THE RISE, FALL AND PROPOSED REBIRTH OF THE AUSTRALIAN MILITARY COURT

Henry Burmester *

INTRODUCTION

In October 2007 a new era in Australian military criminal justice began with the establishment of an Australian Military Court (AMC). The AMC had, however, a short life, being found in August 2009 by the High Court of Australia to be contrary to Chapter III of the *Australian Constitution*.[1] In May 2010 it was announced that a new Military Court of Australia, established in conformity with Chapter III, was to be established to replace the interim system put in place following the High Court's invalidation of the first AMC. A Bill for a new military court was introduced to Parliament in 2010 but lapsed with the dissolution of Parliament for the 2010 election.[2] No replacement Bill had been introduced as at the beginning of 2011. It is unclear when or whether a new military court will be established.

This article examines the reasons behind the establishment of the AMC and then considers the High Court decision in *Lane v Morrison*[3] that unanimously held the AMC to be invalid. It then considers the implications for a replacement Chapter III compliant military court.

In earlier decisions the High Court had accepted that there was an extensive role for a separate military criminal justice system, including in situations covered by the ordinary criminal law system. In recognition of this there was pressure to establish a more independent and transparent system of military justice. The AMC was part of the response to this pressure. Yet the attempt in creating the AMC to mimic to a large degree the ordinary courts, despite the AMC being no more than a military tribunal, led to its constitutional downfall. The use of a body like the AMC to try military

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* Consultant Counsel, Australian Government Solicitor. The author has been publicly acknowledged as having provided advice to the Department of Defence in the development of the original proposal. He was not involved in the case before the High Court. The views expressed are those of the author and do not represent necessarily those of any Department or agency of the Australian Government. This article draws on a presentation to the Defence Legal Conference in December 2009 and on a paper by Andrew Buckland and Simon Thornton 'Court in the Act: Military Justice and Chapter III of the *Constitution*', presented at the Australian Government Solicitor Constitutional Law Forum, November 2009.

1 *Lane v Morrison* (2009) 239 CLR 230 ('*Lane*').

2 Military Court of Australia Bill 2010 (Cth).

3 (2009) 239 CLR 230.

personnel was held not to fall within the historically recognised exception implied in the *Constitution* that allowed a separate military criminal justice system to exist alongside the ordinary criminal law system. This conclusion was justified by reference to a historically frozen model of military justice. There seems inadequate constitutional justification for such a freeze, particularly when the frozen model largely ignores the significant developments that had already occurred in relation to military justice prior to creation of the AMC.

The decision in *Lane*, it is argued, is not constitutionally compelling and has made more difficult attempts to implement an independent and transparent system of military justice. One outcome, however, is a proposal to subject the military justice system in relation to major criminal offences to the exercise of ordinary judicial power. For some, this will be seen as a desirable outcome. For others, it defeats the purpose of a separate military justice system.

A LITTLE HISTORY

The historic development of a system of military justice reflects a story of constant change and evolution. From the very beginning of a military justice system, including under Australia's own system, there has been a constant tension between the extent to which military justice should be exclusive of the ordinary criminal law, especially in time of peace.[4] One can trace the separate system from its initial focus on trials of offences committed outside the Realm by an army only brought into existence as occasion required, to the existence of a standing army with a prerogative system for military justice and then statutory provision for courts martial. In Australia, initially the *Army Act 1881* (Imp) and *Naval Discipline Act 1866* (Imp) as in force from time to time were applied to the Australian Defence Force (ADF), principally when the ADF was on active service.[5] The *Defence Force Discipline Act 1982* (Cth) ('*DFDA*'), from 1985 gave Australia its own comprehensive military justice system albeit still modelled closely on that then applicable in the United Kingdom. It embraced not just offences of a military kind, and applied in Australia as well as overseas.

The result of these developments, however, was that

> [n]aval and military law thus created not only a system for punishing breaches of the laws peculiarly applicable to those forces but also a secondary system for enforcing the ordinary criminal law against naval and military personnel where it was not practicable or convenient for the ordinary courts to exercise their jurisdiction to do so.[6]

There were in effect three categories of military law offences —

(a) military discipline offences for which there is no civilian equivalent;

(b) offences with a close civilian counterpart (e.g. assault on a superior or subordinate); and

(c) civilian criminal offences imported from the law applicable in the Jervis Bay Territory.

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4 See generally *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 554–63 ('*Tracey*').

5 *Defence Act 1903* (Cth) ss 55–6 (as the provisions were originally enacted); see *Lane* (2009) 239 CLR 230, 256–7 [81]–[84].

6 *Tracey* (1989) 166 CLR 518, 563; see also 542–44.

This separate system clearly contemplated military tribunals in certain circumstances applying the substance of the ordinary criminal law of the land. This was reflected in s 61 of the *DFDA*, which picked up the criminal law applicable in the Jervis Bay Territory and applied it to Defence Force personnel in situations covered by the military justice system. Nevertheless, as *Tracey* made clear in 1989, in allowing the criminal justice system to operate alongside the ordinary criminal law in a secondary or supplemental role, it was not possible to exclude the ordinary jurisdiction of the criminal courts. In Australia, the military justice system was complementary not parallel. As *Tracey* also confirmed, conviction by a court martial did not preclude trial before an ordinary court for the same offence.[7]

In this context, the principal focus in the repeated attacks on the exercise of military jurisdiction in Australia has been on where to draw the line between conduct subject to military law and conduct subject only to the ordinary criminal law. In *Tracey*, *Re Nolan; Ex parte Young*,[8] *Re Tyler; Ex parte Foley*[9] and *Re Aird; Ex parte Alpert*,[10] the majority of the High Court in each instance allowed a relatively wide military jurisdiction. In *White v Director of Military Prosecutions*[11] a different attack was made. It was argued that only courts established in accordance with Chapter III of the *Constitution* could try military offences, or at least those not exclusively disciplinary. That case accepted that Chapter III courts did not have exclusive jurisdiction over trying offences necessary to the order and good discipline of the armed forces even if they were the same as offences under ordinary law. It was accepted that a separate military criminal jurisdiction did not only exist over some narrower category of offences 'exclusively disciplinary in character'.

AN INDEPENDENT AND IMPARTIAL TRIBUNAL

Having apparently received support from the High Court for a separate military justice system covering a wide range of conduct by military personnel, there was little incentive in the ADF to rely on the ordinary courts to deal with service related offences, particularly those that duplicated or were incidental to offences in the ordinary criminal law. There were, however, increasing demands for a more transparent and independent military justice system. This was in many ways a response to perceived shortcomings in Defence investigations and decisions to prosecute, rather than the conduct of actual court-martials or trials before Defence Force Magistrates (DFMs). There were, however, calls more generally for reforms to the whole military justice system.

In 1999 the Joint Standing Parliamentary Committee on Foreign Affairs, Defence and Trade inquired into 'Military Justice Procedures in the [ADF]'.[12] While not recommending a military court within the existing Australian judicial system, the idea was canvassed before the Committee. The principal focus of the inquiry was on concerns with the lack of institutional independence under the then current system, in

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7 Ibid 545–49, 575–78.
8 (1991) 172 CLR 460.
9 (1994) 181 CLR 18.
10 (2004) 220 CLR 308.
11 (2007) 231 CLR 570 ('*White*').
12 Commonwealth, *Military Justice Procedures in the Australian Defence Force*, Parl Paper No 125 (1999).

particular the multiple roles of the convening authority who determined whether there should be a trial, the charges, the composition of the tribunal and review of the proceedings.[13] Arising out of that Report was a decision to establish an independent Director of Military Prosecutions, given effect by legislation in 2005.[14] The Committee also heard arguments about the need for reform to ensure service offences were tried by an independent and impartial tribunal in order to meet Australia's obligations under art 14(1) of the *International Covenant on Civil and Political Rights*.[15] It recommended a further review occur in three years, following a series of reforms that had already revised the multiple roles of the convening authority and sought to improve the independence of courts-martial through change to the process for selecting the members.

Another report in 2005 by the Senate Foreign Affairs, Defence and Trade References Committee into '[t]he effectiveness of Australia's military justice system' reached quite different conclusions.[16] It found that major change was still required to ensure independence and impartiality in the military justice system. It recommended that decisions to initiate prosecutions for civilian equivalent and Jervis Bay Territory offences be referred initially to civilian prosecuting authorities,[17] and that a statutory independent Director of Military Prosecutions should be established[18] (which, as already indicated, did occur in 2005). It now also recommended the creation of a Permanent Military Court established in accordance with Chapter III of the *Constitution* to try offences under the *DFDA* tried at courts-martial or Defence Force magistrate level. Again, the concern was to ensure independence, impartiality and greater fairness.[19] There was also a concern that the *DFDA* system as then existing was itself vulnerable to constitutional challenge because of an insufficient lack of independence and impartiality.[20]

It was this pressure for reform and adoption of more judicial like structures independent of the chain of command that led to the development of the AMC. However, a deliberate decision was made by the government at the time not to adopt a Chapter III court but to establish a permanent and independent military tribunal. Central to this decision was a recognition that military justice was not the same as ordinary criminal justice either in the purposes it served or in its practical application. Yet, there were pressures from some quarters to create a military tribunal that was for all intents and purposes as close as possible to an ordinary court. As in most such situations, a compromise emerged. What was clear, and accepted by government at the time, was that it remained preferable to have a separate military criminal justice

13 See especially ibid 120–3 [4.15]–[4.22].
14 *Defence Legislation Amendment Act (No 2) 2005* (Cth); see also ibid 126–35 [4.33]–[4.63].
15 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
16 Commonwealth, *The Effectiveness of Australia's Military Justice System*, Parl Paper No 134 (2005) ('*The Effectiveness Report*').
17 Ibid xxi.
18 Ibid xxii.
19 Ibid 77–104.
20 Ibid 79.

system, even for serious offences under the ordinary law that had a service connection, rather than an ordinary Chapter III court.[21]

The form of the proposed new body became a central issue, and considerable effort was spent on issues like tenure of judges and ensuring its procedures were similar to those of an ordinary court, albeit with unique provisions, such as the use of military juries.

What was inadequately considered, it is now clear, was any consideration of how the design of the new tribunal may impact on the substance of what a military tribunal administered, namely the enforcement of military discipline. It was largely assumed that there were no real changes intended in that regard, despite the new form of tribunal which was removed from the chain of command.

As we shall see, however, the High Court concluded that there had been a deliberate break with the past, not only in the form of the tribunal but also in what it did. That was largely the reason for the AMC's downfall. Yet nothing in the legislative material suggests that a change in role was what the AMC was about. The establishment of the AMC was principally about the form of tribunal used to dispense military justice, with a view to ensuring greater independence and impartiality, but not a change in what it dispensed, namely the enforcement of military discipline for legitimate military purposes. The High Court saw it differently.

Legislation to create the AMC (the Defence Legislation Amendment Bill 2006 (Cth)) was introduced into Parliament on 14 September 2006, and was subsequently referred to the Senate Standing Committee on Foreign Affairs, Defence and Trade. The explanatory memorandum then set out a number of characteristics of the AMC which were to give effect to the Government Response, including that the AMC:

- is to 'satisfy the principles of impartiality and judicial independence, and independence from the chain of command',[22]
- 'is not an exercise of the ordinary criminal jurisdiction';[23] and
- 'is a "service tribunal" under the *DFDA* and therefore is part of the military justice system, the object of which is to maintain military discipline within the ADF.'[24]

The explanatory memorandum went on to note that a number of unsuccessful constitutional challenges had been brought to the current system, and that the 'constitutional status and jurisdiction of the AMC will be the same jurisdiction that applies to the current system'.[25]

In its report on the 2006 Bill, the Senate Committee identified 'a number of serious misgivings about the bill', including the possibility of a successful High Court challenge, based in part on submissions made to it by the then Judge Advocate General

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21 See Commonwealth, Department of Defence, *Government Response to the Senate Foreign Affairs, Defence and Trade References Committee 'Report on the Effectiveness of Australia's Military Justice System'*, (2005) 15, quoted in *Lane* (2009) 239 CLR 230, 239 [18]; see also *Lane* (2009) 239 CLR 230, 254 [74]–[75].

22 Explanatory Memorandum, Defence Legislation Amendment Bill 2006 (Cth) [3].

23 Ibid [4].

24 Ibid.

25 See ibid [5]–[6].

(JAG) and the Law Council of Australia.[26] It appears it was thought that any such challenge would be based on an argument that the AMC was not sufficiently independent from the ADF for a body that would exercise a form of judicial power (as did, it was then thought, courts martial and DFMs).[27] This stemmed from successful challenges to courts martial in both Canada and the UK on the basis that they were not 'independent and impartial tribunals',[28] and from recent High Court decisions concerning the degree of independence and impartiality required of State courts as potential repositories of federal jurisdiction.[29] Ironically, it was because the AMC was too independent that proved to be its downfall.

The AMC was ultimately established on 1 October 2007 by amendments made to the *DFDA* by the *Defence Legislation Amendment Act 2006* (Cth).[30] The *DFDA* provided that the AMC was a 'court of record' which consisted of 'Military Judges'[31] who were required to be members of the Defence Force.[32] Offences could be tried by a Military Judge alone, or with a military jury, depending on the class of offence to be tried. A

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26 Senate Foreign Affairs, Defence and Trade Committee, Parliament of Australia, *Report on the Inquiry into the Provisions of the Defence Legislation Amendment Bill 2006 (Cth)* (2006) 4–5 [1.22].

27 In his submission the JAG stated:

> my suggestion to the MJI was that the AMC should be established pursuant to Chapter III, although I did express the view that this could possibly be problematical having regard to section 80 of the *Constitution*. I understand that subsequent advice to Government was to the effect that this would be so. Under the circumstances, I can have no concern about the decision to establish the AMC under the Defence power rather than Chapter III, but that fact does mean the risk of a successful Constitutional challenge will depend entirely upon the statutory safeguards guaranteeing the judicial independence and impartiality of the AMC.

Justice L W Roberts-Smith, Submission No P3 to Senate Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into the Provisions of the Defence Legislation Amendment Bill 2006 (Cth)*, 19 September 2006, 1 [3].

Similar concerns, including as to the validity of the AMC 'when it bears a greater resemblance to the [AAT] than a court', were expressed by the Law Council of Australia in its submission.

Law Council of Australia, Submission No P5 to Senate Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into the Provisions of the Defence Legislation Amendment Bill 2006 (Cth)*, 26 September 2006, 4 [3].

28 As required by s 11(d) of the *Canadian Charter of Rights and Freedoms* (*Canada Act 1982* (UK) c 11, sch B pt I), and art 6(1) of the *European Convention on Human Rights* (*Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010)), respectively: see *R v Genereux* [1992] 1 SCR 259; *Findlay v United Kingdom* (1997) 24 EHRR 221; *Grieves v United Kingdom* (2004) 39 EHRR 2.

29 See, eg, *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45.

30 This was the 2006 Bill as amended following the Senate Inquiry.

31 See *DFDA* ss 114(1A), (2), as inserted by *Defence Legislation Amendment Act 2006* (Cth) sch 1 pt 1.

32 See *DFDA* ss 188AD, 188AR(1), as inserted by *Defence Legislation Amendment Act 2006* (Cth) sch 1 pt 1.

note to the section establishing the AMC provided that the AMC 'is not a court for the purposes of Chapter III of the *Constitution*'.[33]

THE HIGH COURT'S DECISION

On 8 August 2007 the plaintiff in *Lane* was charged with the offence of 'an act of indecency without consent' contrary to s 61(3) of the *DFDA* in its application of s 60(2) of the *Crimes Act 1900* (ACT), and with the offence of assaulting a superior officer, contrary to s 25 of the *DFDA*. The alleged offences occurred in August 2005, when the plaintiff was a member of the Royal Australian Navy. The charges were referred to the AMC by operation of transitional provisions and on 26 November 2007 the Chief Military Judge nominated the first defendant to try the proceedings.

Following the referral of the charges, the plaintiff commenced proceedings in the High Court seeking prohibition against the first defendant and a declaration that the provisions of the *DFDA* establishing the AMC were invalid.

In the High Court the plaintiff argued that the AMC was invalid on three grounds:[34]

- the creation of the AMC was inconsistent with s 68 of the *Constitution* because it was independent from the 'command in chief of the naval and military forces of the Commonwealth' vested by that section in the Governor-General;
- the AMC was a federal court impermissibly created outside Chapter III of the *Constitution*;
- the AMC was conferred with a general criminal jurisdiction which was not subordinate and supplementary to the general criminal law.

The Court did not determine the invalidity of the AMC by reference directly to any of the plaintiff's arguments (although in relation to s 68 of the *Constitution*, French CJ and Gummow J clearly rejected the argument). Instead the Court decided the case on the basis that the *DFDA* purported to create the AMC to exercise the judicial power of the Commonwealth otherwise than in accordance with Chapter III of the *Constitution*.[35] The Court declared invalid those provisions that both created the AMC and conferred jurisdiction on it (Part VII Division 3 of the *DFDA*), and ordered that the first defendant, the military judge assigned to try the charges against the plaintiff, be prohibited from further proceeding with the charges.

Although the Court's decision was unanimous, two separate judgments were given, one by French CJ and Gummow J, and the other by Hayne, Heydon, Crennan, Kiefel and Bell JJ.

Central to both judgments is the 'undisputed constitutional principle' that the judicial power of the Commonwealth can only be exercised by a court created in

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33 *DFDA* s 114(1), Note 1, as inserted by *Defence Legislation Amendment Act 2006* (Cth) sch 1 pt 1.

34 Three other grounds raised by the plaintiff were not referred to the Full Court by French CJ on the basis that they were 'unsustainable' in light of the existing authority of the Court: *Lane v Morrison* (2009) 83 ALJR 377.

35 *Lane* (2009) 239 CLR 230, 250 [60] (French CJ and Gummow J); 261 [98], 266 [113], [115] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

accordance with Chapter III of the *Constitution*.[36] The AMC was clearly not a court created in accordance with Chapter III of the *Constitution* — at the very least, that is because military judges of the AMC did not have the tenure required by s 72 of the *Constitution* of justices of 'courts created by the Parliament'.[37] The central issue, then, was whether the AMC purported to exercise the judicial power of the Commonwealth.

DID COURTS MARTIAL EXERCISE JUDICIAL POWER (OF THE COMMONWEALTH)?

In *Tracey*,[38] and earlier in *Bevan* in 1942,[39] there were statements that appeared to affirm quite clearly that service tribunals did not exercise the judicial power of the Commonwealth within s 71 of the *Constitution* and hence were not contrary to Chapter III of the *Constitution*. Certain statements at the same time affirmed that the tribunals did, however, exercise judicial power.

Thus, in *Tracey* Mason CJ, Wilson and Dawson JJ made the following comments about the nature of the power being exercised by service tribunals:

> 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;[40] … [i]t 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 Corporation*, '[c]ourts-martial … are as truly entrusted with the exercise of the judicial power of the state as are civil courts'.[41]

Their Honours said that proposition was sufficiently established in a constitutional context by *Bevan*,[42] in which they said it was expressly decided by Starke J and assumed by McTiernan and Williams JJ.[43] They went on and said 'there has never been any real dispute' about whether a court-martial is exercising judicial power.[44] In *Lane* these statements were dismissed as dicta.[45] This came as a surprise.

The relationship between Chapter III and the defence power in s 51(vi) of the *Constitution* had been said in *White* by Gummow, Hayne and Crennan JJ to be 'not a straightforward one'.[46] Nevertheless, *White* reaffirmed that there was a 'well-recognised exception for legislatively based military and naval justice systems' but qualified this by reference to systems 'of the kind which the Supreme Court of the United States had recognised in 1857 and which applied in the Australian colonies at federation'.[47] The United States case in 1857 was *Dynes v Hoover*.[48] In that case the

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36 Ibid 242 [28] (French CJ and Gummow J), 254 [76] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).
37 Ibid 237 [9] (French CJ and Gummow J), 251 [65] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).
38 (1989) 166 CLR 518, 540, 572.
39 *R v Bevan; Ex parte Elias* (1942) 66 CLR 452, 467, 468, 481 ('*Bevan*').
40 *Tracey* (1989) 166 CLR 518, 537.
41 Ibid 539, quoting *Attorney-General v British Broadcasting Corporation* (1980) 3 All ER 161, 182.
42 (1942) 44 CLR 452.
43 *Tracey* (1989) 166 CLR 518, 539.
44 Ibid 540.
45 (2009) 239 CLR 230, 255–256 [78], see also 260–261 [96].
46 *White* (2007) 231 CLR 570, 594.
47 Ibid 596.

Supreme Court upheld the trial and punishment of military and naval offences 'in the manner then [ie in 1789] and now practiced by civilized nations.'[49] It was a case referred to also in *Tracey*[50] and also by Starke J in *Bevan*.[51] This attempt to tie the military justice system operating outside Chapter III to a historical exception did not necessarily suggest the High Court was seriously reconsidering the basis for this exception.

In establishing a court-like body, albeit a body that clearly was not a Chapter III court, comfort was therefore taken from the statements in previous High Court decisions referred to above where it had often been said that courts martial exercised judicial power albeit not the judicial power of the Commonwealth.[52] How could that be done consistently with Chapter III of the *Constitution*, pursuant to which the 'judicial power of the Commonwealth' is vested in various categories of courts not including courts martial?

The two reasons previously given by the High Court as to why the power exercised by courts martial was not the judicial power *of the Commonwealth* and thus not subject to Chapter III were:

- First, as Mason CJ, Wilson and Dawson JJ stated in *Tracey*: 'the proper organization of a defence force requires a system of discipline which is administered judicially, not as part of the judicature erected under Ch III, but as part of the organization of the force itself.'[53] This is an 'essentially pragmatic' approach,[54] based on the perceived necessity of military tribunals operating within the defence force itself (and thus, for example, being deployable overseas with the force) and serving the distinct purpose of upholding the good order and discipline of the military forces.
- Secondly, the long history of military tribunals operating outside the 'judicial system administering the law of the land', and the absence of any suggestion during the Convention Debates that the framers intended to alter this position, support the classification of the power exercised by such tribunals as not the judicial power of the Commonwealth.[55] Thus according to Gaudron J

  > [t]he history of military law and the history of military tribunals … and the decisions in *Bevan* and *Cox*, point inexorably to the recognition within our legal system of a military judicial power in respect of persons subject to military law

48 61 US 65 (1857).
49 *White* (2007) 231 CLR 570, 596, quoting *Dynes v Hoover*, 61 US 65, 79 (1857).
50 (1989) 166 CLR 518, 541.
51 (1942) 66 CLR 452, 467.
52 Ibid 466 (Starke J), 481 (Williams J); *Tracey* (1989) 166 CLR 518, 537, 539, 540 ('the real question … is not whether a court-martial … is exercising judicial power. There has never been any real dispute about that') (Mason CJ, Wilson, Dawson JJ), 572–574 (Brennan and Toohey JJ), 582 (Deane J), 598 (Gaudron J); *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 489, 491 (Deane J), 497 (Gaudron J); *Hembury v Chief of General Staff* (1998) 193 CLR 641, 648 [13] (McHugh J); *Re Aird; Ex parte Alpert* (2004) 220 CLR 308, 319 [31] (McHugh J).
53 (1989) 166 CLR 518, 541. See also *R v Bevan* (1942) 66 CLR 452 at 467–8 (Starke J); *R v Cox; Ex parte Smith* (1945) 71 CLR 1, 23 (Dixon J).
54 *Tracey* (1989) 166 CLR 518, 583 (Deane J).
55 Ibid 573 (Brennan and Toohey JJ). See also *R v Bevan* (1942) 66 CLR 452, 467–8 (Starke J); *White* (2007) 231 CLR 570, 583–584 [8]–[9], 586 [14] (Gleeson CJ), 596 [52], 597–598 [57] (Gummow, Hayne, Crennan JJ).

> which is separate and distinct from the judicial power which a sovereign State has in respect of those persons subject to its general laws, the latter being descriptive of the nature of the judicial power comprehended in the expression '[t]he judicial power of the Commonwealth' as used in Ch III of the Constitution[56]

Thus, it appeared prior to *Lane* that military tribunals were a well established exception not involving the exercise of the judicial power of the Commonwealth, despite the judicial character of the power they exercised. They fulfilled a different purpose other than the administration of the general law.

On that basis, to reconstitute the relevant ad hoc military tribunals into a permanent military tribunal with greater independence did not appear to challenge constitutional orthodoxy.

THE DECISION IN *LANE*

However, in *Lane*, Hayne, Heydon, Crennan, Kiefel and Bell JJ emphasised that the relevant constitutional question is only whether a court martial exercised the judicial power *of the Commonwealth*, and to 'speak of a court-martial exercising a species of judicial power is unhelpful if it distracts attention from [that] … question'.[57] French CJ and Gummow J likewise rejected this distinction.[58] They referred to the statement by Dixon J in *R v Cox*; *Ex parte Smith* as follows:

> In the case of the armed forces, an apparent exception is admitted and the administration of military justice by courts-martial is considered constitutional. **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.[59]

In *Lane* the High Court considered the AMC was in a significantly different position from earlier military tribunals. Their Honours in *Lane* explained the previous decisions, in which it had been held that courts martial did not exercise the judicial power of the Commonwealth, on a new basis, namely that the decisions of courts martial, unlike those of the new AMC, were not 'definitive' of guilt, and the punishments they awarded were not final. That was said to be because

> [t]he decisions, not only whether to hold a court-martial, but also whether and how effect should be given to a finding by a court-martial of guilt, were matters for confirmation or review by higher authority within the chain of command of the forces.[60]

As a result, 'dispositive' decisions about guilt or punishment were not really made by a court martial but within the 'chain of command'. It followed, their Honours said,

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56 *Tracey* (1989) 166 CLR 518, 598.

57 *Lane* (2009) 239 CLR 230, 260–261 [96]; see also *White* (2007) 231 CLR 570, 616–619 [123]–[134] (Kirby J).

58 *Lane* (2009) 239 CLR 230, 237 [10].

59 (1945) 71 CLR 1, 23 (emphasis added) (citations omitted).

60 *Lane* (2009) 239 CLR 230, 257 [84], 257–258 [86] (Hayne, Heydon, Crennan, Kiefel and Bell JJ), 248 [51] (French CJ and Gummow J). Cf *Tracey* (1989) 166 CLR 518, 537 (Mason CJ, Wilson and Dawson JJ):

> a service tribunal, more particularly a court martial, has the power to determine authoritatively the liability of those charged before it, albeit subject to review or appeal. … [N]o relevant distinction can, in our view, be drawn between the power exercised by a service tribunal and the judicial power exercised by a court.

that it was 'right to describe courts-martial as directed to the maintenance of discipline of the forces' and as 'tribunals established to ensure that the discipline administered within the forces was just' which did 'not form part of the judicial system administering the law of the land'.[61] The decisions of the AMC by contrast were not subject to review or confirmation within the military command. This was held to be the fundamental difference that meant the AMC was invalid.

In reaching this conclusion, the judgments in *Lane* relied unduly on what I consider an inaccurate portrayal of the status of a court martial. The joint judgment led by Hayne J refers to an 1821 United States case to the effect that 'proceedings of a court martial were not definitive but merely in the nature of an inquest to inform the conscience of a commanding officer.'[62] This seems a far from accurate portrayal of military justice under the *DFDA*, where review of a conviction was only possible on limited grounds. While this was acknowledged,[63] it was said that the point of importance was that the final decision under the former system was made within the chain of command.

Why this matter of form, rather than the purpose for which an offence is tried and the consequences of conviction, should be definitive is not clear. The decision of a court martial subject to limited review or appeal rights, which leads to enforcement of sentences including imprisonment, and which in the past could lead to execution, seems just as much a definitive exercise of judicial power as a decision made by a specially created military court.

Yet, for Hayne, Heydon, Crennan, Kiefel and Bell JJ, the independence of the AMC from the 'chain of command' was 'the chief feature distinguishing [the AMC] from earlier forms of service tribunal which have been held not to exercise the judicial power of the Commonwealth'.[64] This led to their key conclusion that

> a central purpose of the creation of the AMC was to have the new body make binding and authoritative decisions of guilt and determinations about punishment which, without further intervention from within the chain of command, would be enforced.
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> That … is reason enough to conclude that it is to exercise the judicial power of the Commonwealth.[65]

The impression that one gets from their approach is that Hayne, Heydon, Crennan, Kiefel and Bell JJ were uncomfortable with the notion that a body other than a Chapter III court could exercise judicial power, but did not want to disturb the long line of cases upholding the validity of service tribunals operating outside of Chapter III. For that reason, rather than continuing to accept as valid without question a separate military justice system operating outside Chapter III, their Honours preferred to test the validity of the new military justice system involving the AMC against general notions of judicial power in a way that had not been done before. By emphasising its new features, particularly its independence from command, they could find it problematic in a way which did not threaten the validity of previous systems of military justice.

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61 *Lane* (2009) 239 CLR 230, 257–258 [86] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).
62 *Mills v Martin*, 19 Johns 7, 30 (NY 1821).
63 *Lane* (2009) 239 CLR 230, 259 [90].
64 Ibid 254 [75] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).
65 Ibid 261 [97]–[98] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

Essentially, in *Lane* it was held that a separate military justice system was only capable of existing outside Chapter III if it reflected the traditional, historic model, involving ultimately a final decision made in the chain of command. Only in this way, it seems, can one conclude that the purpose of military discipline can be achieved if a fully fledged Chapter III court is not used.

Why the constitutional exception for military justice should be 'frozen' in this way is not, in my view, adequately explained in *Lane*.[66] Other 'civilized nations' have moved to create more independent systems of military justice outside the ordinary courts but displaying greater attributes of independence from command.[67] In Australia that choice has been largely prevented. From a constitutional perspective it is not clear why this should be so. A number of unanswered questions can be identified in this regard.

UNANSWERED QUESTIONS

(i) What power did reviewing authorities exercise?

The first issue that *Lane* leaves unanswered is the nature of the power exercised by confirming authorities (at federation) and reviewing authorities (under the *DFDA* pre-AMC). As Hayne, Heydon, Crennan, Kiefel and Bell JJ found, such authorities made final, binding and enforceable decisions about guilt and punishment. They did so, however, on limited grounds 'expressed in terms very like those found in common form criminal appeal statutes' conferring appellate jurisdiction on criminal appeal courts.[68] On what basis, then, could it be said that such authorities did not exercise the judicial power of the Commonwealth?

It seems that they may well do so. That form of judicial power apparently falls within the historical exception for military justice that clearly existed and was contemplated at the time of Federation because there was still some remote possibility of review higher up the chain of command.

In the earlier Australian cases that recognised military justice could exist outside the ordinary courts, emphasis was placed on the particular purpose served by a separate military justice system. It was only to the extent it served that purpose that such an exception was upheld and the extent of its jurisdiction determined. Yet in *Lane* there was no attempt to say that use of an independent AMC did not appropriately serve the ends of ensuring military good order and discipline. If it did, it is not readily clear why such a system should be any less sound from a constitutional perspective than the system it replaced just because it operated freed from the chain of command, a feature which had previously seriously called into question the fairness of the system.

(ii) When is someone relevantly in the 'chain of command'?

Secondly, the High Court found, consistently with the government's stated intention, that the AMC was 'independent from the chain of command'. This independence was

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66 The decision has been criticised also in James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 2010) 256–7 [5.72].

67 See summary of overseas developments in *The Effectiveness Report*, above n 16, 90–96 [5.45]–[5.70].

68 *Lane* (2009) 239 CLR 230, 259 [90].

critical to the decision that the AMC exercised the judicial power of the Commonwealth.[69] The Court did not, however, expressly identify why the AMC was not relevantly part of the chain of command, nor why a reviewing (or confirming) authority was. Some negative implications can, however, be drawn from the Court's reasons:

- to be within the chain of command, it is not enough to be an officer within the ADF — that follows because Military Judges were required to be members of the ADF and officers not below a certain rank.
- the fact that the AMC was not subject to command direction in determining charges before it should not preclude it from being within the chain of command — that is because reviewing (or confirming) authorities were held to be in the chain of command notwithstanding that they were (probably) not subject to direction in reviewing / confirming the decisions of courts martial.

There is at least one possible answer to when a military justice decision maker will be relevantly within the chain of command, namely if the decision maker's decision is subject to review at the upper level of the defence force hierarchy.[70]

The High Court saw no need to consider this issue in any detail. It was enough that the AMC decisions had a different independent quality from decisions under the earlier system. The fact the AMC had members of the military as judges, used military juries and imposed punishment for purposes of discipline was not enough.

SERVICE TRIBUNALS MUST BE WITHIN THE 'HISTORICAL STREAM'

The above issues suggest that the determining factor in *Lane* was not whether a military justice decision maker made a final, binding and enforceable decision of guilt or innocence of a criminal offence, but whether that decision was made by a person or body sufficiently integrated within the defence force hierarchy. In that regard, the conclusion that the AMC was independent of the chain of command was central to all their Honours' finding that the AMC was exercising the judicial power of the Commonwealth otherwise than in accordance with Chapter III of the *Constitution*.[71] However that finding was made because its independent nature took the AMC outside the historical conception of the military justice system previously held to have been supported by s 51(vi) and outside the constraints of Chapter III.[72]

In particular, the military justice system in 1900 was 'directed to the maintenance of the defining characteristic of armed forces as disciplined forces organised hierarchically', and courts martial operated within that command structure.[73] By

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69 Ibid 256 [79] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

70 See, eg, ibid 238 [12] (French CJ and Gummow J), 257 [84] (Hayne, Heydon, Crennan, Kiefel and Bell JJ). Note that the *DFDA* pre-AMC did not itself require a reviewing authority to be of superior rank to the service tribunal the subject of review and thus to stand in any particular hierarchical relationship to the tribunal. On that basis it may be that the critical feature was that a tribunal's decision was ultimately reviewable by the Chief of the Defence Force or service chief (*DFDA 1982* (Cth) s 155). It would seem that the availability of the prerogative of mercy (*DFDA 1982* (Cth) s 189) was not sufficient.

71 *Lane* (2009) 239 CLR 230, 237 [10] (French CJ and Gummow J), 256 [79], 261 [98].

72 Ibid 248 [49]–[51], 250 [60] (French CJ and Gummow J).

73 Ibid 237 [10], 238 [12] (French CJ and Gummow J).

taking the AMC outside the command structure (in order to meet concerns that the previous system denied trial by an independent and impartial tribunal), Parliament, according to French CJ and Gummow J, exceeded the power conferred by s 51(vi).[74] For the other judges it meant the AMC was exercising the judicial power of the Commonwealth but in a way contrary to Chapter III.

In reaching their conclusion, French CJ and Gummow J emphasised that the '[t]he powers of the Parliament to create courts are found only in ss 71, 72 and 122 of the Constitution',[75] holding that the *Australian Constitution* does not support the creation of 'legislative courts' resembling those found in the US.[76] Legislative courts are bodies recognised in US decisions as able to decide cases and controversies between the US and citizens arising under the laws of the US, yet they are supported by Article I of the *Constitution* and do not exercise the judicial power of the US provided for in Article III.[77]

One can only conclude that at least for French CJ and Gummow J, but also probably for the other judges, they considered that the Parliament had attempted to borrow for 'the AMC the reputation of the judicial branch for impartiality and non-partisanship' upon which the legitimacy of the judicial branch is said to depend.[78] The AMC was too close for comfort to a Chapter III court to be allowed to coexist as an exception to the requirements of Chapter III.

In this regard, the conclusion was reached in the joint judgment led by Hayne J that the effect of a conviction by the AMC was different from a conviction by a court martial or DFM under the former system. Those judges drew from the designation of the AMC as a court of record that a consequence of a conviction by it was to preclude subsequent prosecution in a civil court for the same offence[79]. This conclusion was seen to have effected a significant change in the role of a military tribunal. No longer was it dispensing merely military justice. It was applying the ordinary law of the land with all the consequences that entailed.

It is recognised that the legislation was not explicit as to the consequences of a conviction. The explanatory memorandum suggested no change in this regard was envisaged, but, unlike with the summary justice system where the position was made clear,[80] no similar provision was included for the AMC. This could have been remedied but would not have cured the more fundamental problem the High Court had with the change to an independent tribunal.

AN ALTERNATIVE ANALYSIS

If the High Court had approached the matter from first principles it seems they could have accommodated a body like the AMC as part of the military justice system.

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74 Ibid 238 [13].
75 Ibid 237 [9].
76 Ibid 243 [30] (French CJ and Gummow J).
77 Ibid 242 [27] (French CJ and Gummow J).
78 Ibid 238 [12]. Stellios, above n 66, 257–8 considers this a more persuasive reason for invalidity than the independence from command ground.
79 *Lane* (2009) 239 CLR 230, 266 [112].
80 *DFDA 1982* (Cth) s 131B.

If the AMC was considered as a military tribunal as was intended, despite its name, its establishment was to be judged by reference to the defence power in the *Constitution*. This should have been answered by reference to whether the tribunal was reasonably appropriate and adapted to ensuring military discipline. There seems no reason given its limited jurisdiction mirroring that of previous tribunals why an affirmative answer could not have been given to that question. There is no justification, in my opinion, in terms of the defence power, to limit the manner in which military justice can be delivered to the form in which it was delivered in 1901. It is not self-evident why an independent tribunal is any less able to promote good order and discipline than a strict command system.

If the AMC was otherwise within power under s 51(vi) of the *Constitution*, as facilitating military discipline, the question would then be did it infringe Chapter III of the *Constitution*. If one accepts that its name and status as a court of record are not determinative (as the joint judgment led by Hayne J did), and if one accepts that a conviction was not intended and did not have greater effect than a conviction by a court martial, the question is what then offends Chapter III?

The absence of review through a chain of command does not change the status of the ultimate final binding decision that results from the discipline system. The fact that the final decision is reached by the AMC and not by command only after confirmation does not seem to be something that should be constitutionally determinative, if one has concluded that the system serves purposes of military discipline. Yet we know it is.

The reasoning in *Lane* seems to value form over substance. No doubt if the Court could speak further it would say that is not what it is doing — imposition of punishment by the chain of command is a matter of substance. But why should what is a historic feature be determinative? The constitutional question is whether the AMC system is a legitimate way in which to give effect to the need for a military justice system to ensure military discipline and good order. If it is, it seems no more offensive in terms of an exception to Chapter III than the previous court martial system.

However, when confronted with an imitation of a real Chapter III court the High Court appears to have been uncomfortable with the possibility that such an exception for the military may embolden attempts to clothe other tribunals with court-like characteristics, and in doing so impair the integrity of judicial power. This they would not allow; and this seems the largely unstated premise behind the decision.

IMPLICATIONS FOR THE FUTURE

The decision in *Lane* has temporarily been overcome.[81] It has been announced that a separate Chapter III military court will be established as a replacement for the AMC, and legislation was introduced in 2010.[82] It remains to be seen whether similar legislation will ultimately be passed or whether there will be a policy rethink and reversion to a more traditional military justice system. The decision in 2010 by the Director of Military Prosecutions to charge certain ADF members with offences,

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81 *Military Justice (Interim Measures) Act (No 1) 2009* (Cth); *Military Justice (Interim Measures) Act (No 2) 2009* (Cth). There are, however, challenges to the validity of the No 2 Act, to the extent it purports to give effect to punishments imposed by the AMC. These cases have been heard by the High Court and are reserved for judgment: see [2011] HCATrans 77.

82 Military Court of Australia Bill 2010 (Cth).

including manslaughter, for conduct while in Afghanistan has drawn attention to the consequences of an independent prosecutorial decision outside the chain of command.[83] It has also led to renewed suggestions that a Chapter III military court is not necessarily the way to go.[84] The current parliamentary situation with minority government may make introduction of a Chapter III military court far from certain.

The High Court has effectively created a situation where the only way an independent system of military justice for serious criminal offences can exist is through use of Chapter III courts. Yet this has major implications for the existence of a supplementary military justice system. The ultimate rationale for a separate military justice system is to maintain military discipline. This is reflected in the nature and circumstances when offences fall within military jurisdiction, and in the punishments imposed. To the extent that a Chapter III court is intruded into the process there is a risk that day to day recognition of the rationale will necessarily be forgotten.

A Chapter III military court can only impose punishments able to be imposed by any other ordinary court. It will not dispense merely supplementary justice for disciplinary purposes but justice parallel to that able to be dispensed by other courts. Use of a Chapter III military court will thus establish a parallel system of criminal justice applicable to Defence Force members and dispensing criminal rather than military justice. One result is that if an offence is dealt with by a Chapter III military court this is likely to preclude any other court from exercising jurisdiction.

Given such a parallel system, the temptation may, however, be to try and extend the military court jurisdiction more broadly beyond situations involving a sufficient service connection. It is not clear that the civilian courts or prosecuting authorities will always get the first opportunity to deal with offences that are civilian equivalent. Who makes the decision as to which of the two parallel systems is to be used for particular cases may become an even more critical, and possibly controversial, decision.

For instance, a military court may avoid delays associated with the ordinary courts. To overcome s 80 of the *Constitution*, offences tried before the military court will probably not be indictable and there may, thus, be no entitlement to a jury. There clearly may be arguments about which system is more favourable to an accused.

Further, if a court and not a military tribunal is to exercise jurisdiction, what justifies having a specially created Chapter III military court trying offences often the same as offences that could be tried in the ordinary way by the relevant civilian courts under the ordinary criminal law. Are the differences between being tried in a new federal military court and an ordinary state court otherwise having jurisdiction justified (such as the absence of a jury in a trial before the military court even for what would normally, by reason of the penalty, be indictable offences)?

Establishment of a Chapter III military court will signal that there is still a separate system of military justice, albeit one administered for the more serious offences through a true court rather than tribunal. It will not end the debate about the scope and manner of administration of military justice. The driving force for a military court, namely to have an independent and impartial body trying service offences, will have

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83 Department of Defence, 'Defence comment on update by Director of Military Prosecutions on February 12, 2009 incident' (Media Release, MECC 555/10, 26 September 2010).

84 See, eg, Justice Paul Brereton, 'The Director of Military Prosecutions, the Afghanistan Charges and the Rule of Law' (2011) 85 *Australian Law Journal* 91.

been achieved. However, the overriding purpose of a military justice system is not the same as the purpose of any Chapter III court. The extent to which a separate Chapter III military court can administer ordinary criminal justice while also achieving military discipline objectives will create inevitable tensions in this regard. Attempts will no doubt be made to ensure military circumstances are properly taken into account, such as requiring judges to have had military experience, but how effective this is in ensuring military circumstances are accommodated will only be evident over time. Effective discipline will be a hoped for side product of the exercise of judicial power by the court, but it is hard to see how it can be the primary objective of a judicial system administering the criminal law of the land. There may be pressures to deal with disciplinary concerns in other ways, such as administratively by dismissal rather than through criminal prosecution. All this remains unclear, however, in the absence of final action by Parliament on a replacement system and in the absence of any experience with a court as proposed in 2010. .

It is a pity in my view that the High Court used history to freeze development in the form of the original AMC. However, any future system this leads to will have its own challenges and dilemmas. A continuing debate will no doubt occur about how best, and when, to administer military justice to members of the Defence Force.