HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

BRIAN GEORGE LANE PLAINTIFF

AND

COLONEL PETER JOHN MORRISON, A MILITARY JUDGE OF THE AUSTRALIAN MILITARY COURT & ANOR DEFENDANTS

Lane v Morrison [2009] HCA 29
26 August 2009
C3/2008

ORDER

1. *Declare that the provisions of Division 3 of Part VII of the* Defence Force Discipline Act *1982 (Cth) are invalid.*

2. *Order that a 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.*

3. *Second defendant to pay the costs of the plaintiff.*

Representation

A W Street SC with K S Cochrane and M J Duncan for the plaintiff (instructed by Provest Law)

S J Gageler SC, Solicitor-General of the Commonwealth with S B Lloyd SC and J G Renwick for the second defendant (instructed by Australian Government Solicitor)

Submitting appearance for the first defendant

Intervener

G T W Tannin SC with J C Pritchard intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor for Western Australia)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Lane v Morrison

Constitutional law (Cth) – Judicial power of the Commonwealth – Military courts – Member of Australian Defence Force charged under *Defence Force Discipline Act* 1982 (Cth) ("Act") – Where hearing before Australian Military Court ("AMC"), established by s 114 of Act – Where AMC a court of record and decision subject to appeal to tribunal – Relevance of fact that AMC has criminal jurisdiction – Whether AMC exercising judicial power of the Commonwealth – Whether AMC created in accordance with Ch III of Constitution.

Constitutional law (Cth) – Defence power – Military courts – AMC independent from command structure – Whether creation of AMC beyond the scope of s 51(vi) of Constitution – Whether creation of AMC inconsistent with power vested in Governor-General by s 68 of Constitution.

Words and phrases – "command structure", "court", "court of record", "courts-martial", "judicial power", "judicial power of the Commonwealth", "service tribunal".

Constitution, Ch III, ss 51(vi), 68, 71, 72, 73(ii), 75(v), 77, 122.
Defence Act 1903 (Cth).
Defence Force Discipline Act 1982 (Cth), ss 3(1), 53, 61, 63, 114-121, 140, 188AP, 188AZ, 191.
Defence Force Discipline Appeals Act 1955 (Cth), s 20.

1 FRENCH CJ AND GUMMOW J. The first defendant, Colonel Morrison, is a Military Judge holding office as a member of the Australian Military Court ("the AMC"). He is an officer of the Commonwealth within the meaning of s 75(v) of the Constitution[1]. The AMC is created by s 114 of the *Defence Force Discipline Act* 1982 (Cth) ("the 1982 Act" or "the Act"). Section 114 is found in Div 3 (ss 114-121) of Pt VII. That Division was inserted by the *Defence Legislation Amendment Act* 2006 (Cth) ("the 2006 Act")[2] and was amended by the *Defence Legislation Amendment Act* 2008 (Cth) ("the 2008 Act").

2 The relevant provisions of the 2006 Act commenced on 1 October 2007. The agreed statement of facts discloses that the plaintiff enlisted in the Royal Australian Navy ("the RAN") on 30 March 1998. On 14 March 2007 the plaintiff was discharged from the RAN and transferred for a five year period of service to the Naval Reserve (Active Reserve) ("the Reserve"). On 8 August 2007 the plaintiff was charged with the offence of "an act of indecency without consent" contrary to s 61(3) of the 1982 Act as applying s 60(2) of the *Crimes Act* 1900 (ACT), and with the offence of assaulting a superior officer, contrary to s 25 of the 1982 Act. The alleged offences occurred earlier, in August 2005, while he was a member of the RAN. The plaintiff was discharged from the Reserve with effect on 3 September 2007.

3 On 21 September 2007 the Director of Military Prosecutions ("the DMP") sought the convening of a court-martial to try the charges against the plaintiff. By force of the transitional provisions in the 2006 Act[3] the DMP was taken, on 1 October 2007, to have withdrawn that request and requested referral of the charges to the AMC for trial. On 26 November 2007, the Chief Military Judge nominated the first defendant to try the charges against the plaintiff.

4 Section 114 of the Act states:

> "(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.

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1 The original jurisdiction of this Court also is attracted by s 76(i) of the Constitution and s 30(a) of the *Judiciary Act* 1903 (Cth), and by s 75(iii) of the Constitution.

2 Sched 1, Pt 1.

3 Sched 1, Pt 3, item 257.

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."

The significance of the classification of the AMC as a "service tribunal" is discussed later in these reasons[4]. The AMC has jurisdiction conferred by s 115 to try certain charges of offences against the Act or the regulations made under it and, by virtue of the 2008 Act, to hear and determine certain "appeals" from decisions of "summary authorities", including commanding officers. The AMC is to have a seal (s 119). It may sit at any place in or outside Australia (s 117) and is constituted by a single Military Judge (s 116).

5 Provision is made outside Div 3 of Pt VII for the hearing in public of the proceedings of the AMC, subject to restrictions respecting the interests of the security and defence of Australia and "the proper administration of justice or public morals" (s 140). The office of Registrar of the AMC is established by s 188F. Military Judges are appointed by the Governor-General by written instrument, for a term of 10 years (s 188AP). Appointments may be terminated by the Governor-General for cause (s 188AZ(1)). The appointment of a Military Judge comes to an end if the appointee ceases to be a member of the Defence Force (s 188AZ(2)).

6 The plaintiff seeks prohibition to restrain the first defendant from trying the charges laid against him and declaratory relief, including a declaration that the central provisions made by the 2006 Act and included as Div 3 of Pt VII of the Act are invalid. The first defendant entered a submitting appearance. The Commonwealth is the second defendant. The Attorney-General for Western Australia intervened in support of the plaintiff.

7 The Commonwealth has accepted that the relevant date for the determination of the question of validity is 1 October 2007 and submissions by both sides were directed to the legislation as it stood on that date. If the plaintiff's case be made out, it will be unnecessary to consider the amendments respecting the AMC made by the 2008 Act.

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4 At [49]-[51].

8 The plaintiff should have prohibition and a declaration of the invalidity of Div 3 of Pt VII.

Outline

9 In outline, the reasons for that conclusion are as follows. The judicial power identified in Ch III is that of a body politic, namely the Commonwealth, which is distinct from that of the States and, given the presence of s 74, that of the United Kingdom. The powers of the Parliament to create courts are found only in ss 71, 72 and 122 of the Constitution[5]. The creation of the AMC is not supported by s 122 as a law with respect to the government of any territory. Nor is the AMC comprised of Justices who are appointed by the Governor-General in Council and with the tenure provided by s 72 of the Constitution.

10 Further, however, the jurisdiction conferred upon the AMC by s 115 of the Act, to try charges of service offences, involves the exercise of the judicial power of the Commonwealth otherwise than in accordance with Ch III of the Constitution. Legislation conferring that jurisdiction is consistent with the Constitution only if the changes introduced by the 2006 Act, including the establishment of the AMC, are supported by s 51(vi) of the Constitution. But the special position of military justice, which is given by the defence power, is confined to that which, as a matter of history, answers the description given by Dixon J in *R v Cox; Ex parte Smith*[6]. There, after noting the treatment of the administration of military justice by courts-martial as an apparent exception to the principles of Ch III of the Constitution, his Honour stated that the exception was "not real" and continued:

> "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."

11 The validity of the system of military justice established by the Act, as it stood before the introduction of the AMC by the 2006 Act, was upheld in *White v Director of Military Prosecutions*[7]. The 2006 Act, as the explanatory materials emphasise in considerable detail, was designed to supersede, and improve upon, that system with one more nearly approaching, but stopping short of, the Ch III

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5 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 346 [57]; [1999] HCA 44.

6 (1945) 71 CLR 1 at 23; [1945] HCA 18.

7 (2007) 231 CLR 570; [2007] HCA 29.

paradigm. There 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[8], and to thereby apply "the neutral colours of judicial action"[9] to the work of the AMC. However, it was recognised in the *travaux preparatoires* that this would be a risky endeavour by the Parliament. And, in the event, the 2006 Act took the AMC beyond what is authorised by s 51(vi) of the Constitution.

12 The description of the military justice system given by Dixon J in *Cox* was adopted in *White v Director of Military Prosecutions*[10] by Gleeson CJ[11] and underpinned the emphasis by Gummow, Hayne and Crennan JJ upon an understanding of that system in 1900[12]. That system was, their Honours observed[13]:

> "directed to the maintenance of the defining characteristic of armed forces as disciplined forces organised hierarchically".

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.

13 In 1997 this characteristic of the British military justice system was held in *Findlay v United Kingdom*[14] to contribute to a contravention of Art 6(1) of the European Convention on Human Rights by denying an entitlement to trial by "an independent and impartial tribunal established by law". In Australia, 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

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8 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 9, 21-22; [1996] HCA 18.

9 *Mistretta v United States* 488 US 361 at 407 (1989).

10 (2007) 231 CLR 570.

11 (2007) 231 CLR 570 at 585 [12]-[13].

12 (2007) 231 CLR 570 at 598 [58].

13 (2007) 231 CLR 570 at 596 [52].

14 (1997) 24 EHRR 221 at 243-246.

Findlay. But in doing so, the Parliament exceeded the exercise of power conferred by s 51(vi).

14 We turn to develop the above outline of reasons.

The explanatory materials

15 In June 2005 the Foreign Affairs, Defence and Trade References Committee of the Senate delivered its Report titled *The effectiveness of Australia's military justice system* ("the 2005 Senate Report"). The Committee stated (par 5.79):

> "It is becoming increasingly apparent that Australia's disciplinary system is not striking the right balance between the requirements of a functional Defence Force and the rights of Service personnel, to the detriment of both. Twenty years since the introduction of the [1982 Act], the time has come to address seriously the overall viability of the system. Australian judicial decisions and the evidence before this committee suggest the discipline system is becoming unworkable and potentially open to challenge on constitutional grounds. Overseas jurisprudence and developments suggest that alternative approaches may be more effective."

16 *Findlay* had concerned the court-martial procedures under the *Army Act* 1955 (UK) ("the 1955 UK Act") and in *Grieves v United Kingdom*[15] a similar result had obtained with respect to naval courts-martial under the *Naval Discipline Act* 1957 (UK) ("the 1957 UK Act"). In Canada, the Supreme Court held in *R v Généreux*[16] that a general court-martial under the *National Defence Act* (Can)[17] was not an independent and impartial tribunal for the purposes of s 11(d) of the *Canadian Charter of Rights and Freedoms*. Remedial legislation had followed in both the United Kingdom and Canada. Article 14(1) of the International Covenant on Civil and Political Rights ("the ICCPR") is in similar terms to the provisions applied in *Findlay*, *Grieves* and *Généreux*, and the 2005 Senate Report emphasised that Australia is a signatory to the ICCPR.

17 Recommendations 18 and 19 in the 2005 Senate Report were that a permanent military court be created in accordance with Ch III of the Constitution "to ensure its independence and impartiality" and that it be capable of trying

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15 (2004) 39 EHRR 2.

16 [1992] 1 SCR 259.

17 RSC 1985, c N-5.

offences currently tried under the 1982 Act by a court-martial or a Defence Force magistrate.

18 The Government Response issued in October 2005 rejected the creation of a permanent military court under Ch III of the Constitution on grounds that Ch III imposed "real constraints" upon an effective military justice system. The Response continued:

> "The limitations resulting from those constraints means that having a separate military court outside Chapter III is preferable to bringing the military justice system into line with Chapter III requirements.
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> The Government will instead establish a permanent military court, to be known as the Australian military court, to replace the current system of individually convened trials by Courts Martial and Defence Force Magistrates. The Australian military court would be established under appropriate Defence legislation and would satisfy the principles of impartiality and judicial independence through the statutory appointment of military judge advocates by the Minister for Defence, with security of tenure (fixed five-year terms with possible renewal of five years) and remuneration set by the Remuneration Tribunal (Cth). To enhance the independence of military judge advocates outside the chain of command, they would not be eligible for promotion during the period of their appointment.
>
> Advice to the Government indicates that a military court outside Chapter III would be valid provided jurisdiction is only exercised under the military system where proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline."

19 Clause 114 of the Bill for the 2006 Act as introduced into the House of Representatives did not include sub-cl (1A), which classifies the AMC as "a court of record". The sub-clause was included as an amendment moved by the Government after a Report on the Bill to the Senate by the Standing Committee on Foreign Affairs, Defence and Trade ("the 2006 Report"). The Committee determined "that the proposed AMC would not achieve the level of independence and impartiality needed to ensure a fair and effective military justice system" (par 1.27). The Supplementary Explanatory Memorandum on the revised Bill stated that the new sub-cl (1A) "further enhances the status of the AMC" (par 13); it also said (par 12):

> "Courts martial and trials by Defence Force magistrates were not designated as 'courts of record' under the [1982 Act]. Consistent with this, the AMC was not specifically made a court of record because there was

> no legal or practical reason for doing so. Additionally, it avoided conferring the characteristics of a civilian court (with greater jurisdiction) on the AMC. Notwithstanding this, the functional attributes of a court of record are provided for in the Bill, including the capacity to deal with contempt of the court, conduct of proceedings in public, and a requirement to record proceedings. The AMC has now been accorded the status of a court of record, noting that there will be a provision to limit publication of proceedings in the interests of the security and defence of Australia or for particularly sensitive matters."

20 As explained later in these reasons, the presence of s 114(1A) emphasises, but is not the sole indication of, a legislative intention to create a body with the character of a Ch III court, save for the manner of appointment and tenure of the Military Judges. It would be a denial of that legislative intention to read down s 114 by excising sub-s (1A) pursuant to s 15A of the *Acts Interpretation Act* 1901 (Cth)[18], and, even if this were done, the legislation would not be saved.

Courts and the Constitution

21 The noun "court" is used in varied contexts and in many senses. *The Oxford English Dictionary*[19] gives the following meanings, among others: "a princely residence, household, retinue", and "an assembly held by the sovereign", a use which gave rise to the terms "the 'high court of parliament'" and "'the king's courts' of justice". Of its use in the sense last mentioned, Barton J said[20]:

> "'Court' as the name of a place is merely a secondary meaning. 'The Court' is the deciding and enforcing authority, even if it sits under a tree, as sometimes it does in parts of the British Empire."

22 Hence the statement by McHugh JA in *Australian Postal Commission v Dao (No 2)*[21]:

> "In ordinary usage the word 'court' has many meanings: they range from the group who form the retinue of a sovereign to an area used to play

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18 *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 502; [1996] HCA 56.

19 2nd ed (1989), vol 3 at 1057-1059.

20 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 452; [1918] HCA 56.

21 (1986) 6 NSWLR 497 at 515.

> certain ball games. Legal usage also gives the word several meanings. Thus a 'court' may refer to a body exercising judicial power as in the Constitution, Ch III, or to a body exercising non-judicial power such as the Coroners Court or to a court of petty sessions hearing committal proceedings. It may even refer to a body exercising judicial and arbitral powers such as the former Commonwealth Court of Conciliation and Arbitration or the Queensland Industrial Court."

23 In *Dao*, as a matter of statutory construction, it was held that the Equal Opportunity Tribunal, established by the *Anti-Discrimination Act* 1977 (NSW), was a "court" within the meaning of the *Suitors' Fund Act* 1951 (NSW). In *Trevor Boiler Engineering Co Pty Ltd v Morley*[22] the Supreme Court of Victoria held that the Workers Compensation Board was "a court of law" within the meaning of the *Administrative Law Act* 1978 (Vic), with the consequence that its decisions were not amenable to review under that statute. On the other hand, the Tasmanian Anti-Discrimination Tribunal is not a "court of a State" within the meaning of s 77(iii) of the Constitution[23], nor is the New South Wales Administrative Decisions Tribunal[24].

24 The "creation" or "erection" of a "court" provides for the formation and constitution of a body which answers that description[25]. There is a distinction between the creation of a federal court by the Parliament and the conferral of its jurisdiction under s 77 of the Constitution. The judicial power of the Commonwealth spoken of in s 71 of the Constitution identifies the function of a court rather than the body of law to be applied in exercise of that function[26].

25 Section 71 speaks of "such other federal courts as the Parliament creates". The Justices of those federal courts are appointed in accordance with, and have the tenure and remuneration provided in, s 72. Whilst in office they cannot be removed otherwise than as provided by s 72(ii). It would appear to follow that

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22 [1983] 1 VR 716.

23 *Commonwealth v Anti-Discrimination Tribunal (Tasmania)* (2008) 169 FCR 85.

24 *Trust Company of Australia Ltd v Skiwing Pty Ltd* (2006) 66 NSWLR 77.

25 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 345-346 [56].

26 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469; [1992] HCA 29; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 407 [233]; [2005] HCA 44.

once created by the Parliament, and at least while its Justices are in office, a federal court may not be abolished by the Parliament.

26 The provisions formerly made in Pt IX of the *Navigation Act* 1912 (Cth)[27] for Courts of Marine Inquiry were an example of the Parliament creating a body with use of the term "court" without seeking to endow it with the character of a court as understood in Ch III of the Constitution. When considering Pt IX in *R v Turner; Ex parte Marine Board of Hobart*[28] at least a majority of the Court (Knox CJ, Gavan Duffy, Rich and Starke JJ and Powers J) were able to dispose of the case without ruling on the question whether s 51(i) empowered the Parliament to erect a court with exclusive power to deal with marine collisions in inter-state trade.

27 In *Turner* Higgins J[29] was attracted to United States decisions which upheld the validity of what became known as "legislative courts". These courts are not limited to military tribunals and territorial courts, and decide cases and controversies between the United States and citizens which arise under the laws of the United States, yet they are sufficiently supported by Art I of the Constitution and do not exercise the judicial power of the United States provided for in Art III[30]. These courts currently include the Tax Court, the validity of which was upheld in *Simanonok v Commissioner of Internal Revenue*[31], and the body known as the Foreign Intelligence Surveillance Court, which comprises a panel of serving federal judges designated by the Chief Justice of the United States for a maximum of seven years[32].

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27 Part IX was repealed by s 45 of the *Transport and Communications Legislation Amendment Act (No 2)* 1989 (Cth).

28 (1927) 39 CLR 411 at 424, 454; [1927] HCA 15.

29 (1927) 39 CLR 411 at 449-450.

30 See *Northern Pipeline Construction Co v Marathon Pipe Line Co* 458 US 50 at 67-70, 91 (1982); Chemerinsky, *Federal Jurisdiction*, 5th ed (2007) at 221-225, 236-263; Wright and Kane, *Law of Federal Courts*, 6th ed (2002) at 48-61.

31 731 F 2d 743 (1984). Nevertheless, the Tax Court is a "Court of Law" within the meaning of the Appointments Clause in Art II, so that the Congress may authorise it to appoint its "inferior Officers": *Freytag v Commissioner of Internal Revenue* 501 US 868 (1991).

32 50 USCA §1803. The validity of this legislation was upheld in *United States v Cavanagh* 807 F 2d 787 at 791-792 (1987) and *United States v Nicholson* 955 F Supp 588 at 592-593 (1997). Cf *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

28 However, in Australia, matters stand differently. In the *Boilermakers' Case*[33] Dixon CJ, McTiernan, Fullagar and Kitto JJ remarked:

> "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."

29 In its written submissions the Commonwealth contended in general terms that the replacement of the court-martial system by the AMC was but a "modernization" of terminology and was not a matter of substance. The Parliament, it was said, in reliance upon legislative powers outside ss 71 and 72 of the Constitution might create a body styled as a "court" and displaying some features commonly associated with courts, provided only that the body "does not exercise the judicial power of the Commonwealth".

30 This submission appeared to lay the ground in Australia for a system of "legislative courts" resembling the United States model. Any such submission should be rejected. It cannot stand with the statement of general principle in the passage from the *Boilermakers' Case* set out above.

31 In his oral submissions the Solicitor-General correctly disclaimed the existence of any general power in the Parliament to create legislative courts. Rather, he stressed the special position occupied by the defence power as the basis for the creation of the AMC.

32 The provisions of the 2006 Act indicate a legislative intention to create a body with the character of a court created by the Parliament under Ch III of the Constitution, save for the manner of appointment and tenure of its members. That intention is emphasised by the statement in s 114(1A) of the Act that the AMC is "a court of record". Such a court has two relevant attributes. First, a court of record which is not created as a superior court nevertheless has the

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33 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 269; [1956] HCA 10.

power to punish for contempt committed in the face of the court[34]. Section 53(4)(d)(i) creates an offence of engagement in conduct which constitutes a contempt of the AMC; this appears to supplement the contempt power of the AMC itself. However, of that contempt power, the following statement in *R v Taylor; Ex parte Roach*[35] is in point. Dixon, Webb, Fullagar and Kitto JJ said:

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

33 Secondly, the proceedings of a court of record preserved in its archives are called records, and are conclusive evidence of that which is recorded therein[36]. More generally, as Barton J put it in *Waterside Workers' Federation of Australia v J W Alexander Ltd*[37], in its usual acceptation the term "court of record" identifies "a body which has power both to make its determinations and to enforce them".

34 The conclusive evidentiary character of the records of the AMC, otherwise flowing from its creation as a court of record, must be understood in the light of s 191 of the Act. This treats certain certificates setting out facts respecting AMC proceedings as *prima facie* evidence in any civil court. The result is that s 191 assists the operation of s 114(1A). The record is conclusive but the presence of a certificate relieves the need to prove by other means the content of the record.

35 However, the Act must be read with changes made by the 2006 Act to the *Defence Force Discipline Appeals Act* 1955 (Cth) ("the Appeals Act"). The result is the subjection of the AMC by s 20 of the Appeals Act to "appeals" brought to the Defence Force Discipline Appeal Tribunal ("the Appeal Tribunal"), but only by leave where the ground is not a question of law. The

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34 *The Master Undertakers' Association of NSW v Crockett* (1907) 5 CLR 389 at 392-393; [1907] HCA 65; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 83 ALJR 327 at 349 [129]; 252 ALR 471 at 496; [2009] HCA 4.

35 (1951) 82 CLR 587 at 598; [1951] HCA 22.

36 *Halsbury's Laws of England*, 1st ed, vol 9 at 10.

37 (1918) 25 CLR 434 at 455; cf at 467 per Isaacs and Rich JJ.

Appeal Tribunal is not created as a court[38]. 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 Ch III of the Constitution[39], in particular to s 73(ii) which provides for the appellate jurisdiction of this Court.

36 The upshot is that while the Parliament has given to the AMC some of the attributes of a court which may be created by the Parliament for the exercise of the judicial power of the Commonwealth, it has not created such a body. Indeed, Note 1 to s 114 and the legislative history indicate that the 2006 Act was not designed to achieve that outcome.

The issues

37 The issues which then arise may be stated as follows. First, does the 2006 Act, in providing for the creation of the AMC, answer the description of a law with respect to military justice which may be supported under the special provision made by the defence power in s 51(vi) of the Constitution? The plaintiff and Western Australia submit that the 2006 Act goes beyond what as a matter of history was encompassed by the administration of military justice by a hierarchical command structure. The second issue is related to the first and asks whether the power conferred on the Parliament by s 51(vi) of the Constitution extends to the identification of the AMC as a "Court", albeit not a court answering, as a matter of its formation and constitution, the character of a court created by the Parliament under ss 71 and 72 of the Constitution.

Command structure

38 The *Defence Act* 1903 (Cth) ("the 1903 Act") provided in Pt VIII (ss 86-100) for courts-martial. The 1903 Act applied to the naval and military forces of the Commonwealth (s 5). The effect of s 88 was that except so far as inconsistent with the 1903 Act, there applied to the composition, procedures and powers of courts-martial the provisions of the current Imperial law. In 1903 this

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38 From decisions of the Appeal Tribunal there lies an "appeal" to the Federal Court on a question of law. See *Hembury v Chief of the General Staff* (1998) 193 CLR 641; [1998] HCA 47.

39 See *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 409 [241].

was found principally in the *Naval Discipline Act* 1866 (Imp)[40] ("the 1866 Act") and the *Army Act* 1881 (Imp)[41] ("the 1881 Act").

39 The 1866 Act stipulated that, save in the case of the death sentence (which could be remitted only by the sovereign), the Admiralty might suspend, annul or modify sentences passed at a court-martial (s 53(1)). The death sentence, save in the case of mutiny, was not to be carried out until it was confirmed by the Admiralty or by the Commander in Chief on a foreign station (s 53(3)).

40 Section 46 of the 1881 Act dealt with the power of the commanding officer with respect to charges against a person under his command; the officer might dismiss the charge if he was of the opinion that it should not proceed, or take steps to bring the offender to a court-martial or, in the case of a soldier, deal himself with the case summarily. There were regimental, general, district and field general courts-martial (s 54(1)). Findings of acquittal apart (s 54(3)), the finding and sentence of a court-martial was valid only if confirmed by the relevant authority specified in s 54(1) (s 54(6)). The confirming authority might send back a finding or sentence for revision (s 54(2)) or mitigate or remit the punishment (s 57(1)). A sentence of death or penal servitude awarded by a field general court-martial was not to be carried into effect unless and until confirmed by the general or field officer commanding the force (s 54(1)(d)).

41 If a sentence passed by a court-martial was confirmed and the sentence was undergone in a colony, the officer commanding the forces in that colony was empowered by s 57(2)(c) of the 1881 Act to remit, mitigate or commute the punishment. Where there was no superior authority in a colony to confirm the findings or sentences of a court-martial, the Governor had power to do so (s 54(4)). The Governor, if in command of the regular forces of the colony, was a qualified officer to confirm findings or sentences (s 54(7))[42].

42 That these systems of naval and military justice did not administer the ordinary law of the land was made apparent by s 101 of the 1866 Act (which

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40 29 & 30 Vict c 109. The *Naval Discipline (Dominion Naval Forces) Act* 1911 (Imp) made provision for the application of the 1866 Act to naval forces raised by the self-governing Dominions. The 1866 Act was repealed by s 137 of the 1957 UK Act.

41 44 & 45 Vict c 58. The 1881 Act ceased to have effect in the United Kingdom on 31 December 1956 (*Revision of the Army and Air Force Acts (Transitional Provisions) Act* 1955 (UK), s 1) when it was replaced by the 1955 UK Act.

42 See Tarring, *Chapters on the Law Relating to the Colonies*, 4th ed (1913) at 31.

stated that nothing in that statute was to supersede the authority of the ordinary civil and criminal courts) and s 41(5)(b) of the 1881 Act (which confirmed that a person subject to military law might be tried by any competent civil court for an offence for which he could be triable if not subject to military law).

43 In Australia, s 86 of the 1903 Act, which was located in Pt VIII, empowered the Governor-General to convene, and appoint the officers to, courts-martial, and to approve, confirm, mitigate or remit any sentence. Section 87 conferred a power of delegation upon the Governor-General. No death sentence was to be carried into effect until confirmed by the Governor-General (s 98).

44 Section 86 was amended[43] to provide in s 86(2) to the effect that nothing in s 86 affected the powers of convening courts-martial and confirming findings and sentences, as provided in the 1866 Act, the 1881 Act and the *Air Force Act* 1917 (Imp). Section 5 of the *Naval Defence Act* 1910 (Cth) continued the application of Pt VIII of the 1903 Act to the Naval Forces of the Commonwealth and s 36 confirmed the operation of the 1866 Act[44].

45 Part VIII of the 1903 Act was repealed by the *Defence Force (Miscellaneous Provisions) Act* 1982 (Cth). Provision for review of proceedings of "service tribunals", being a court-martial, a Defence Force magistrate or a summary authority, was made by Pt IX of the 1982 Act (ss 150-169). Section 150 provided for the appointment by a chief of staff of officers to be a "reviewing authority". In the case of convictions by a subordinate summary authority there was a preliminary automatic review by the commanding officer (s 151); in the case of convictions by another service tribunal, there was automatic review by a reviewing authority (s 152). Provision was made for further review by a chief of staff, upon sufficient grounds appearing to him for that review (s 155). The system of "appeals" under the Appeals Act to the Appeal Tribunal was accommodated by s 156 to those review processes of Pt IX of the 1982 Act; the general effect of the lodgement of an appeal or application to the Appeal Tribunal for leave to appeal was to bar the exercise of the powers of the reviewing authority pending dismissal of the appeal or refusal of leave.

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43 By the *Defence Act* 1917 (Cth), s 23, and the *Air Force Act* 1939 (Cth), s 3.

44 See *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 461-462, 463, 470-471, 476-477, 482-486; [1942] HCA 12.

Judicial power

46 In *Grant v Gould*[45], when giving the judgment of the Court of Common Pleas, Lord Loughborough said:

> "Naval Courts Martial, Military Courts Martial, Courts of Admiralty, Courts of Prize, are all liable to the controlling authority, which the Courts of Westminster Hall have from time to time exercised, for the purpose of preventing them from exceeding the jurisdiction given to them: the general ground of prohibition being an excess of jurisdiction, when they assume a power to act in matters not within their cognizance."

That reasoning was applicable to the jurisdiction of this Court established by s 75(v) of the Constitution.

47 However, in England the reasons of Atkin LJ in *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co (1920) Ltd*[46] supported the proposition that prohibition and certiorari may be issued to bodies "having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially". The effect of these influential observations, as Mason J put it in *Kioa v West*[47]:

> "was to focus attention on those elements in the making of administrative decisions which are analogous to judicial determination as a means of determining whether the rules of natural justice apply in a particular case. The emphasis given in subsequent decisions to the presence and absence of these characteristics diverted attention from the need to insist on the adoption in the administrative process of fair and flexible procedures for decision-making, procedures which do not necessarily take curial procedures as their model."

Thereafter, in *Australian Broadcasting Tribunal v Bond*[48] Deane J explained:

> "There was a time when it was customary to refer to the duty of a non-curial statutory decision-maker to observe common law requirements of fairness and detachment in certain circumstances as a 'duty to act

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45 (1792) 2 H Bl 69 at 100 [126 ER 434 at 450].

46 [1924] 1 KB 171 at 205.

47 (1985) 159 CLR 550 at 583-584; [1985] HCA 81.

48 (1990) 170 CLR 321 at 365-366; [1990] HCA 33.

> judicially' (see, eg, *Testro Bros Pty Ltd v Tait*[49]; *Board of Education v Rice*[50]; *R v Electricity Commissioners*[51]; *Local Government Board v Arlidge*[52]). There were, however, disadvantages in that phraseology. For one thing, as Lord Diplock pointed out in *O'Reilly v Mackman*[53], it tended to give rise to, and preserve, subtle and often confusing distinctions between decisions that were 'quasi-judicial' and those that were 'merely' administrative. For another, particularly in this country where there is a constitutional barrier against the conferral of any part of the judicial power of the Commonwealth upon an administrative decision-maker, it involved the potential for confusion between an obligation to act judicially and the well-settled notion of exercising judicial power."

48 The treatment of the jurisdiction conferred by s 75(v) of the Constitution with respect to prohibition directed to officers of the Commonwealth constituting military tribunals appears to have been influenced in the way described by Mason J and by Deane J. It may explain the frame of mind in which statements have been made, notably by Starke J in *R v Bevan; Ex parte Elias and Gordon*[54], that although military tribunals did not exercise "the judicial power of the Commonwealth" identified in s 71, they did exercise "judicial power". But the only judicial power which the Constitution recognises is that exercised by the branch of government identified in Ch III.

The 2006 Act

49 The 1982 Act had continued the long-established system of automatic review within the command structure of the defence forces. From this system the 2006 Act departed with the creation and interposition of the AMC. The heading of Pt IX was changed from "Review of proceedings of service tribunals" to "Review of proceedings of summary authorities". The AMC is a "service tribunal" but is not a summary authority and the review provisions of Pt IX do not apply to it. Part VII of the 1982 Act now distinguishes between summary authorities (Div 2, ss 104-113) and the AMC (Div 3, ss 114-121). Summary

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49 (1963) 109 CLR 353 at 365, 369, 370; [1963] HCA 29.

50 [1911] AC 179 at 182.

51 [1924] 1 KB 171 at 205.

52 [1915] AC 120 at 132.

53 [1983] 2 AC 237 at 279.

54 (1942) 66 CLR 452 at 466.

authorities are officers appointed by the Chief of the Defence Force as a "superior summary authority" or by a commanding officer as a "subordinate summary authority", and, in the case of certain charges, a commanding officer is the summary authority (ss 105, 107). A charge may be referred by a commanding officer, or a superior officer, to the DMP (s 105A(2)). The DMP may request the Registrar of the AMC to refer the charge to the AMC for trial (s 118(1)). (This is the procedure which was followed with respect to the plaintiff, as explained, with reference to the transitional provisions, earlier in these reasons.)

50 A punishment imposed or order made by the AMC takes effect forthwith (s 171), save that the AMC may order that the execution of the punishment be stayed in whole or part pending the determination of an "appeal" or application for leave to appeal to the Appeal Tribunal (s 176(2)). On the other hand, a range of punishments imposed, and orders made, by a summary authority do not take effect unless approved by a reviewing authority (s 172).

51 The decision of the AMC upon the trial of a charge is conclusive, subject to the success of an "appeal" to the Appeal Tribunal and of any further "appeal" to the Federal Court. The result is that, as indicated by authorities including *Brandy v Human Rights and Equal Opportunity Commission*[55], the 2006 Act purports to entrust to the AMC the exercise of the judicial power of the Commonwealth unless it can be said, despite the placement of the AMC outside the chain of command, that the 2006 Act is supported by s 51(vi) of the Constitution.

The plaintiff's submissions

52 The primary submission by the plaintiff emphasised the importance of the hierarchical command structure to the system of military justice derived from that in the United Kingdom at the time of federation in Australia. But this supplied the starting point for an argument based upon alleged incompatibility between the 2006 Act and s 68 of the Constitution.

53 Section 68 states:

> "The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative."

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55 (1995) 183 CLR 245 at 258-259, 269-271; [1995] HCA 10. See also *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at 358-360 [16]-[24], 363 [34]-[35]; [2007] HCA 23.

The reference to the naval and military forces "of the Commonwealth" had, in 1900 and for some time thereafter, a particular significance in the scheme of Imperial naval defence[56]. The Constitution, by special provision in covering cl 5, was not in force on those British ships which were the Queen's ships of war even if their first port of clearance or port of destination was in Australia.

54 The plaintiff seeks to make good a different point. He refers to other provisions in the Constitution, particularly the appointment and delegation provisions in ss 64, 67 and 72 and the temporary expenditure provision in s 83. These refer to the Governor-General in Council, an expression which bespeaks action upon advice of the Federal Executive Council. Section 63 makes this plain. Section 68 refers to the Governor-General, without more.

55 The plaintiff submits (a) that s 68 vests in the Governor-General the prerogative power of the Crown as understood in the United Kingdom to maintain disciplined military forces and (b) that the power of command is beyond impairment by the legislation establishing the AMC, with the result that s 51(vi) does not support the 2006 Act.

56 The first proposition is an incomplete statement of the effect of the Constitution. At the third session of the Federal Convention at Melbourne in 1898, Mr Deakin unsuccessfully sought to add to the draft s 68 a requirement that the Governor-General act under the advice of the Federal Executive Council[57]. Mr Barton considered the amendment unnecessary because "in these modern days" the exercise of a prerogative of the Crown required the advice of a responsible Minister[58]; that advice might be tendered to the Governor-General without the formality of an Executive Council meeting.

57 It is true that another delegate, Mr Lewis MHA of Tasmania, said that nothing could be more subversive of discipline than for the power to review the

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56 See *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 596-597 [53] and, with respect to the British naval station in Sydney Harbour, *New South Wales v The Commonwealth* (1926) 38 CLR 74; [1926] HCA 23.

57 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 10 March 1898 at 2251-2264.

58 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 10 March 1898 at 2254.

decisions of courts-martial to be exercised upon ministerial advice[59]. But that ignored the point made by Todd[60] and repeated by Quick and Garran as follows[61]:

> "The command-in-chief of the naval and military forces of the Commonwealth is, in accordance with constitutional usage, vested in the Governor-General as the Queen's Representative. This is one of the oldest and most honoured prerogatives of the Crown, but it is now exercised in a constitutional manner. The Governor-General could not wield more authority in the naval and military business of the country than he could in the routine work of any other local department. Of what use would be the command without the grant of the supplies necessary for its execution? All matters, therefore, relating to the disposition and management of the federal forces will be regulated by the Governor-General with the advice of his Ministry having the confidence of Parliament."

58 Hence the statement by Mr O'Connor[62] in the debate upon the Deakin motion that the appointment of which s 68 speaks is nominal in the sense that it is placed within the system of responsible government, as well understood at the time of the debate in the Convention.

59 Once that is understood there is no ground remaining for the second proposition by the plaintiff. The exercise of that command may be the subject of legislation supported by s 51(vi) of the Constitution. Indeed, the legislative structures for review in disciplinary matters created in the United Kingdom by the 1866 Act and the 1881 Act and then in Australia by the 1903 Act and the 1982 Act diminished the scope for the political interference, the fear of which appears to have moved Mr Lewis in the Convention debate.

60 There remains the secondary, but more substantial, submission that the 2006 Act in creating the AMC apart from the command structure described earlier in these reasons, and in thereby purporting to provide for its exercise of the judicial power of the Commonwealth, cannot be sustained by s 51(vi). It is upon this ground that the case falls for decision.

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59 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 10 March 1898 at 2263.

60 Todd, *Parliamentary Government in the British Colonies*, 2nd ed (1894) at 377.

61 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 713.

62 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 10 March 1898 at 2258.

Conclusions

61 In oral submissions the Commonwealth Solicitor-General agreed that it was fundamental to the case for validity of the legislation under challenge that it did not place the AMC beyond the "historical stream" of the previous systems of military justice.

62 The difficulty with the case for validity is that the AMC was designed to make a break with that past and the analysis of the 2006 Act earlier in these reasons shows that the Parliament achieved its objective. It was the presence of some characteristics of that "historical stream" which exposed the legislation in the United Kingdom and Canada to the successful attacks made in *Findlay*, *Grieves* and *Généreux*. Once it was decided to deal with the 1982 Act not by the creation of a Ch III court but by the creation of the AMC, the 2006 Act became vulnerable to the attack now successfully made upon the validity of the AMC. The power conferred by s 51(vi) does not extend to the creation of a "legislative court", in the sense discussed in these reasons, which operates outside the previous system of military justice.

63 It therefore is unnecessary to deal, save in one respect, with the further arguments presented by the plaintiff. It was submitted that the power conferred by s 51(vi) was limited to the punishment of crimes such as those charged here which were committed on active service (not this case) or in the circumstances and places where the jurisdiction of the ordinary courts could not conveniently be exercised[63]. That submission is inconsistent with decisions, the most recent of which is *White v Director of Military Prosecutions*[64], which should not be re-opened.

Orders

64 Upon the further amended application for an order to show cause, referred by the Chief Justice to the Full Court by order made 16 January 2009, there should be, pursuant to r 25.03.4 of the High Court Rules 2004, an order for a writ of prohibition directed to the first defendant. This should prohibit him from trying the charges against the plaintiff identified in par 17 of the agreed statement of facts dated 16 January 2009. There should also be a declaration that Div 3 of

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63 cf *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 563 per Brennan and Toohey JJ; [1989] HCA 12.

64 (2007) 231 CLR 570.

Pt VII of the *Defence Force Discipline Act* 1982 (Cth) is invalid. The plaintiff should have against the second defendant his costs in the cause.

65 HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ. Section 114 of the *Defence Force Discipline Act* 1982 (Cth) ("the DFDA") creates a court: the Australian Military Court ("the AMC"). It is a court of record[65]. It is created by the Parliament but the Commonwealth submits that the AMC is not one of those "other federal courts" created by the Parliament under s 71 of the Constitution in which the judicial power of the Commonwealth is vested. The AMC is not a court whose judges are appointed in the manner, or have the tenure and the security of remuneration, required by s 72 of the Constitution. The determinative issue in this matter is whether the DFDA provides for the AMC, a court not created in accordance with Ch III of the Constitution, to exercise the judicial power of the Commonwealth.

The proceedings

66 The plaintiff has been charged with offences allegedly committed when he was a member of the Permanent Navy, and thus a "defence member"[66]. It is intended that the charges will be tried by the AMC. The first defendant, Colonel Morrison, is a Military Judge of the AMC and has been nominated to try the case. The plaintiff has brought proceedings in this Court against Colonel Morrison and the Commonwealth seeking relief that includes prohibition directed to the first defendant and a declaration that the provisions of Div 3 of Pt VII of the DFDA (ss 114-121) are invalid. The first defendant filed a submitting appearance. The plaintiff and the Commonwealth having agreed in a statement of agreed facts, the proceedings were referred for hearing by the Full Court. The Attorney-General for Western Australia intervened in support of the plaintiff.

67 The plaintiff put his claim that the legislation creating the AMC is invalid on several different bases. It is convenient to deal first with the argument that Div 3 of Pt VII of the DFDA is invalid because it provides for the exercise of the judicial power of the Commonwealth by a body not created in accordance with Ch III of the Constitution.

68 In connection with that argument, the plaintiff relied on amendments made to the DFDA by the *Defence Legislation Amendment Act* 2008 (Cth) ("the 2008 Amendment Act") providing for the AMC to hear "appeals" from the decisions of summary authorities made under the DFDA. The amendments made

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65 *Defence Force Discipline Act* 1982 (Cth) ("the DFDA"), s 114(1A).

66 DFDA, s 3.

by the 2008 Amendment Act do not apply to the proceedings against the plaintiff. Not only would the provisions to which the plaintiff points not be engaged, the transitional provisions of the 2008 Amendment Act provide[67] that the DFDA, as in force before the commencement of the 2008 Amendment Act, is to apply in relation to proceedings which had been commenced under the earlier form of the legislation. The proceedings brought against the plaintiff had been commenced under the earlier form of the legislation. It is not necessary to decide when they were commenced but that had happened by November 2007 when they were referred for trial by the AMC.

69 It is, therefore, neither necessary nor appropriate to have regard in this matter to the amendments made by the 2008 Amendment Act. These reasons are directed to the validity of the relevant provisions of the DFDA (Div 3 of Pt VII) as those provisions stood before the commencement of the 2008 Amendment Act.

70 Section 114 provides:

> "(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."

It is sufficient for present purposes to note that the provisions of Div 3 of Pt VII, apart from s 114, are s 115 (dealing with the jurisdiction of the AMC), s 116 (providing for the exercise of the jurisdiction of the AMC), s 117 (providing that

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67 Sched 8, item 4.

the AMC may sit in or outside Australia), s 118 (concerning the referral of charges to the AMC and nomination of a Military Judge to try a charge), s 119 (providing for the seal of the AMC), s 120 (providing for an AMC stamp) and s 121 (providing for staff necessary to assist the AMC).

The history of the legislation

71 The provisions of Div 3 of Pt VII were introduced into the DFDA by the *Defence Legislation Amendment Act* 2006 (Cth) ("the 2006 Amendment Act"). The 2006 Amendment Act was enacted after a lengthy inquiry by the Senate Foreign Affairs, Defence and Trade References Committee into the effectiveness of the Australian military justice system in providing "impartial, rigorous and fair outcomes, and mechanisms to improve the transparency and public accountability of military justice procedures"[68].

72 In its report, the Committee noted[69] that the United States[70], Canada[71], the United Kingdom[72] and other European nations[73], as well as Australia[74], had seen numerous court challenges in the preceding 20 years to the legal validity of their respective military justice systems. In Europe and Canada the challenges had centred upon whether service tribunals were independent and impartial. In particular, the European Court of Human Rights had concluded[75] that

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68 Australia, Senate, Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005 at v ("the 2005 Senate Committee Report").

69 2005 Senate Committee Report at xxv.

70 *Weiss v United States* 510 US 163 (1994).

71 *R v Généreux* [1992] 1 SCR 259.

72 *Grieves v United Kingdom* (2004) 39 EHRR 2.

73 See *Cooper v United Kingdom* (2004) 39 EHRR 8.

74 The Committee referred to *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; [1989] HCA 12; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; [1991] HCA 29; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18; [1994] HCA 25.

75 *Findlay v United Kingdom* (1997) 24 EHRR 221. See also *Grieves v United Kingdom* (2004) 39 EHRR 2.

courts-martial of United Kingdom service personnel (conducted under statutory provisions generally similar to those for which the DFDA then provided) violated the requirements of Art 6(1) of the European Convention on Human Rights that the determination of any criminal charge be by "an independent and impartial tribunal established by law". And the Supreme Court of Canada had held[76] that the system of General Courts Martial then in force in Canada infringed the right to trial by an independent and impartial tribunal guaranteed by s 11(d) of the *Canadian Charter of Rights and Freedoms*.

73 The 2005 Senate Committee Report recommended changes in the military justice system. In particular, it recommended[77] that a permanent military court be created in accordance with Ch III of the Constitution to ensure its independence and impartiality.

74 The Government published a written response to the 2005 Senate Committee Report. In that response the Government agreed[78] to create a permanent military court, but did not support[79] the creation of such a court under Ch III. The purpose of the Bill for the 2006 Amendment Act was to give effect to the Government Response[80].

75 Both the Government Response[81] to the 2005 Senate Committee Report and the Explanatory Memorandum for the Defence Legislation Amendment Bill 2006 (Cth)[82] made plain that the AMC was intended to satisfy the principles of

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76 *R v Généreux* [1992] 1 SCR 259.

77 2005 Senate Committee Report at liv, Recommendation 19.

78 Australia, 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"*, October 2005 at 4 ("the Government Response").

79 Government Response at 14-15.

80 Australia, House of Representatives, Defence Legislation Amendment Bill 2006, Explanatory Memorandum, "Outline".

81 at 14-15.

82 at [3].

impartiality and judicial independence, *and independence from the chain of command* in matters of military discipline. As will later be demonstrated, it is the independence of the AMC from the chain of command which is the chief feature distinguishing it from earlier forms of service tribunal which have been held not to exercise the judicial power of the Commonwealth.

Accepted doctrine

76 It is as well to begin consideration of the issues that arise in this matter by restating an undisputed constitutional principle. In *R v Kirby; Ex parte Boilermakers' Society of Australia* ("the *Boilermakers' Case*") it was held[83] that:

> "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)

The Commonwealth submissions

77 The Commonwealth submitted that s 114, and the other provisions of Div 3 of Pt VII of the DFDA, are made under s 51(vi) as a law with respect to "the naval and military defence of the Commonwealth and of the several States". The Commonwealth submitted that the AMC is not a court encompassed by the phrase, in s 71 of the Constitution, "such other federal courts as the Parliament

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83 (1956) 94 CLR 254 at 269; [1956] HCA 10.

creates". The Commonwealth noted, correctly, that since long before Federation, tribunals acting judicially have been seen as essential to the organisation of an army, navy or air force[84]. Courts-martial have been held[85] not to exercise the judicial power of the Commonwealth. The Commonwealth submitted that what the AMC is to do is not relevantly different from what was done by courts-martial or other forms of service tribunal.

78 The Commonwealth sought to develop its argument by describing the functions performed by courts-martial as an exercise of "judicial power" which was not the exercise of the "judicial power of the Commonwealth". In this connection the Commonwealth referred to dicta[86] in earlier decisions of this Court which were said to support such an analysis. But as will later appear, reference to the exercise of a species of judicial power that is not the judicial power of the Commonwealth does not assist the resolution of the issue in this case. Rather, it is necessary to focus upon the central plank of the Commonwealth's argument: that the AMC does not differ in any material respect from earlier forms of service tribunal, particularly naval and military courts-martial, which have been held not to exercise the judicial power of the Commonwealth.

79 As noted earlier, the AMC was *intended* to differ from earlier forms of service tribunal. It is independent from the chain of command. That independence is critical to the decision whether the AMC is to exercise the judicial power of the Commonwealth.

80 To explain the nature and extent of the changes made by the 2006 Amendment Act it is necessary to say something about courts-martial, and then compare the AMC with those earlier institutions and associated arrangements for service discipline.

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84 *R v Cox; Ex parte Smith* (1945) 71 CLR 1 at 23 per Dixon J; [1945] HCA 18.

85 *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452; [1942] HCA 12; *R v Cox; Ex parte Smith* (1945) 71 CLR 1; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518.

86 For example, *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 539-540.

Courts-martial

81 Part VIII (ss 86-100) of the *Defence Act* 1903 (Cth), as originally enacted, provided that the Governor-General may convene[87] courts-martial, appoint[88] officers to constitute courts-martial, and "[a]pprove, confirm, mitigate, or remit the sentence of any court-martial"[89]. Those powers could be delegated[90]. Section 88 of the *Defence Act* provided that, except so far as inconsistent with the Act, "the laws and regulations for the time being in force in relation to the composition, mode of procedure, and powers of courts-martial" in the Imperial forces ("the King's Regular Naval Forces" and "the King's Regular Forces") were to apply to the naval and military forces of the Commonwealth.

82 At the time of enactment of the *Defence Act*, courts-martial in the Imperial forces were regulated by the *Naval Discipline Act* 1866 (Imp) (29 & 30 Vict c 109) and the *Army Act*[91]. Consistent with the provisions of s 86 of the *Defence Act* (and its reference to the Governor-General's power to "confirm, mitigate, or remit the sentence of any court-martial") neither a finding of guilt nor a sentence passed by a military court-martial held under the *Army Act* was valid or effective until confirmed by an army officer designated as a confirming authority[92]. And the sentence passed by a naval court-martial could (except in the case of a sentence of death, which could be remitted only by the sovereign) be suspended, annulled, modified, substituted by an inferior punishment or remitted by the Admiralty[93]. Except in the case of mutiny, the punishment of death could not be inflicted until the sentence had been confirmed by the Admiralty or by the Commander-in-Chief on a foreign station[94].

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87 s 86(a).

88 s 86(b).

89 s 86(c).

90 s 87.

91 *Army Act* 1881 (Imp) (44 & 45 Vict c 58) as renewed in operation from year to year by the *Army (Annual) Act*.

92 *Army Act*, ss 54 and 57.

93 *Naval Discipline Act* 1866 (Imp), s 53(1).

94 s 53(3).

83 In 1910, the *Naval Defence Act* 1910 (Cth) was enacted. That Act made particular provisions for the Naval Forces of the Commonwealth. Section 5 provided that a number of provisions of the *Defence Act* (including the provisions of Pt VIII concerning courts-martial) continued to apply in relation to the Naval Forces of the Commonwealth. Section 36 provided that, subject to the *Naval Defence Act*, the *Naval Discipline Act*[95] "and the King's Regulations and Admiralty Instructions for the time being in force in relation to the King's Naval Forces" applied to the Naval Forces of the Commonwealth.

84 In 1917, s 86 of the *Defence Act* was amended[96] to provide that the powers given to the Governor-General by that section did not affect the powers conferred by the *Naval Discipline Act* or the *Army Act* "of convening courts-martial and confirming the findings and sentences of those courts". This amendment emphasised a point already apparent from the conferral of authority on the Governor-General to convene courts-martial, and to approve, confirm, mitigate or remit the sentence of any court-martial. The 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. They were matters for the Governor-General as Commander in Chief of the naval and military forces of the Commonwealth[97], or an officer designated by or on behalf of the Commander in Chief as a convening or confirming authority under the applicable Imperial legislation.

85 Although written in a different time and context, the central point to be made about these arrangements was accurately captured by Platt J of the Supreme Court of New York when he said that[98]: "The proceedings of the Court-Martial were not definitive, but merely in the nature of an inquest, to inform the conscience of the commanding officer. He, alone, could not condemn

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95 Defined in s 3 as "the Imperial Act called *The Naval Discipline Act* as amended from time to time ... [including] any Act for the time being in force in substitution for that Act".

96 *Defence Act* 1917 (Cth), s 23.

97 Constitution, s 68.

98 *Mills v Martin* 19 Johns 7 at 30 (1821).

or punish, without the judgment of a Court-Martial; and, it is equally clear, that the Court could not punish without his order of confirmation."

86 These features of the provisions for courts-martial set them apart from the exercise of the judicial power of the Commonwealth. The decisions of courts-martial were not "definitive" of guilt; the punishments awarded by courts-martial were subject to confirmation or review. Dispositive decisions about guilt and punishment were made on confirmation or review within the chain of command. It was, therefore, right to describe courts-martial as directed to the maintenance of discipline of the forces. They were tribunals established to ensure that the discipline administered within the forces was just. But as Dixon J pointed out in *R v Cox; Ex parte Smith*[99], courts-martial did "not form part of the judicial system administering the law of the land".

87 Until the enactment of the DFDA in 1982, the *Defence Act* continued to provide[100] for courts-martial, and to identify the laws applicable to military courts-martial (as distinct from naval courts-martial) by reference to "the Imperial Act called the Army Act" as in force at identified times. The *Naval Defence Act* continued to make special provision for the Naval Forces of the Commonwealth but continued to provide[101] that Pt VIII of the *Defence Act* (dealing with courts-martial) applied to and in relation to the Naval Forces and the members of those Forces. And like provision was made in respect of the Air Force by the *Air Force Act* 1923 (Cth).

88 Until the enactment of the DFDA in 1982, the *Defence Act* continued to provide power to the Governor-General to convene courts-martial, to appoint officers to constitute courts-martial, to "confirm the finding, or finding and sentence of any court-martial, or in the case of a military or air-force court-martial send back the finding and sentence or either of them for revision"[102], to mitigate or remit the punishment awarded by any sentence, or commute the punishment for some less punishment[103], and to suspend the

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99 (1945) 71 CLR 1 at 23.

100 See, for example, *Defence Act* 1903-1973, s 88.

101 s 5(1).

102 s 86(1)(c).

103 s 86(1)(d).

execution or currency of any sentence[104]. And the powers conferred by Imperial Acts with respect to convening courts-martial, and confirming the findings and sentences of those courts, as picked up and applied by s 86(2) of the *Defence Act*, remained unaffected.

89 Although the DFDA recast the law relating to service discipline, some particular features of the former law remained substantially unaltered. In particular, under the DFDA as originally enacted, courts-martial in all arms of the Australian Defence Force were convened by an officer appointed as a convening authority by the Chief of Defence Force Staff, Chief of Naval Staff, Chief of the General Staff or Chief of the Air Staff[105]. The President and other members of a court-martial were appointed by a convening authority[106]. If a person was convicted by a court-martial, the proceedings were automatically to be reviewed[107] by an officer appointed[108] by a chief of staff as a reviewing authority. In addition, a person convicted by a court-martial could petition[109] for review of the proceedings by a reviewing authority. A review by a reviewing authority did not prevent a further review of the proceedings by a chief of staff "if it appears to him that there are sufficient grounds for a further review"[110]. On review, whether by a reviewing authority or a chief of staff, the conviction could be quashed[111], a

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104 s 86(1)(e).

105 s 102.

106 s 119.

107 s 152.

108 s 150.

109 s 153.

110 s 155(1).

111 s 158.

new trial could be ordered[112], conviction for an alternative offence could be substituted[113], or in some cases the punishment imposed could be quashed[114].

90 The grounds upon which a reviewing authority could exercise these powers were limited. The limits were expressed in terms very like those found in common form criminal appeal statutes. So, for example, s 158(1) of the DFDA obliged a reviewing authority to quash a court-martial conviction if it appeared (among other things) that "the conviction is unreasonable, or cannot be supported, having regard to the evidence", or that, "as a result of a wrong decision on a question of law, or of mixed law and fact, the conviction was wrong in law and that a substantial miscarriage of justice has occurred". And reviewing authorities were bound[115] to obtain a report on the proceedings from a legal officer, and bound[116] by any opinion on a question of law set out in the report. But the point of present importance to be observed is that the final decision about guilt or punishment was not made by the court-martial; the final decision about those matters was made within the chain of command of the forces.

91 In 2005 the DFDA was amended, by the *Defence Legislation Amendment Act (No 2)* 2005 (Cth), to provide for the offices of Director of Military Prosecutions ("the Director") and Registrar of Military Justice ("the Registrar"). The general effect of the amendments was to give the Registrar some of the powers of a convening authority and the Director the power to decide[117] whether a charge should proceed and, if it should, whether it was to be dealt with summarily, by trial before a Defence Force magistrate or by trial by court-martial. Other features of the scheme for trial by court-martial remained substantially unaltered.

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112 s 160.

113 s 161.

114 s 169.

115 s 154(1).

116 s 154(2).

117 DFDA, s 103.

92 In addition to the "review" system for which provision was made by the DFDA, a person convicted by court-martial could appeal against the conviction. In 1955, the Parliament had provided for appeals from courts-martial to a Courts-Martial Appeal Tribunal[118]. That body, renamed the Defence Force Discipline Appeal Tribunal by the *Defence Force (Miscellaneous Provisions) Act* 1982 (Cth) ("the Appeal Tribunal"), was given power to hear and determine certain appeals against conviction by court-martial and, more recently[119], appeals against sentence.

93 Since 1982, the Appeal Tribunal has been constituted by persons holding State or federal judicial office. It was not submitted, however, and it is not the case, that the Appeal Tribunal is a federal court, or that it exercises the judicial power of the Commonwealth[120]. The references made in legislation to "appeals" to the Appeal Tribunal are to be understood accordingly. Following the amendments made to the DFDA by the 2006 Amendment Act, the Appeal Tribunal may hear appeals from the AMC.

The AMC

94 The Bill for the 2006 Amendment Act, which among other things was to create the AMC, was intended to give effect to the Government Response to the 2005 Senate Committee Report. The provisions of the Bill for the 2006 Amendment Act were considered by the Senate Standing Committee on Foreign Affairs, Defence and Trade. The report[121] of that Committee (the 2006 Senate Committee) was tabled in October 2006.

95 Although the 2006 Senate Committee considered[122] that the proposed AMC would not achieve the level of independence and impartiality needed to

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118 *Courts-Martial Appeals Act* 1955 (Cth).

119 *Defence Legislation Amendment* Act 2006 (Cth), Sched 1, item 25, inserting s 20(3) and (4) in the *Defence Force Discipline Appeals Act* 1955 (Cth).

120 *Hembury v Chief of General Staff* (1998) 193 CLR 641 at 648 [13], 654 [32]; [1998] HCA 47.

121 Australia, Senate, Standing Committee on Foreign Affairs, Defence and Trade, *Defence Legislation Amendment Bill 2006 [Provisions]*, October 2006 ("the 2006 Senate Committee Report").

122 2006 Senate Committee Report at 6 [1.27].

ensure a fair and effective military justice system, it is evident that a central principle informing the relevant provisions of the 2006 Amendment Act was that the AMC was to be independent of the chain of command in the Australian Defence Force. Whereas the decisions of a court-martial to convict and sentence a member of the forces were subject to automatic review and confirmation by reviewing and confirming officers designated by a chief of staff, the decisions of the AMC were not to be subject to any review or confirmation within the chain of command. To adopt and adapt the dictum of Platt J[123], no longer were there to be proceedings "in the nature of an inquest, to inform the conscience of the commanding officer"; the new court was to be able to condemn and punish without review or confirmation by a commanding officer.

96 At least since the enactment of the Imperial *Naval Discipline Act* and *Army Act*, courts-martial of members of the forces subject to naval or military discipline were conducted according to procedures generally analogous to those followed by the civil courts. Courts-martial pronounced verdicts of guilt or innocence of offences, some of which were or were analogous to offences against the general criminal law. The punishments awarded by courts-martial included forms of punishment provided by the general criminal law. It is, then, not surprising that it has been said that courts-martial exercised a form of judicial power. Such an observation, however, is not helpful in the resolution of the issue that arises in this case. First, on analysis the observation may go no further than asserting that courts-martial act judicially[124]. That observation may be made of many tribunals. Secondly, and more importantly, the question which is presented by Ch III of the Constitution is whether the body under consideration exercises the judicial power *of the Commonwealth*. To speak of a court-martial exercising a species of judicial power is unhelpful if it distracts attention from the relevant constitutional question.

97 That constitutional question was resolved in respect of courts-martial, as it was in *R v Bevan*, *R v Cox* and later *Re Tracey*, at a time when courts-martial were not independent of the chain of command of the forces. Courts-martial were convened only by order from within the chain of command; conclusions of guilt and determinations of punishment were subject to review or confirmation within that chain of command. A court-martial did not make a binding and

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123 *Mills v Martin* 19 Johns 7 at 30 (1821).

124 cf *R v Cox; Ex parte Smith* (1945) 71 CLR 1 at 23.

authoritative decision of guilt or determination of punishment[125]. A court-martial did not enforce its decisions[126]. Enforcement of any decision, other than acquittal of the accused, depended upon the outcome of review of the decision within the chain of command. But 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.

98 That the AMC is to make binding and authoritative decisions on the issues identified without further intervention from within the chain of command is reason enough to conclude that it is to exercise the judicial power of the Commonwealth. It is, however, desirable to notice two further aspects of the amendments made by the 2006 Amendment Act, both of which relate to s 114(1A), providing that the AMC is a court of record.

A court of record

99 The plaintiff submitted, and the Commonwealth disputed, that because the AMC is created as a court and as a court of record, it exercises the judicial power of the Commonwealth. Particular attention was given in this connection to what power the AMC has to deal with that species of contempt referred to as contempt in the face of the court. The plaintiff submitted that the AMC has that power because it is a court of record, and that having that power demonstrates that the AMC exercises the judicial power of the Commonwealth. The Commonwealth submitted that courts-martial had always had power not substantially different from a court of record's power to deal with contempt in the face of the court, at least in respect of persons subject to naval or military law[127], and that the inclusion of s 114(1A) did no more than ascribe a particular status to the new body; it did not give the new body powers different from those of courts-martial.

100 It is not necessary to resolve this aspect of the debate between the parties. Designation of a body created by a law of the Parliament as a "court of record"

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125 cf *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ; [1909] HCA 36.

126 cf *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 at 198-199 per Latham CJ; [1944] HCA 17.

127 *Defence Act* 1903 (Cth), ss 89, 90, 91. See now DFDA, s 53(5).

may not, without more, show that it exercises the judicial power of the Commonwealth[128]. It is necessary to have regard to what the body does. And in this case the validity of the provisions which create the AMC turns on more fundamental considerations than what power it has to punish for contempt in the face of the court and whether that power is given by express provision or by designating the AMC as a court of record. It is, nonetheless, desirable to say something further about the provisions that create the AMC as a court and, in particular, s 114(1A), which provides that it is a court of record. It is convenient to do that by reference to some features of the legislative history that lies behind the inclusion of s 114(1A) in the DFDA by the 2006 Amendment Act.

The legislative history of s 114(1A)

101 As originally introduced, the Bill for the 2006 Amendment Act did not include the provision that would become s 114(1A). The 2006 Senate Committee recommended[129] that the Bill be amended or redrafted because, among other things, the Committee considered[130] that "the proposed AMC would not achieve the level of independence and impartiality needed to ensure a fair and effective military justice system" even though, as noted earlier, the Explanatory Memorandum for the Bill for the 2006 Amendment Act had said[131] that the creation of the AMC was intended to "satisfy the principles of impartiality and judicial independence, and independence from the chain of command". The 2006 Senate Committee Report recorded[132] a number of criticisms of the Bill, including "the failure to stipulate that the AMC was to be a court of record".

102 As the Committee's written questions on notice to the Department of Defence showed[133], the Judge Advocate General of the Australian Defence Force

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128 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 446, 454-456, 467; [1918] HCA 56; *R v Turner; Ex parte Marine Board of Hobart* (1927) 39 CLR 411 at 441-442; [1927] HCA 15.

129 2006 Senate Committee Report at 7 [1.31].

130 2006 Senate Committee Report at 6 [1.27].

131 at [3(b)].

132 2006 Senate Committee Report at 4-5 [1.22].

133 The questions were published as Appx 3 to the 2006 Senate Committee Report.

had understood that the original intention was that the AMC would be a court of record, and he had expressed[134] the view that:

> "there is no sensible reason why the AMC should not expressly be made a court of record and making it so would *put beyond doubt its status as a court and its judicial authority*". (emphasis added)

103 The Department of Defence's response to the Committee's question about this aspect of the Bill was[135] that advice to the department "was that it would be inappropriate to provide that the AMC is a court of record". The departmental response continued[136]:

> "The concept [of court of record] has meaning in connection with the civilian court system. The AMC is not part of that system and should not be conferred with a status that might be taken to suggest that it is (or that it has a similar jurisdiction). There is no reason to expand the use of the concept in relation to the AMC, which is a unique statutory creature. Its powers should generally be set out in its enabling legislation and not determined by reference to powers exercised by courts in the civilian system. The statutory status of the proposed AMC and its judicial authority is clear. The status of 'court of record' is also not required to establish the independence or impartiality of the proposed AMC."

104 Nonetheless, the Bill for the 2006 Amendment Act was amended to provide, by the insertion of what was to become s 114(1A), that the AMC was to be a court of record. The Supplementary Explanatory Memorandum and Corrigendum to the Original Explanatory Memorandum circulated in respect of the Bill for the 2006 Amendment Act said of this provision:

> "11. A court of record is a court that is declared by an Act to be so or a court that has the power to impose a fine or imprisonment for contempt against it or for another substantive offence (contempt includes

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134 2006 Senate Committee Report at 26 [20].

135 2006 Senate Committee Report, Appx 5, Department of Defence, "Responses to Questions" at 6 [34].

136 2006 Senate Committee Report, Appx 5, Department of Defence, "Responses to Questions" at 6-7 [34].

disturbance of proceedings, interference with the authority of the court or publication of material which may prejudice its proceedings).

12. Courts martial and trials by Defence Force magistrates were not designated as 'courts of record' under the DFDA. Consistent with this, the AMC was not specifically made a court of record because there was no legal or practical reason for doing so. Additionally, it avoided conferring the characteristics of a civilian court (with greater jurisdiction) on the AMC. Notwithstanding this, *the functional attributes of a court of record are provided for in the Bill, including the capacity to deal with contempt of the court, conduct of proceedings in public, and a requirement to record proceedings. The AMC has now been accorded the status of a court of record*, noting that there will be a provision to limit publication of proceedings in the interests of the security and defence of Australia or for particularly sensitive matters.

13. Paragraph (8) will reinforce the provisions discussed in paragraphs 11 to 12 by inserting new subclause 114(1A), to provide that the AMC is a 'court of record'. It will reinforce existing provisions in the DFDA which will require the public publication of AMC records except where it would be inappropriate to do so (for example, if it would be contrary to the interests of the security or defence of Australia, the proper administration of justice or public morals). These examples currently apply to the conduct of public hearings. This amendment further enhances the status of the AMC." (emphasis added)

105 That is, the inclusion in the Bill of what was to become s 114(1A), providing that the AMC is a court of record, was seen as reinforcing what was already provided in the Bill. Without this provision the Bill was understood to provide for the AMC to have "the functional attributes of a court of record": it was to have capacity to deal with contempt of court, was to conduct its proceedings in public, and was to be required to record its proceedings. The amendment inserting what was to become s 114(1A) in the Bill was treated in the Supplementary Explanatory Memorandum as directed to "enhanc[ing] the status of the AMC", but appeared not to be intended to effect any substantive change in the nature of the body that was to be created.

106 There is, however, a consequence of creating the AMC as a court of record which goes beyond the questions of status and contempt powers. That consequence depends upon the AMC both having power to make binding and authoritative determinations of guilt and being designated a court of record. It is necessary to examine further the kinds of issues which the DFDA, as amended

by the 2006 Amendment Act, provides for the AMC to decide, and the final and binding nature of those decisions.

107 The decisions which the AMC is to make include decisions about guilt of offences against the general criminal law. Section 115(1) of the DFDA, as amended by the 2006 Amendment Act, provides that:

> "Subject to section 63, the Australian Military Court has jurisdiction to try any charge against any person."

Section 115(2) qualifies the generality of s 115(1) by excluding from the jurisdiction of the AMC the trial of charges of certain offences committed by service personnel undergoing detention, but this qualification may be put aside from further consideration.

108 Section 3(1) of the DFDA defines "charge" as "a charge of a service offence". Section 61 of the DFDA makes it an offence against the DFDA, and thus a "service offence", to engage in conduct that would be an offence against a law of the Commonwealth in force in the Jervis Bay Territory, or any other law (including any unwritten law) in force in that Territory which creates offences or imposes criminal liability for offences[137]. Offences of these several kinds are identified[138] in the DFDA as Territory offences. Because s 115(1) gives the AMC jurisdiction (subject to s 63) to try any charge against any person, the charges that may be tried by the AMC extend to charges of service offences that are constituted by engaging in conduct contrary to the general criminal law.

109 The qualification to the jurisdiction of the AMC provided by the reference to s 63 is not unimportant but is of limited effect. Section 63 provides, in substance, that except with the consent of the Director of Public Prosecutions of the Commonwealth, proceedings under the DFDA are not to be instituted for certain identified offences including treason, murder, manslaughter, bigamy and certain sexual offences. There remains a wide range of Territory offences that are subject to the jurisdiction of the AMC. The offences with which the plaintiff is charged include a Territory offence that is not an offence of a kind described in s 63.

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137 cf *Re Aird; Ex parte Alpert* (2004) 220 CLR 308; [2004] HCA 44.

138 s 3(1).

110 Before the amendments made by the 2006 Amendment Act, s 190 of the DFDA provided for the jurisdiction of the civil courts in relation to service offences. In particular, s 190(1) provided that "[s]ubject to the Constitution, a civil court does not have jurisdiction to try a charge of a service offence" and s 190(2) provided that, subject to some qualifications, "the jurisdiction of a civil court to try a charge of a civil court offence is not affected by this Act". As orginally enacted, sub-s (5) of s 190 provided that "[w]here a person has been acquitted or convicted of a service offence, the person is not liable to be tried by a civil court for a civil court offence that is substantially the same offence". And sub-s (3) provided that if a court-martial (or a Defence Force magistrate) was asked to, and did, take some other service offence into consideration when dealing with a person convicted of a service offence, the person was not liable to be tried for a civil court offence that was substantially the same offence as that taken into consideration. Both sub-s (3) and sub-s (5) were held invalid in *Re Tracey*[139] because they interfered with the exercise by State courts of their general criminal jurisdiction.

111 The consequence of the decision in *Re Tracey* was not substantially different from that which had obtained, before Federation, under the Imperial *Army Act*. Section 162 of that Act had provided for what the sidenote to the section described as the "[a]djustment of military and civil law" by providing:

> "(1) If a person sentenced by a court-martial in pursuance of this Act to punishment for an offence is afterwards tried by a civil court for the same offence, that court shall, in awarding punishment, have regard to the military punishment he may have already undergone.
>
> (2) Save as aforesaid, nothing in this Act shall exempt an officer or soldier from being proceeded against by the ordinary course of law, when accused or convicted of any offence, except such an offence as is declared not to be a crime for the purpose of the provisions of this Act relating to taking a soldier out of Her Majesty's service."

112 If the impugned provisions of the DFDA are valid the "adjustment of military and civil law" is very different. If the provisions are valid, the 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. So much would

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139 (1989) 166 CLR 518.

follow from the status of the AMC as a court of record. As was said in *Island Maritime Ltd v Filipowski*[140]:

> "Just as judgment of a court of record in a civil action changes the cause of action to a matter of record[141], conviction in a court of record in respect of a criminal offence brings about 'the substitution of a new liability'[142]."

If the impugned provisions are valid, the AMC is given power to make a binding and authoritative determination of the issues of fact and law which are tendered on the trial of an offence the elements of which are identified by the generally applicable criminal law. If the impugned provisions are valid, the AMC is given power to punish a person found guilty of that offence. And, if the impugned provisions are valid, it follows from its being a court of record that the decision of the AMC would preclude further prosecution for the same offence under the generally applicable criminal law.

113 For the AMC to make a binding and authoritative determination of such issues pursuant to the DFDA is to exercise the judicial power of the Commonwealth. There is no dispute that the AMC is not constituted in accordance with Ch III.

114 It is unprofitable to examine whether, or in what sense, it is right to describe the AMC as a "court". To ask whether the legislature's use of the word is apposite invites debate about the definition of a word that has been used in diverse circumstances not always associated with the exercise of judicial power. What is determinative of the issue in the present case is what the AMC is to do under the DFDA, as amended by the 2006 Amendment Act. And what the AMC is to do is to exercise the judicial power of the Commonwealth otherwise than in accordance with Ch III. The AMC cannot validly exercise the judicial power of the Commonwealth.

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140 (2006) 226 CLR 328 at 343 [42]; [2006] HCA 30.

141 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 606; [1996] HCA 38.

142 *R v Wilkes* (1948) 77 CLR 511 at 519; [1948] HCA 22.

Severance?

115 The Commonwealth submitted that, if s 114(1A) making the AMC a court of record was the reason provisions creating the AMC were beyond power, s 114(1A) could readily be severed. But as already indicated in these reasons, the provisions creating the AMC are invalid not just because the AMC is created a court of record, but because it is established to make binding and authoritative decisions of guilt or innocence independently from the chain of command of the defence forces. It is to exercise the judicial power of the Commonwealth. None of the provisions of Div 3 of Pt VII of the DFDA can be severed or read down in a way that would give the provisions valid operation. The whole of Div 3 of Pt VII should be declared to be invalid.

Some additional arguments

116 The plaintiff submitted that the provisions creating the AMC were invalid because s 68 of the Constitution[143] precludes the creation of the AMC "by reason of [it] being separate from and unlawfully fettering 'command', to which the law making power in s 51(vi) is subject". The plaintiff sought, in this branch of the argument, to emphasise the extent to which the AMC stood apart from the chain of command of the forces and to contrast that with what was identified as a constitutional imperative that command of the forces be vested in the Governor-General. As already explained, the separation of the AMC from command and the conferral on it of authority to decide issues of guilt or innocence finally is of determinative significance in considering whether the AMC exercises the judicial power of the Commonwealth. It is therefore not necessary to decide the issue raised by the plaintiff's arguments regarding s 68, or to explore what is entailed by vesting the command in chief of the forces in the Governor-General.

117 The parties also made submissions about the limits upon the exercise of the legislative power conferred by s 51(vi) to proscribe and provide for the punishment of conduct outside the engagement of Ch III. The Attorney-General for Western Australia intervened in the proceedings to make submissions on this issue. There was therefore debate in argument about "service status" as distinct

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143 Section 68 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."

from "service connection"[144] and the notion of "disciplinary offences"[145] as providing a criterion or criteria that mark the limit of that power. Given the footing on which the present litigation is to be decided, it is neither necessary nor desirable to go beyond what was said in *White v Director of Military Prosecutions* on these issues or to consider reopening that decision.

Conclusion and order

118 There should be a declaration that the provisions of Div 3 of Pt VII of the *Defence Force Discipline Act* 1982 (Cth) are invalid. A writ of prohibition should 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. The Commonwealth should pay the plaintiff's costs of the proceedings.

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144 *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 321-322 [36]-[37]; *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 580-581 [3]; [2007] HCA 29.

145 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 591; *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 599-602 [65]-[75].