimony by video link in terrorism cases: Andrew Lynch, 'Use of overseas evidence in terrorism offences: The implications of the Commonwealth's new scheme for defendants and the courts' (2006) 27 *Australian Bar Review* 288.