LANE V MORRISON
[2009] HCA 29

Kathryn Cochrane*

Introduction

It was said to me after the decision in *Lane v Morrison* was handed down on 26 August 2009 that the outcome of this case was a foregone conclusion – a lay down misere.

I have to say, that came as a surprise to me and my co-counsel. I think it was more a case of, "all that is solid melts into air" (Marx).

But hindsight is a wonderful thing.

For us, when we started this case, the odds seemed so clearly against, in light of the jurisprudence in the line of cases from *Re Tracey* to *White.*

I know of one Lieutenant Commander who bet $10 we would win, but he was on his own, and thought to be a bit daft anyway. I understand he has framed the $10.

The jurisprudence prior to the decision in *Lane v Morrison* was problematic for us.

However, the result was 7 – nil for the plaintiff.

Senior counsel in the case was Sandy Street, SC, of the Sydney Bar, and a long standing member of the Royal Australian Navy Reserve. Sandy has a passion for section 80 of the Constitution – that section of the Constitution that provides that a jury trial is necessary on a trial of indictment of any offence against any law of the Commonwealth.

The question might now arise as to whether s 80 of the Constitution would allow for military juries.

Co-junior counsel was Max Duncan, also from Fullagar Chambers. Max is ex-Permanent Navy, now in the Navy Reserve. Max's capacity to not only locate – but also to remember verbatim – the obscure, the bizarre and the arcane is phenomenal. This is both good and bad! The good is finding the stuff – the bad is telling me in exquisite detail of some strange 1780s case – they were generally old and bizarre cases – more than I wanted to know, usually somewhere around midnight when burning the midnight oil. There were times…..

In this talk I will:

- outline the legislative change to the Defence Force Discipline Act that led to this case;
- outline what confronted us when we began this case;

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- give an overview of the plaintiff's arguments before the Court; and
- set out how those arguments played out in the decision in *Lane v Morrison*.

The Legislation

From federation until 1986, military discipline and courts-martial were covered by separate legislation that largely reflected Imperial legislation for the Army, Navy and Air Force. Very broadly speaking, the legislation allowed for command to convene courts-martial. Command had power to review, confirm, mitigate, quash or remit any sentence of a court martial. Paragraph 85 of the decision in *Lane* describes the court-martial proceedings:

> Although written in a different time and context, the central point to be made about these arrangements was accurately captured by Platt J of the Supreme Court of New York in the 1821 case of *Mills v Martin*[1] when he said :
>
> > "The proceedings of the Court-Martial were not definitive, but merely in the nature of an inquest, to inform the conscience of the commanding officer. He, alone, could not condemn or punish, without the judgment of a Court-Martial; and, it is equally clear, that the Court could not punish without his order of confirmation."

That earlier legislation was replaced in 1986 by the *Defence Force Discipline Act* – the DFDA, which applied to the Army, Navy and Air Force, though each service had its own convening authorities.

Whatever other changes were made by that 1986 Act, it remained the case that the Act continued to provide for command convened courts martial and the retention of all the powers of review, confirmation, petition and such like. This was the jurisdiction dealt with by the cases *Re Tracey; ex parte Ryan*[2] *;Re Nolan; ex parte Young*[3]*; Re Tyler; ex parte Foley*[4] - called the trilogy of cases; *McWaters v Day*[5]*; Re Colonel Aird; ex parte Alpert*[6]*; and White v Director of Military Prosecutions*[7]*.*

In 2006, Parliament passed an Act that created the Australian Military Court. It was established to stand independently of command.

The Charges

The plaintiff was charged with the offences of:

> one count of "an act of indecency without consent" – alleged tea bagging – contrary to s 61(3) of the DFDA as applying s 60(2) of the *Crimes Act 1900 (ACT)*; and
>
> one count of "assaulting a superior officer, contrary to s 25 of the DFDA".

The offence of "an act of indecency without consent" is called "a territory offence". DFDA s 61 territory offences import criminal offences from other jurisdictions into the DFDA as "service offences".

DFDA s 61 offences are not peculiarly military in nature.

Remarking on the nature and potential scope of DFDA s 61 offences in *White's case*[8]*,* Chief Justice Gleeson referred to remarks of Alexander Hamilton in *Solorio v United States*[9] about the nature of the defence power – that it is impossible to foresee or define the extent and variety of national exigencies, or the means which may be necessary to satisfy them.

DFDA s 61 is a mechanism which allows a broad range of offences to be imported into the DFDA to cover all possible circumstances.

Chief Justice Gleeson also referred to Justices Brennan and Toohey in *Re Tracey; ex parte Ryan*[10] to the effect that, whether a DFDA s 61 offence will be a breach of military discipline or a breach of civil order, will depend not upon the elements of the offence but on the circumstances in which it is committed.

The circumstances of the offence give rise to the vexed issue of "service nexus" or "service connection"; military jurisdiction is predicated on the requirement that the prosecution of a DFDA s 61 offence can be regarded as substantially serving the purpose of military discipline.

The "service nexus" issue was NOT a ground that was referred to the Full Court for hearing in *Lane's* case, but it found its way back into the argument – an inevitability, as this has been a most controversial area of the military disciplinary jurisdiction.

By contrast, the DFDA s 25 offence is peculiarly military in nature; this offence concerns a core aspect of command relationships.

The plaintiff, Mr. Lane, was charged by the Director of Military Prosecutions on 8 August 2007. He discharged from the Navy Reserve on 23 August 2007. He was not a service member when the matter first came before the AMC court in March 2008.

Former Leading Seaman Lane denies the charges.

At that hearing before the Australian Military Court, the plaintiff did not enter an appearance and therefore did not submit to jurisdiction. The Military Judge was not greatly amused.

An application for a Notice to Show Cause was lodged in the original jurisdiction, High Court of Australia under ss 75(iii) and 75(v) of the Constitution, seeking a writ of prohibition restraining Colonel Morrison as a Military Judge of the Australian Military Court from trying the charges against former Leading Seaman Lane.

Why this case?

We thought the case was an excellent case to run for the following reasons:

- the offence was a DFDA s 61 charge;
- the particulars of the charge;
- the plaintiff had done three tours of duty in dangerous places;
- the alleged offence occurred in Roma, Queensland. Other than for DFDA s 61, the offence would be a matter for the Queensland Police, and subject to the jurisdiction of Queensland State courts by reference to the Queensland Criminal Code;
- The alleged offence occurred:
  on–shore;
  in a non-operational environment;
  in the State of Queensland;
  not on an exercise; and
  not on Commonwealth land.

- the issue of the service nexus/service status test was not raised as an issue on the facts, that concession was made at the hearing on 9 December 2008;

- the alleged conduct for which Mr. Lane was charged is at the lower end of the scale of offences which fall into the category of an act of indecency without consent. It is unlikely that the Queensland Police would have prosecuted on the facts;

- if the Queensland Police did prosecute and Lane were to be found guilty, there was the prospect of no conviction being recorded. This option was not open to the Australian Military Court under the DFDA sentencing and punishment provisions; and

- the consequence of a conviction by the Australian Military Court is a criminal conviction. Such a conviction would have a significant impact in Mr Lane's post-military life. However, the trial was by a tribunal purporting not to be a Chapter III court, per the note to DFDA s 114.

It is important to note that the public policy issues which arise for sentencing for criminal purposes are different to the public policy issues which arise for sentencing for disciplinary purposes.

Justices Brennan and Toohey in *Re Tracey* had this to say:

> Section 51(vi) does not support a jurisdiction standing outside Chapter III of the Constitution except to the extent that the jurisdiction serves the purpose of maintaining and enforcing discipline. That being the purpose which is essential to the jurisdiction, it is the purpose to which its exercise must be directed. The purpose of criminal proceedings in the civil courts is far wider, and the exercise of jurisdiction by civil courts may properly embrace considerations which have no relevance to service discipline. It is the difference between purpose of proceedings before service tribunals, and the purpose of proceedings before civil courts, that justifies the subjection of service personnel to the jurisdiction of both[11].

Our questions were:

What disciplinary effect is there in pursuing either charge against the member after he discharged from the Navy Reserve, giving rise to a criminal conviction but without the due process of the ordinary courts of the land?

What does the charge say about the way the Director of Military Prosecutions exercises her discretion by referring the charge to the Australian Military Court?

Why was this not a summary matter before a CO, where a finding of guilt for disciplinary purposes would not result in a criminal conviction?

I understand that the Director of Military Prosecutions is proceeding against Lane under the new arrangements reinstating courts martial and Defence Force Magistrates.

Where we started this case

When we started this case we were faced with two diametrically opposed propositions from *White v Director of Military Prosecutions*[12]:

Kirby J (in the minority):

> The (pending) amendments to the (*Defence Force Discipline Act 1982 (Cth)*) (i.e. the amendments introducing the Australian Military Court) - provide a warning about the importance of this decision (that

> is, the decision in *White*) for whether criminal laws might be applied outside the ordinary courts of the land to citizens who might happen to be members of the Defence Force. The Court cannot later complain that it was not warned of the next intended step in military exceptionalism[13].

In the same case Callinan J. said:

> The presence of s. 68 in the Constitution may even, arguably, have further relevance to military justice, with the result that it may not be subject to judicial supervision under Chapter III of the Constitution, and is administrable only militarily, and not by Chapter III courts, whether specially constituted or not[14].

The competing themes are, on the one hand, whether the exception to the judicial power of the Commonwealth vesting with a Chapter III Court envisages a military tribunal determining issues of criminal guilt – as opposed to the *sui generis* power of making a finding of liability for purely military disciplinary purposes – and if so, whether it encroaches on the judicial power of the Commonwealth being dispensed by a non-Chapter III Court.

On the other hand, and diametrically opposed, Justice Callinan's concern is that military discipline can never be dispensed by a Chapter III court, subject possibly only to supervision by the High Court in its original jurisdiction, because it draws its authority from s. 68 of the Constitution.

Lane v Morrison does actually reconcile the irreconcilable, but in an unexpected way.

The odds against us

The line of cases from *Re Tracey* to *White* was problematic.

All the cases have as their starting point *R v Bevan; ex parte Elias and Gordon*[15] and *R v Cox; ex parte Smith,*[16] which are authority for the proposition that the power to establish military tribunals was not in Chapter III but under s 51(vi) of the Constitution [17]; and that s 51(vi) allows for the exercise of a judicial power by courts-martial.

Bevan and *Cox* dealt with earlier legislation. Our starting place was *Re Tracey; ex parte Ryan*, as this was the first case under the DFDA which replaced the war-time legislation. The judgment of Chief Justice Mason, and Justices Wilson and Dawson in *Re Tracey* gave the Commonwealth the widest possible jurisdiction for military discipline under s 51(vi) of the Constitution, except, perhaps, the decision in *White's case.*

The terms of s 51(vi) – the Defence power – are as follows:

> That the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth, with respect to:
>
> (vi) the naval and military defence of the Commonwealth and the States, and the control of the forces to execute and maintain the laws of the Commonwealth.

In *Re Tracey, their Honours made the following comments* about the nature of the power being exercised by service tribunals:

> [At p 537] "That it was evident from the scheme of the DFDA as it stood at that time that a service tribunal had practically all the characteristics of a court exercising judicial power; the court-martial had the power to determine authoritatively the liabilities of all those charged before it, albeit subject to review or appeal (my emphasis)"; and
>
> [At p 539] "It is, however, unnecessary to prolong any discussion concerning the nature of the power exercised by a court martial. As Lord Scarman observed in Attorney-General v. British Broadcasting Corporation18: "Courts-martial ... are as truly entrusted with the exercise of the judicial power of the state as are civil courts".

That proposition is sufficiently established in a constitutional context in *R. v. Bevan* and *R. v. Cox*. In the first of those two cases it was expressly decided by Starke J. and assumed by McTiernan and Williams JJ. that the power exercised by a court martial was judicial in character. In the latter case – *Cox* – Dixon J., after referring to the fact that Chapter III of the Constitution confides the judicial power of the Commonwealth exclusively in courts of justice, observed at p 23:

> In the case of the armed forces, an apparent exception is admitted and the administration of military justice by courts-martial is considered constitutional (R. v. Bevan, at pp 467, 468, 481). **The exception is not real. To ensure that discipline is just, tribunals acting judicially are essential to the organization of an army or navy or air force.** But they do not form part of the judicial system administering the law of the land. It is not uniformly true that the authority of courts-martial is restricted to members of the Royal forces. It may extend to others who fall under the same general military authority, as for instance those who accompany the armed forces in a civilian capacity. To include them with members of the armed forces as liable to court-martial would involve no infringement upon the judicial power of the Commonwealth[19].

Their Honours said that the defence power is different because the proper organisation of the defence force requires a system which is administered judicially, not as part of the judicature erected under Chapter III but as part of the organisation of the force itself [p 540].

Their Honours in *Re Tracey* continued:

> No purpose can be served in this case by attempting yet another description of judicial power. No description can, in any event, be truly definitive…It is sufficient to say that no relevant distinction can, in our view, be drawn between the power exercised by a service tribunal and the judicial power exercised by a court. Nor do we think it possible to admit the appearance of a judicial power and yet deny its existence by regarding the function of a court-martial as merely administrative or disciplinary. Such an approach was adopted in relation to certain tribunals under the *Public Service Act 1922 (Cth)* in *R v White; ex parte Byrnes*[20], p 537.

DFDA s3(15) was modelled on a section of the Public Service Act relevant in *Byrnes case,* to make clear the offences were part of a disciplinary code between employers and employees. This section remains in the DFDA.

Argument in *Lane* was that, post amendments to DFDA s 10 and post the introduction of the Australian Military Court, DFDA s 3(15) could no longer have the effect of regulating the relationship between the Commonwealth and members of the Defence Force, that s 3(15) was no more than a legislative opinion that could not undo the consequences of the DFDA s 10. The jurisdiction now vested in the Australian Military Court was a criminal jurisdiction, at least with respect to offences under DFDA s. 61.

DFDA s 10 provides that Chapter 2 of the Commonwealth Criminal Code applies to service offences; Chapter 2 sets out the general principles of criminal responsibility.

Back to *Re Tracey, where,* their Honours went on to say:

> Of course, the end to be achieved by martial law, consistently with s 51(vi) of the Constitution, is the promotion of the efficiency, good order and discipline of the defence forces and no more. This object was made clear in *Groves v The Commonwealth*[21] [p 538].

In summary, section 51(vi) of the Constitution supports the proposition that courts martial are exercising a judicial power which is not the judicial power of the Commonwealth – the so-called exception – and that Parliament has the power to make law making any conduct which is a civil offence an offence against military law if committed by a defence member. A court-martial has the power to make authoritative findings as to liability, though the findings are subject to command review.

This was not good for us!

White's case[22] emphatically confirmed the military disciplinary jurisdiction as not being the exercise of the judicial power of the Commonwealth, thereby also allowing the exception.

The intervening cases were various refinements of the same general propositions.

It should be noted that the legislation in place at the time of *White's case* differed from that dealt with in *Re Tracey, Re Nolan and Re Tyler.* The DFDA had been amended in two critical respects:

> Act No 141 of 2001 repealed and substituted s 10 DFDA, providing that Chapter 2 of the Commonwealth Criminal Code applied to service offences. Chapter 2 of the Code sets out general principles of criminal responsibility; and
>
> Act No 142 of 2005, which introduced the statutory roles of the Director of Military Prosecutions (DMP) and the Registrar of Military Justice (RMJ), both Ministerial appointments[23] - not appointment by the Governor-General. The DMP assumed some of the role formerly undertaken by the command convening authority; that is, the DMP and RMJ retained a connection with command, though a somewhat tenuous connection.

This amending legislation was in place for *Alpert's case,* and *White's case.* This was problematic for our case!

I wish to come back to Dixon J's words in *Cox – "The exception is not real".* A lot of our attention focussed on this elusive phrase. There are two other so-called exceptions which are also not real exceptions. One is the power of the Parliament to punish for contempt. This power is found within s 49 of Chapter 1 of the Constitution, dealing with Parliament, and addressed in *R v Richards; ex parte Fitzpatrick and Browne*[24]*.* This case also involved Dixon as Chief Justice. The other so-called exception relates to s 122 of the Constitution and whether courts created in Territories exercise the judicial power of the Commonwealth, but not as Chapter III courts.

I remind you of words already quoted – that courts-martial findings as to liability were subject to review by command.

What was unknown – and the gamble in *Lane* – was whether command was the defining element of the exceptionalism of the jurisdiction afforded to the Defence Force under s 51(vi) of the Constitution.

On the jurisprudence prior to *Lane,* it might well be that the Australian Military Court was a valid exercise of Parliament's power under s 51(vi) of the Constitution, as the exercise of a judicial power as an exception to the judicial power of the Commonwealth vesting in a Chapter III Court.

It was not a foregone conclusion that the plaintiff would be successful.

The Plaintiff's arguments

There were four separate but inter-dependent arguments:

> the "command" argument;
> the "looks like a duck, quacks like a duck" argument;
> the "supplementary and subordinate " argument; and
> the "if all else fails" argument.

The following is a summary of each.

The "command" argument

Whether s68 of the Constitution precluded the creation of the Australian Military Court constituted by the appointed Australian Military judges and the statutory office of the Director of Military Prosecutions, for the trial of alleged disciplinary offences under *Defence Force Discipline Act 1982*, Part VIII Division 2, by reason of being separate from and unlawfully fettering "command", to which the law making power in s51(vi) is subject.

Essentially, the argument was that s 68 was not a "titular power"[25] (see *Commonwealth v Quince*), but had some work to do in its own right as an executive power of "command".

It was argued that s 68 was either the legislative expression of the antecedent prerogative power of the Crown[26] to maintain disciplined military forces or, alternatively, s 68 itself vested the power with the Executive to maintain disciplined military forces[27].

In point form:

- The DFDA enacted by the legislature was an empty shell until enlivened by command convening a disciplinary process.
- The apparent or 'not real' exception to the judicial power of the Commonwealth vesting in courts established under Chapter III of the Constitution[28], arises from the particular character of ad hoc service tribunals as being an exercise of command in respect of military discipline[29].
- The not real"[30] exception imposes the obligation on the Executive to act judicially, not that the Executive exercises a judicial power.
- The exercise of a judicial power by a court not constituted under Chapter III of the Constitution offends the separation of powers[31] - the *Boilermakers'* doctrine[32].
- S. 68 of the Constitution precluded the establishment of a permanent court outside Chapter III to exercise a *sui generis* judicial power for the maintenance and enforcement of military discipline.
- The Australian Military Court, not being part of command structure, has established a jurisdiction that is self-perpetuating. Such a court is not reasonably adapted to serve the purpose of command discipline.
- Any command role in discipline would now constitute contempt of court by command[33].
- In enforcing general criminal laws, the Australian Military Court is no more part of command discipline than the ordinary courts of the State or Territories.
- It was command discipline. Neither the Australian Military Court, in exercising its jurisdiction, nor the Director of Military Prosecution's pursuit or refusal to pursue charges, is within the oversight, control, direction, review and confirmation of command.

The "looks like a duck" argument

This ground argues that the Australian Military Court is a federal court[34] impermissibly created outside Chapter III of the Constitution, contrary to s 71[35] of the Constitution.

Oral argument canvassed whether the Australian Military Court as a court of record could be a court for the purposes of s 77 (iii) of the Constitution[36]; that is, IF the DFDA was a piece of State legislation, it would be a court within the meaning of s 77(iii) of the Constitution.

While purporting not to be a Chapter III court[37], the Australian Military Court had the indicia of a federal court established under Chapter III of the Constitution, *inter alia,* being a permanent[38] court of record[39], with a seal[40], and a stamp[41], and with the nomenclature of 'Chief Judge' and 'Judge'[42], and 'Your Honour'[43]. It has a 'jury' system[44], must apply the rules of evidence as a court[45] and is the final appellate court for appeals from decisions of Summary Authorities[46]. It determines criminal guilt[47] and has a power of contempt of court[48].

The judgment and punishment of criminal guilt is exclusively an exercise of the judicial power of the Commonwealth[49].

The "not subordinate and supplementary" argument

Whether the Australian Military Court is impermissibly defined and vested by *Defence Force Discipline Act 1982*, ss10, 15 – 61, 114 and 115 and Part VIII, Division 2 with a general criminal jurisdiction and a criminal judicial power that is not subordinate and supplementary to the general criminal law, because it creates a criminal jurisdiction in a court that violates the separation of powers under Chapter III of the Constitution.

It was argued that the object of military discipline law is limited to the trial of breaches of military duty[50]. The amendments to Chapter 2 of the *Criminal Code Act 1995* as picked up by s 10 of the DFDA stood in stark contrast with the earlier s10[51] and 12[52] of the DFDA, which did not involve the conviction of a disciplinary offence having a criminal effect.

If the Australian Military Court was determining criminal guilt then the offence being tried is not a disciplinary service offence but a criminal offence, with all the consequences of *autrefois convict* and *autrefois acquit* from the determination of guilt by the Australian Military Court.

The determination of criminal guilt must be the exercise of the judicial power of the Commonwealth[53].

The joint judgment of Brennan and Toohey, JJ in *Re Tracey* highlighted that the significance of the history of British naval and military courts martial lay in its explanation of the scope and history of the jurisdiction that they exercised, and in the priority which naval and military authorities were required to afford to the jurisdiction of the civil courts[54].

The historical rationale for subjecting defence members to the jurisdiction of State and Territory criminal courts, as well as naval and military discipline law, arises from the difference between the purpose of proceedings before service tribunals compared to the purpose of proceedings before 'civil criminal courts'[55].

The legislative power conferred on Parliament under s 51(vi) of the Constitution is purposive,[56] to advance the end of the maintenance and discipline of naval and military forces of the Commonwealth and, accordingly, must be confined to a disciplinary code for breaches of military duty.

The Australian Military Court was impermissibly exercising a criminal jurisdiction, parallel but not subordinate to that of the States and Territories, thereby enlivening s 109 of the Constitution[57]. This is because the alleged service offence under DFDA s 61 is really the vesting of a general criminal jurisdiction. The effect of the DFDA is to now permit executive conviction in the nature of a Bill of Attainder (see *Ferrando v Pearce*[58]).

"If all else fails"

The argument here is whether the jurisdiction defined and vested in the Australian Military Court by *Defence Force Discipline Act* ss10, 15- 61, 114 and 115 and Part VIII, Division 2 outside Chapter III is invalid by reason of being beyond the law making power found in s 51(vi) of the Constitution.

This last ground is essentially that for all the reasons stated in the preceding three grounds, this particular tribunal is beyond power.

The Decision

The Australian Military Court was found to be exercising the judicial power of the Commonwealth, although it is not a court created by s 71 of the Constitution.

The court was unanimous in its decision in favour of the plaintiff but split 2/5. Joint judgments were given Chief Justice French, and Mr. Justice Gummow, and the majority judgment of Justices Hayne, Heydon, Crennan, Kiefel and Bell.

Both judgments dealt extensively with the history of courts-martials and the earlier Imperial legislation, emphasising the review and confirmation processes of command with respect to court-martial findings and the capacity for petition; they emphasised that the earlier legislation for military justice did not administer the ordinary law of the land.

Both judgments emphasised that the stated intention in the Explanatory Memorandum for the 2006 Amendment Act was to create a body independent of command to establish independence and impartiality, these being attributes of judicial power.

The majority judgment said that it was the independence of the Australian Military Court from the chain of command that is the chief feature distinguishing it from earlier forms of service tribunals, which were held not to exercise the judicial power of the Commonwealth[59].

Being established as a "court of record" was significant, but it was this fact, together with the contempt powers, and the fact that a decision of the Australian Military Court on the trial of a charge was conclusive, that led to the result that the AMC was held to be exercising the judicial power of the Commonwealth, and therefore beyond the scope of s 51(vi) of the Constitution. Chief Justice French and Justice Gummow referred to *R v Taylor; ex parte Roach*[60]:

> By definition, contempt is confined as an offence to courses of conduct prejudicial to the judicial power and does not extend to impairments of other forms of authority. Obstructions to the exercise of legislative power, executive power or other governmental power are not within the conception of the offence of contempt of court.

The liquid nature of language was an issue, the difficulty of the various meanings of the word "court", and the shifting use of the phrases in the earlier judgments - "exercising a judicial power" and "a tribunal acting judicially". The majority judgment closed the debate:

> to speak of a court-martial exercising a species of judicial power is unhelpful if it distracts attention from the relevant constitutional question. That constitutional question was resolved in respect of courts-martial, as it was in *R v Bevan, R v Cox,* and later, *R v Tracey,* at a time when courts-martial were not independent of the chain of command of the forces[61].

Of the s 68 argument, Chief Justice French and Justice Gummow said that the exercise of command may be the subject of legislation supported by s 51(vi) of the Constitution, though the creation of the Australian Military Court apart from the command structure and thereby

purporting to exercise the judicial power of the Commonwealth, could not be sustained by the defence power[62].

The majority found it was not necessary to decide the plaintiff's submissions with respect to s 68 of the Constitution[63].

Chief Justice French and Gummow J dealt with the concept of "legislative courts".

The Commonwealth submissions were that the replacement of the courts-martial system by the creation of the AMC was but a matter of degree and not a matter of substance. The Commonwealth further submitted that Parliament may create a body styled as a court and displaying some of the features of a court, provided only that the body does not exercise the judicial power of the Commonwealth. Such was the case for the "special position" of defence in creating the AMC.

Their Honours stated that the creation of the Australian Military Court was not supported by s 122 of the Constitution as a law with respect to the government of the territories. It is interesting to note here that s 122, as a plenary power, allows for the creation of Territory courts – though whether those courts exercise the judicial power of the Commonwealth remains an open question – the other possible "so-called exception".

Their Honours referred to a capacity in the United States to have "legislative courts", which were supported by Article 1 of the Constitution, but that those courts do not exercise the judicial power of the United States.

Their Honours referred to *Boilermakers case*[64]*,* and the point that if there was no Chapter III in Australia's Constitution, then it may be supposed that at least some of the heads of legislative power under s 51 would have been construed as extending to the creation of courts with jurisdictions appropriate to the subject matter of the power".

Their Honours made it clear that there was no place for legislative courts under our Constitution.

My take on this

In effect, the High Court has:

- said that the military disciplinary jurisdiction allowed for in the Constitution is pretty much fixed by history and necessity.

  As Peter Cundall would say, "that's your bloomin' lot";

- the jurisdiction is defined by "command"; The command review role is the touchstone for the so-called exception;

- the high watermark for that military disciplinary jurisdiction is defined by the legislation applicable in *White's case* which allows for a Director of Military Prosecutions and Registrar of Military Justice undertaking some convening authority tasks;

- Senate Committee references to the UK cases such as *Findlay, Grieves* and the Canadian case of *R v Genereux* have misled the Parliament, because those decisions are given in the context of very different constitutional arrangements which do not reflect Australia's Constitutional arrangements; and

- strongly affirmed the *Boilermakers case*, and the separation of powers.

The outcome in *Lane* did not turn on the nature and scope of the DFDA s 61 "territory offences"; the military jurisdiction can extend to service offences which have an equivalent criminal offence, provided that the prosecution of these offence serves a disciplinary end. The result is that service nexus, or service connection, is likely to remain a constitutional issue.

The outcome did not turn the exercise of a judicial power or the need for a tribunal to act judicially; the latter is assumed.

Determinative was that the Australian Military Court was making final determinations as to guilt and punishment. The majority said at paragraph 98:

> that the AMC is making binding and authoritative decisions on the issues identified, without further intervention from within the chain of command is reason enough to conclude that it is the exercise of the judicial power of the Commonwealth.

The Aftermath

On 22 September 2009, the *Military Justice (Interim Measures) Act No 1 and Act No 2* passed into law.

Both Acts have in their title the words "interim measures". In the second reading speech on the introduction of the Bills into Parliament, Senator Conroy said "the Government will move to establish a Chapter III court as soon as possible"[65].

I wonder if this is possible?

Isn't it the case that it's not "the vibes", it's *Boilermakers'!* It's *Lane v Morrison!*

If the military discipline does become something to be administered by a Chapter III Court, it becomes something else other than a command relationship. It becomes a judicial process, with all the paraphernalia that a judicial process entails. It may be good for military lawyers, but is it good for military discipline?

This brings us back to Callinan J in the opening remarks. Is it the case that military discipline is not administrable by a Chapter III court?

A further question is whether a Chapter III Court wants to second guess what are essentially command relationships. To what extent are command imperatives justiciable?

I wait for the next exciting chapter in military discipline and Chapter III courts.

Endnotes

1 19 Johns 7 at 30 (1821)
2 (1988-1989) 166 CLR 518
3 (1991) 172 CLR 460;
4 (1994) 181 CLR 18;
5 (1989) 168 CLR 289
6 (2004) 220 CLR 308
7 (2007) 231 CLR 570
8 [2007] HCA 29 at paragraph 21,
9 [1987] USSC 159; US 435 at 441(1987)
10 (1988-1989) 166 CLR 518
11 *Re Tracey; ex parte Ryan* (1988-1989) 166 CLR 518 at 571.

12 [2007] HCA 29
13 [2007] HCA 29 at paragraph 89.
14 [2007] HCA 29 at paragraph 241.
15 (1942) 66 CLR 452
16 (1945) 71 CLR 1.
17 *Re Tracey*, p 534.
18 (1981) AC 303, at p 360
19 *Re Tracey,* p 539
20 (1963) 109 CLR 665
21 (1982) 150 CLR 113
22 [2007] HCA 29
23 Act 142/2005, Part XIA
24 (1955) 92 CLR 157
25 In so far as Williams J in *Commonwealth v Quince* (1943-44) 68 CLR 227 at p 255 refers to the King as the titular head of the armed forces and therefore the Governor General in this role, it does not address the work done by s 68 and confirms the power of command in its most absolute form involves the obligation of a member inferior in rank to comply with lawful orders of his superiors. Furthermore, where Deane J in *Coutts v Commonwealth,* (1984-85) 157 CLR 91 at pp 108-109 suggests that the role of the Governor General under s 68 of the Constitution is essentially titular, the remark does not accord with Constitutional principles of interpretation (see *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309 at 367-368; *Reg v Coldham* (1983) 153 CLR 297 at 314; *Street v Queensland Bar Association*(1989) 168 CLR 461 at 527. The vesting of power by s 68 is real and titular office in no way derogates from command as vested by s 68 and as permissibly addressed through s 9(2) of the *Defence Act 1903.*
26 Clode's Military and Martial Law, 2nd Edition, John Murray, Albemarle Street, London, 1874, Chapter VII, page, 91, paragraph 21, Annexure 1.
27 *R v Bevan; ex parte Elias and Gordon* (1942) 66 CLR 452 per Starke J at pp 467-468, and per Williams J at p 481; *Commonwealth v. Quince* (1944) 68 CLR 227 per Williams J.
28 See *R v Cox; Ex parte Smith* (1945) 71 CLR 1 per Dixon J at p 23.
29 See *White v Director of Military Prosecutions* (2007) 231 CLR 570 per Callinan J at p 649, paragraphs 240 and 242; moreover the distinction recognised in *Hembury v Chief of the General Staff* (1998) 193 CLR 641 at 653 that the DFDT was not exercising jurisdiction analogous to that of a Court of Criminal Appeal would no longer be sustainable in respect of appeals from the AMC as a permanent Court which is external to "command".
30 *Ibid.*
31 *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
32 *R v Kirby; ex parte Boilermakers' Society of Australia* (1955-56 CLR 254 at p 270
33 Section 89 *Defence Act 1903*
34 Paragraph 50 of the Parliament of the Commonwealth of Australia House of Representatives Defence Legislation Amendment Bill 2006 Explanatory Memorandum expressly provides that the Australian Military Court is a federal court wherein it says "paragraph (38) amends the *Judges Pensions Act 1968*. Given that the AMC is a federal court, the proposed term of appointment is for ten years, an unintended consequence would see military judges being eligible for pensions under the *Judges Pensions Act 1968*.".
35 *R v Kirby; ex parte Boilermakers' Society of Australia* (1955-56) 94 CLR 254.
36 Transcript 22 April 2009, page 9, Gummow J.
37 *Defence Force Discipline Act 1982 (Cth),* s114.
38 *Defence Force Discipline Act 1982 (Cth),* s114.
39 *Defence Force Discipline Act 1982 (Cth),* s114.
40 *Defence Force Discipline Act 1982 (Cth),* s119.
41 *Defence Force Discipline Act 1982 (Cth),* s120.
42 *Defence Force Discipline Act 1982 (Cth),* ss188AA, 188AO.
43 Practice Direction No 1 of the Australian Military Court, paragraph 3, 5 November 2007, Annexure 3.
44 *Defence Force Discipline Act 1982 (Cth),* Part VII, Division 4.
45 DFDA s 146 the reference to "court" therein, and see *Evidence Act (Cth)* Dictionary, Part 1, definition of "Australian Court", Annexure 5.
46 *Defence Force Discipline Act 1982 (Cth),* Part IX. Curiously, appeal is from a court to a tribunal, the Defence Force Discipline Tribunal established under the *Defence Force Discipline Appeals Act 1955.*
47 *Defence Force Discipline Act 1982 (Cth),* in contrast to the jurisdiction of a Summary Authority per s 131B.
48 Defence Force Discipline Act, s 53(4)(d).
49 *Chu Kheng Lim and Others v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at p. 27; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 per Deane J at p 608, Toohey J at p 685, and Gaudron J at p 706; *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1 at p 11.
50 *Groves v Commonwealth* (1982) 150 CLR 113 at pp 125 and 126 per Stephens, Mason, Aickin and Wilson JJ; *Re Tracey; Ex Parte Ryan* (1989) 166 CLR 518, per Mason CJ, Wilson and Dawson JJ at p 538, and per Brennan and Toohey JJ at p 557.
51 Repealed DFDA s 10 provided:

"Subject to this Part, the principles of the common law with respect to criminal liability apply in relation to service offences other than old system offences".

Section 10 was repealed and substituted by s 40 *Defence Legislation (Application of the Criminal Code) Act 2001 ,* Act No 141 of 2001.

Section 10 now provides:

"Chapter 2 of the *Criminal Code* applies to all service offences, other than old system offences".

Note:Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Service offences under DFDA ss 15-60 were amended to reflect physical and fault elements of each offence and to identify the legal and evidential burdens of proof.

52 Repealed s 12 says that the onus is on the prosecution and the burden is beyond reasonable doubt but does not impose or provide for "criminal guilt". Section 12 was repealed by s 43 Defence Legislation (Amendment of the Criminal Code) Act 2001, Act No 141 of 2001.

53 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189; *Waterside Workers Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 444.

54 *Ibid,* at 562.

55 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 per Brennan and Toohey at p 571; *McWaters v Day*, (1989) 168 CLR 289 at p 299.

56 *Stenhouse v Coleman* (1944) 69 CLR 457, Dixon CJ at 471; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, Fullagar J at 253; *The Commonwealth v Tasmania (The Tasmanian Dams Case)* (1983) 158 CLR 1, Brennan J at 232, Deane J at 260; *Richardson v Forestry Commission* (1988) 164 CLR 261, Deane J at 308, Dawson J at 326.

57 *Re Nolan; ex parte Young* (1991) 172 CLR 460 at p 481.

58 (1918) 25 CLR 241 at 268–270

59 Paragraph 75.

60 *R v Taylor; ex parte Roach* (1951) 82 CLR 587 at 598.

61 *Lane v Morrison,* paragraph 96-97.

62 *Lane v Morrison*, paragraphs 59 and 60.

63 *Ibid*, paragraph 116.

64 *R v Kirby; ex parte Boilermakers' Society of Australia*, (1956) 94 CLR 254 at 269.

65 Senate Hansard, Wednesday 9 September 2009, p. 18 per Senator Conroy.