Does the ADF require a Chapter III military court?¹

Abstract

It is well settled that service tribunals exercise power of a judicial nature in the determination of disciplinary proceedings but do not exercise the judicial power of the Commonwealth. Accordingly, service tribunals are not required to be constituted under Chapter III of the Constitution.

The paramount service tribunal, the courts martial, had its genesis in English law which has evolved since the 1650s. Australia and many nations allied to it inherited the courts martial model from the UK. The inherited model has recently been reviewed in Canadian and European courts following complaints that its form contravened modern human rights conventions.

Australia attempted to address these concerns with reform to the Australian courts martial processes via the Defence Legislation Amendment Acts in 2003, 2005 and 2006.

These reforms principally sought to separate out and render independent each of the principal pillars of the courts martial system, functions which were formerly undertaken solely by a convening authority.

The separation involved the creation of an independent prosecutor (Director of Military Prosecutions (DMP)) with power to prefer and prosecute offences; a Registrar of Military Justice (RMJ) with power to appoint a time and place for conducting a courts martial, including appointment of court martial members; a Chief Judge Advocate (CJA) to manage the provision of judge advocates (JA) who are appointed by the Judge Advocate General (JAG) to hear the cases; and an independent reviewing authority linked into the chain of command to review courts martial proceedings and determine whether trial proceedings should be confirmed and upheld.

The 2006 amendments sought to create a non-Chapter III court, the Australian Military Court (AMC), as the principal service tribunal. In Lane v Morrison² the AMC was declared unconstitutional as a court not created under Chapter III of the Constitution but which purported to exercise the judicial power of the Commonwealth.

¹ A paper prepared for delivery to the annual Judge Advocate General’s conference to be held at HMAS Creswell, Jervis Bay NSW on 28 October 2013 by AIRCDRE his Honour Judge M. Burnett, DJAG (AF).
Following the striking down of the AMC, government has struggled to settle upon a model that addresses the one matter which now remains outstanding from a convention perspective, namely the provision of an independent military discipline tribunal.

Government’s initial response to Lane v Morrison was to create a Chapter III military court. However, informed consideration has identified risk with that model. First, its members cannot be members of the ADF. The Court will have the appearance of a civilian court no matter how it is styled. Second, there is a risk that service members before the court may successfully claim a right to s 80 trial by jury notwithstanding the styling of offences as services offences. That might occur because the civil equivalents of many service offences are indictable in character. Thirdly, there will be a need to retain the extant courts martial system because of difficulties with the deployability of a Chapter III court and its judicial members.

The former courts martial system has been reinstated. However, arguably its current form does not adequately address safeguards for judicial independence.

It is apparent that the courts martial system can be appropriately reformed to preserve it as a discipline system but also to address the outstanding issue of the independence of its judicial officers.

Those reforms would include:

1) Establishment of a standing Courts martial Tribunal;
2) Appointment of the CJA by the Governor-General;
3) Qualifications for appointment of the CJA to be identical to those of the JAG;
4) Appointment of JAs by the Governor-General; and
5) Qualification for appointment of JAs to include that the appointee hold a judicial commission in a federal or state court.

This paper examines the recent history of the ADF Courts Martial system and explains why the suggested reforms may bridge the lacuna between those who see only a Chapter III solution and those who contend that the current model is satisfactory.

Introduction

In June 2005 the Senate Foreign Affairs, Defence and Trade References Committee reported on The Effectiveness of Australia’s Military Justice System (the 2005 Senate Report). It recommended, inter alia, that the creation of a permanent
Chapter III military court capable of trying offences under the *Defence Force Discipline Act 1982* (Cth) (*DFDA*), which were at that time tried at the Court Martial or Defence Force magistrate level by JAs or Defence Force magistrates (*DFM*).\(^3\) This recommendation saw the creation of the ill-fated AMC. Upon its demise, the former courts martial and Defence Force magistrate discipline regime was reinstated.\(^4\) Two attempts have been made to enact a replacement regime for the AMC. They have each proposed the establishment of a Chapter III Court to be titled the Military Court of Australia (*MCA*). However, both the *Military Court of Australia Bill 2010* (Cth) and the *Military Court of Australia Bill 2012* (Cth) lapsed with the proroguing of the 42\(^{\text{nd}}\) and 43\(^{\text{rd}}\) parliaments, respectively. Against the background of the ill-fated AMC, there is bi-partisan recognition of the need to address the issues identified in the 2005 Senate Report. However, there are concerns about the structure proposed in the lapsed bills.

This paper examines the proposed reforms related to the creation of a new military court and considers the options open in addressing the original concerns identified in the 2005 Senate Report.

**Short History**

The enactment of the DFDA involved the repeal of various single service discipline acts and consolidation of those processes into a common tri-service model for

---

\(^3\) Recommendations 18 and 19.

\(^4\) The reinstatement measures included both permanent and temporary features. The courts martial system was reinstated. Temporary measures were directed to the office holders appointed at the time the AMC was struck down. Sunset provisions governed their transition into new offices. These temporary provisions have since been extended on two further occasions.
service discipline.\textsuperscript{5} It provided for the conduct of disciplinary proceedings at both the summary and the higher court martial level. This paper addresses only matters relevant to the court martial level.\textsuperscript{6}

The underpinnings of the system employed in higher level proceedings are service tribunals constituted by the courts martial and DFM processes. The validity of the courts martial system generally has been the subject of direct challenge on three occasions: \textit{Re Tracey; Ex parte Ryan,\textsuperscript{7}} \textit{Re Nolan; Ex parte Young}\textsuperscript{8} and \textit{Re Tyler; Ex parte Foley}.\textsuperscript{9} The current system was considered in \textit{White v Director of Military Prosecutions}.\textsuperscript{10}

\textsuperscript{5} The \textit{Naval Discipline Act 1866 (Imp)} and the \textit{Army Act 1881 (Imp)} as Imperial acts were adopted into Australian law in 1901 and modified by their adoption into the \textit{Defence Act 1903 (Cth)}. The general situation was summarised in the \textit{Manual of Military Law} (1941) at page 387:

\begin{quote}
"Certain provisions of the Army Act have been applied by the law of the Commonwealth, save so far as they are inconsistent with the Defence Act and the Regulations made thereunder … The law in relation to the composition, procedure and powers of courts-martial contained in the Army Act and the regulations and under that Act have been applied by the law of the Commonwealth except so far as they are inconsistent with the Defence Act and the regulations made under the Defence Act to the Australian Military Forces wherever serving at all times."
\end{quote}

Specifically, the military discipline of the nascent Australian Army was regulated in Australia by the \textit{Army Act 1881 (Imp)} until the enactment of the \textit{Defence Act 1903 (Cth)} and the subsequent introduction of the \textit{Australian Military Regulations & Orders} in 1914 and amended in 1916 which provided, in a form adapted from the \textit{Army Act 1881 (Imp)} and \textit{Regulations}, a series of military offences and a regime for the conduct of courts martial and summary proceedings. That scheme remained in place but was subject to a significant revision and re-write by the \textit{Australian Military Regulations 1927 (Cth)} which repealed the \textit{Australian Military Regulations 1916}. For the Navy, matters remained as provided under the Imperial statutes until the \textit{Naval Defence Act 1910 (Cth)} which provided for the continued application of the Imperial law as modified by the \textit{Defence Act 1903 (Cth)}. The RAAF came into being in 1923 and its members were subject to the \textit{Air Force Act 1923 (Cth)} and the terms of the \textit{Air Force (Constitution) Act 1917 (UK)} were applied with modifications.

\textsuperscript{6} While the DFDA deals with service offences generally, there is no dispute that in respect of the offences tried at the lower summary level service tribunals are not exercising the judicial power of the Commonwealth. This matter is not the subject of express judicial determination but rather inference. Arguably there is no logical reason why the principles applicable to the higher level service tribunals such as courts martial would not apply with equal force to the lesser tribunals.

\textsuperscript{7} (1991) 172 CLR 460.
\textsuperscript{8} (1989) 166 CLR 518.
\textsuperscript{9} (1994) 181 CLR 18.
\textsuperscript{10} (2007) 231 CLR 570.
In each instance the High Court held that the exercise of judicial-like powers by a non-Chapter III court in respect of defence disciplinary matters does not offend Chapter III of the Constitution. The High Court has consistently followed and applied the longstanding authority of \textit{R v Cox; Ex parte Smith}\textsuperscript{11} and the observations of Dixon J that the administration of military justice by military tribunals constitutes an exception to Chapter III.\textsuperscript{12} In that case, his Honour observed:

\begin{quote}
"To ensure that discipline is just, tribunals acting judicially are essential to the organisation of an army or navy or air force. But they do not form part of the judicial system administering the law of the land."\textsuperscript{13}
\end{quote}

In accepting the constitutionally sound nature of service tribunals, each court considering the point expressly considered that service tribunals did not give rise to any conflict with the principles expressed in \textit{R v Kirby; Ex parte Boilermakers’ Society of Australia},\textsuperscript{14} as they do not exercise the judicial power of the Commonwealth. Notwithstanding that, it is acknowledged that no material distinction can be drawn between the power exercised by a service tribunal and the judicial power exercised by a court.\textsuperscript{15}

In \textit{Re Tracey; Ex parte Ryan}, the court considered expressly the question of whether a service tribunal was exercising the judicial power of the Commonwealth under Chapter III of the Constitution. In considering the point, Mason CJ, Wilson and Dawson JJ concluded:

\textsuperscript{11} (1945) 71 CLR 1.
\textsuperscript{12} \textit{Haskins v Commonwealth} (2011) 244 CLR 22 at 35, noting in particular its previous decisions in footnote 56.
\textsuperscript{13} At 23.
\textsuperscript{14} (1956) 94 CLR 254.
\textsuperscript{15} \textit{Re Tracey; Ex parte Ryan} at 537 per Mason CJ and Wilson and Dawson JJ, and at 572 per Brennan and Toohey JJ. A powerful dissent to the reasoning of the majority in distinguishing Dixon J’s conclusions in \textit{R v Cox; Ex parte Smith} can be seen in the judgment of Deane J at 582-583.
“... the defence power is different because the proper organization of a
defence force requires a system of discipline which is administered judicially,
not as part of the judicature erected under Ch. III, but as part of the
organization of the force itself. Thus the power to make laws with respect to
the defence of the Commonwealth contains within it the power to enact a
disciplinary code standing outside Ch. III and to impose upon those
administering that code the duty to act judicially.”

Since Re Tracey; Ex parte Ryan, the High Court has consistently, but only by a
majority, considered the exercise of power in respect of discipline of the ADF to be
an exercise of the defence power as Re Nolan; Ex parte Young, Re Tyler; Ex parte
Foley and White v Director of Military Prosecutions demonstrate.

Most recently in Haskins v Commonwealth17 the majority (French CJ, Gummow J,
Hayne, Crennan, Kiefel and Bell JJ) summarised the principle at 35, paragraphs
[21]-[22], stating:

“it is to be borne at the forefront of consideration of the plaintiff’s arguments
about the application of Ch III of the Constitution that this Court has
repeatedly upheld the validity of legislation permitting the imposition by a
service tribunal that is not a Ch III court of punishment on a service member
for a service offence. Legislation permitting service tribunals to punish service
members has been held to be valid on the footing that there is, in such a
case, no exercise of the judicial power of the Commonwealth. Punishment of
a member of the defence force for a service offence, even by deprivation of

16 Re Tracey; Ex parte Ryan at 540-541. To like effect are the conclusions of Brennan and Toohey JJ
at 574.
17 (2011) 244 CLR 22.
liberty, can be imposed without exercising the judicial power of the Commonwealth. Because the decisions made by courts martial and other service tribunals are amenable to intervention from within the chain of command, the steps that are taken to punish service members are taken only for the purpose of, and constitute no more than, the imposition and maintenance of discipline within the defence force; they are not steps taken in exercise of the judicial power of the Commonwealth.

By contrast, the legislation declared invalid in Lane v Morrison was held to be an impermissible attempt to provide for the exercise of the judicial power of the Commonwealth by a body that was not established in the manner required by Ch III. As noted at the outset of these reasons, the AMC was empowered by the legislation held invalid in Lane v Morrison to make binding and authoritative decisions of guilt, and determinations about punishment for service offences, without further intervention from within the chain of command of the defence force.”

However, concerns arise about the institutional independence of the ADF courts martial system following human rights complaints made in allied jurisdictions which are signatories to the Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights. These and related concerns were considered by the Canadian Court of Appeal in R

---

18 Reference to the ‘courts martial system’ is a reference to the more serious offences tried by court martial and/or DFM proceedings, and is used in distinction to offences tried at the summary level by summary authorities. In light of the High Court’s decisions, the constitutional validity of the system of summary proceedings now appears certain.
v Généreux\textsuperscript{19} and the European Court of Human Rights in \textit{Findlay v United Kingdom},\textsuperscript{20} \textit{Cooper v United Kingdom}\textsuperscript{21} and \textit{Grieves v United Kingdom}.\textsuperscript{22}

\textsuperscript{19} [1992] 1 SCR 259.
\textsuperscript{20} (1997) 24 E.H.R.R 221. In that case the Strasbourg Court was considering the UK courts martial system contained in the \textit{Army Act 1955} (UK), the \textit{Rules of Procedure (Army) 1972} (UK) and the \textit{Queen's Regulations 1975} (UK) which then closely resembled the ADF 1982 model. The court was critical of the "control role played by the convening officer" in the organisation of the courts martial (at paragraph 80). Additionally, it noted the role of the JAG as advisor on matters of military law (although that was in the context of advice to the executive) but more importantly he "... was also responsible for advising the confirming and reviewing authorities following a court martial" (at paragraph 42). The court noted that the process would not be regarded as independent and impartial simply because of the involvement of an independent judge advocate. It also noted that because of its ad hoc nature the convening authority had the power to dissolve it either before or during the trial (at paragraphs 72 and 78). Finally it noted that whether a tribunal can be considered as "... "independent," regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence ..." (at paragraph 73). [From the Australian perspective many of those matters were addressed by DLAA 2003 and DLAA 2005. In the UK all these matters were progressively reformed before the final reform undertaken with the \textit{Armed Forces Act 2006} (UK).] The Strasbourg court was particularly troubled that the judge advocate was not a member of the court martial and further that the judge advocate did not take part in deliberations on the charges and advise on sentencing. That took place in private by the tribunal members (at paragraph 103). [A system of permanent members was introduced but subsequently abandoned with the 2006 reforms.]

\textsuperscript{21} (2004) 39 E.H.R.R 2. In \textit{Cooper v United Kingdom} the Strasbourg Court was considering and refused an application to set aside proceedings conducted before a RAF court martial –proceedings which were contended to offend the fundamental human rights of trial by an independent and impartial tribunal. The court martial in question was conducted consistent with the requirements of the \textit{Armed Forces Act 1996} (UK). In all but one respect (which is not material for present purposes) the process reflected the 1982 DFDA model as modified by DLAA 2003 and DLAA 2005. At paragraph 117 the court held:

"... a judge advocate has a central role in the court-martial proceedings which, like Lord Rodger in \textit{R v Boyd and Others}, the Grand Chamber would compare to that of a Crown Court trial judge. The judge advocate is responsible for the fair and lawful conduct of the court-martial and his rulings on the course of the evidence and on all questions of law are binding and must be given in open court. The judge advocate has no vote on verdict and does not therefore retire with the other court-martial members to deliberate on verdict. However, he sums up the evidence and delivers further directions to the other members of the court-martial beforehand, and he can refuse to accept a verdict if he considers it "contrary to the law," in which case he gives the president and ordinary members further directions in open court, following which those members retire again to consider verdict. The judge advocate retires with the other members in order to provide advice, deliberate and vote on sentence ... there is no evidence to suggest that members (the permanent president and ordinary members) of a court-martial would be less diligent than civilian jurors in complying with binding rulings and directions on points of law given to them.

\textit{In such circumstances, the Court finds that the presence in a court-martial of a civilian with such qualifications and with such a pivotal role in the proceedings constitutes not only an important safeguard but one of the most significant guarantees of the independence of the court-martial proceedings.}"

\textsuperscript{22} (57067/00) [2003] ECHR 683. In \textit{Grieves} the Strasbourg court found that the courts martial contravened the Constitution. The head note summarised the principal finding concerning the judge advocate. It noted:
The human rights concerns that were raised initially related to the lack of structural independence of the principal pillars of the courts martial system, that is, the independence of the convening authority; the prosecutor and person who prefers the charges; the judge advocate; the courts martial panel; and the reviewing authority. This system as employed in the UK, Canada, Australia and other allied nations had its origins in the English system of military justice that evolved from the 1650s with the creation of Cromwell’s ‘New Model Army.’ Most significantly, command had input into each of these matters. That fact lent support to concern that the system lacked internal structural independence and thus possibly contravened Australia’s commitment to the fundamental right of a fair and impartial trial in respect a service offence by any of its service personnel.

The 2005 Senate Report noted with caution the developments in this area and expressed concern that the then extant military discipline system did not adequately address these human rights principles.

“... the naval Judge Advocate fulfils a pivotal role in the court-martial but ... he is a serving naval officer in a post which may or may not be a legal one and who, although “ticketed” indefinitely, sits in courts-martial only from time to time. As to the Government’s reliance on the involvement of a civilian Judge Advocate of the Fleet (“JAF”), the JAF has not input into naval court-martial proceedings. Furthermore, it is not the JAF but the Chief Naval Judge Advocate (“CNJA”) (a naval officer) who is responsible for the initial “ticketing” of a Judge Advocate …

The Court also notes with some concern certain reporting practices as regards Judge Advocates which applied at the relevant time. The JAF could pass comments about a Judge Advocate’s court-martial performance to the CNJA, a senior service officer whose main functions included the appointment of legally trained service officers to legal posts in the service and who was answerable to the senior Admiral responsible for personnel policy. In addition, the JAF’s report on a Judge Advocate could be forwarded to the latter’s service reporting officer. Accordingly, the Judge Advocate took up his duties in the applicant’s court-martial at a time when his performance could have been the subject of a report to his evaluating service officer …

For these reasons, even if the naval Judge Advocate appointed to the applicant’s court-martial could be considered to have been independent despite the reporting matters highlighted, the position of naval Judge Advocates does not constitute a strong guarantee of the independence of a naval court-martial.”
Earlier internal review within the ADF had identified the potential difficulty occasioned by developments in the law following the Canadian and European decisions. Then CDF, GEN Baker, appointed BRIG the Honourable Justice Abadee to report on those issues. His report, entitled ‘A Study into the Judicial System under the Defence Force Discipline Act’ (*Abadee Report*), considered, *inter alia*, these issues and made recommendations.

The immediate response to the Abadee Report was to put in place administrative arrangements to separate the appointment of trial judge advocates and prosecutorial functions from the convening authorities, this being the most obvious source for any perception of conflict. These measures were then formally secured with the enactment of the *Defence Legislation Amendment Act 2003* (*DLAA 2003*). That Act created the position of CJA, an appointment made upon nomination of the JAG, and provided that the JAG nominate to convening authorities JA/DFMs for courts martial and DFM proceedings.

Further reforms were legislated for by the *Defence Legislative Amendment Act 2005* (*DLAA 2005*) which provided for the effective abolition of the role of Convening Authorities; the creation of the independent office of the DMP and its responsibility for processing charges; the creation of the independent office of the RMJ for the administration and provision of management services in connection with charges and trials under the DFDA; and the creation of a Superior Authority for the provision of representation for persons charged with offences under the DFDA.

One of the recommendations arising out of the 2005 Senate Report was the creation of a Chapter III military court. That recommendation was rejected and instead it was determined to proceed with the establishment of the AMC. The plain intention was to
address the evident structural deficiencies in the system but otherwise leave the administration of serious military offences in the hands of a service tribunal, to be called the AMC. This final step in separating the pillars of the courts martial system, being the creation of an independent service tribunal, was provided for by the Defence Legislative Amendment Act 2006 (DLAA 2006) which included the creation of the AMC.

The AMC was struck down by the High Court as unconstitutional principally because its structure sought to extract it from the chain of command. That characteristic was essential to its characterisation as a service tribunal and not a court. As the AMC had been removed from the chain of command but otherwise purported to exercise judicial power it did not do so under the accepted exception provided for in respect of military tribunals.

Importantly, no other part of the overall reform package effected by DLAA 2003 and DLAA 2005 has been challenged. Accordingly, it can be inferred from the lack of challenge that, despite the opportunity provided for criticism by the High Court in White v Director of Military Prosecutions, Lane v Morrison and Haskins v Commonwealth, there is nothing about those other reforms open to challenge.

It follows that the focus of any prospective reform now must be on the form of service tribunal to be adopted to hear cases concerning services offences. No other part of the current discipline regime requires attention.
Possible solutions

Chapter III model

A Chapter III model military court was provided for in both the Military Court of Australia Bill 2010 (Cth) and the Military Court of Australia Bill 2012 (Cth).

The model was not radical. However, difficulties are foreshadowed in three respects, namely:

a. The absence of defence personnel as judicial officers;

b. The absence of a military panel to assist in the trial process; and

c. Capacity to deploy

The first difficulty was addressed in the bills, although questions surround the effectiveness of the proposed measure. The second and third matters remain problematic.

The Military Court Judge

The bills commonly provided that a person would not be eligible for appointment as a Judge of the MCA if he/she is a member of the ADF. This measure follows advice to government regarding difficulties associated with the judicial officers of the MCA being members of the ADF. A principal consideration is that judicial officers not appear to be connected with command. For instance, it is reasoned that the absence of uniformed MCA judges would reinforce the impression that serious matters of defence discipline are no longer necessarily subject to command influence.
However, in order to ensure that any potential appointee to the MCA has some appreciation of the ADF, the Military Court of Australia Bill 2012 (Cth) also provided that a person must not be appointed as a Judge of the MCA unless that person, “by reason of experience or training,” understands “the nature of service in the ADF.”

The measure provides significant latitude for appointment. For instance it does not prescribe how a person might gain such “experience or training” giving rise to an understanding of “the nature of service in the ADF.”

Although the measure is not unsound it must be considered in the light of the fact that appointment will be to the age of 70, which is well beyond the usual retirement age provided for senior officers of the ADF and significantly beyond the mean age of the ADF population, they being the ones who will most often be subject to this discipline regime.

An inappropriate or unsatisfactory appointment could significantly damage the MCA’s credibility in the eyes of ADF personnel and also adversely impact service discipline, particularly remembering that the purpose of the MCA is to hear the most serious service discipline offences.

The fact remains that the military art, like any other, is a matter of practice. To maintain currency in the art it must be practised. It is unlikely that even the most militarily proficient appointee at the time of appointment will be able to maintain currency in the military arts once that appointee separates from the system.

The matter of appointment of military personnel with a legal background to judicial roles in the military discipline system has been the subject of observation by the Canadian Supreme Court in *R v Généreux.*
In that decision, Lamer CJ made observations addressing the necessary military characteristics of judges in military tribunals. They were immediately followed by his endorsement of a conclusion reached by James B. Fay in Part IV of his considered study of the Canadian Military Law, Canadian Military Criminal Law: An Examination of Military Justice (1975) 23 Chitty’s L.J. 228, where the author stated:

“In a military organisation, such as the Canadian Forces, there cannot ever be a truly independent military judiciary; the reason is that the military officer must be involved in the administration of discipline at all levels. A major strength of the present military judicial system rests in the use of the trained military officers, who are also legal officers, to sit on courts martial in judicial roles. If this connection were to be severed, (and true independence could only be achieved by such severance), the advantage of independence of the judge that might thereby be achieved would be more than offset by the disadvantage of the eventual loss by the judge of the military knowledge and experience which today helps him to meet his responsibilities effectively. Neither the Forces nor the accused would benefit from such a separation.”24

The MCA model necessarily will deny the court this benefit.

**Military Judges sitting without juries**

The second difficulty concerns the absence of any military personnel sitting with the judge on the MCA.

---

24 At 248.
Although a courts martial panel is not a jury, it exercises a similar role and also determines punishment. In a courts martial, a panel of officers, assisted by the JA who issues binding directions on law, examines the evidence and makes findings of guilt or otherwise. For lesser offences a JA sits alone, styled as a DFM. The process largely reflects the modern criminal trial.

The measure proposed in the MCA Bill is for the judge to sit alone. As the judge will not be an ADF member, he/she will have the status and appearance of a civilian judge unaided by anybody, military or otherwise. All of the matters to be heard before the judge will be styled “service offences” by operation of the measures provided in the Bill. However, many of those offences in their civilian equivalent would be indictable offences.

There are concerns that the mere legislative styling of an indictable offence as a “service offence” may not be sufficient to exclude their true characterisation and, in turn, an entitlement to a service member of the s 80 constitutional right to trial by a jury in respect of such offences.

Although these matters were the subject of observation in Re Tracey; Ex parte Ryan, there remains doubt about this matter. For instance, the then JAG, MAJGEN Roberts-Smith, made a submission to the 2005 Senate Report inquiry expressing concerns on this issue. More recently, those concerns were amplified in a submission made by Alexander Street SC to the Senate Standing Committee on Legal and Constitutional Affairs regarding the Military Court of Australia Bill 2012

---

Additionally, it should not be overlooked that the comments in *Re Tracey; Ex parte Ryan* were made in the context of offences being considered by a service tribunal and not a Chapter III court. This is an important distinction.

If the worst fears were to be realised the ADF would not only have its discipline matters subject to trial by civilian judge but also by civilian jury. That is not to criticise such an outcome, as it would unquestionably provide the fairest possible process for ADF members. However, that may not produce the best outcome from a discipline perspective. Indeed, if what is intended is a civilianised system then it is open to ask why bother establishing a military court?

The reality is that service discipline requires something more than the application of civilian processes to offences committed in a service environment. The existence of service tribunals simply recognises the peculiar needs of the defence environment that pertain to the maintenance of service discipline. In his report, BRIG the Honourable Justice Abadee stated:

“... the integrity of the chain of command can only be preserved if discipline is inculcated at each level of the military hierarchy and there exists a system of justice which is specifically designed to respond to the unique needs of the military. Discipline is at the heart of efficient and effective military forces. This

---

27 Submission Part B – paragraphs 7 to 32.
28 *Re Tracey; Ex parte Ryan* per Brennan and Toohey JJ at 578 and Gaudron J at 596.
29 A case study on point concerns the current proceedings against PTE Alexander Gail. He has been charged before a state court with offences of dangerous driving causing death and six counts of dangerous driving following an incident which occurred on service land, killing one and injuring other service members and which was conducted in the course of a training exercise as he manoeuvred a troop carrier which subsequently crashed into a tree. It is clear since *McWaters v Day* (1989) 168 CLR 289 that discipline offences do not exclude ordinary criminal liability. To address jurisdictional difficulties a prosecutorial memorandum of understanding has been agreed between DMP and state and Commonwealth prosecution authorities to address these issues. Although the offence charged in Gail’s case is one for which DMP would have been required to obtain the consent of CDPP the fact remains the offences by their nature and circumstances were quintessentially service offences.
reality explains and justifies the existence of a separate justice system, with a unique Code of Service Discipline so important it should be embodied in a separate statute."30

Deployability

Concerns about the substitution of the courts martial system by the MCA are further amplified by the measure providing for the retention of the courts martial system for use in operational circumstances.

The Chapter III model requires the retention of the courts martial model because of the difficulties associated with the ability of a court to deploy to the field. The judicial officers of a Chapter III court cannot be directed or required to deploy with the ADF as might be required. There may also be diplomatic issues related to the deployment of a sovereign court of the Commonwealth to the locality of another sovereign nation to deal with offences committed within that sovereign jurisdiction.

As discussed below, the extant 1982 courts martial model has been tested and is constitutionally sound. The fact that the MCA Bill does not propose its complete abandonment provides tacit acknowledgment of its constitutional integrity. That being so, a question arises as to the necessity and utility of standing up a parallel system.

Summary

Short of constitutional reform, no Chapter III solution appears capable of delivering on all desirable measures.

30 Bills Digest – Defence Legislation Amendment Bill (No. 2) 2005 at page 3 quoting the Abadee Report and footnoted at footnote 6.
Ultimately, this is a question for government. The ADF will adopt and work with whatever regime is provided. However, it is noteworthy that both the Australian Defence Association and the RSL have made strong, plain and fulsome submissions opposing the measures contained in the MCA Bill.\textsuperscript{31} Although those bodies do not speak for the ADF, they do reflect a view of persons who have a close, continuing and informed relationship with ADF members and former members at all levels.

Following the demise of the AMC, the immediate response of the then Minister, supported by the then CDF, was to commit government to establishing a Chapter III court. Respectfully, that commitment was made in the absence of an informed consideration of the proposal and without recognition of the limitations of the proposal as is now evident. I hazard to suggest that if they were each now invited to express a view, informed by all that has since transpired, they would be less sanguine at the prospect of a Chapter III court as a suitable service tribunal.

\textbf{The pre-Lane v Morrison Courts Martial Model}

With the demise of the AMC the courts martial model (then extant immediately prior to its repeal in 2007) was again stood up by the \textit{Military Justice (Interim Measures) Act (No. 1) 2009} (Cth). That Act largely re-enacted the provisions of the DFDA which had previously been repealed upon the enactment of the DLAA 2006 creating the AMC.\textsuperscript{32}

The pre-\textit{Lane v Morrison} courts martial model was introduced with the enactment of the DFDA. The original iteration of the courts martial model was comprised of five

\textsuperscript{31} Submissions to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the \textit{Military Court of Australia Bill 2012} (Cth) and \textit{Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012} (Cth), October 2012.

\textsuperscript{32} \textit{Military Justice (Interim Measures) Act (No. 1) 2009} (Cth).
principal pillars, being the convening authority; the prosecutor and/or person who prefers the charges; the judge advocate; the courts martial panel; and the reviewing authority. In the original courts martial model the convening authority was responsible for preferring the charges, appointing a prosecutor, the judge advocate, the courts martial panel and the reviewing authority.

The constitutionality of the original model has been directly challenged on three occasions, as earlier noted. In each instance the point of challenge principally concerned whether it exercised the judicial power of the Commonwealth. The other components of the 1982 model remain unchallenged.

In each instance the High Court has upheld the validity of the original iteration of the courts martial model, essentially determining that:

“… history and necessity combine to compel the conclusion, as a matter construction of the Constitution, that the defence power authorises Parliament to grant disciplinary powers to be exercised judicially by officers of the armed forces and, when that jurisdiction is exercised, “the power which is exercised is not the judicial power of the Commonwealth; it is a power sui generis which is supported solely by s 51(vi) for the purpose of maintaining or enforcing service discipline.””

33

The majority in White v Director of Military Prosecutions reached a similar conclusion to that of the Chief Justice noted in the quotation above. In doing so, they acknowledged the historical foundations of defence discipline, particularly explained

33 White v Director of Military Prosecutions at [14] per Gleeson CJ.
in *Re Tracey; Ex parte Ryan* by Brennan and Toohey JJ, views which are founded in its earlier decisions in *R v Bevan; Ex parte Elias* and *R v Cox; Ex parte Smith*. The original model was amended in 2003 and 2005 by reforms designed to address human rights concerns identified in the Canadian and European decisions referred to earlier. These amendments altered the structural features of the original courts martial model to strengthen the independence of the individual components of the model. Subject to discussion below, there is nothing to suggest that those amendments would impact the underlying constitutional validity of the courts martial model earlier considered by the High Court. It was this amended iteration which was before the court when it considered the application in *White v Director of Military Prosecutions*. On that occasion no adverse comment was made about the reformed components of the courts martial model.

The courts martial model having been reinstated in its entirety, it is now arguably free of any realistic risk of successful constitutional challenge concerning its legal foundation as a defence tribunal. However, it is acknowledged that the courts martial model may be subject to challenge in respect of the human rights issues identified by the 2005 Senate Report which were not addressed in the 2003 and 2005 reforms. It is noteworthy that in *Lane v Morrison* the Chief Justice observed that the AMC’s creation was designed, in part, to address those matters. Remembering that the DLAA 2005 provided for the creation of the DMP, the RMJ, Superior Authorities and the Inspector General ADF and that those processes too were intended to address concerns identified in the European and Canadian authorities, it would appear that those deficiencies have now been adequately addressed.

---

34 (1942) 66 CLR 452.
35 (1945 – 46) 71 CLR 1.
However, an outstanding issue may arise concerning the independence of JAs. It was thought the creation of the AMC as a tribunal independent of command would have resolved that difficulty. It is noteworthy that in striking down the AMC the High Court was not troubled by questions of the independence of the judges of the AMC. The focus of the High Court’s attention was directed to the AMC itself which was found to be unconstitutional as a tribunal purporting to exercise the judicial power of the Commonwealth not having been created under Chapter III.

This was principally because the DLAA 2006 scheme removed the command oversight of disciplinary processes by discarding the review process. The rationale for reviews was expressed by Clode\textsuperscript{36} at page 361, where he stated:

“There could not be a more dangerous rule to lay down than that the Crown, or indeed the General in Chief Command, is inflexibly bound by the findings of Courts-martial, so as to be obliged to act in accordance with their sentence of acquittal or punishment. The Officers have partialities and antipathies in favour of or against the accused, beside which their rule of professional duty or morality may be of a lower standard than the General deems it safe or expedient to recognise in his Command.”

Clode continued at page 364:

“The proceedings of all General Courts-martial, of which the Sovereign is the Confirming officer, are sent direct to the Judge-Advocate-General for his examination and approval. If they are confirmed, it is upon his responsibility as a Minister of the Crown, for which he would be accountable in Parliament.

In these cases the persons under sentence lose their legal remedy against the Sovereign as confirming Officer, but hold one against the Minister in Parliament.

The duty of Judge-Advocate-General is confined to an examination into the legality of the proceedings: – the validity of the charges, the evidence of guilt, and the sentence with reference to the Statute Law. The expediency of carrying out the sentence or of extending mercy, does not come within his province.”

Until the introduction of the Army Act 1881 (Imp), the office of Judge Advocate General was an executive office. Although that office was subsequently absorbed into the Adjutant-General’s department, the function largely remains the same as that now performed by the JAG.

Accordingly, an efficacious review process through the chain of command must be maintained to preserve the status of any courts martial tribunal as a disciplinary system and to ensure that the exercise of judicial powers by judge advocates will not be seen to constitute an exercise of the judicial power of the Commonwealth. This matter was recently restated by the High Court in Haskins v Commonwealth.

The JAG is the office ultimately responsible for the provision of advice to command via the reviewing authority on service proceedings. The JAG is also responsible for the appointment to office of JAs and for the nomination of JAs to hear individual proceedings.

The High Court has never formally addressed the structure providing for JAs in the former courts martial model except in a general manner by determining the system
to be constitutional. It appears, by implication, that the High Court accepted that JAs were engaged in the exercise of power under s 51(vi) and were not exercising the judicial power of the Commonwealth. The structure that was extant at the time the High Court considered the application in *White v Director of Military Prosecutions* had been modified to introduce some measures to support its independence from command. No adverse comment was made in that decision about the then extant structure and, in particular, the independence of the role of JA.

Accordingly, it is fair to conclude that the courts martial model remains constitutionally sound although possibly remains at risk of challenge in respect of the independence of JAs. However, a risk appears to exist in the relationship between the role of the JAG as the principal adviser to reviewing authorities and as appointer and nominator of JAs to hearings.

**A Reformed Courts Martial Model**

**Qualifications for Judge Advocates**

Accepting that the courts martial model provides an established legal foundation, the question arises as to whether the current system can be further modified to enhance the one remaining concern identified in the Canadian and European cases, namely the independence of the presiding JA. Plainly, the standing up of a Chapter III court would address this matter.

To date, recommendations have only addressed the prospect of the Chapter III solution. Following the striking down of the AMC and the re-establishment of the courts martial regime, Defence Legal established a team to research and report on prospective models. Their instructions were to report only on a Chapter III model as
this was the only solution demanded by the Minister. That model has now been put before two Parliaments and lapsed in each instance.

Significantly, Defence Legal did not investigate and report on enhancements to the courts martial model. The courts martial model has survived judicial consideration as noted earlier. However, the more recent concern expressed about the independence of the judge advocates has not been the subject of express consideration, although the human rights concerns have been remarked upon.37

While retention of the courts martial model may concede the shortfall complained of by the Senate Committee concerning the perception of a lack of independence of military JAs, the question remains as to whether this matter can be addressed outside Chapter III.

Currently, the courts martial model provides for the CJA. The office of CJA is a statutory office with tenure38 and remuneration39 fixed by the DFDA. He/she is appointed by instrument issued by the JAG. The DFDA provides that the JAG appoints all JAs to courts martial upon their being convened by the RMJ: DFDA ss 129B and 129C. The CJA, by delegation, can exercise all powers of the JAG except the power to appoint JAs and DFMs to office and provide s 154 opinions. The CJA is

37 *Lane v Morrison* at 251, [62] per French CJ and Gummow J.

38 *Military Justice (Interim Measures) Act (No. 1) 2009* (Cth) provides at s 188A for a term of 5 years with one extension giving a maximum term of 10 years. In *Re Tyler; Ex parte Foley*, Brennan and Toohey JJ at 33 critically alluded to the tenure of the JAG, noting that he only had security within his period of tenure. Arguably to address these concerns JAs should be appointed on the same basis as the CJA. That is, the term of their appointments should be for the balance of their service life with no right to return to other duties. Otherwise the measures provided for in respect of the AMC would provide an appropriate model.

39 If the CJA and JAs are judicial officers and not remunerated in respect of duties they perform in the capacity of JAs, this will not be in issue. As a judicial officer their remuneration will directly be subject to protection. In the case of reservists undertaking duty, they would enjoy the protection of the *Defence Reserve Service (Protection) Act 2001* (Cth) in respect of the performance of duty. Additionally, the rendering of judicial service in the performance of duty could be subject to cooperation between the state and federal Attorneys-General (as well as the MINDEF) via COAG, as is presently contemplated in respect of service for the JAG by s 182(1) DFDA.
required to provide administrative assistance to the JAG. The CJA must hold at least a one star rank and be a member of the judge advocates’ panel. To be eligible for appointment to the judge advocates’ panel, the appointee must be an “officer” who “is enrolled as a legal practitioner and has been so enrolled for not less than 5 years”: DFDA s 196(3). The close connection between the JAG and appointment of JAs to conduct trials was very adversely remarked upon by the court in Grieves v United Kingdom.

To safeguard the independence of the office of CJA the appointment could be made by the Governor-General, as occurs with the JAG. Furthermore, the appearance of judicial independence could be enhanced by providing the qualifying requirements for the CJA be identical to those of the JAG. Otherwise tenure, rank and remuneration could be addressed in a manner similar to that which was provided by the AMC scheme.

Likewise, the apparent independence of JAs and DFMs could be enhanced by requiring that their appointment be by the Governor-General and by a qualifying requirement that appointees hold judicial office in either a Federal or State court.

Likewise, questions of tenure, rank and remuneration could also be addressed in a manner similar to that which was provided for by the AMC scheme. Additionally, the

---

40 Upon reaching retirement age or medical incapacity for service, the CJA or JA would automatically cease to be an officer and thus be ineligible to hold appointment.
41 Appointment by the Attorney-General would ensure appropriate consultation between both the Attorney-General and MINDEF on both appointments of the CJA and JAs.
42 If the CJA were to be a federal judge, consideration could be given to also commissioning that judge as a judge of a territory court to enable him/her to undertake jury trials in order to maintain currency and proficiency as state judges otherwise do.
43 According to the Reserve Legal Officers’ contact directory, the following ADF legal officers (excluding the JAG) currently hold Commonwealth or state judicial commissions – CMDR D. Cowdroy, LEUT A. Eckhold, CDRE M. Slattery, CDRE T. Woods, LEUT C. Strofield, LCDR P. Barr, LCDR S. Emmett, MAJ J. Leyland, MAJ M. Antrum, MAJ L. Verra, LTCOL P. Smith, LTCOL S. Durward, SQNLDR C. Hoy, GPCAPT D. McLeod, AIRCDRE M. Burnett, WGCDR G. Lerve, SQNLDR M. Perry.
CJA could assume the sole responsibility for the appointment of JAs and DFMs upon reference from the RMJ.

The effect of this arrangement would be to render the JAG solely responsible for the system of summary justice, and reviews and petitions from both summary and courts martial proceedings. The CJA would be solely responsible for the administration of the JAs for the courts martial system.

Accordingly, the central issue is whether a requirement that courts martials be conducted by judicial office holders (being either Chapter III and/or state judicial office holders) appointed to the task of presiding as JAs in court martial proceedings could do so without offending the constitution. There appears to be no constitutional impediment to that proposal.  

Arguably there is no incompatibility between the holding of a Chapter III commission and a military commission. So much is to be inferred from s 180(1) DFDA, which deals with qualifications for the office of JAG.

A related question which remains is whether an issue of incompatibility of commission may arise between the holding of judicial commission judge and a military commission with appointment as a JA.

44 In fact it was a scheme that involved the use of appropriately qualified reservists that was originally proposed by the Abadee Report. In the Bills Digest for the Defence Legislation Amendment Bill (No. 2) 2005 at page 4 it was observed:

“Justice Abadee maintained that the legal process needed to be one that would not compromise the integrity of the senior military chain of command and, as such, needed to function within a military environment and be run by military officers.

However, the Joint Standing Committee Report reported that Justice Abadee specifically recommended greater autonomy be granted to defence legal personnel from the normal military chain of command. In addition, Justice Abadee was of the view that many of the senior legal personnel should be Reservists who could bring civilian experience to military courts martial in particular. His report strongly advocated the continued employment of Reserve legal officers in the permanent military justice system because ‘the civilian influence is extremely strong in the Australian military context.’”
Given the nature of the appointment, arguably, no issue of incompatible commissions should arise. In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* at [15], the majority (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ) observed when considering the question of Chapter III judges undertaking inquiries:

“The constitutional condition on the vesting of non-judicial power in (or the conferring of a non-judicial function on) a Ch III judge is that the exercise of the power (or the performance of the function) be compatible with performance of judicial functions as stated in [Grollo v Palmer (1995) 184 CLR 348]. When that condition is satisfied, judges not only are, but are seen to be, independent of the other branches of government. The appearance of independence preserves public confidence in the judicial branch.”

Both the functions of and style of ‘judge advocate’ are compatible with the performance of judicial function. The office of judge advocate shares judicial characteristics which, the majority in *Wilson*, stated at [23] support that characterisation. That is, the function of judge advocate is not an integral part of or closely connected with the function of the legislative or the executive arm of government. Although the function is plainly part of the executive arm, it is well down the chain and in that sense well removed from direct proximity of the Minister. Next is the issue of whether the function is regarded to be performed independently of any institutional advice or wish of the legislature or the executive government. In *Wilson* these matters where discussed and illustrated at [24] in the context of the Chapter III

---

judicial officers sitting as presidential members of the AAT. Plainly that analysis is applicable here.

State judicial officers do not have the Chapter III issue to contend with. Each state judicial officer however would have to examine the terms of their individual commissions to ascertain whether issues of incompatibility could arise. The probability that a conflict would arise is low, but history suggests that if such issues arise they may be addressed. For instance, when MAJGEN the Honourable Justice Jack Kelly was appointed JAG in 1976, The Honourable Jack Lawrence Kelly Enabling Act 1976 (Qld) was enacted. Its enactment was not to deal with any incompatibility of commission, but rather his entitlement to claim for the expenses and allowances of office. In stating that, it should be noted that the preamble to that Act observed that the taking of office and performance of duties of the JAG “… would be deemed in law an avoidance of his office of Judge of the Supreme Court of Queensland.” Avoidance was associated with acceptance of another office of profit without the consent of the Crown. The Act expressly prohibited his taking remuneration for performance of his duties in the office of JAG but otherwise permitted him payment of expenses associated with that office.

Our constitutional framework already permits to appointments of Chapter III judges to membership of tribunals. Usually judges are appointed as presidential members of tribunals to distinguish them from ordinary members. See, for instance, the Administrative Appeals Tribunal, the Copyright Tribunal, the Australian Competition Tribunal, the National Native Title Tribunal and the Defence Force Discipline Appeal Tribunal.
They sit as members of tribunals exercising the powers of the tribunal but not the judicial power of the Commonwealth. However they bring to that task the prestige and semblance of independence associated with their judicial office. 46 Whilst sitting in the capacity of tribunal member they may not be exercising judicial power or enjoying all the same protections that judicial office affords, but their presence assumes the qualities of judicial office.

In addition, it is well settled that judges may hold commissions to conduct commissions of inquiry issued pursuant to the Royal Commissions Act 1902 (Cth) without risk of offending principles of incompatibility.47 Were such an issue to arise it could reasonably be expected that there would be a degree of inter-governmental cooperation.48 If the risk of incompatible commissions was considered real, the problem could be addressed by both state and Commonwealth governments enacting enabling legislation.

Generally, the use of commissioned judicial officers also holding military commissions would ‘borrow’ for the courts martial tribunal the reputation of the judicial branch of government for impartiality and non-partisanship and apply to the courts martial tribunal “the neutral colors of judicial action” to its work: see Lane v Morrison [11] at 237.

The use of commissioned judicial officers also holding military commissions would serve to enhance both the appearance and reputation of courts martial proceedings.

46 The observation should be considered in the context of the remarks of McHugh J (at 377) and Gummow J (at 392) in Grollo v Palmer (1995) 184 CLR 348 adopting a passage in the opinion of the Supreme Court of the United States in Mistretta v United States (1989) 488 US 361 at 407 that “The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and non-partisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.”
47 Wilson v Minister for Aboriginal and Torres Strait Islander Affairs at 32-33.
This matter was commented upon by the 2005 Senate Report committee in its Issues Paper, where it noted:

“In his 1997 report Justice Abadee (a NSW Supreme Court judge and Reserve Brigadier) wrote “… that JAs like DFMs must be independent in the exercise of their powers. They must be independent to serve the Defence Force (and indeed the public). Confidence (indeed public confidence) in the system of military justice also requires an appearance of manifest impartiality on their part. The present system of appointment to the judge advocates’ panel, as DFMs and as s 154(1)(a) reporting officers (all of which have an involvement of the JAG in the process of appointment), ensures that only those who have achieved sufficient experience and professional standing are so appointed. The requirement that only military officers may be so appointed, satisfies the need that trained military officers with military knowledge and experience are appointed to these roles. In practice, those appointed … have had considerable experience as civil practitioners in the ordinary trial courts. The present system furnishes men and women who have the qualifications and experience, both civilian and military for appointment to these positions.”

It is apparent that Justice Abadee, like the European Court, placed considerable importance on civilian trial experience and civilian practice for military judges. Indeed, he went on to state “I make these observations at this stage because there are those who argue that a greater degree of independence and impartiality might also be achieved by appointing full time judges, in effect, to a military division of the Federal Court of Australia under Ch III of the Constitution with corresponding reduction in the role of the
military in its military justice system. There is no compelling or persuasive view in support of such suggestion. Another alternative advanced is the establishment of what might be professional military judges selected from the military to become, in effect, a full time military judiciary. As to this latter view, I do not consider that, as the present situation stands, there are those in the regular services who would be qualified or trained for such position.”

In the current system, permanent military legal officers of the rank of senior Major and above are unlikely to have appeared as counsel in a civilian court for at least ten years and more likely fifteen years. Consequently, the civilian trial experience so highly valued by Justice Abadee and the European Court, is not and will not be present for some time, in the pool of permanent military legal officers available for judicial appointments.

On the other hand, there remains a large pool of Reserve officers with the necessary experience of the civilian courts to fill these positions. It is noteworthy that prior to the introduction of the DFDA in the mid-eighties, there were no DFM, only courts martial with Reserve JAs. The JA then, as now, made rulings and advised on the law, the court martial President and the members of the court were the arbiters of fact and also decided on sentence. One of the principal arguments for retaining criminal offences in the military system is that all behaviour of the members of a disciplined force is germane to the control and effectiveness of that force. The argument asserts the need for trained military officers to assess such offences through the prism of their professional understanding of the military and its ethos and cultural needs.
That is the classical British common law model which still operates in the UK.49

I have earlier noted Lamer CJ’s endorsement of comments that outside [Chapter III] there can be no perfect structure of judicial independence. The question is whether such a structure, including the use of judicial office bearers who also hold military commissions, would afford actual independence and not simply apparent independence?

In R v Généreux the Canadian Appeal Court was considering the constitutionality of a general court martial in the context of the Canadian Charter of Rights and Freedoms, which provided that an accused had the right to be tried by an independent and impartial tribunal. The Court noted that the question was to be interpreted in the context of both the Charter and the existence of a system of military tribunals with jurisdiction over cases governed by military law. At its heart the question was whether a reasonable person, familiar with the constitution and structure of general courts martial, would perceive the tribunal as independent (at 261). Critically, the Chief Justice noted that the good faith or otherwise of the adjudicator was not the issue. The Court considered what the structure and constitution of the general courts martial required as essential conditions of judicial independence. In discussing that matter, Lamer CJ noted at 263,

“To meet the requirement of “institutional independence” … an ad hoc military tribunal, composed of military personnel, operating within a military hierarchy, must be free to make its decisions on the merits … There must be found some point within the military hierarchy where an officer or official has no real

or apparent concern about the outcome of a case. There is, at that point, sufficient independence in the setting of military tribunals.”

The matter of impartiality was not in issue. As his Honour noted at 283, “the circumstances of an individual case must be examined to determine whether there is a reasonable apprehension that the decision-maker, perhaps by having a personal interest in the case, will be subjectively biased in the particular situation.” His Honour however continued to distinguish the question of impartiality to that of independence. He continued:

“The question of independence, in contrast, extends beyond the subjective attitude of the decision-maker. The independence of a tribunal is a matter of its status. The status of a tribunal must guarantee not only its freedom from interference by the executive and legislative branches of government but also by any other external force, such as business or corporate interests or other pressure groups.”

His Honour considered the essential conditions of independence to include institutional independence with respect to the matters of administration that relate directly to the exercise of the tribunal’s function.50

In this regard he noted, “It is unacceptable that an external force be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the courts and court lists.”51

50His Honour noted the other two essential characteristics as security of tenure, that is, that the decision maker be removable only for cause, and a basic degree of financial security. However, these characteristics are not in issue in any model under consideration for the ADF.
51 At 286.
The test for the purpose of assessing this matter is “whether an informed and reasonable person would perceive the tribunal as independent.”52

At the outset, the Chief Justice observed that the existence of a parallel system of military tribunals staffed by members of the military who are aware of and sensitive to military concerns was not by its nature inconsistent with an independent tribunal. Indeed, the matter was not challenged. Nor did he have any difficulty concluding that the Canadian Charter of Rights and Freedoms permitted a parallel system of justice to exist alongside the ordinary criminal courts.

His Honour considered that the president and members of a courts martial tribunal appropriately appointed could afford sufficient independence.53 His Honour then immediately proceeded to make a similar observation concerning judge advocates of courts martial, noting the observation of James B. Fay referred to earlier.

Those remarks were the starting point for his Honour’s analysis of the Canadian system.54 The other matters relevant to his Honour’s consideration, including tenure and remuneration, are not relevant in the ADF context as they are addressed by any model under consideration although not as well as the measures provided for by the AMC. Those matters were not an issue in Lane v Morrison and, by inference, it can be concluded that the High Court was content that the measures put in place to fix tenure and remuneration of military judges provided for by the DLAA 2006 adequately addressed those considerations. For completeness those measures could be adopted into the courts martial model.

52 At 286.
53 At 291.
54 The Canadian Supreme Court struck down the then extant system because in part it accepted that the appointment of JAs structurally lacked sufficient institutional independence. However, the court noted that since the appeal the system had been subject to legislative reform providing for the independent appointment of JAs which addressed that issue – at 309.
Significantly, the Abadee Report endorsed the views of Lamer CJ and recommended a similar courts martial model for the ADF as noted earlier in this paper.

Likewise, the other institutional measures relevant to the independence of the service tribunal, namely the independence of the prosecutor and the convening authority for courts martial, have now been satisfactorily addressed within the extant courts martial model.

In *Lane v Morrison*, the High Court had identified the requirement of an “*independent and impartial tribunal established by law*” as essential to a discipline tribunal. Unfortunately, the AMC sought to address this question outside Chapter III.

Except for the constitutional problem underlying the AMC, there was no suggestion in the judgment of the High Court that the other measures provided to establish an independent military judiciary failed to do so. That is to say that the measures introduced, such as fixed term appointments; fixed promotion and independent remuneration provided in terms similar to the remuneration of judges, were all regarded as acceptable. The AMC failed principally because it sought to stand outside the command structure, with its decisions not being subject to internal review.\(^{55}\)

Accordingly, it appears that the matter of structural independence of JAs remains the only matter outstanding. The issue of structural independence between the JAG, CJA and JAs could be resolved by each office enjoying a common form of appointment. The terms of appointment of the JAG and CJA could be identical. The CJA could be granted the powers to administer and nominate JAs to trials. The

\(^{55}\) *Lane v Morrison* at 248.
JAG’s involvement in the trial processes would be limited to oversight of the reviews required by command.

Additionally, the holding of a judicial commission could be a prerequisite for appointment as a JA. Such office holders also being JAs would enhance the perception of independence of the office of JA if accompanied by the measures provided for by the AMC for the then military judges.

**A Standing Courts Martial Tribunal**

A criticism of the courts martial system is that it is ad hoc, being stood up as occasion requires. Of particular concern are restraints upon the abuse of powers under Parts V and VI of the DFDA, the powers related to summons’, arrest, custody, suspension from duty and investigation of service offences. Further, the absence of a standing tribunal can cause difficulties with procedural issues. Given the ad hoc nature of a court martial, it does not come into being until it sits and its members are sworn in.

A standing tribunal could dispose of interlocutory matters before a courts martial proceeding commences. Consideration could also be given to the provision of power to the CJA to make any orders relevant to matters arising under the DFDA. Review of such decisions could be by the reviewing authority, which would be bound by a determination of the DFDAT on such points.

In respect of any proceeding before a service tribunal, the CJA could be empowered to issue any directions or make orders as might be necessary up until the commencement of trial with such powers being delegable. Again, the AMC measures would provide a suitable model for this proposal.
The quorum for the standing courts martial could be reduced to one for limited procedural purposes. An officer or a number of officers of LTCOL or equivalent rank on final posting could be designated as a permanent presidential members of the standing courts martial tribunal. Other members could be appointed as required in the manner presently provided for. This model would broadly follow the form of RAF standing courts martial tribunals that existed before the 2006 UK reforms.

Finally, it is important that the standing courts martial tribunal be styled as a ‘tribunal’ and not a ‘court’ in order to emphasize its status.

**Conclusion**

Reform of the military justice system has proven to be problematic because of constitutional limitations. A Chapter III solution may be the simplest, but risks an adverse outcome for defence discipline because of its civilianized character.

The courts martial model has successfully withstood constitutional challenge and is accepted as fundamentally sound from a constitutional perspective. Unquestionably, it would deliver the best discipline outcome for the ADF.

However, recent decisions in allied jurisdictions, particularly in Canada and the UK, have highlighted human rights limitations on the courts martial model owing to a lack of institutional independence of the major pillars of that model, namely: the role of the commanding authority; the prosecutor; the courts martial panel; the judge advocate; and the reviewing authority. In Australia, each of these matters has been addressed by the legislation in 2004, 2005 and 2006. However, the 2006 measures standing up the AMC were struck down. The range of measures introduced in 2003 and 2005 to address structural independence of the courts martial system, and
which now prevail in their current form, do not ensure the same degree of institutional separation for its military judges as the AMC provided.

It appears the only characteristic of the extant system requiring reform to strengthen the overall institutional independence and the integrity of the court martial system is the independence of the JAs. Arguably, once this characteristic is addressed the extant court martial system should satisfy all reasonable concerns relating to both actual and perceived independence.

The matters to which consideration ought be given are,

1) Establishment of a standing courts martial tribunal;

2) Appointment of the CJA by the Governor-General;

3) Qualifications for appointment of the CJA to be identical to those of the JAG;

4) Appointment of JAs by the Governor-General; and

5) Qualifications for appointment of JAs to include that the appointee hold a judicial commission in a state or federal court.