

APCML/CCCS JOINT SEMINAR¹

AUSTRALIAN MILITARY JUSTICE AND CHAPTER III

WHERE TO NEXT?

A. Introduction

1. Given that our Constitution was substantially borne out of visions concerning the defence of this great nation and that federal courts are the Constitutional bastion of the rule of law it is appropriate to discuss first the defence power, next the recent decision in *Lane v Morrison*, the effect of the decision, possible Parliamentary rectification of ongoing anomalies, an appropriate Chapter III court and advantages of the Federal Magistrates Court of Australia.

B. The constitutional defence power

2. Before turning in more detail to the Constitutional provisions as to the defence power we are all familiar with the lawmaking power in s51(vi):

“The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.”

3. That power was really first exercised in a coherent manner concerning defence discipline over all three military arms by the *Defence Force Discipline Act 1982*. A similar unification of discipline systems had been introduced in Canada and the push for this reform started in the 1960's. The constitutionality of the legislation dealing with defence discipline has however been the source of much dispute. The *Defence Force Discipline Act 1982* creates service offences, some of which are clearly peculiar to the armed services and by certain devices many service offences substantially mirror civilian criminal offences. The pre-1982 court martial procedures were unified by a statutory

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regime that included defence force magistrates and both restricted and full courts martial. This was replaced in 2006 by an Australian Military Court.

4. In *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 a provision in the *Defence Force Discipline Act 1982* that purported to make conclusive a conviction by a Service tribunal so as to avoid that person being retried in a civil court for a civil court offence which was substantially the same as the Service offence was struck down. It is interesting to see which States did or did not support the validity of s190 in that case in the joint judgment of Mason CJ, Wilson J and Dawson J, it was observed that the Commonwealth had chosen to exempt Service:

“... persons from the operations of laws for the most part being State laws which apply to those persons by denying jurisdiction to the civil courts, for the most part State courts, to try case brought under those laws. For our part we doubt whether the provisions of that kind, which strike at the judicial power of the States, can ever be regarded as within the legislative capacity of the Commonwealth having regard to s106 of the Constitution, but it is sufficient to say that they clearly exceed the power to make laws with respect to the defence of the Commonwealth. ... In our opinion it is clearly beyond the defence power and the incidental power of the Parliament to interfere in this manner with the exercise by State courts of their general criminal jurisdiction.”

5. Brennan and Toohey JJ referred to the Commonwealth provisions intending to prevent double jeopardy and at 574 – 575 said:

“However that may be, provisions which purport to prohibit the exercise of the ordinary criminal jurisdiction vested in State courts by State law can find no support in the Constitution. State courts are an essential branch of the government of a State and the continuance of State Constitutions by s106 of the Constitution precludes a law of the Commonwealth from prohibiting State courts from exercising their functions. It is a function of State courts to exercise jurisdiction in matters arising under State law.”

6. Gaudron J expressed a wider view concerning the Act:

“... to the extent that it purports to vest in service tribunals jurisdiction in relation to conduct engaged in by defence members in Australia constituting service offences which are substantially the same as civil court offences, is, in the present circumstances, beyond legislative power and invalid.”

7. The Constitution provides for a legislative power in Chapter I s1 and executive power in Chapter II s61, a judicial power in Chapter III s71, each of which identifies in whom the relevant power is “vested”. The only other vesting

provision in the Constitution is s68 concerning whatever may be the content of the power of command in chief of the Naval and Military Forces of the Commonwealth. In respect of the power under s51:

“... subject to this Constitution ... 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 of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.”

8. Reference perhaps should also be made to *Placitum xxxii*

“The control of railways with respect to transport for the naval and military purposes of the Commonwealth.”

9. *Placitum xxxvi*

“Matters in respect of which this Constitution makes provision until the Parliament otherwise provides.”

10. *Placitum xxxix*

“Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.”

11. Section 52 provided a law making power relevantly in relation to (ii):

“Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government or the Commonwealth.”

12. Section 69 in Chapter II provides for the transfer to the Commonwealth relevantly of “Naval and Military defence”.

13. Section 114 provides:

“A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.”

14. Section 119 provides:

“The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.”

15. Words in s51(vi) in terms of the defence power as to “naval and military” have been said not to be words of limitation, *Thomas v Mowbray* (2007) 233 CLR 307 and it has been said to be a purposive power obviously depending upon the circumstances in which the power is exercised, be it peacetime or wartime. Whilst prescribing a political party and excluding its members from participation in industrial affairs was unsuccessful in *Australian Communist Party v Commonwealth* (“*Communist Party case*”) (1951) 83 CLR 1, the defence power was found to support terrorist legislation in *Thomas v Mowbray*, in the state of international deterioration of the political situation, it supported restricting capital-raising activities of Australian businesses, *Marcus Clark & Co Ltd v Commonwealth* (“*Capital Issues case*”) (1952) 87 CLR 177, it supported a system of compulsory of military service, *Krygger v Williams* (1912) 15 CLR 366; *Giltinan v Lynch* (1971) 124 CLR 153; controlling of commodities of value to the military, *Jenkins v Commonwealth* (1947) 74 CLR 400; *Logan Downs Pty Ltd v Federal Commissioner of Taxation* (1965) 112 CLR 177.
16. Prior to the decision in *Lane v Morrison*, the 1982 Defence discipline legislation had been the subject of a partially successful attack in *Re Tracey* (supra) and then unsuccessful attacks in *Re Nolan; Ex Parte Young* (1991) 172 CLR 460; *Re Tyler; Ex Parte Foley* (1994) 181 CLR 18; *Re Colonel Aird* (2004) 220 CLR 308; *White v Director of Military Prosecutions* (2007) 235 ALR 455.
17. The fixing of the price for commodities during wartime was upheld in *Farey v Burvett* (1916) 21 CLR 433. In that case Griffith CJ said:

“In my opinion the word ‘defence’ of itself includes all acts of such a kind as may be done in the United Kingdom, either under the authority of Parliament or under the Royal Prerogative, for the purpose of the defence of the realm, except so far as they are prohibited by other provisions of the Constitution.”
18. It may not be so readily accepted today that any step taken which had the effect of tending to secure adequate supplies to Great Britain during the war and so increasing or preventing diminution of the resources of that part of the Empire would be a measure tending also to the more efficient defence of the Commonwealth.

19. A law which prohibited the destruction or injury of property was also upheld, passed under the *Unlawful Associations Act 1916*, in the time of war was also upheld in *Pankhurst v Kiernan* (1917) 24 CLR 120, a law for the deportation of aliens under the *Alien Restriction Order 1915* was upheld in *Jerger v Pearce* (1920) 28 CLR 588 and machinery provisions concerning the *Treaty of Peace Act 1919* were upheld in *Roche v Kronheimer* (1921) 29 CLR 329.
20. Clearly, the scope of the defence power has to sit within the Federal compact and that the extreme position of “being” comes before “wellbeing” is a notion that has a number of constraints and limitations.

C. The decision in *Lane v Morrison* [2009] HCA 29

21. In the exercise of its original jurisdiction conferred by s30 of the *Judiciary Act 1903*, the High Court made a declaration (arguably under s31 of the *Judiciary Act 1903*) “that the provisions of Division 3 of Part VII of the *Defence Force Discipline Act 1982 (Cth)* are invalid”.
22. The High Court also made an order in the nature of prohibition under s33 of the *Judiciary Act 1903* “that writ of prohibition issue directed to the first defendant, Colonel Peter John Morrison, a Military Judge of the Australian Military Court, prohibiting him from proceeding further with the charges relating to the plaintiff identified in the charge sheet dated 8 August 2007 and referred to the Australian Military Court for trial”.
23. The source of original jurisdiction of the High Court flowed from s75(iii) and s75(v) of the Constitution as well as through s76(i) of the Constitution and the law made conferring original jurisdiction under that section being s30 of the *Judiciary Act 1903*.
24. The two orders were effectively inter-related in that the declaration held invalid the following provisions:

Division 3 Australian Military Court

Section 114 Creation of the Australian Military Court

(1) A court, to be known as the Australian Military Court, is created by this Act.

Note 1: The Australian Military Court is not a court for the purposes of Chapter III of the Constitution.

Note 2: The Australian Military Court is a service tribunal for the purposes of this Act: see the definition of service tribunal in subsection 3(1).

(1A) The Australian Military Court is a court of record.

(2) The Australian Military Court consists of:

- (a) the Chief Military Judge; and
- (b) such other Military Judges as from time to time hold office in accordance with this Act.

Section 115 Jurisdiction

(1) Subject to section 63, the Australian Military Court has jurisdiction to try any charge against any person.

(2) However, the Australian Military Court does not have jurisdiction to try a charge of a custodial offence.

(3) The Australian Military Court has jurisdiction to hear and determine appeals from decisions of summary authorities (including a decision relating to a charge of a custodial offence).

Note: Part IX deals with appeals to the Australian Military Court.

Section 116 Exercise of jurisdiction

(1) For the purposes of the exercise of the jurisdiction of the Australian Military Court (including the Court's jurisdiction to hear and determine appeals from decisions of summary authorities), the Court is to be constituted by a single Military Judge.

(2) The Australian Military Court constituted by a Military Judge may sit and exercise the jurisdiction of the Court even if the Court constituted by another Military Judge is at the same time sitting and exercising the jurisdiction of the Court.

Section 117 Venue

(1) The Australian Military Court may sit at any place in or outside Australia.

(2) The Australian Military Court may, at any stage of proceedings in the Court, order that:

- (a) the proceedings; or
- (b) a part of the proceedings;

be conducted or continued at a place specified in the order, subject to such conditions (if any) as the Court imposes.

Section 118 Referral of cases to the Australian Military Court and nomination of Military Judges

Referral of charges

- (1) The Registrar must refer a charge to the Australian Military Court if the Director of Military Prosecutions requests the Registrar to do so.

Nomination of Military Judge to try charge or hear appeal

- (2) The Chief Military Judge must nominate the Military Judge who is:
 - (a) to try a charge referred to the Australian Military Court; or
 - (b) to hear and determine an appeal to the Australian Military Court.

Section 119 Seal of the Australian Military Court

- (1) The Australian Military Court is to have a seal, and the design of the seal is to be determined in writing by the Minister.
- (2) The seal of the Australian Military Court must be kept in such custody as the Chief Military Judge directs.
- (3) The seal of the Australian Military Court must be affixed to documents as provided by this or any other Act or by the Australian Military Court Rules.
- (4) A determination made under subsection (1) is not a legislative instrument.

Section 120 Stamp of the Australian Military Court

- (1) There are to be one or more Australian Military Court stamps. For this purpose, an Australian Military Court stamp is a stamp the design of which is, as nearly as practicable, the same as the design of the seal of the Australian Military Court.
- (2) A document or a copy of a document marked with an Australian Military Court stamp is as valid and effectual as if it had been sealed with the seal of the Australian Military Court.
- (3) An Australian Military Court stamp must be affixed to documents as provided by this or any other Act or by the Australian Military Court Rules.

Section 121 Staff of the Australian Military Court

The staff necessary to assist the Australian Military Court are to be the following:

- (a) defence members made available for the purpose by the appropriate service chief;
 - (b) persons engaged under the Public Service Act 1999 and made available for the purpose by the Secretary of the Department.
25. The facts the subject of the charge referred to the first defendant, COL Morrison, as a military judge of the Australian Military Court, relevantly involved an alleged act of indecency without consent contrary to s61(3) of the *Defence Force Discipline Act 1982* applying a general application of ACT criminal jurisdiction which picked up s60(2) of the *Crimes Act 1900*. There was a second charge of alleged assault on a superior contrary to s35 of the 1982 Act.
 26. The Court dealt with the question of validity by reference to the date 1 October 2007 and it was unnecessary for the Court to consider the amendments that had been made to the Australian Military Court by the 2008 Act. The kernel of the reasoning of the Chief Justice and Gummow J embraced a special position of military justice was an apparent but not real exception to Chapter III for the administration of military justice by courts martial which Dixon J said was:

“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.”
 27. French CJ and Gummow J identified that the validity prior to the 2006 Act had been upheld in *White v Director of Military Prosecutions* (2007) 231 CLR 570 and that the 2006 Act “

“... was an attempt by the Parliament to borrow for the AMC the reputation of the judicial branch of government for impartiality and non-partisanship, upon which its legitimacy has been said, in this Court, ultimately to depend, and to thereby apply ‘the neutral colours of judicial action’ to the work of the AMC.”
 28. Their Honours said that the 2006 Act took the “AMC beyond what is authorised by s51(vi) of the Constitution”.
 29. Their Honours identified that the military justice system that had been upheld in *White* was “directed to the maintenance of the defining characteristic of armed forces as disciplined forces organised hierarchically”, and French CJ and Gummow J added:

“Within that command structure, and in contrast to the operation of the civilian justice system, the sentences of courts-martial required confirmation by a superior officer and that confirmation in turn might be quashed upon petition to higher levels of the chain of command.”

30. The judgment of the Chief Justice and Gummow J held that:
- “... the 2006 Act established the AMC outside the previous command structure and evinced a legislative design to meet the concerns which had underpinned the decision in *Findlay*². But in doing so, the Parliament exceeded the exercise of power conferred by s 51(vi).”
31. The AMC was classified as “a court of record by s114(1A)” (itself a belated amendment) which it was said emphasises:
- “... but is not the sole indication of, a legislative intention to create a body with the character of a Chapter III court, save for the manner of appointment and tenure of the Military Judges.”
32. The joint judgment held that it would be a denial of the legislative intention to read down s114 and that even if this were done the legislation “would not be saved”.
33. Arguably, this means that irrespective of the label “court of record”, Parliament had created a body with the character of a Chapter III court that was invalid. In paragraph 25 French CJ and Gummow J after explaining the security of tenure and remuneration provided by s72 and the judicial power of the Commonwealth spoken of in s71 as identifying the function of the court rather than the body of law to be applied said “It would appear to follow that once created by the Parliament, and at least while its Justices are in office, a federal court may not be abolished by the Parliament”.
34. The Court applied the reasoning in the *Boilermakers’ case*³ “... the existence in the Constitution of Chapter III and the nature of the provisions it contains make it clear that no resort can be made to judicial power except under or in conformity with ss71 – 80”.
35. In the joint judgment of the Chief Justice and Gummow J it was said that the 2006 Act indicated “a legislative intention to create a body with the character of a Chapter III court, save for the manner of appointment and tenure of the members”.

² *Findlay v United Kingdom* [1997] ECHR 82; (1997) 24 EHRR 221 at 243-246

³ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 at 269

36. The Court identified that the offence created by the contempt of the AMC may lead to problems identified in *R v Taylor; Ex parte Roach*⁴, to the effect that contempt is confined as an offence to courses of conduct prejudicial to the judicial power. There was also reference to the fact that a court of record identifies a body that has power to make its determinations and to enforce them. Reference was also made to the conclusive evidentiary character of the records of the AMC.
37. The Court made reference to the Defence Force Discipline Appeal Tribunal and that an appeal lay from the AMC to the Appeal Tribunal which was not a court and said:
- “The creation of an ‘appeal’ from a federal court, were the AMC to have that character, to an administrative body such as the Appeal Tribunal, would be repugnant to Chapter III of the Constitution, in particular to s 73(ii) which provides for the appellate jurisdiction of this Court.”
38. Now, if I keep extracting slabs of what was decided there will be nothing left for you to read in the decision itself, but there are perhaps one or two more pearls that I should pick up from the joint judgment of the Chief Justice and Gummow J at paragraph 48 “the only judicial power which the Constitution recognises is that exercised by the branch of government identified in Chapter III”.
39. The effect of the 2006 Act was summarised in a way of highlighting the distinction to the 1982 long established system of automatic review within the Command structure of the Defence Forces. The review provisions did not apply to Part IX punishments imposed or orders made by the AMC took effect forthwith without any requirement for approval by a reviewing authority. The decision upon the trial of charge was conclusive subject to the statutory rights of appeal and it was said that the 2006 Act “purports to entrust the AMC the exercise of the judicial power of the Commonwealth”.
40. There was an issue raised by Callinan J in *White* as to the scope of justiciability as to a matter of Defence discipline and the joint judgment of French CJ and Gummow J makes plain in relation to any military tribunal may be prevented from exceeding their jurisdiction by application of the jurisdiction conferred by

⁴ (1951) 82 CLR 587 at 598

s75(v) of the Constitution. This is a jurisdiction likely to be more regularly invoked in serious matters if the longer term solution is not in fact a Chapter III court being vested with power to hear what are serious criminal offences against members of the Armed Services.

41. In paragraph 48 of the joint judgment by the Chief Justice and Gummow J, the mischievous notion originated by Starke J in *R v Bevan; Ex parte Elias and Gordon*⁵, that there was a creature of military judicial power was scotched by reasserting that the only judicial power which the Constitution recognises is that exercised by the branch of government identified in Chapter III. This reasoning not only accords with principle but removes the discordant analogy that military judicial power was as like judicial power as military music is to music.
42. In paragraph 60 of the joint judgment the reasons referred to the argument referring to the AMC being created outside the command structure and purporting to provide for its exercise of the judicial power of the Commonwealth, whereby the 2006 Act could not be sustained by s51(vi). The ratio found in paragraph 62 is that the power by s51(vi) does not extend to the creation of a legislative court, which operates outside the previous system of military justice.
43. In paragraph 63, the joint judgment touched on the issue whether the defence power in s51(vi) was limited to the punishment of crimes committed on active service or in the circumstances where the jurisdiction of the ordinary courts could not be conveniently exercised and the view expressed that the earlier decisions, including most recently *White*, should not be re-opened.
44. This argument concerning the scope of crimes picked up by the defence power and the re-opening of *White* was touched on in the joint judgment Hayne, Heydon, Crennan, Kiefel and Bell JJ in paragraph 117 and both the intervention of Western Australia on this issue and the debate about service status, service connection and the notion of disciplinary offences in defining the limit of power was said to be one which it was not desirable to go beyond what was said in *White* or to consider re-opening that decision. Curiously, *White* was not a case where any such issue of service connection or service status was raised,

⁵ (1942) 66 CLR 452 at 466.

although there was argument put as to the characterisation of disciplinary offences that gave rise to exercise of judicial power.

45. The joint judgment of the other justices of the High Court of Australia emphasised the accepted Constitutional principle in the *Boilermaker's Case* (1956) 94 CLR 254 at 269:

“Had there been no Chap III in the Constitution it may be supposed that some at least of the legislative powers would have been construed as extending to the creation of courts with jurisdictions appropriate to the subject matter of the power. This could hardly have been otherwise with the powers in respect of bankruptcy and insolvency (s 51(xvii)) and with respect to divorce and matrimonial causes (s 51(xxii)). *The legislature would then have been under no limitations as to the tribunals to be set up or the tenure of the judicial officers by whom they might be constituted. But the existence in the Constitution of Chap III and the nature of the provisions it contains make it clear that no resort can be made to judicial power except under or in conformity with ss 71-80.* An exercise of a legislative power may be such that ‘matters’ fit for the judicial process may arise under the law that is made. In virtue of that character, that is to say because they are matters arising under a law of the Commonwealth, they belong to federal judicial power. But they can be dealt with in federal jurisdiction only as the result of a law made in the exercise of the power conferred on the Parliament by s 76(ii) or that provision considered with s 71 and s 77.” (emphasis added)

46. The joint judgment by the other justices held that the independence from Command was critical to the issue of whether the AMC was exercising the judicial power of the Commonwealth. In addition it was observed that the consequence of the AMC being a court of record was that a “decision of the AMC would preclude subsequent prosecution in the civil courts for an offence substantially the same as the offence tried by the AMC”. To make binding and authoritative determinations of criminal guilt precluding further prosecution under the general criminal law was held to be a purported exercise of the judicial power of the Commonwealth.
47. The ratio of the five person joint judgment as per paragraph 113 was “For the AMC to make a binding and authoritative determination” of guilt and punishment, which precluded further prosecution for the same offences under the generally applicable criminal law, “is to exercise the judicial power of the Commonwealth”.

48. There was an argument raised in relation to s68 of the Constitution which provides:

“The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen’s representative.”

49. In Article 2 s2 of the US Constitution paragraph 1 provides relevantly:

“The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States; ...”

In essence, it was argued that there was a vesting of power in the Governor-General and that that power of command is beyond impairment by legislation establishing the AMC with the result that s51(vi) does not support the 2006 Act.

50. French CJ and Gummow J rejected the argument holding that “command may be the subject of legislation supported by 51(vi) of the Constitution”. The balance of the members of the High Court in their joint judgment held that it was not necessary to decide the issue raised by s68 “or to explore what is entailed by vesting the command in chief of the forces in the Governor-General”.
51. Accordingly, whether s68 of the Constitution is a nominal titular provision has not been conclusively determined and whilst it may be accepted that the vesting has been “placed within the system of responsible government, whereby the Governor-General must act in a constitutional manner so that he acts with the advice of the Ministry, there remains a question as to what if any limitations confined the legislative power found in s51(vi) concerning the exercise of the command vested by s68”.
52. The starting premise in the plaintiff’s argument was that the legislature could not pass a law that command in chief of the Naval and Military Forces of the Commonwealth could be vested in an entity other than the Governor-General. This means that there must be some constraint in the work done by s68 and the scope and content of that constraint arguably remains yet to be determined.

D. Effect of High Court of Australia's decision

53. In *South Australia v Commonwealth* (“*First Uniform Tax case*”) (1942) 65 CLR 373 at 408, Latham CJ said:

“Common expressions, such as: ‘The courts have declared a statute invalid,’ sometimes lead to misunderstanding. A pretended law made in excess of power is not and never has been a law at all. Anybody in the country is entitled to disregard it. Naturally he will feel safer if he has a decision of a court in his favour – but such a decision is not an element which produces invalidity in any law. The law is not valid until a court pronounces against it – and thereafter invalid. If it is beyond power it is invalid *ab initio*.”

54. Whilst this declaratory theory of the law has been the subject of criticism by McHugh J in *Peters v Attorney-General in and for the State of NSW* (1988) 16 NSWLR 24 at 38, but arguably represents the accepted constitutional theory as expounded in *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83, upheld by the Privy Council in (1956) 94 CLR 177. In the *Antill Ranger* dispute both the High Court and the Privy Council proceeded on the theory that once declared to be in breach of s92 the statute was of no force or effect at any time.
55. This declaratory line of country was distinguished referable to court orders not being a nullity in *Residual Assco Group v Spalvins* (2000) 202 CLR 629. The latter decision however was confined to the inapplicability of a nullity doctrine to court orders.
56. Subject to the very recent commencement of Bill No 2 which I gather received assent on 22 September 2009, whether the orders of the AMC are subject to any continuing effect as to conviction and punishment (or in the case of detention/imprisonment give rise to civil redress for wrongful imprisonment) might be said to depend upon the inability to waive rights which are of a public nature see *Brown v R* (1986) 160 CLR 171.
57. *Act No 2* appears to have been drawn based on the reasoning of Stephen J in *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 243 on the basis that the section operates on the invalid decrees by attaching to them, as acts in the law, consequences which the legislation declares them to always to have had, described by reference to the consequences flowing from an order by a judge.

58. Mason J at 250, whilst agreeing, was careful to identify that there were limitations as made plain by *Liyanage v The Queen* (1967) 1 AC 259, at pp 289-290, and referred to the argument signifying some infringement of the provisions of Chapter III respecting the exercise of the federal judicial power and said “What that infringement is in the instant case, the argument did not condescend to make clear”.
59. It might be suggested that there are a number of differences on the face of the position in *Lane v Morrison* against as opposed to *R v Humby*, first and foremost being the declaration of invalidity by the High Court of Australia, there is the difference as to the nature of the orders as there was a concession that Parliament could by legislation dissolve a matrimonial relationship, whereas Parliament cannot by legislation convict and punishment of a crime; there is also the difference that a purported court order is not regarded as a nullity and arguably this principle can have no application to the invalid convictions and punishments by the Australian Military Court; there is arguably no act in law given the invalidity of the conviction and punishments upon which the legislation could operate.
60. Indeed, it may be difficult to see any distinction in the design of the present legislation from the speech of Lord Pearce in *Liyanage v The Queen* (1967) 1 AC 259 at 290:
- “The pith and substance of both Acts was a legislative plan *ex post facto* to secure the conviction and enhance the punishment of those particular individuals. It legalised their imprisonment while they were awaiting trial. It made admissible their statements inadmissibly obtained during that period. It altered the fundamental law of evidence so as to facilitate their conviction. And finally it altered *ex post facto* the punishment to be imposed on them.”
61. It may be that *Humby* could be distinguished and there is a risk that *Bill No 2* found to be invalid by reason of the reasoning in *Liyanage*. Further, it might be suggested that the infringement in the present case where the words of Lord Pearce appear apposite:
- “If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges.”
62. If *Act No 2* was challenged arguably the constitutional separation of powers entrenched in Chapter III and exclusivity of the Federal judicial power has by

legislation been taken out the hands of the judges. It may be an answer to contend that an administration disciplinary tribunal might have imposed a disciplinary punishment as that was not the character of the purported conviction and punishment imposed by the Australian Military Court. The character of the purported acts by the Australian Military Court were that of a purported exercise of Federal judicial power and this may create a difficulty that *Humby* doesn't cure.

63. It might also be advanced that *Act No 2* undermines the institutional integrity of the Federal judicial power by purporting to validate what the High Court of Australia has declared to be invalid and by purporting to clothe its declaration with the status of State judicial power that it does not possess and by purporting to declare consequences of a State exercise of judicial power as circumventing a declaration of the High Court of Australia. There is a further potential constitutional issue as of invalidity flowing from the legislature transgressing the command power proposed by s68 and the limits of s51(vi). Accepting it is within power to legislate as to the nature and features of a discipline system, it arguably transgresses the constitutional protection by legislation to direct command how to exercise its disciplinary command system in a retrospective manner imposing penalties. Retrospective laws are also not free from difficulty.
64. Further, it is arguable that the declaration of validity in the present case by *Act No 2* is itself a judicial proceedings, see *R v Davison* (1954) 90 CLR 353 at 370, as the legislation is purporting to declare and enforce liabilities as they stand on present or past facts and under laws that existed as describes by Holmes J in *Prentis v Atlantic Coast Line Co* (1908) 211 US 210.
65. A further potential ground of invalidity is if this legislation offends the implied prohibition in s77(iii) of the Constitution, see *Le Mesurier v Connor* (1929) 42 CLR 481.
66. But another effect of the decision is hopefully to enlighten and brighten all as to the importance of the rule of law and their on-going role to ensue all military systems accord with the rule of law.
67. The statutory duties of a legal officer are enshrined in s122B (1) of the *Defence Act 1903* which provides:

“A legal officer acting in that capacity is entitled to exercise his or her professional rights, and discharge his or her professional duties and obligations, in accordance with the generally accepted rights, duties and obligations applying to legal practitioners”.

68. Of course there are statutory, ethical and fiduciary duties that also attach in performance of specific legal duties to advise command, obligations of confidentiality overlapping with secrecy statutory duties and it will be the relevant legal task that scopes what activities may give rise to duty and conflict issues. However all legal officers when acting as a legal adviser for a member of the armed service have a duty to advise as to legal rights whether Constitutional or otherwise. Conflicts of interest are classically fiduciary in nature, dependent upon some power or advantage that the legal officer may have by reason of acting for or advising command on the matter in issue or other grounds of self interest. A proper comprehension of these duties of a legal officer is essential to a fair or just military justice system.

E. Parliamentary rectification of ongoing anomalies

69. The interim courts martial system set up by the *Military Justice (Interim Measures) Act No 1 2009* (assented to on 22 September 2009) itself might face some possible problems given the permanent nature of the defence force magistrates together with the external appointment of the Registrar of Military Justice and there remains a risk of further challenge unless a permanent system is introduced that properly vests criminal jurisdiction for serious offences by members of the Armed Forces in a Chapter III court.
70. The most obvious court to deal with this jurisdiction is the Federal Magistrates Court of Australia, particularly given the judicial expertise with which this Court is replete.
71. More urgent than the Defence interim measures legislation is rectification of the continuing anomaly of misnomer of this Chapter III Court. It is unfortunate in the extreme that the nature and status of this Chapter III Court was not fully comprehended by those that inserted the adjective “Magistrate”. There is and has never been a Magistrate on this Chapter III Court. This Chapter III Court

comprises justices appointed by precisely the same constitutional provision as the judges of the High Court of Australia.

72. This Chapter III Court has all the constitutional protections for the benefit of the public of any other Chapter III Court. These protections include principles of independence and sustenance of the judiciary.
73. Urgent legislation needs to be passed to correct the misnomer by removing the name Magistrate and giving this Chapter III Court an appropriate appellation which without being imaginative would at least be no longer misleading if the adjective Magistrate was replaced with the word “District”.
74. Further, urgent reform needs to be implemented to recognise the Chapter III status of the justices of this Court and entitlement to equal sustenance and financial security. The independence of any Chapter III justice on a particular federal court arguably should under principles of unity be comparable to all justices on that federal court.
75. The *Military Justice (Interim Measures) Act No 2 2009* is a masterpiece of creative imagination whereby Parliament is seeking to re-declare valid what the High Court has declared invalid. It is not difficult to formulate a fresh administrative procedure that can utilise material placed before the Australian Military Court but excising the invalid act of conviction and the invalid act of punishment from any such review and affording appropriate procedural fairness. The attempt to validate the act of the Australian Military Court involving punishment by treating the same as if valid presumably because of some perceived separate administrative capacity that the Australian Military Court might have had, had it not exceeded power is extraordinary. The act of punishment and the act of conviction by a Court that it was beyond the power of the Commonwealth Parliament to create appears to be a nullity and its acts are void *ab initio*. It probably does not lie within the legislative capacity of Parliament to declare partially valid or indirectly to attempt to declare partially valid that which the High Court of Australia has declared invalid. This Act should probably be repealed and a valid scheme introduced as an interim measure.

F. An appropriate Chapter III Court and the defence power

76. The *Federal Magistrates Act 1999* by s8 creates, pursuant to the power in s71 of the Constitution, a federal court. Pursuant to s8(3) it is “a court of record and a court of law and equity”.
77. Section 10 is a vesting of original jurisdiction provision by reference to express provision of laws made by Parliament but is of course confined to matters within ss75 and 76 of the Constitution. By ss10 and 15C of the *Acts Interpretation Act 1901* jurisdiction is conferred in respect of authorised institution of civil proceedings in a matter. Section 18 picks up associated matters to the extent permitted by the Constitution within its conferred jurisdiction. The purported constraints by s20 give rise to issues under s73 of the Constitution.
78. Section 32AB(8A) of the *Federal Court of Australia Act 1976* gives this Court the full panoply of jurisdiction over matters within Chapter III defined as jurisdiction of the Federal Court of Australia. This Court has accordingly a vast jurisdiction in respect of all legislation made under the defence power if transferred under s32AB. The overlapping family jurisdiction of this Chapter III court is also of considerable importance but this court has a much broader subject matter jurisdiction than the Family Court of Australia as a Chapter III court. It is the breadth of this court’s federal jurisdiction, its expanded public reputation and the broad judicial expertise that makes the continuation of this court and expansion of jurisdiction in matters within the defence power concordant with the greater public interest.
79. In early 2008 Des Semple of Des Semple & Associates, an accountant and social worker, was retained by the Attorney-General’s Department to prepare a paper which was delivered in August 2008, entitled “Future governance options for Federal Family Courts in Australia striking the right balance”.
80. The report was described by as prepared by Des Semple of Des Semple & Associates in conjunction with the Attorney-General’s Department. The report identified terms of reference with entrenched alleged problems of “continuing difficulties in the administration of the delivery of family law services” and “continuing confusion among litigants over the appropriate court to handle their

matters”. The report identified that there had been “extensive consultations over an eight week period”. That report on grounds of “most efficient utilisation of resources” and an assertion of “duplication of administrative structures and corporate services” after discussing corporate governance and advantages of single administration and corporate services, recommended that the Federal Magistrates Court of Australia become a division of the Family Court of Australia.

81. This report was the subject of a careful analysis by the Hon Justice Fogerty AM in an article “Why should the Federal Magistrates Court be abolished?” (2009) 23 Australian Journal Family Law p79.

82. Recently, at the 36th Australian Legal Convention, Chief Justice R S French delivered “The state of the Australian Judicature” address on 18 September 2009 in Perth. He picked up the reference points for considering the state of the judicature from a paper earlier given by Sir Gerard Brennan in 1977, and the first reference point in that regard was:

“1. A judicature that is and is seen to be impartial independent of government and of any centre of financial or social power, incorruptible by prospects of award or personal advantage and fearless in applying the law irrespective of popular acclaim or criticism.”

83. Chief Justice French said in his paper, relevantly “it is important to bear in mind in the design of the institutional arrangements in these case that the judicial function is not confused with the provision of services by executive branch of government”. The Chief Justice proceeded to address the issue of funding saying:

“The question of funding for courts and how it should be done has been the subject of public discussion by former Chief Justices of the High Court of Australia, academics and in other jurisdictions. There has been a diversity of approaches, some favouring funding directly by Parliament, others by the Executive. It is unnecessary for present purposes to canvass the diversity of views. However, whatever model is adopted funding should be provided within a distinctive policy framework which respects the constitutional and functional characteristics of the courts. In this respect, I’ll repeat what Chief Justice Brennan said in his ‘State of Judicature’ address in 1977:

‘In times of financial stringency, there is a risk that governments might regard the courts simply as another executive agency, to be

trimmed in accordance with the executive's discretion in the same way as the executive is free to trim expenditure from the functions of its own agencies. It cannot be too firmly stated that courts are not an executive agency. The law ... goes unadministered if the courts are unable to deal with ordinary litigation. ... The courts cannot trim their judicial functions. They are bound to hear and determine cases brought within their jurisdiction. If they were constrained to cancel sittings or to decline to hear cases that they are bound to entertain, the rule of law would be immediately imperilled. This would not be merely a problem of increasing the backlog; it would be a problem of failing to provide dispute resolving mechanism that is the pre-condition of the rule of law. ... Constitutional convention, if not constitutional doctrine, requires the provision of adequate funds and services for the performance of curial functions.”

84. On 25 September 2009, Chief Justice French commented about recent funding problems and the need to close on quiet weekends when the court is not in session, the Chief Justice said “we would like to be able to fund both days (of the weekend) for longer hours, but that’s part of our funding proposal to the government ... One needs to balance the efficient use of public money against any intrusion on the core function because we are not just another line item in the portfolio of the Attorney-General’s department. We are the third branch of government.”
85. The Des Semple of Des Semple & Associates report prepared in conjunction with the Attorney-General’s Department in August 2008 is perhaps most alarming because there is not one word in the whole paper referring to the constitution, Chapter III, s71, s72 or the constitutional principles that attach to the obligations of the executive and legislature to sustain a court created under s71.
86. The propositions essential to the financial analysis in the Semple recommendations, was also the subject of a material error in defining the work undertaken by the Federal Magistrates Court of Australia as the same work as the Family Court and in the assertion of exercising concurrent jurisdiction and in the assertion of duplication of services. To conceive of Federal Courts as mere service providers is to entirely misunderstand the nature and structure of our constitution, the separation of powers, the federal balance and the constitutional obligations that attach in relation to maintaining a Chapter III court. To conceive the jurisdiction of the Federal Magistrates Court as

concurrent with the Family Court of Australia is both an error of principle by reference to s77(i) and is entirely erroneous as a matter of jurisdiction.

87. In short, the proposal to implement the Des Semples & Associates report creates a constitutional crisis and is on one view a direct failure of the executive and legislative arms to sustain their constitutional obligations in relation to another arm of government. On one view, the proposal to abolish the Federal Magistrates Court of Australia on alleged funding grounds reflects in principle an attack by the executive arm on the judicial arm of government. The corporate governance funding and service analysis in the Des Semples & Associates report would be entirely appropriate for another department of the executive. It is however, an attempt to treat the judicial arm of government reflected in the Federal Magistrates Court of Australia created under Chapter III as if another line item in the portfolio of the Attorney-General's Department.
88. Our constitution is founded on twin principles of the rule of law and judicial independence. The decision in *Lane v Morrison* is a reflection of the importance of adherence to the rule of law and the special importance of Chapter III courts in our constitutional balance. The decision in *Lane v Morrison* is a useful background against which to consider the current proposal to abolish the Federal Magistrates Court of Australia.

G. Advantages of the Federal Magistrates Court

89. The Federal Magistrates Court is uniquely placed to service federal criminal jurisdiction whether from the ADF or at large. The judicial resources on this court have been highly honed and the protection for the public and ADF members from a Chapter III court being vested with appropriate jurisdiction is obvious. The advantages arise out of the nature of a Chapter III court and the various protections enshrined by the Constitution including the implications and prohibitions already recognised or which arguably attach.
90. We have the exhaustive and exclusive nature of the judicial power of the Commonwealth contained within Chapter III and all the consequences of its separation from the legislative and executive powers. Whether the judicial power of the Commonwealth within Chapter III is exhaustive of the power to

legislate as to a judicial power under s122 remains contentious particularly in the context of the exhaustive appellate power found in s73 and limited language of s77. The non-federal jurisdiction theory of Territory laws seems doomed.

91. The continuing existence of the Federal compact was touched on in *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 and also in *Austin v Commonwealth* (2003) 215 CLR 185. It has been suggested that Federal legislation that is inconsistent with the continued existence of that Federal compact or is aimed at destruction of the constituent entities for one or more of their governmental attributes or capacities may be invalid. Although the focus was on impairment of constitutional status of the States or interference with the capacity to function as a government rather than the imposition of financial burden, it is crystal clear that the Federal compact included as relevant Commonwealth entities in the Federal compact, the Federal Courts then yet to be created under Chapter III. Can the Commonwealth pass Federal legislation inconsistent with the continued existence of the Federal compact entity being a federal court? The answer appears to be no.
92. Looking at the language of s71 in Chapter III might be said to imply a prohibition as to the destruction of Federal Courts once created. Clearly, once created if there is no power of destruction by reason of the language of s71 this might confine the lawmaking power in defining the jurisdiction of an existing Federal Court under s77(i) in a manner destructive of its existence. In *MZOT v Minister for Immigration and Citizenship* (2008) HVA 38 at para 37 Gleeson CJ, Gummow J and Hayne J after referring to the generalised notion of ability to repeal in whole or in part that which is enacted said “the legislative powers conferred within Chapter III may require special consideration”.
93. Being a Chapter III court vested with the judicial power of the Commonwealth this federal court has all powers as are necessary and incidental to the exercise of its jurisdiction. Without being exhaustive the powers of contempt, stay to effectuate appellate jurisdiction, and arguably power to protect procedures against abuse. The defining of this federal court’s jurisdiction is exclusively a matter of Commonwealth legislative power and there is the implied negative which proscribes jurisdiction being vested by State parliamentary legislative power in a federal court.

94. The number of judges that Parliament may prescribe is referred to in s79 and also s71 which mandates a minimum for the High Court of Australia but even this legislative power to prescribe the numbers is constrained by the text structure and implications of specifically Chapter III within the federal compact in the Constitution.
95. Another issue that arises referable to the Federal Court created by the Parliament is the extent to which s77(i) in defining jurisdiction of a Federal Court can curtail the scope and operation of s80 as to trial by jury. This raises the limitation in s39B that seeks to excise “any other criminal matter”. As each provision of Chapter III other than s75 is a special lawmaking power there are interesting issues as to the extent to which a Chapter III court once created permits any legislative prohibition or restraint upon s80 rights for matters within its defined jurisdiction. Section 77 recognises the limitation in relation to defining of jurisdiction of any Federal Court by reference to “any of the matters mentioned in the last two subsections”. Section 75 is worded by reference to “in all matters” in defining the High Court’s original jurisdiction, whereas s76 permits the making of a law conferring original jurisdiction “in any matter” as specified. What legislative constraint arises from “defining” in this context is of real interest both from the view of “redefining” and from the view of subdivision or expansion/contraction of the nine paragraphs of matter. When is a law that removes jurisdiction of a Federal Court one within s77(i) or a law that runs counter to an implied prohibition against destruction of a Chapter III court? Is there scope to define jurisdiction as to any one of the five kinds matters in s75 so as to exclude “all matters” of that kind? Alternatively perhaps s75(v) given its judicial relief focus read with “all matters” is beyond contraction?
96. Section 72 is of the utmost importance as to the appointment, tenure, remuneration and independence of justices of all Chapter III courts. The express prohibition against remuneration not being diminished during “their continuation in office” enshrines judicial independence including necessary financial security. These words of prohibition have work to do in relation to the paragraph that commences “Subject to this section ...”, specifically in the context of a power to make a law fixing in age less than 70 years for justices of a court created by the Parliament. The words of prohibition leave to be implied

the extent of security necessary for judicial independence upon cessation of office.

97. Perhaps also a question arises as to whether the protection of remuneration of justices “during their continuation in office”, in s72, embraces a concept of the collective of justices or in other words a principle of unity in the context of remuneration. Whilst the remuneration of the Chief Justice of a Chapter III court should be fitting for the additional burdens of such high office all justices should have financial security and arguably on principles of unity or equality it is difficult to see how differing packages could properly be imposed. Nor arguably could financial security be properly addressed for a Chapter III justice if an adequate judicial pension or equivalent thereof were not an implied protection.
98. There is also considerable significance in the context of the continued existence of a Federal Court in the appellate jurisdiction addressed by s73. Interesting issues arise as to the scope and content of the “exception and ... regulations as the Parliament prescribes” in the jurisdiction of the High Court of Australia “to hear and determine appeals from all judgments, decrees, orders and sentences ... (ii) Of any other federal court” in respect of which the judgment of the High Court of Australia “in all such cases shall be final and conclusive”. But that right of appeal also implies the continued existence of any other Federal Court.
99. What would also be destructive of a federal court would be inadequate resourcing and perhaps this includes adequate justices to exercise the jurisdiction vested. The nature and scope of the duty of the legislative and executive arms of government not to permit the destruction of a federal court may give rise to interesting questions the answers to which will all be moulded round the enshrined Constitutional twin principles of the rule of law and judicial independence.
100. The question of what’s in a court name is perhaps also thrown up by *Lane v Morrison* and there may be real questions as to the validity of the provisions that seek to describe this Chapter III court as a “Service”. The anomaly as to the middle name is perhaps also open to criticism although perhaps this just falls

into that category of the “inconvenient” and that common sense of reform should prevail.

Alexander W Street SC