BOOK REVIEW

DANIELLE IRELAND-PIPER (ED), *NATIONAL SECURITY LAW IN AUSTRALIA* (FEDERATION PRESS, 2024)

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This national security educator has likely not been alone in lamenting the absence of a single, Australia-focused, "reference" text addressing relevant law, policy and live issues, and featuring contributions from globally renowned experts from which modular, "scaffoldable" topic learnings can be offered to cross-disciplinary students.[1] Thankfully, rejoicing is now in order following the arrival of this indispensable edited collection. The credentials and subject-matter expertise of the editor and the contributors she has assembled need no restatement here.[2]

Contextualising national security law marks a logical starting point for educators and students alike. In Chapter 1, the editor asks, 'What is National Security Law in Australia?', observing that 'notions of…[it]…are broadly conceived…[engaging] …with the work of philosophers, ethicists, scientists, economists, political scientists and technology specialists'.[3] It would be a lazy reviewer, however, who simply plagiarised the succinct chapter summaries the author goes on to offer, so I revisit them here from the perspective of a national security law researcher and unit coordinator for the cross-disciplinary unit 'Security and Intelligence Governance'.

In Chapter 2, 'History, Concepts and Constructs in National Security Law', James Mortensen[4] examines the evolution of 'collective security' in the debates accompanying League of Nations attempts to establish a system of international law. He then 'interrogates the outcome of these debates (such as it impacted our understanding of "security") by comparing…(then Oxford Professor and Westminster MP) Arthur Salter and…[German academic and Nazi Grand Jurist]… Carl Schmitt'.[5] This is used to 'demonstrate the importance of law to security, both in the way in which security evolved historically, and how the debates of that history

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1 In his foreword, Professor Rory Metcalfe, Head of the National Security College at the Australian National Security College, states that the collection 'merits a place, not only in law curricula, but in the reading lists of any institution teaching Australian security'.

2 See 'About the Contributors' in Danielle Ireland-Piper (ed), *National Security Law in Australia* (Federation Press, 2024) xi–xv.

3 At 2.

4 Senior Lecturer, National Security College, Australian National University.

5 At 25.

may better inform the way security is enacted today'.[6] In addition to providing an appropriate foundation for understanding Australia's national security legal architecture, the key learning outcome for critical thinkers appears in his profound conclusion:

> An important but difficult question those involved in national security must ask themselves is "from where does the legitimacy of our law derive, and how will this act/law affect that legitimacy?" Too often the answer…becomes simplistic — "the social contract" (vaguely construed), for example…our security laws and practices have an enduring effect on the sort of nation that is continually being created and recreated through legislation and public discourse. It is important therefore to consider what effect an act will have not only in practice but in…our deeper notion of law…Regardless of what is chosen to place as the justifying notion of law or state action, creating exceptions to legal norms-something that is often the purview of national security law — challenges by its very existence the normative function that law serves…any weighing up of the freedom of individuals against the needs of the state, or the proportionality of a law against existing norms is worthwhile. However, when a security policy or law is analysed, it should also be considered how it is that rights, security, and the state we seek to secure is underwritten.[7]

In Chapter 3, 'Powers and Functions of National Security Agencies', Australia's current Independent National Security Law Monitor ('INSLM'), Jake Blight, not only comprehensively fulfils the title's mandate, but supplements this with measured and pertinent analysis regarding the rule of law. For those expecting "boilerplate" fare wherein *all* executive conduct is likely justiciable, his observation that 'agencies are largely exempt from most of the other forms of regulation and oversight that apply to Commonwealth government agencies…[meaning that]…[t]here is almost no practical avenue for judicial review of any type',[8] is both sobering and confronting, and resurrects Mortensen's Chapter 2 conclusion.

In Chapter 4, 'The Separation of Judicial Power and National Security', Rebecca Ananian-Welsh[9] reinforces the INSLM's observations. She examines the erosion, primarily due to judicial deference, of formerly clearer constitutional boundaries between the executive and judicial arms. She concludes that '[p]reventive constraints on liberty…once thought of as extreme, even unthinkable, []now have a

[6] Ibid.
[7] At 38.
[8] At 40.
[9] Associate Professor, TC Beirne School of Law, University of Queensland.

settled place within "the judicial power of the Commonwealth"'.[10] In another sobering and confronting section, 'Secret Evidence, Closed Justice', she compellingly critiques the seemingly infinite scope and at times authoritarian impact of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).[11] Her analysis draws on the most serious examples of the Act's application to court proceedings ('Witness K' and the Solzhenitsyn-like 'Witness J' proceedings),[12] as well as the jurisprudence affirming the Act's constitutionality (*R v Lodhi*[13] and *Assistant Commissioner Condon v Pompano Pty Ltd*).[14] Her next section, 'Preventive Justice',[15] critically examines the Control Order and Preventative Detention schemes within the *Criminal Code Act 1995* (Cth), again providing scholars with the essential case law illustrating the scheme's impact and constitutionality.[16] Perhaps more than in any other chapter in the collection, the author's writing *demands* critical thinking from today's scholars, who are, after all, tomorrow's practitioners and reformers. Her unmissable conclusions are pure 'truth to power',[17] culminating with a call for judges to 'dig in and get their hands dirty…to defend the rule of law'.[18]

In Chapter 5, 'Executive Power and National Security', Patrick Emerton[19] asserts that the executive's powers in national security matters 'remain a matter of ambivalence in Australian law'.[20] Drawing on French CJ's description of executive power in *Williams v Commonwealth*,[21] he opines that

> [while] the executive's power is sourced in the Constitution…it can be explained by reference to constitutional law and profound constitutional principles…[those]…same constitutional considerations give rise to uncertain exceptions to the limits on that power, when what is at stake is national security…[thus risking]…unprincipled, even arbitrary, exercises of executive power…[and even] departures from the rule of law.[22]

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[10] At 93.
[11] At 81–6.
[12] Citation unavailable, however the proceedings are examined in Independent National Security Legislation Monitor, 'The Operation of Part I, Division I of the *National Security Information (Criminal and Civil Proceedings) Act 2004* as it applies in the Alan Johns matter' (2022).
[13] [2006] NSWSC 571.
[14] (2013) 252 CLR 38.
[15] At 57.
[16] See *Thomas v Mowbray* (2007) 233 CLR 307; *Benbrika (No 1)* (2021) 272 CLR 68.
[17] At 93.
[18] Ibid.
[19] Professor, Deakin Law School.
[20] At 94.
[21] (2012) 248 CLR 156, 184–5 [22].
[22] At 95.

Given the compelling evidence of this provided by Ananian-Welsh, Emerton's chapter might have been better placed *before* hers, but the point is moot. In concluding that the 'mechanism of parliamentary democracy',[23] including current oversight arrangements, 'provides a solution to the ambivalent status of executive power',[24] it is difficult to avoid the inference he is not fully convinced. Chapters 3 and 4 provide solid grounds as to why.

In Chapter 6, 'Australian Federalism and National Security Law', the editor and James Mortensen combine to introduce federalism and its constitutional underpinnings. Following on from a succinct yet comprehensive 'Historical Context' section,[25] the *Australian Constitution*'s enumerated and plenary legislative national security powers are discussed,[26] followed by sections on the heads of Commonwealth legislative power ('defence' and 'external affairs'),[27] constitutional restrictions on said powers,[28] and the effect of s 119,[29] where leading case law is used effectively to illustrate the influence of the judicial arm in shaping the operational environment. Understanding the 'rigorously contested'[30] and 'politically and legally charged'[31] nature of Australian federalism is essential introductory reading.

No treatise on national security is complete without reference to internationally recognised human rights norms and the various imperatives to ensuring states' laws in the national security arena do not unduly infringe them. In Chapter 7, 'Human Rights and National Security', Maria O'Sullivan[32] concisely outlines Australia's international obligations (the 'International Bill of Rights' and supplementary 'soft law' principles)[33] and Australia's domestic human rights framework,[34] before outlining the domestic context, noting the 'problem' regarding full implementation of international norms posed by Australia's dualist system and illustrating the dearth of case law (other than terrorism cases) that has addressed human rights aspects of national security before federal courts.[35]

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[23] At 113.
[24] Ibid.
[25] At 117–125.
[26] At 125–7.
[27] At 127–131.
[28] At 131–3.
[29] At 133–8.
[30] At 139.
[31] Ibid.
[32] Associate Professor, Deakin Law School.
[33] At 141–2.
[34] At 143–5.
[35] At 153.

In Chapter 8, 'Gender and National Security', Susan Harris-Rimmer[36] and Elise Stephenson[37] offer a feminist critique of Australia's national security law, policy and culture, asserting that 'heteronormative, cis-gendered male experience underpins Australian national security policy and law, while masquerading as ungendered and neutral'[38] and that 'key documents, policies, laws and principles remain mostly created by men'.[39] The assertion that 'sovereignty (as a national security concept) has completely ignored or marginalised First Nations conceptualisations of sovereignty'[40] should prick consciences and merits further discussion (indeed a chapter on First Nations perspectives in this collection would have been welcome), as do the propositions that domestic violence and extreme misogyny represent national security threats.[41]

In Chapter 9, 'Citizenship and National Security', Sangeetha Pillai[42] outlines the history of citizenship-stripping as a national security tool, and critically assesses the Commonwealth legislature's bipartisan efforts to draft statutory measures conforming with Australia's *Constitution* and international instruments such as the *Principles on Deprivation of Nationality as a National Security Measure*.[43] The irony that, despite the political attractiveness of deploying citizenship deprivation as a "tough on terrorism" policy tool, and the enactment of several iterations of citizenship deprivation laws in response to adverse judicial findings such as those in *Benbrika,*[44] 'everyone who has been stripped of their Australian citizenship on national security grounds since 2015 now has that citizenship back' is made crystal clear. [45]

In Chapter 10, 'Counter Terrorism and National Security', the doyens of scholarship in this domain, George Williams AO[46] and Keiran Hardy,[47] explore Australia's now labyrinthine and perennially politicised counterterrorism legislation architecture, stated as comprising almost 100 statutes.[48] Whilst affirming the necessity for counterterrorism measures, they highlight the reality of the at times

[36] Professor, Griffiths University.
[37] Deputy Director, Global Institute for Women's Leadership, Australian National University.
[38] At 165.
[39] At 166.
[40] Ibid.
[41] Ibid.
[42] UNSW, Senior Research Associate, Andrew and Renata Kaldor Centre for International Refugee Law.
[43] At 212–6. For the principles, see Institute on Statelessness and Inclusion, *Principles on Deprivation of Nationality as a Security Measure* (2020) <DOnehttps://files.institutesi.org/PRINCIPLES.pdf>.
[44] *Benbrika v Minister for Home Affairs* [2023] HCA 33.
[45] At 212.
[46] Vice Chancellor and President, Western Sydney University.
[47] Associate Professor, School of Criminology and Criminal Justice, Griffith University.
[48] At 217.

disproportionate infringements of national security laws on internationally recognised human rights norms, further reinforcing the numerous examples in prior chapters.

In Chapter 11, 'Espionage, Foreign Interference and Foreign Influence', Dominique Dalla-Pozza[49] offers a topical, valuable and plain-English deconstruction of how the Australian government understands these three relatively recent concepts, her descriptive nous meaning that scholars new to them can readily acquire understanding. The *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) and the *Foreign Influence Transparency Scheme Act 2018* (Cth) schemes are explained, the author noting that both were drafted in response to intelligence community advocacy that the three distinct forms of conduct posed a threat to 'Australia's "way of life"',[50] as opposed to actual lives.[51] Her postscript highlights a recurring theme in this collection, namely that of "legislate in haste, repent at leisure", observing that in 2024 the Parliamentary Joint Committee on Intelligence and Security found the *Foreign Influence Transparency Act* 'largely ineffective',[52] making fourteen recommendations for reform.[53]

In Chapter 12, 'Cyberspace and National Security', Samuli Haataja[54] and Dan Sventesson's[55] opening sentence almost understates the relevance and crucial importance of an effective cybersecurity strategy to address cyber threats to national security.[56] The authors outline key aspects of Australia's cybersecurity legal framework, noting the absence of a single statute and 'a patchwork of rights and obligations', again a recurring theme in this collection. They then examine international law's influence on states' national security activities in cyberspace.

In Chapter 13, 'Biosecurity as National Security', Wendy Bonython[57] addresses the sobering reality manifested in the recent Covid-19 pandemic that biosecurity measures are an essential pillar in broader national security law and policy. Readers are introduced to the distinct concepts of biological warfare, bioterrorism, and biocrime, in commendably plain-English prose. Following a context-setting

[49] Senior Lecturer, Australian National University Law School.
[50] At 232, quoting Mike Burgess, 'Director-General's Annual Threat Assessment' (Speech, Canberra, 9 February 2022).
[51] Ibid.
[52] At 260, discussing Parliamentary Joint Committee on Intelligence and Security, Commonwealth Parliament, *Review of the Foreign Influence Transparency Scheme Act 2018* (Report, March 2024) [4.10]–[4.11] ('Parliamentary Joint Committee').
[53] At 260, discussing Parliamentary Joint Committee (n 51) [4.13]–[4.123].
[54] Associate Professor, Griffith Law School.
[55] Professor, Faculty of Law, Bond University.
[56] At 284.
[57] Associate Professor, Faculty of Law, Bond University.

chronology of states' biosecurity measures (principally quarantine-driven), there is a useful overview of Australian biosecurity legislation (the *Biosecurity Act 2015* (Cth) and *National Health Security Act 2007* (Cth)) and reference to the influential Beale Report which influenced both.[58] Oddly, the section is headed 'Key *Cases* and Materials'[59] yet contains no case law. This oversight does not detract from the chapter's analytical depth however, with the following section educating readers on relevant international and other legal instruments relevant to Australia's biosecurity.[60] The chapter confronts head on some of the ethical and moral debates that arose during 2021–22 in relation to the Covid-19 pandemic,[61] and offers balanced as opposed to emotive analysis. Biosecurity arguably plays second fiddle (in terms of perceived importance) to cybersecurity concerns. The author's contribution to this collection compellingly corrects that injustice.

For anyone positing that the use of lethal weapons by domestic law enforcement agencies might fall outside the umbrella of "national security" law, in Chapter 14, Brendan Walker-Munro[62] cleverly deploys "core" national security law (s 4 of the *Australian Security and Intelligence Organisation Act 1979* (Cth)) to counter-argue. In an era where security is being increasingly impacted by developments in AI, quantum computing, and other technological developments, the author provides readers with a comprehensive overview of the legal bases (common law and statutory) for the use of lethal force by law enforcement agents,[63] and by the Australian Defence Force ('ADF') in support of law enforcement;[64] and the legal and policy debates addressing states' use of lethal force by autonomous weapons.[65] Given the lethality discussed, his cogent conclusions are instructive.

In Chapter 15, 'The Law of the Sea and Maritime Security', Keilin Anderson[66] and Douglas Guilfoyle[67] firstly articulate what 'maritime security' means,[68] before outlining the international law of the sea and state jurisdiction,[69] and Australia's maritime security architecture (principally the Guide to Australian Maritime

[58] At 293–303.
[59] At 294.
[60] At 303–9.
[61] At 303–314.
[62] Senior Lecturer, Faculty of Business, Law and Arts, Southern Cross University.
[63] At 321–6.
[64] At 326–9.
[65] At 329–334.
[66] Senior Legal Officer, Australian Government Attorney-General's Department and Sessional Academic at Australian National University.
[67] Professor, UNSW Canberra.
[68] At 339–342.
[69] At 343–6.

Security Arrangements and the Civil Maritime Security Strategy). The role of the Maritime Border Command (a division of the perhaps better known Australian Border Force) is explained.[70] The matrix of relevant legislation is also succinctly explained.[71] In addition to case studies on the oft-controversial media favourites of 'unauthorised maritime arrivals'[72] and 'illegal, unreported and unregulated'[73] fishing (a key UN Food and Agriculture Organisation issue), there is a short, yet high-value articulation of Australia's 'dedicated regime for the protection of submarine cables'.[74] This is an effective complement to Chapter 12, the role of submarine cables in critical infrastructure and cybersecurity discussions being regularly under-discussed.

In Chapter 16, 'International Humanitarian Law and National Security', Lauren Sanders[75] explores 'the nexus between…global, regional and national security'[76] as impacted by international humanitarian law, particularly in light of the expeditionary activities of the ADF.[77] It might be argued that these activities are less about protecting Australia's national security than contributing to global efforts towards peacekeeping, but the author's chapter convincingly demonstrates the relevance of international humanitarian law applicable to national security (not least the state's monopoly on the use of violence) as well as its application to ADF operations beyond, but on behalf of Australia. The section addressing detention,[78] prisoners of war[79] and internment[80] adds genuine educational value to national security law scholarship, and the inclusion of a comprehensive synopsis of international law, domestic legislation and leading relevant cases completes the reader's immersion in this area.

Chapter 17, the final chapter, entitled 'Space Law and National Security', addresses the final frontier in national security. It opens with Melissa de Zwart[81] compellingly articulating *why* space constitutes a national security issue and the leading relevant theories.[82] The following section on regulation is short, primarily because of the

[70] At 344.
[71] At 346–350.
[72] At 350–3.
[73] At 353–5.
[74] At 355–6.
[75] Adjunct Associate Professor, TC Beirne School of Law, University of Queensland.
[76] At 360.
[77] See ibid.
[78] At 371–2.
[79] At 372–4.
[80] At 374–5.
[81] Professor, Space Law and Governance, University of Adelaide.
[82] At 390.

place of space as perhaps a last bastion of national security operational secrecy — the opaque space-related provisions of the *Space (Launches and Returns) Act 2018* (Cth) and *Security of Critical Infrastructure Act 2018* (Cth) used as evidence.[83] The chapter focuses instead on the relationship between space technology and military technology, international regulation of space, and even "games" national security situations potentially arising from a return to the Moon. The increasing role of non-government entities in space is also discussed.[84]

By way of closing (dispensable) "quibbles" to offset the gushing and deserved praise lavished on the collection so far, the first is that its content and ultimate importance to the literature has been arguably undersold by its title, which more accurately might read, 'Australia's National Security: Law, Policy and Contemporary Issues' given its inclusion of chapters discussing human rights, separation of powers, lethal autonomous weapons in policing, and gender. Furthermore, the absence of dedicated contributions discussing climate change and Indigenous Australian perspectives is noticeable. To conclude in this way would be churlish, however. This is a collection of the highest quality scholarship in the national security discipline in Australia, edited and contributed to by an eminent scholar. It is an essential addition to the national security literature that will appeal domestically and internationally, across many disciplines beyond law.

[83] At 391.
[84] At 401–7.