The Australian Defence Force within the Executive

If the legislative power enacts, not from year to year, but forever, on the raising of public funds, it runs the risk of losing its liberty … The same is true if the legislative power enacts, not from year to year, but forever, about the land and sea forces, which it should entrust to the executive power.1

I Introduction

Right at the beginning of the constitutional and legal tradition which Australia has inherited, William I gained and maintained the Crown of England through force of arms; and military power remains at the heart of executive power.2 In the Westminster system, despite nearly 1,000

years of constitutional development in limiting executive power, there is still a uniquely direct relationship between government and militaries. Military power underlies the integrity of the state and the existence of government.\(^3\) Dicey recognised

the common law right of the Crown and its servants to repel force by force in the case of an invasion, riot, or generally of any violent resistance to the law. This right, or power, is essential to the very existence of orderly government, and is most assuredly recognised in the most ample manner by the law of England.\(^4\)

The constitutional challenge has been to harness military power to underwrite governmental power whilst ensuring that such military power remains under the control of government.

This chapter considers the relationship between the ADF and executive power. It seeks to establish how executive power is transmitted to the ADF and how the ADF is then made subordinate to the civilian government. It draws a distinction between the ADF as a part of the executive branch of the Commonwealth Government, and the exercise of executive power inside the ADF. It will consider the historical factors which have shaped the current constitutional relationship between the executive government and the ADF. This chapter will then address the consequences of this prerogative authority for the relationship between the ADF and the Parliament, as well as the executive government and the judiciary. It will also consider the awkward interaction between the ADF and the power of the States, being a result of a federal system which historical English principles do not address. This chapter will also address the constitutional relationship between the Crown and members of the ADF.

It is important to see the ADF as a central but distinct part of the executive. It attracts the limits that apply to Commonwealth executive power generally but it also has limits of its own because it is a potential danger to the civilian government which it serves. There is a careful balancing between granting the ADF enough power to perform its function without usurping executive power altogether. The tension within this balancing informs every aspect of the exercise of executive power by the ADF. This discussion, therefore, underpins the remaining chapters.

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\(^3\) See W F Finlason, *Commentaries upon Martial Law, with Special Reference to its Regulation and Restraint* (Stevens, 1867) 74.

The chapter will conclude that, whilst there is considerable history behind these constitutional relationships, they are still uncertain and not well understood in some respects. This is perhaps because of their centuries-old character and the relatively recent development of Australia as an independent actor in defence matters. Australia’s defining legend is that of ANZAC.\(^5\) The Gallipoli campaign from which it grew and campaigns before the East Timor intervention in 1999 mostly involved citizens in uniform, that is to say, personnel who served for a particular war or intervention as volunteers or conscripts but, mostly, not for a career.\(^6\)

Until 1999, Australia also always participated in these campaigns as a junior participant in a bigger force. East Timor was the first major campaign with Australia as the lead nation and with an all-professional contingent of personnel.\(^7\) Arguably then, Australia has not really had to address issues around the constitutional relationship between the military and the executive very often at all. The primary focus on providing citizen forces to fight overseas as part of larger United Kingdom or United States forces has had the result that, when the courts have occasionally addressed these issues, they have tended to apply the inherited English principles without much adaptation.

II The Underlying Danger

The warning of Dixon J, repeated by French CJ and quoted in Chapter 1 is worth repeating here because it points to the underlying danger of executive power to a constitutional democracy, as well as the fact that this danger has been of enduring concern in the High Court. Dixon J stated in *Australian Communist Party v Commonwealth* (‘Communist Party Case’) in 1951:

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\(^7\) Ibid 191–3.
History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.\(^8\)

French CJ quoted this statement in *Pape v Commissioner of Taxation* after stating that:

Future questions about the application of the executive power to the control or regulation of conduct or activities under coercive laws, absent authority supplied by a statute made under some head of power other than s 51(39) alone, are likely to be answered conservatively. They are likely to be answered bearing in mind the cautionary words of Dixon J.\(^9\)

Cases in recent years in the courts of Australia’s near neighbours amply illustrate the issue. The Fijian military has staged four coups d’état against democratically elected civilian governments since 1987, two in 1987, one in 2000 and another in 2006.\(^10\) In 2009, the President of Fiji abrogated the constitution altogether and installed a military government under an extraconstitutional legal order.\(^11\) The 2001 case of *Republic of Fiji Islands v Prasad* (‘*Prasad*’)\(^12\) considered the question of when the military could stand lawfully in the place of the elected government, and also when it had acted unconstitutionally. The ‘Sandline’ affair in Papua New Guinea in 1997 saw the civilian government contract with a mercenary company, Sandline International, to quell the separatist uprising in Bougainville Province. The then Papua New Guinea Defence Force commander, Brigadier Singirok, made an address to the nation calling on the civilian government to resign and ordered Operation Rausim Kwik, which

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\(^8\) *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187 (‘*Communist Party Case*’).

\(^9\) *Pape*.


\(^11\) *Decree No 1 Fiji Constitution Amendment Act 1997 Revocation Decree 2009* (10 April 2007); *Decree No 2 Executive Authority of Fiji Decree 2009* (10 April 2009).

apprehended the mercenaries.\textsuperscript{13} This had a destabilising effect, soldiers rioted outside Parliament and the Defence Force faced mutiny within its ranks. These events were, inter alia, the subject of proceedings in 1997 in \textit{State v Enuma}\textsuperscript{14} and in 2002 in \textit{State v Dege}.\textsuperscript{15} Papua New Guinea came very close to losing a constitutional relationship between the civilian government and the military. As Sevua J said of the Sandline affair in the Court Martial matter of \textit{State v Enuma},\textsuperscript{16} ‘Operation Rausim Kwik … almost brought constitutional and parliamentary democracy to their knees’. Remarkably Papua New Guinea addressed these issues through the courts. These events were near to Australia and relatively recent in time. They amply illustrate Dixon J’s point.

Militaries can be the ultimate guarantee of the rule of law and also pose its greatest threat. The extended use of executive power through the military, with its potential arbitrariness, is contrary to the idea of the rule of law. Conversely, in some cases only the extended use of executive power through the military can preserve the rule of law. The relationship, then, between civilian governments and their militaries has to be a careful balance between effective military power and subjection to lawful authority.

A The 17\textsuperscript{th} Century and the English Constitution

The events of the 17\textsuperscript{th} century and their effect on the English Constitution are central to understanding the place of the ADF within the executive government today. Seventeenth-century England saw the reign of Charles I, the English Civil War of 1642 to 1651, the following period of rule by the Cromwells and the brief and troubled reign of James II. The Glorious Revolution in which Parliament gave the crown to William and Mary on terms finally quieted much of this upheaval.\textsuperscript{17} The spectre of that bloody period in English history hides behind much of the current constitutional relationship between executive, Parliament and judiciary in Britain and Australia, and it has a particular presence in the relationship of each of those

\begin{footnotesize}
\begin{enumerate}
\item State v Enuma [1997] PGNC 171.
\item State v Dege [2002] PGMCJ 1.
\item State v Enuma [1997] PGNC 171, 173.
\end{enumerate}
\end{footnotesize}
branches of government to the ADF. The 1989 High Court of Australia case of *Re Tracey; Ex parte Ryan* (‘*Re Tracey*’)\(^{18}\) places much emphasis on the discipline legislation applying to the ADF having its provenance in the *Bill of Rights 1688* (Imp)\(^{19}\) and the *Mutiny Act 1689* (Imp).\(^{20}\) Importantly, military discipline law could not displace the application of civilian law because the *Petition of Right 1628* (Eng),\(^{21}\) established that civilian law applies to military personnel as much as it applies to civilians. As Brennan and Toohey JJ put it in *Re Tracey*:

> True it is that, by the time of federation, the scope of naval and military law and of the special jurisdictions to enforce that law were governed by statute but the provisions of those Acts, especially the *Army Act* [the successor to the *Mutiny Act*] reflected the resolution of major constitutional controversies.\(^{22}\)

### 1 The *Petition of Right 1628*

The *Petition of Right 1628* (Eng) was the first significant enduring constitutional development of the 17th century. Charles I in 1625, the first year of his reign, had issued a Commission to the Lord Marshal and Sergeant-Major of the Army, along with 23 other ‘Commissioners’, to punish ‘soldiers and other dissolute persons … for robberies, felonies, mutinies, or other outrages or misdemeanours which, by Martial Law, ought to be punished by death’. The Commission authorised ‘by summary course, as used in Armies in time of War’ to put them to death ‘for an example of terror to others, and to keep the rest in due awe and obedience’.\(^{23}\) It also required the erection of gallows or gibbets for the execution of offenders in open view. It excluded most of the jurisdiction of the common-law courts.\(^{24}\)

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\(^{19}\) 1 Wm & M, sess 2 c 2 s6.

\(^{20}\) Ibid c 5.

\(^{21}\) 3 Car 1 cl I.

\(^{22}\) *Re Tracey* (1989) 166 CLR 518, 562.


\(^{24}\) Ibid. Brennan and Toohey JJ placed great weight upon Clode as an authority in this area in *Re Tracey* (1989) 166 CLR 518, 555.
The *Petition of Right* was a parliamentary attempt to reassert the jurisdiction of the common law and provided that

the aforesaid commissions for proceeding by Martial Law may be revoked and annulled; and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid.  

Any trials and executions had to be by ‘the laws and statutes of the land’, and without exemption for those subject to martial law by virtue of being soldiers. From that time on, martial law under the authority of royal prerogative has been considered illegal in England, apart from when James II authorised the extension of the *Articles of War* to the civilian population for a brief period during the Duke of Monmouth’s rebellion in 1685. Given the constitutional consequences of James II’s reign discussed below, this should be taken as an exceptional instance. William III gave a commission for martial law in Ireland and martial law has existed at various times in other parts of the empire. The *Petition of Right* nonetheless established the constitutional principle that martial law was not part of the law of England as applicable to the civilian population, and that it was not a basis for exemption of military personnel from the jurisdiction of the civilian courts.

2 The Glorious Revolution—the *Bill of Rights 1688* and the *Mutiny Act 1689*

There was further bloodshed and constitutional turmoil in England between the enactment of the *Petition of Right* and the next significant legislative development in the control of military forces. This included the civil war between parliamentary and royal forces, the execution of Charles

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26 For the parliamentary proceedings on the petition see Henry I, *Coronation Charter*, (1100) in Carl Stephenson and Frederick George Marcham (eds and trans), *Sources of English Constitutional History: A Selection of Documents from AD 600 to the Present* (Harper and Brothers, 1937) 453–4.
27 Clode, above n 17, 6–8, 53.
28 Ibid.
29 Ibid 8.
I on 30 January 1649, the Cromwellian interregnum, the restoration of Charles II on 29 May 1660, and the brief reign of James II from 1685. James II’s conflict with Parliament led eventually to his forceful overthrow and the invitation by Parliament to William and Mary to take the throne in 1688. Against this background, Parliament enacted the *Bill of Rights 1688* primarily to grant the throne to William and Mary upon terms, but also to prohibit the existence of a standing army without parliamentary authority. It made a clear link between abuses of power by the Crown and the maintenance of a standing army, reciting:

Whereas the late King James the Second, by the assistance of divers evil counsellors, judges, and Ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of the kingdom. [among other things]

5. By raising and keeping a standing army within this kingdom in time of peace without the consent of parliament and quartering soldiers contrary to the law.

6. By causing several good subjects, being Protestants, to be disarmed at the same time when papists were both armed and employed contrary to the law.

The following year Parliament passed the *Mutiny Act 1689* to authorise the existence of a standing army whilst requiring and enabling the Crown to keep its forces in good discipline, providing:

whereas it is judged necessary by their majesties and this present parliament that during this time of danger several of the forces which are now on foot should be continued and others raised for the safety of the kingdom … and whereas no man may be forejudged of life or limb, or subjected to any kind of punishment by martial law, or in any other manner than by the judgment of his peers and according to the known and established laws of this realm … it being requisite for retaining such forces as are or shall be raised during this exigence of affairs in their duty [that] an exact discipline be observed, and that soldiers who shall mutiny or stir up sedition or shall desert their majesties’ service be brought to a more exemplary and speedy punishment than the usual forms of law will allow.

32 Clode, above n 17.
33 *Bill of Rights 1688* (Imp).
34 Recital. The Crown could still issue Articles of War, which were disciplinary orders based upon prerogative power, in addition to, but not contrary to, the *Mutiny Act*, see Holdsworth, 'Martial Law Historically Considered', above n 31, 122.
Initially this was for six-month periods at a time but eventually became an annual authorisation.\(^{35}\) (The *Army Act 1881* (Imp) eventually replaced the *Mutiny Act* but reenacted many of the provisions of the earlier Act, including the requirement for annual authorisation of a standing army.\(^{36}\)) It is important to remember that a standing army was a new development in England in the 17\(^{th}\) century. Previously armies had been raised for particular campaigns, essentially on a feudal basis. Given the willingness of monarchs and others to resort to military force to overcome political opposition within the country, it is not surprising that Parliament was concerned to have some control over this new and potentially threatening institution.\(^{37}\) The Crown still controlled the forces but this was subject to parliamentary approval of their existence in standing form, their funding, and the continued submission of those forces to civilian law and courts, as well as a statutory discipline regime for the army.\(^{38}\) This is not to say that the balance between Crown and parliamentary control over the military forces or the relationship between military and civilian jurisdiction was settled fully at the end of the 17\(^{th}\) century.\(^{39}\) It is perhaps fairer to say that this period established enduring principles which have continued to develop to the present day.

### 3 The Naval Exception

There is an important exception to note here with respect to naval forces. The historical concern with military forces was that they posed a threat to civilian government because of the physical power at the military’s disposal.\(^{40}\) Even though there had to be an annual Act of Parliament to authorise the continuance of a standing army, there was no similar requirement for the Royal Navy. Its discipline system was statutory from at least 1682, although there were earlier parliamentary ordinances on the subject.\(^{41}\) Despite the navy being a powerful standing force that enforced the law against civilians, such as foreign smugglers,\(^{42}\) it apparently did

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35 *Mutiny Act 1689* (Eng) s 8.
37 Holdsworth, above n 31, 121–2.
38 Clode, above n 17, 41–2. See also *Re Tracey* (1989) 166 CLR 518, 556.
41 Clode, above n 17, 41–2.
not pose the same threat to parliamentary government. As Clode put it, ‘[T]he history of the Naval Code is written in a few sentences, because it has never been made the subject of parliamentary conflict.’43

The obvious distinction between the Royal Navy and the British Army is that the Royal Navy has operated primarily offshore with a focus on external security. It was the ‘wooden wall’ that protected Britain.44 This distinction is significant for the ADF, with its joint command of the three services,45 because the historical concerns about the British Army affect the ADF generally in its presence ashore in Australia, while the contrasting lack of historical concern with the Royal Navy influences the ADF generally in its activities outside Australia and at sea.46 Chapter 6 will return to this point.

4 Significance for Prerogative Power

Parliament’s assertion of authority over the Crown’s control of military forces through the Mutiny Act 1689 still left substantial power in the hands of the Crown to employ and regulate military power without resorting to Parliament.47 Parliament did not seek the actual command of the military forces. As Lord Lawrence stated in China Navigation Company, Ltd v Attorney-General (‘China Navigation’):48

When Parliament has given its consent to the raising and keeping of the army for the year, it leaves the Crown to exercise its prerogative powers as to the manner in which the army is to be raised and kept and in respect to the disposition and use of the army and the administration of its affairs. The manner in which these powers are exercised is constitutionally subject, like the exercise of other prerogatives, to the advice of the Ministers of the Crown, of whom the one particularly responsible for the army was, until recently, the Secretary of State for War.49

45 Defence Act 1903 (Cth) s 9.
46 Cf in this book Chapter 3 on martial law with Chapter 6 on operations beyond the realm.
47 Attorney-General v De Keyser’s Royal Hotel Ltd [1920] AC 508 (‘De Keyser’s Royal Hotel’); Burmah Oil Co Ltd v Lord Advocate [1965] AC 75 (‘Burmah Oil’).
48 [1932] 2 KB 197.
49 Ibid 228.
Some of the most significant residual power of the Crown today in Australia is still found in the prerogatives that relate closely to the ADF, concerning the armed forces, martial law, internal security, the defence of the realm (also known as the war prerogative), and external affairs. Subsequent chapters will address each of these prerogatives in more detail. It is necessary to mention them here to provide some context for the following discussion of current formal constitutional arrangements for the ADF as part of the executive branch of government.

B Control and Disposition of the Forces

It is important at this point to address first the prerogative as to the control and disposition of the forces as the source of the power of command. It is the authority to determine the organisation, structure, placement, arming and equipment of the ADF. Quick and Garran referred to it as follows:

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 ... All matters ... relating to the disposition and management of the federal forces will be regulated by the Governor-General with the advice of his ministry.50

There is a reasonable body of cases to support this proposition. In China Navigation51 in 1932 the House of Lords found for the Crown in rejecting a demand from a British shipping company to place troops on its ships to protect against pirates. The Crown would only do so upon payment for their services, stating:

In Chitty’s Prerogatives of the Crown it is said that ‘as the constitution of the country has vested in the King the right to make war or peace, it has necessarily and incidentally assigned to him on the same principles the management of the war; together with various prerogatives which may enable His Majesty to carry it on with effect. Thus the King is at the head of his army and navy, is alone entitled to order their movements, to regulate their internal arrangements, and to diminish, or, during war, increase their numbers, as may seem to His Majesty most consistent with political propriety.’52

51 [1932] 2 KB 197.
52 Ibid 207.
The case went on to refer to the preamble to

The Statute Law Revision Act, 1863 (26 & 27 Vict c 125), [which] left unrepealed that part of the preamble of the Act of 1661, which recited that ‘within all His Majesty’s realms and dominions, the sole supreme government, command, and disposition of the militia and of all forces by sea and land, and of all forts and places of strength, is, and by the laws of England ever was, the undoubted right of His Majesty, and his Royal predecessors, Kings and Queens of England; and that both, or either of the Houses of Parliament cannot, nor ought not to pretend to the same.’

In 1964 in Chandler v Director of Public Prosecutions the House of Lords considered China Navigation on the issue of protestors entering a Royal Air Force base without authorisation to prevent aircraft taking off or landing. Lord Devlin stated:

So long as the Crown maintains armed forces for the defence of the realm, it cannot be in its interest that any part of them should be immobilised … It is by virtue of the Prerogative that the Crown is the head of the armed forces and responsible for their operation.

The House of Lords case of Council of the Civil Service Unions v Minister for the Civil Service (‘CCSU Case’) and the New Zealand Court of Appeal case of Curtis v Minister of Defence, discussed further below, both followed these cases. While there is no Australian case on the point, the reasoning in these cases would seem no less applicable in Australia. The cases reflect the constitutional compromise of the 17th century, in which Parliament asserted control over criminal and disciplinary jurisdiction, as well as the funding of, the armed forces but left their command to the Crown. This is consistent with the view of the theorists that while Parliament should be deliberative, the executive should be able to act with, as Blackstone put it, ‘unanimity, strength, and dispatch.’ Despite the increasing encroachment of statute to regulate the ADF, arguably the need to be able to respond to Fortuna means that it would never be

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54 [1964] AC 763.
55 Ibid 807. See discussion of this case and control and disposition of the forces generally in Peter Rowe, Defence: The Legal Implications: Military Law and the Laws of War (Brassey’s, 1987) 3–4.
56 [1985] AC 374, 405–406. (‘CCSU Case’).
57 [2002] 2 NZLR 744, 752 (‘Curtis’).
58 Blackstone’s Commentaries with Notes, above n 53, 250.
wise, or even possible, to reduce every power required for the effective command of the ADF to statutory provisions. This leads to the question of the constitutional structures for command of the ADF.

III The Relationship of the ADF to the Civilian Government

Formal constitutional arrangements cannot prevent militaries from usurping civilian governments. Militaries usually have the physical power at their disposal to enforce their will against a civilian government, whereas the civilian government can usually only rely on the military for physical power. Formal constitutional arrangements also cannot ensure that a military will do exactly what it is told by a civilian government. They cannot prevent cowardice in the face of an external threat or an excess of force in the face of an internal threat. Formal constitutional arrangements can only ever be part of the way in which civilian governments remain in control of military power and protect themselves against it. Political and military culture, leadership, resources, training and a range of other factors are also relevant to achieving the desired relationship between civilian governments and their militaries. As interesting as these other factors might be, it is not for this chapter to consider them. Its aim now is to examine the formal arrangements to see what they reveal about the structure of that relationship. In some cases it is not possible to know with certainty why arrangements are the way they are but it is possible to advance arguments on their current value. Quick and Garran saw them as defining the Commonwealth as the national government: ‘The execution and maintenance of the Constitution, the execution and maintenance of the Federal laws, and the Command-in-Chief of the naval and military forces, are the foremost attributes of a national government’.

More than this, these arrangements also entrench the principle of military subordination to the civilian government. In doing so, they subject the military to the principle of legality by making it subject to the Parliament and the judiciary. This in turn counters the threat of abuse of power

60 Quick and Garran, above n 50, 700.
and despotism, which Montesquieu saw as the principle purpose for the separation of powers.\textsuperscript{61} That these threats have not really materialised in Australia since Federation suggests that the current arrangements serve their purpose and the principle of military subordination to the elected civilian government is of fundamental value to the constitutional order.

A Command and Command-in-Chief of the Australian Defence Force

There is a clear distinction between the command-in-chief held by the Governor-General and the command vested in the Chief of the Defence Force (CDF). This indicates that the ultimate formal source of authority for military power is with the Crown itself, rather than those who exercise military power on its behalf. There is, nonetheless, a close connection between the Governor-General as the commander-in-chief and the CDF, because the Governor-General appoints the military commander. Effectively, the right to exercise military power is granted by the Commonwealth’s highest officer.\textsuperscript{62} The historical basis of the power of the Crown originally resting on military power is clearly evident in this arrangement.

Section 68 of the Australian Constitution provides that: ‘The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen’s representative’.

Under s 12 of the Defence Act 1903 (Cth), the Governor-General may appoint the CDF and the Vice-Chief of the Defence Force, and the provision assumes that this occurs. Section 9 of the Defence Act then grants the power of command to the CDF over the ADF. Section 8 of the Defence Act gives the Defence Minister ‘the general control and administration of the Defence Force’ and goes on to require that, in exercising their powers, the CDF and the Secretary of the Department of Defence ‘must comply with any directions of the Minister’. It is an explicit function of the Chief

\textsuperscript{61} Montesquieu, above n 1, 155, 157.

\textsuperscript{62} See George Winterton, ‘Who is Our Head of State?’ (2004) 48(4) Quadrant September 60; George Winterton, ‘The Evolving Role of the Governor-General’ (2004) 48(3) Quadrant March 42. Cf, for a view with which this author does not entirely agree on the basis that the Governor-General holds the residue of prerogative power exercisable in the case of necessity as discussed in Chapter 3 and as occurred in Fiji in 2000, see Mitchell Jones, ‘The Governor-General as Commander-in-Chief’ (2009) 16(2) Australian Journal of Administrative Law 82.
of the Defence Force to advise the Minister upon matters relating to the command of the ADF.63 The Defence Act clearly stops short of granting the Minister the power of command.

Command-in-chief is also placed above the level of the elected government. Command-in-chief is not a portfolio that comes and goes in accordance with the priorities of the government of the day. It exists regardless of the policies of the elected government. Command-in-chief is so important that it rests with the leader of the state itself rather than with the leader of the party that forms government. The commander-in-chief is still obliged to act on the advice of the elected government64 but, if there is uncertainty as to who the leader of the elected government might be, there is no uncertainty as to who the commander-in-chief is.65

The grant of command to the CDF is also precise and unambiguous. There is one military commander who appears to have decisive legal charge over the military, and that commander is accountable to the government. The connection between the government and the person charged with wielding military power on its behalf is direct. This indicates that, whilst there is a separation between the civilian government and the ADF, military power is readily available to the civilian government.

B The Relationship to the Elected Civilian Executive

While the ADF is clearly within the executive branch of government there are other important aspects which separate it from, as well as subordinate it to, the elected civilian government.

1 Subject to Ministerial Control but not Command

The importance of discipline to command, discussed further below, may go some way to explaining the distinctly different power of control given to the Minister for Defence. There is an obligation on the CDF to accept

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the control or direction of the Minister.\textsuperscript{66} This assists the principle of responsible government as the military is accountable to the Minister, who is in turn accountable as a member of the elected government and Parliament.\textsuperscript{67} Serving members of the ADF cannot be members of Parliament and only members of Parliament can be Ministers.\textsuperscript{68} Civilians, other than the Governor-General, also cannot exercise any power of command over members of the ADF.\textsuperscript{69} It follows then that Ministers cannot have a power of command over the ADF. The sanction for failing to comply with Ministerial direction or control is not disciplinary. The remedy apparently available to a Minister would be to ask the Prime Minister to advise the Governor-General as Commander-in-Chief to dismiss or not reappoint a CDF that did not follow Ministerial control or direction.\textsuperscript{70} A 2015 amendment to the \textit{Defence Act} effectively took this power from the Minister and gave it to the Prime Minister, although it requires that the Prime Minister receive a report from the Minister about the proposed termination.\textsuperscript{71} This would appear to have strengthened the position of the CDF in relation to the Minister but the explanatory memorandum to the Bill introducing the amendment does not explain why this has occurred. Even so, in this way the power of command is linked to executive power, but it is also clear that it is a distinct power.

Why have a military not under the command, but under the control of the responsible civilian Minister? The key effect of this arrangement is to separate the military from the civilian government. A military subject to the command of an elected government Minister could be bound to obey commands which draw the military into internal politics or actions found subsequently to be unlawful.\textsuperscript{72} A CDF concerned to avoid this could only refuse the Minister's command under risk of prosecution for disobedience. Where a Minister does not have a power of command, a military commander may refuse a Ministerial direction and offer his or her resignation without being subject to disciplinary sanction.

\textsuperscript{66} \textit{Defence Act 1903} (Cth) s 8.
\textsuperscript{67} See Clode, above n 17, 57.
\textsuperscript{68} \textit{Constitution} ss 44, 64.
\textsuperscript{69} \textit{Defence Force Discipline Act 1982} (Cth) s 27.
\textsuperscript{70} \textit{Defence Act 1903} (Cth) s 15.
\textsuperscript{71} \textit{Defence Legislation Amendment (First Principles) Act 2015} (Cth).
\textsuperscript{72} On the dangers of this in recent Australian history see Smith, above n 65, 39; Rowe, above n 55, 3–5 for the contrasting position in the United Kingdom, where the Secretary of State for Defence acting through the Defence Council exercises command. On the historical context in the British Army see Robert Blake, ‘Great Britain: The Crimean War to the First World War’ in Michael Howard (ed) \textit{Soldiers and Governments: Nine Studies in Civil–Military Relations} (Eyre & Spottiswoode, 1957) 27–31.
The advantage of a control without command relationship between the Minister and the CDF would appear to be to assert civilian control whilst reducing the potential to draw the military into internal politics or potentially unlawful action.\footnote{73 It is also worth noting the contrast with arrangements for Ministerial control of police. Ministerial control of the police is more removed, with Ministers only able to give general directions. Operational decisions rest with the police commander in order to ensure the prosecutorial independence of the police force, eg, \textit{Australian Federal Police Act 1979} (Cth) s 37.}

There have been reports at various times of tension between the Minister and the CDF and some uncertainty surrounding the proper nature of the relationship.\footnote{74 See Mark Thomson, ‘Serving Australia: Control and Administration of the Department of Defence’ (2011) \textit{Australian Strategic Policy Institute Special Report} June 41, 8–12, 16–18; Deborah Snow and Cynthia Banham, ‘Calling Shots in Defence’, \textit{Sydney Morning Herald} 28 February – 1 March 2009 7.} Interestingly, in the event of a conflict between the Governor-General and the Minister, the CDF’s legal obligation is to the Governor-General. Given that the Governor-General has command-in-chief over the ADF and the CDF’s commission as an officer obliges him or her to obey the commands of his or her superiors,\footnote{75 ‘Charge and Command you faithfully to discharge your duty as an officer and to observe and execute all such orders and instructions as you may receive from your superior officers’, taken from the author’s own commission. \textit{Order-in-Council of the Governor-General} 1 November 1991.} the CDF would be obliged to obey the command of the Governor-General even if it conflicted with the direction of the Minister.\footnote{76 \textit{Defence Force Discipline Act 1982} (Cth) s 27 makes it an offence to disobey a lawful command however a lawful command may only be given by a member of the ADF so it would be unlikely to apply to the situation of a command from a civilian Governor-General to the CDF. See discussion in Michael Head, \textit{Calling out the Troops: The Australian Military and Civil Unrest} (Federation Press, 2009) 130–1, quoting Air Vice Marshal Geoffrey Hartnell, \textit{Canberra Papers on Strategy and Defence No 27} (The Australian National University, Canberra 1983) 88.} This would be, perhaps, even more the case where the Governor-General issued a general order to the ADF, for example under the call-out provisions of Part IIIAAA of the \textit{Defence Act}.\footnote{77 See, eg, \textit{Defence Act 1903} (Cth) s 51A.} The \textit{Defence Force Discipline Act 1982} (Cth) s 29 makes it an offence for the CDF, or any member of the ADF, to fail to comply with such a general order. Disobedience or failure to comply by the CDF could also be grounds for summary removal from the position of the CDF, not that any grounds would be required according to \textit{Coutts v Commonwealth} (discussed below).\footnote{78 \textit{Coutts v Commonwealth} (1985) 157 CLR 91.} Although s 15 of the \textit{Defence Act} now requires that termination be by notice in writing on the recommendation of the Prime Minister, it does not require the provision of reasons and possibly not even the recommendation of the Prime Minister. Even if the convention is that
the Governor-General must act on advice, formally only the Governor-General can appoint or dismiss the CDF. While the CDF would rightly be concerned at any exercise of powers by the Governor-General which were contrary to Ministerial direction, and should then inform the Minister, it would be for the Minister to advise the Governor-General to take a different course. The CDF would still be obliged to follow the Governor-General’s command or order over the Minister’s direction until such time as the Governor-General gave a new command or order or terminated the appointment of the CDF.

2 The Tampa Affair

The Tampa Affair in Australia in 2001 raised questions about the extent of executive power and the ADF’s proper relationship with government. The Border Protection (Validation and Enforcement Powers) Act 2001 (Cth) created a ‘validation period’, defined in s 4, to be the period between 27 August 2001 and the day the Act commenced on 27 September 2001. It applies, according to s 5:

- to any action taken during the validation period by the Commonwealth, or by a Commonwealth officer, or any other person, acting on behalf of the Commonwealth, in relation to:
  - the MV Tampa;
  - the Aceng; or
  - any other vessel carrying persons in respect of whom there were reasonable grounds for believing that their intention was to enter Australia unlawfully; or
  - any person who was on board a vessel mentioned in paragraph (a), (b) or (c) at any time during the validation period (whether or not the action was taken while the person was on board the vessel).

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79 See FAI Insurances v Winneke (1982) 151 CLR 342, 365, which is authority for the proposition that the Governor-General ordinarily should act only upon advice; Constitutional Commission, Advisory Committee on Executive Government: Issues Paper (Constitutional Commission, 1986) 10; Quick and Garran, above n 50, 406, as cited in Renfree, above n 64, 177; Peter Boyce, above n 64, 124–35.

Section 6 of the Act states that all action under s 5 during the validation period ‘is taken for all purposes to have been lawful when it occurred’. It then goes on to state that no proceedings, civil or criminal, may be instituted or continued in any court in relation to such action against the Commonwealth, a Commonwealth officer or any person who acted on behalf of the Commonwealth although it preserves the jurisdiction of the High Court under s 75 of the Constitution.

This legislation was virtually unprecedented in post-Federation Australia and resembled the type of indemnity Act passed after a period of martial law (the subject of Chapter 3). It arose out of the exceptional events of late 2001 involving the ADF’s boarding of the MV *Tampa* and the operations to stop unlawful immigration into North-Western Australia by sea. The *Tampa Case* narrowly determined that the actions in relation to the ADF boarding MV *Tampa* and preventing it landing the hundreds of rescued asylum seekers on board were lawful pursuant to the executive power under s 61 of the Constitution. Despite this decision, there was considerable argument that these actions were unlawful. Perhaps reflecting this, the second reading speech in the House of Representatives for the *Border Protection (Validation and Enforcement Powers) Act 2001* was on 18 September 2001, seven days after the decision of the Full Court of the Federal Court in the *Tampa Case*.

The Act reflects some uncertainty as to the legality of the actions of the ADF during the period in question. The author welcomed the legislation at the time as appropriate to protect the interests of members of the ADF carrying out apparently lawful orders which came through the normal ADF chain of command from the CDF, following the direction of the

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81 *Border Protection (Validation and Enforcement) Act 2001* s 7.
82 Ibid s 9.
83 Such as the *Martial Law Indemnity Act 1854* (Vic). Evans was critical of this legislation as contrary to the values of the rule of law, although conceding that this was not a basis of constitutional invalidity, Evans, ‘The Rule of Law, Constitutionalism and the MV *Tampa*’, above n 80, 99–101. Pringle and Thompson saw it as an attack on the judiciary and a relative strengthening of the executive within the separation of powers, above n 80, 142. Either view would support the point that the ADF may have been in a situation it should not have been; that is, involved in internal politics.
85 *Ruddock v Vadarlis* (2001) 110 FCR 491 (‘Tampa Case’).
86 Ibid 542.
87 See above n 80.
88 *Tampa Case* (2001) 110 FCR 491. To indicate something of the political atmosphere at the time, in Australia, it was also only six days after the terrorist attacks in the United States of 11 September 2001.
Minister for Defence. Still, the existence of the legislation does raise the question of whether the appropriate balance was struck between the ADF acting properly at the direction of the civilian government and acting unlawfully. There was debate at the time as to whether the actions of the ADF gave the government an electoral advantage in the general election of October 2001. This raises the question whether it crossed the line into involvement in internal politics. If the ADF had done so unlawfully, or even with a concern of doing so unlawfully, it also potentially undermined the principle of legality as well as exposing members of the ADF to personal liability. As discussed in Chapter 1, it has been clear since Entick v Carrington that ‘one should naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant’.

If the matter was uncertain enough as to need an indemnity Act after the event, then arguably the law was not clear enough to warrant the action. It is open then, to query whether the ADF should have been so willing to carry out the directions of the Minister in circumstances of possible illegality that there was a need for the Border Protection (Validation and Enforcement Powers) Act 2001.

The Tampa Affair is a modern illustration of the potential for uncertainty in defining limits between political power and military power in the Westminster system generally, and the constitutional relationship between the civilian-elected government in Australia and the ADF in particular. It gave a prominence to the exercise of executive power by the ADF only accentuated by subsequent ADF internal security operations in 2002 and 2003, the subject of Chapter 4, and the ADF’s wars in Afghanistan from 2001 and Iraq from 2003, which are the subject of Chapter 5. Given the very significant case to which it gave rise, the Tampa Affair, more than any other operation, reveals how an ill-defined executive power can challenge the principle of legality.

89 Above n 84. This was a highly publicised political decision of the government, rather than a routine operational decision of the ADF; ibid 523–4.
90 See above n 84.
91 (1765) 19 St Tr 1030.
IV The Relationship of the ADF to the Rest of Government

It is not just the ADF’s relationship to the elected civilian government that has implications for the limits on its use of the executive power. The ADF’s separate relationships with the Parliament, the States and the judiciary are distinct and also impose limits on the use of executive power by the ADF.

A Parliament

1 Exclusion of Serving Military Personnel from Parliament

As 17th-century principles provide a separation between the civilian government and the ADF, equally they govern the relationship between Parliament and the ADF. The tradition of excluding those holding an office of profit under the Crown from the House of Commons dates from the Act of Settlement 1701.\(^{92}\) It developed, presumably, to prevent the Crown influencing the deliberations of Parliament through inducements to individual members. As mentioned above, no full-time member of the ADF can be a member of Parliament as there is a prohibition in s 44 of the Constitution on members of the forces wholly employed by the Commonwealth becoming members of Parliament. Reservists may, therefore, sit but not whilst on full-time military service. This virtually prevents members of the ADF from becoming Ministers as s 64 of the Constitution states that a Minister may not hold office for more than three months without becoming a member or senator in the Commonwealth Parliament. The overall effect reflects the historical concern to keep the military out of internal politics.\(^{93}\) Given the history of the 17th century in England in separating military power from political power, it must be one of the most profound limitations on the use of executive power by the ADF, as it powerfully asserts the supremacy of the legislature over the

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\(^{92}\) Act of Settlement 1701 (Imp) 12 & 13 Will 3 c 2.

\(^{93}\) Quick and Garran have little to say on the point other than that officers or members of the Imperial Navy or Army are qualified to become members of the Federal Parliament because the disability relates to those paid out of revenues of the Commonwealth, above n 50, 494–4. Harrison Moore does not add anything further. See W Harrison Moore, The Constitution of the Commonwealth of Australia (Maxwell, 2nd ed, 1910) 116, 128 and 168. For a contemporary consideration of the issue of military involvement in internal politics in New Zealand see Douglas White QC and Graham Ansell, ‘Review of the Performance of the Defence Force in Relation to Expected Standards of Behaviour, and in Particular the Leaking and Inappropriate Use of Information by Defence Force Personnel’ (Report to the State Services Commissioner, 20 December 2001).
executive. In particular, it prevents the military from assuming the power of the Parliament, which ensures that government remains in civilian hands and the military remains a servant of the Parliament.

2 Declarations of War

Conversely, as the ADF has no role in Parliament, the Commonwealth Parliament has no role in decisions to deploy the ADF into hostilities. The power to use force outside of Australia derives from the war prerogative or the prerogative to conduct foreign relations (for uses of force less than war such as peacekeeping or enforcement operations), which later chapters will discuss. This was a matter of some controversy with the decision to participate in the Iraq War of 2003. Each chamber of the Parliament debated motions on Australia’s involvement. The House of Representatives supported the government’s decision and the Senate, where the government did not command a majority, passed a motion to have Australian troops withdrawn. It would appear to be the first time a deployment of Australian forces has not had majority support in both Houses of the Parliament yet, as a matter of law, this made no difference to whether the ADF could participate in the Iraq War.

The Senate subsequently debated the Defence Amendment (Parliamentary Approval for Australian Involvement in Overseas Conflicts) Bill 2003 but it did not become law. In response to a recommendation from the Prime Ministerial 2020 Summit in 2009 that both Houses of Parliament have the power to approve whether the ADF should deploy to a ‘war or warlike situation’, the then Labor government stated that it did not support such a change. Far from imposing a limit, this illustrates the absence of restraint upon the government in its operational use of the ADF, at least outside of Australia. The only limits, then, being much as they have been since the Glorious Revolution: that the government is responsible to the Parliament for such actions; that it must rely upon the Parliament to approve the funding of such actions; and that it must answer to the electorate at the end of its term. As discussed above, the Parliament should

96 Australian Government, Responding to the 2020 Summit (Commonwealth of Australia, 2009), 236. Chapter 5 will address the question of the internal legal issues arising from failing to declare war when engaged in armed conflict.
be deliberative and the executive should be able to act with ‘unanimity, strength, and dispatch’. This compromise between Parliament and the Crown arguably balances the need to respond to Fortuna while preventing such action becoming an abuse of power or despotic. As with the debate over the Iraq War, there will be differing views on whether this balance has been struck but the government remains accountable to the Parliament and the electorate for its actions.

B The States

An occasionally unsettled question is the relationship between the ADF and the power of the States. It is an area where inherited English principles and a federal constitution do not always sit well together. The traditional position since the Bill of Rights 1688 and the Mutiny Act 1689 is that the armed forces are subject to the law of the land. The additional application of disciplinary laws to regulate the forces in no way alters the application of all other laws. The difficulty is that in the Australian federal system the ADF is an agency of the Commonwealth Government and the general criminal law is a matter for the States. The Defence Act 1903 deals with some issues of the application of State laws directly so that, for example, ADF members do not now require a State licence to carry a weapon or drive a vehicle. These provisions prevail over State laws by virtue of s 109 of the Constitution.

Can the States regulate other activities of the ADF through the general criminal law? This raises the complex question of intergovernmental immunities, which this book will not address other than to argue that a limited immunity in respect of some of the prerogative and nationhood powers under which the ADF may act is appropriate. In Pirrie v McFarlane in 1925, a member of the Royal Australian Air Force was charged under Victorian law with driving a motor vehicle without a licence, although he was acting under the orders of a superior. The High Court applied the traditional English principle, Starke J putting the reason of the majority most succinctly and foreshadowing his judgment in Shaw Savill & Albion Co Ltd v Commonwealth stated:

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97 Blackstone’s Commentaries with Notes, above n 53, 250.
99 Defence Act 1903 (Cth) s 123.
100 (1925) 36 CLR 170.
101 (1940) 66 CLR 344 (‘Shaw Savill & Albion Co Ltd’).
A soldier or a member of the Air Force does not cease to be a citizen: if he commits an offence against the ordinary criminal law, he can be tried and punished as if he were a civilian. The command of an officer cannot justify a breach of the law.\textsuperscript{102}

Isaacs J, in dissent, stated the problem:

It is on this basis that the English doctrine stands. And so it was in Australia before Federation. But under our Constitution an entirely different rule must be observed. Defence is in Commonwealth hands; ordinary citizenship in State hands … \textit{A soldier acting for this purpose is acting not in his capacity of State citizen but as a soldier of the Commonwealth} … In other words, military commands, lawful by Commonwealth law, are not susceptible of denial or abridgment by State law as to citizenship. All the observations of English jurists on this subject have to meet this fundamental distinction \cite{103}.

This case still stands as the law and the case of \textit{Re Residential Tenancies Tribunal of NSW v Henderson; Ex parte Defence Housing Authority},\textsuperscript{104} in which the High Court found the Defence Housing Authority to be subject to the \textit{Residential Tenancy Act 1987 (NSW)}, is consistent with it; although these cases concerned driving a motor vehicle and a residential tenancy, matters within the ordinary field of regulation by the States. The point at which State law applies to a member of the ADF, who is acting in accordance with one of the Commonwealth’s sole prerogatives such as the defence of the realm, a matter not within the ordinary field of regulation by the States, is less clear.

In the \textit{DHA Case}, Dawson, Toohey and Gaudron JJ gave the opaque test of the States not being able to restrict the capacities of the Commonwealth (which includes its prerogative powers) but being able to regulate the exercise of those capacities where they are exercised ‘in the same manner

\textsuperscript{102} Ibid 228.
\textsuperscript{103} Ibid 205. \textit{Defence Act 1903} s 123 now states that a member of the ADF ‘is not bound by any law of a State or Territory … that would require the member to have permission (whether in the form of a licence or otherwise) to do anything in the course of his or her duties as a member of the Defence Force’.
\textsuperscript{104} (1997) 190 CLR 410 (‘DHA Case’).
as its [the Crown’s] subjects’.

This would appear to mean that the States cannot legislate to restrict the Commonwealth’s prerogative powers with respect to such things as war and defence of the realm, but it can regulate situations where the Commonwealth, through the ADF, is acting like any other citizen, such as driving a car. This will depend heavily upon the factual scenario.

Penhallurick criticises the court’s decision in the *DHA Case* as based upon an implication, arguing that constitutional implications can only arise where necessary. A Commonwealth immunity from State law is unnecessary due to the existence of s 109 regarding inconsistency between Commonwealth and State laws. Whilst providing a much clearer rule to apply, this view could require the Commonwealth Parliament to legislate in respect of the prerogative and nationhood powers relevant to the ADF, beyond the extent to which it has already in s 123 of the *Defence Act*.

As this book argues, as much as statutory power can provide clarity and, therefore, support the principle of legality, the character of Fortuna is such that it is not possible to legislate in advance for every possibility. An uncertain executive power might be a better authority upon which to rely in an unexpected situation than no authority at all. Legislating to immunise all ADF action from the application of State or Territory law risks unintentionally displacing this possibility. On the other hand, legislating to provide more immunity than s 123 already does risks undermining the principle of legality as put by Starke J in *Pirrie v Macfarlane* and *Shaw Savill & Albion Co Ltd.* As opaque as the current test might be in

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107 (1925) 36 CLR 170, 228.

108 (1940) 66 CLR 344, 355.
the *DHA Case*,\(^{109}\) it may be the best balance that can be struck between the principle of legality, as effected through State and Territory law, and Commonwealth executive power as a means to respond to *Fortuna*.

Further, Gladman suggests that foreign affairs and national defence should be exclusive powers of the Commonwealth, and therefore immune from State law, by virtue of it being the national government.\(^{110}\) Taking Blackstone’s view of such matters requiring ‘unanimity, strength, and dispatch’\(^{111}\) it would make sense for them to be regulated exclusively by the level of government with responsibility for them, the Commonwealth. It would be consistent with the former colonies in Australia having given over effectively complete control of defence to the Commonwealth through the combined effect of sections 51 (vi),\(^{112}\) 68,\(^{113}\) 69,\(^{114}\) 84,\(^{115}\) 85,\(^{116}\) 114\(^{117}\) and 119\(^{118}\) of the *Constitution*.\(^{119}\) It would also be consistent with the States never having had external affairs powers as such. As Barwick CJ put it in the *Seas and Submerged Lands Case*:

> Whilst the power with respect to external affairs is not expressed to be a power exclusively vested in the Commonwealth, it must necessarily of its nature be so as to international relations and affairs. Only the Commonwealth has international status. The colonies never were and the States are not international persons.\(^{120}\)

This does not resolve the practical question of when an action by the ADF is a matter of foreign affairs or national defence but it does lend weight to the *DHA Case*\(^ {121}\) test being appropriate despite its opacity.

Therefore, with respect to State law as a limitation upon the exercise of executive power by the ADF, the federal character of the *Constitution* provides some limits, although they are not precise. They would appear

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110 Gladman, above n 105, 162.
111 Blackstone’s *Commentaries with Notes*, above n 53, 250.
112 Power to legislate for defence.
113 Command-in-Chief.
114 Relating to transfer of colonial defence departments to the Commonwealth.
115 Relating to transfer of officers from colonial defence departments to the Commonwealth.
116 Relating to transfer of property from colonial defence departments to the Commonwealth.
117 States not to raise forces without Commonwealth consent.
118 Commonwealth to protect States from invasion and domestic violence.
120 (1975) 135 CLR 337, 373.
121 (1997) 190 CLR 410.
to depend upon whether the exercise is of an executive power shared in common with any other citizen, or whether it is an exercise of prerogative power which only the Commonwealth could exercise. Even though much of the general law regulating the conduct of any person in Australia is State law, members of the ADF should only be exempt from its application where they are exercising an executive power of the Commonwealth which only the Commonwealth, and not just any person, could exercise. Even then, as Shaw Savill & Albion Co Ltd makes clear and as discussed in Chapter 1, outside of combat with the enemy the armed forces are as much subject to the general law as anyone else. Where the war prerogative is not in issue, the question would have to be, then, whether an ADF action contrary to State law could find authority in the prerogatives with respect to martial law, internal security or external affairs, or the nationhood power with respect to internal security. This is on the view that these powers are capacities of the Commonwealth rather than only the exercise of capacities ‘in the same manner as its [the Crown’s] subjects’. This helps to limit the exercise of executive power to those situations where necessity justifies it, or the action is external and not subject to State law. This is an expression of the principle of legality which preserves the capacity to respond to Fortuna. Subsequent chapters will address this.

C The Judiciary

It turns, then, to consider the relationship of the ADF to the judiciary. There is provision for the courts to exercise judicial review over decisions relating to the ADF made under executive power. There are mechanisms for both the Federal Court and High Court to perform this function. The Judiciary Act 1903 s 39B provides that:

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122 If it was a prerogative which a State could share in common with the Commonwealth, such as internal security, then it is probably susceptible to State regulation, in the absence of any prevailing Commonwealth legislation. Lee discusses criteria for the application of State laws in Ricky Lee, ‘Applicability of State Laws to Commonwealth Land and Activities’ (2002) 6 University of Western Sydney Law Review 39, 47.
123 (1940) 66 CLR 344.
124 Ibid 355 (Starke J).
125 DHA Case (1997) 190 CLR 410, 442.
The original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.

The Constitution's 75(v) also provides that the High Court shall have original jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.\textsuperscript{126} Ordinarily, judicial review of decisions by Commonwealth officials may occur under the \textit{Administrative Decisions (Judicial Review) Act 1977} (Cth) but, by virtue of s 3, it only applies to decisions made under an enactment rather than nonstatutory power such as prerogative power.\textsuperscript{127} Notwithstanding these provisions for judicial review, the courts have traditionally been unwilling to review the exercise of the prerogatives relevant to this book: control and disposition of the forces,\textsuperscript{128} martial law,\textsuperscript{129} internal emergencies,\textsuperscript{130} war\textsuperscript{131} and external affairs.\textsuperscript{132} The courts have recognised the existence of these prerogatives but have not attempted to define fully the limits of such powers. As will be discussed below, the courts have granted a degree of deference to the Crown in such matters.\textsuperscript{133}

Traditionally, decisions made under prerogative power were immune from judicial review, notwithstanding that the existence of a claimed prerogative power was always reviewable.\textsuperscript{134} The zenith of this approach is arguably the statement of Lord Parker in the 1916 Privy Council prize law case of \textit{The Zamora} that:

\begin{flushright}
\begin{enumerate}
\item \textsuperscript{126}Whilst not deriving from the common law, this jurisdiction is essentially common law as it is mainly (though not exclusively) defined in both provisions by the common-law writs of mandamus or prohibition, or the equitable remedy of injunction, Robin Creyke and John McMillan, \textit{Control of Government Action: Text, Cases & Commentary} (Lexis Nexis Butterworths, 3\textsuperscript{rd} ed, 2012) 41–2, 51–2; Chief Justice Robert French, ‘Constitutional Review of Executive Decisions – Australia’s US Legacy’ Speech to the Chicago Bar Association and the John Marshall Law School (25 and 28 January 2010) published in (2010) 35(1) \textit{University of Western Australia Law Review} 35.
\item \textsuperscript{127}Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd (1987) 15 FCR 274, 275.
\item \textsuperscript{128}Council of the Civil Service Unions v Minister for the Civil Service [1985] AC 374, 396, citing with approval Chandler v Director of Public Prosecutions [1964] AC 763.
\item \textsuperscript{129}Marais v General Officer Commanding the Lines of Communication [1902] AC 109 (‘Marais’).
\item \textsuperscript{130}R v Sharkey (1949) 79 CLR 121.
\item \textsuperscript{131}Shaw Saville & Albion Co Ltd (1940) 66 CLR 344.
\item \textsuperscript{132}Thorpe v Commonwealth (No 3) (1997) 144 ALR 677.
\item \textsuperscript{134}Council of the Civil Service Unions v Minister for the Civil Service [1985] AC 374, 398 (Lord Fraser).
\end{enumerate}
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Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.\footnote{1916}{2 AC 77, 107.}

This position is arguably no longer likely to be the law. Al-Jedda \textit{v Secretary of State for Defence} (‘Al-Jedda’\footnote{2011}{2 WLR 225, 272.}) went before the Court of Appeal in England in 2010. Chapter 6 will discuss this case in more detail, but the court looked very closely at the detention of a British citizen in Iraq by the British Army. Elias J noted that, ‘For centuries the conventional jurisprudence was that the courts could determine the scope of prerogative powers but not the manner of their exercise’.\footnote{Ibid 272.}

However, his Honour in that case asserted a greater role for the courts to exercise control over prerogative powers in some cases.\footnote{Ibid.} This chapter argues that it is becoming less likely that a court will find a matter to be nonjusticiable, preferring instead to hear evidence and argument before either deciding to defer to the executive or granting a remedy against it.\footnote{See generally Campbell McLachlan, \textit{Foreign Relations Law} (Cambridge University Press, 2014). Chapter 6 will consider this work in more detail.} This is an argument which this chapter will introduce and which subsequent chapters will address.

\section*{1 What is Justiciability?}

with standing and ‘polycentricity’ (that is, a multifaceted rather than adversarial problem). Put simply, it concerns the suitability of a court to adjudicate on a particular matter.

A good recent example is that of *Curtis v Minister of Defence* (‘Curtis’) concerning judicial review of the decision to disband the Royal New Zealand Air Force Air Combat Force, which involved removing all fighter aircraft from New Zealand service. The New Zealand Court of Appeal held that it was a matter of the control and disposition of the forces and therefore nonjusticiable. Tipping J for the Court struck out the application for judicial review stating that the matter was ‘par excellence a non-justiciable question. It is a question which is not susceptible of determination by any legal yardstick’.

His Honour also noted with apparent approval the view of Wilson J in the Supreme Court of Canada in *Operation Dismantle v R*, a case in which judicial review of United States’ cruise missile testing in Canada was struck out. Tipping J stated, ‘that matters such as those with which the present case is concerned are not justiciable because they involve moral and political considerations which it is not within the province of the Courts to assess.’

Tipping J applied *Chandler v Director of Public Prosecutions*. In that case, Lord Devlin perhaps states the traditional position most clearly as follows:

> A number of matters relating to the safety of the realm and the command of the Royal Forces are now regulated by statute. So far however as this is not the case the powers in that regard are at common law in the prerogative of the Crown acting on the advice of its servants. The powers so left to

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143 *Habib v Commonwealth* (2010) 183 FCR 62, 79 (Perram J citing Gummow J in *Re Ditfort; Ex parte DCT* (1988) 19 FCR 347, 370–1) 82, 98 (Jagot J cited the same authority to make essentially the same point) (‘*Habib*’).
144 Finn, above n 140, 242–7.
145 Justice Alan Robertson, ‘Commentary on the Boundaries of Judicial Review and Justiciability: Comparing Perspectives from Australian and Canada’ (Paper presented at the Australian Institute of Administrative Law (NSW Chapter) Seminar, Sydney, 22 July 2013), 1, and also for a review of recent Australian cases on justiciability.
146 [2002] 2 NZLR 744.
147 Ibid.
148 Ibid 752.
150 *Curtis* [2002] 2 NZLR 744, 752.
151 [1964] AC 763.
the unfettered control of the Crown include both in time of peace and war all matters related to the disposition and armament of the military, naval and air forces … In our opinion the manner of the exercise of such prerogative powers cannot be inquired into by the Courts, whether in a civil or a criminal case … A similar principle underlies the powers of the executive, though pursuant to statute and not the prerogative, to requisition or to do other acts where in its discretion that is considered necessary to the national interest.\textsuperscript{152}

These cases reflect two distinct reasons for nonjusticiability in defence matters. The first is the lack of a cause of action and the second is that courts are not well placed to review high-level policy or political decisions in matters of national security. For either reason, this may be because the issues involve questions of allocation of national resources, which are fundamentally political rather than legal in nature. High-level political, or even low-level operational, decisions may also depend upon secret information which cannot be disclosed in court. They may also involve moral or political judgements on the part of a decision-maker, which are entirely matters of discretion. As Dixon J stated in \textit{Shaw Savill \& Albion Co Ltd}:

\begin{quote}
The Court is not in a position to know or to inquire what measures are necessary for the proper conduct of a warlike operation and must depend upon those upon whom finally rests the responsibility of action.\textsuperscript{153}
\end{quote}

This is consistent with a theory of executive power requiring ‘unanimity, strength, and dispatch’\textsuperscript{154} rather than, as French CJ and Gummow J put it in the 2009 High Court of Australia military discipline case of \textit{Lane v Morrison}, the qualities ‘of the judicial branch of government for impartiality and nonpartisanship.’\textsuperscript{155} For these reasons it is quite appropriate that in such cases the judiciary should defer to the decision of the executive, but, as will be discussed below, it may also be appropriate for a court to hear evidence and argument first rather than just striking out a claim as nonjusticiable. As Hayne and Kiefel JJ stated in \textit{Pape}:

\begin{quote}
Reference to notions as protean and imprecise as ‘crisis’ and ‘emergency’ (or ‘adverse effects of circumstances affecting the national economy’) to indicate the boundary of an aspect of executive power carries with
\end{quote}

\textsuperscript{152} Ibid 775–6.
\textsuperscript{153} (1940) 66 CLR 344, 363.
\textsuperscript{154} Blackstone’s Commentaries with Notes, above n 53, 250.
\textsuperscript{155} (2009) 239 CLR 230, 237.
it difficulties and dangers that raise fundamental questions about the relationship between the judicial and other branches of government. … If it is for the Court to decide these matters, questions arise about what evidence the Court could act upon other than the opinions of the Executive, and how those opinions could be tested or supported. Yet, if it is to be for the Executive to decide whether there is some form of ‘national emergency’ (subject only to some residual power in the Court to decide that the Executive’s conclusion is irrational), then the Executive’s powers in such matters would be self-defining.156

Hearing evidence and argument first rather than just striking out a claim as nonjusticiable is essentially what occurred in the 1985 House of Lords case of CCSU157 which established in English law that decisions made under prerogative, as opposed to statutory, power may be subject to judicial review.158 This is a principle which a number of Australian cases have followed.159 At the same time, the CCSU Case also made clear that decisions which dealt with certain subject matter, in that case national security, were not suitable for judicial review. As to what ‘national security’ might include, the CCSU Case gives a number of illustrative, rather than exhaustive, examples as follows:

- ‘all matters relating to the disposition and armament of the armed forces’160
- ‘matters so vital to the survival of the nation as the conduct of relations with foreign states and – what lies at the heart of the present case – the defence of the realm against potential enemies’161

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161 Ibid 410 (Lord Diplock).
2. THE AUSTRALIAN DEFENCE FORCE WITHIN THE EXECUTIVE

• ‘[i]mplicitly actions in or related to combat by reference to Burmah Oil Co Ltd v Lord Advocate (‘Burmah Oil’)’162
• ‘in time of peace as in days of war … direction of the defence forces … So are treaties and alliances with other states for mutual defence …’163

These examples touch on most of the prerogatives relevant to this book and have an obvious direct significance for the ADF. Interestingly, this also reflects the way Montesquieu described executive power—the prince ‘makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions’.164

It is important to note that the Law Lords heard evidence that national security was at issue before deferring to the executive on the question.165 Despite Curtis166 and Operation Dismantle v R,167 the CCSU Case perhaps indicates the trend in judicial review of ‘national security’ cases, which is to treat them as justiciable before deferring to the executive or finding against it. This is not to argue that Curtis and Operation Dismantle v R were inappropriately decided at all, but only to state that it should be an exceptional case in which a court should find a claim for judicial review of a ‘national security’ matter to be nonjusticiable, such as because there is no clear cause of action. It would be more consistent with the principle of legality for a court to treat a matter as justiciable before determining on evidence and argument that it should defer to the executive.

Lindell observes that courts are reluctant to intrude into foreign affairs as well and will at times rely on nonjusticiability to avoid doing so.168 He observes ‘what becomes increasingly difficult to rationalise is how this [reluctance] can be justified given the ever growing scope of judicial review’.169 Lindell, then, discusses recent English cases where judicial review has started to occur in a limited way in such areas.170 In Australia, Tamberlin J stated in Hicks v Ruddock in 2007:

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162 Ibid 411 (Lord Diplock).
163 Ibid 421 citing Chandler v Director of Public Prosecutions [1964] AC 763 (Lord Roskill).
164 Montesquieu, above n 1, 19.
165 CCSU Case [1985] AC 374, 402–403 (Lord Fraser).
166 [2002] 2 NZLR 744.
168 Lindell, The Coalition Wars, above n 140, 33.
169 Ibid.
170 Ibid.
The modern law in relation to the meaning of ‘justiciable’ and the extent to which the court will examine executive action in the area of foreign relations and Acts of State is far from settled, black-letter law.\(^{171}\)

This was a single judge decision.

Perram J went further in *Habib* in stating that ‘the effect of this principle is to ensure that whenever a question as to the limits of Commonwealth power arises it is justiciable’.\(^{172}\) This statement is possibly too broad given the *Shaw Savill & Albion Co Ltd* combat immunity doctrine discussed above. It does however support the view that the rise of judicial review in Australia in general,\(^{173}\) meaning an increasing requirement for the executive to be accountable for its decisions and therefore more subject to the principle of legality,\(^{174}\) may well mean that no assumptions can be made as to the extent to which the judiciary may find a decision of the ADF to be nonjusticiable. This is particularly so given the more recent English cases of *Al-Jedda*\(^ {175}\) and the United Kingdom Supreme Court case of *Smith v Ministry of Defence* (*‘Smith’*) of 2012,\(^{176}\) discussed in Chapter 5 and, more importantly, the statement of Gageler J in *M68*, quoted above, that:

> The purpose of s 75(v), as Dixon J put it, was ‘to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power’.\(^ {177}\) … The purpose was to supplement s 75(iii) so as to ensure that any officer of the Commonwealth acted, and acted only, within the scope of the authority conferred on that officer by the *Constitution* or by legislation.\(^ {178}\)

While there may well be areas into which a court should not intrude because it could adversely affect national security, the ability to keep secrets for example being a distinct and essential quality of the executive

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172 (2010) 183 FCR 62, 73.
173 See above n 159.
175 [2011] 2 WLR 225.
176 [2013] UKSC 41.
177 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1, 363.
178 *M68* [2016] HCA 1 [126], [145].
in the separation of powers, it is increasingly likely that a court will hear evidence and argument before it decides that it should not intrude further.

The significance of this for the ADF is that it cannot assume judicial review of a traditionally excluded subject will not occur in future. There are still likely to be decisions relating to the ADF, however, which will almost always be unsuitable for judicial review.

Either way, an important point for this book is the history of judicial deference to the executive on matters of national security. This means that there are very few cases which have tested the exercise of prerogative power by military forces, let alone the ADF. Common law may simply not address some powers because they have always been assumed to exist. The courts may clearly impose some limits on the exercise of executive power by the ADF, those limits may be changing though, and it is just not clear what their extent might be in any given case.

2 The Exercise of Powers by the Governor-General in Person: Is ‘Direct’ Prerogative Power Subject to Judicial Review?

A distinct issue is that of personal exercises of prerogative power by the Sovereign or the Governor-General. The *CCSU Case* did not decide whether a direct exercise of prerogative power was justiciable. The clear suggestion seemed to be that it was not as the Minister was exercising prerogative power in the *CCSU Case*. The nonjusticiable nature of personal decisions of the Sovereign probably derives from the ancient constitutional rule that ‘the King can do no wrong’. Although not directly applicable to decisions made under prerogative power, the *Administrative Decisions (Judicial Review) Act 1977* precludes review of decisions made by the Governor-General under an enactment. In *R v Toohey; Ex parte Northern Land Council* the court reviewed the exercise of statutory power of the Administrator of the Northern Territory, assuming that office to be vice-regal, although it did not decide on the

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179 Harrison Moore, above n 93, 292.
181 Ibid 379.
182 Ibid 380.
183 Ibid 379.
question of judicial review of exercises of prerogative power. *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd*\(^{186}\) made clear that decisions of the Governor-General in Council should be subject to judicial review, although not in that case.\(^{187}\)

Whether exercises of prerogative power directly by the Sovereign or the Governor-General are immune from judicial review a priori, or because of their subject matter, is not certain. It is worth noting this issue, however, because a decision relating to the ADF under prerogative power given effect by the Governor-General personally has a different legal character to a decision made within the ADF itself or by the Governor-General in Council.\(^{188}\)

A potentially important means of maintaining military subordination to the civilian government could be a removal or termination by the Governor-General personally of the CDF, the Vice-Chief of the Defence Force (officers appointed to their positions by the Governor-General under *Defence Act* s 12 discussed above) or other service chief. Termination of the service by the Governor-General personally of such a very senior officer from the ADF would most likely fall under s 15 of the *Defence Act* and the *Defence (Personnel) Regulations 2002* (Cth)\(^{189}\) and so be an exercise of statutory power. It would not be reviewable by virtue of the *Administrative Decisions (Judicial Review) Act 1977* not applying to decisions of the Governor-General. Such a decision might possibly be reviewable under s 75(v) of the *Constitution* or s 39B of the *Judiciary Act* but, if personal exercises of power by the Governor-General are immune from judicial review a priori, then such a decision could remain unreviewable, particularly given the decisions in *Coutts v Commonwealth*\(^{190}\) and *Jarratt v Commissioner of Police for New South Wales*\(^{191}\) discussed below. This could operate as a limit on the exercise of executive power by the ADF through

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187 Ibid 278.
189 Reg 85.
190 (1985) 157 CLR 91.
191 (2005) 224 CLR 44. Another way that the career of a senior officer could be effectively terminated, but as an exercise of prerogative power, could be through compulsory transfer to the reserves. The *Defence (Personnel) Regulations 2002* (Cth) do not address the ending of a very senior officer’s career because reg 65, which deals with transfer to the stand-by reserve of such officers at the end of their appointment, is silent on compulsory transfer before the end of their appointment. A prerogative decision of this nature may also be nonjusticiable if made by the Governor-General personally.
senior officers not having security of tenure, or their appointments not
being subject to the scrutiny of the courts. This leads into the question of
the relationship of individual members of the ADF to executive power, as
opposed to the relationships of the ADF as an institution to the executive
power and the other parts of government.

V The Relationship of Members of the
ADF to Executive Power

A The Character of Service

With respect to the relationship of individual members of the ADF to
the Crown, the obligation of obedience still facilitates the exercise of
executive power and the concept of service at the pleasure of the Crown,
which limits the scope for its usurpation. While the Defence (Personnel)
Regulations 2002 comprehensively regulate the service of members of the
ADF, they do not explicitly extinguish the executive power on the same
subject. As mentioned above, there may still be room for some of the
earlier principles to operate. Also, even though the Defence (Personnel)
Regulations 2002 do reflect the traditional character of service to a large
extent, it is important to refer to the earlier cases to understand that
character. As Logan J said of reg 77 of the Defence Force Regulations,
dealing with redresses of grievance:

Knowledge of legal history, of the relationship between the Sovereign,
the Parliament and the Armed Forces, of the rank structure and chain
of command within the Army and of the responsibilities in respect of
subordinates assumed by those who hold the Queen’s commission in the
Defence Force is essential to an appreciation of the nature of the power.

Further, the oath of enlistment prescribed most recently in the Defence
Personnel Regulations in 2002 states:

I swear that I will well and truly serve Her Majesty Queen Elizabeth the
Second, Her Heirs and Successors according to law … and that I will
resist her enemies and faithfully discharge my duty according to law.

192 For a modern reappraisal of the relationship in Britain, see Peter Rowe, ‘The Soldier as a Citizen
Illustrating the continuity of this relationship, Charles Clode, Solicitor to the War Office in London from 1858 to 1877, had written in 1872:

Now and for the last 200 years and upwards the substance of the Officer’s and Soldier’s engagements with the Crown has been the same. The officer’s agreement is: 1. As towards his inferiors, to take charge of the Officers and soldiers serving under him, to exercise and well discipline them in arms, and to keep them in good order and discipline (those under him being commanded to obey him as their superior Officer). 2. As towards the Crown and his superiors, to observe and follow such orders and directions as from time to time he shall receive from the Sovereign or any of his superior Officers, according to the rules and discipline of law. The Soldier’s agreement (usually confirmed by his oath) is: 1. To defend the Sovereign, his Crown and dignity against all enemies; and 2. To observe and obey all orders of his Majesty and of the Generals and officers set over him.

Clode wrote the following words on the relationship between the Crown and the armed forces in *Military Forces of the Crown: Their Administration and Government* in 1869:

In the first place, he is bound to obey and to give his personal service to the Crown under the punishments imposed upon him for disobedience by the *Mutiny Act* and *Articles of War*. No other obligation must be put in competition with this; neither parental authority nor religious scruples, nor personal safety, nor pecuniary advantages from other service. All the duties of his life are, according to the theory of Military obedience, absorbed in that one duty of obeying the command of the Officers set over him.

Clode is significant because the High Court of Australia has often referred to him in consistently affirming a view of the relationship between the Crown and members of the armed forces in Australia which is characterised by a long history of obedience of the latter to the former. Callinan J referred to this precise passage in obiter dicta in the relatively recent case of *X v Commonwealth* in 1999. There is some caution as to the use of Clode, Windeyer J stating in *Marks v Commonwealth* in 1964:

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196 Clode, *The Administration of Justice under Military and Martial Law*, above n 17, 73.
His books are a most valuable mine of interesting information, much of it not readily obtainable elsewhere. But it is, I think, a mistake to take all of his statements as if they were, in unqualified terms, authoritative pronouncements of law.\textsuperscript{199}

Nonetheless, in relevant military matters, Australian cases have relied heavily on his works and historical material and perceptions generally.

A chronological selection of extracts from the cases would appear to draw strongly upon Clode’s view of the relationship between the Crown and the armed forces as being one of obedience. In \textit{Commonwealth v Quince} (‘Quince’), Williams J stated the following on the power of command, military obedience and the relationship to the Crown:

\textit{Clode} proceeds to point out … ‘Of course in war there is no limit to obedience (which is the first, second, and third duty of a soldier at all times) save a physical impossibility to obey. A subordinate officer must not judge of the danger, propriety, expediency, or consequence of the order he receives: he must obey – nothing can excuse him but a physical impossibility. A forlorn hope is devoted – many gallant men have been devoted. Victories have been obtained by ordering men upon desperate services, with almost a certainty of death or capture.’\textsuperscript{200}

His Honour went to say:

The King remains the titular head of the armed forces of the Crown, and the \textit{Constitution}, s 68, therefore, provides that the command in chief of the Naval and Military Forces of the Commonwealth is vested in the Governor-General as the King’s representative. The oath is an oath to serve the King in person according to its tenor. Service in the Air Force, as in the naval or military forces, involves in its most absolute form the right of a member superior in rank to give lawful orders to a member inferior in rank, and the obligation of the member inferior in rank to obey those orders.\textsuperscript{201}

\textsuperscript{199} \textit{Marks v Commonwealth} (1964) 111 CLR 549, 577. For another equivocal application of Clode, see Zelman Cowan, ‘The Armed Forces of the Crown’ (1950) 66 \textit{Law Quarterly Review} 478, 478–9 and 492.
\textsuperscript{200} (1944) 68 CLR 227, 255.
\textsuperscript{201} Ibid.
In *Marks v Commonwealth*, Owen J made these observations about the employment relationship between the Crown and members of the armed forces:

>[M]uch of what was said in *Reg v Cuming* (1887) 19 QBD 13 and *Hearson v Churchill* (1892) 2 QB 144 is in point and affords strong support for the quotations from Clode and *Halsbury’s Laws of England* which I have set out earlier and which, in my opinion, correctly state the common law … Service is during the pleasure of the Crown, not during the pleasure of the officer.\(^{202}\)

In 1985, in *Coutts v Commonwealth*,\(^ {203}\) Flight Lieutenant Coutts had failed a medical fitness test which resulted in his transfer to the retired list without his consent. The Governor-General in Council (not the Governor-General alone) approved the termination of his appointment in the permanent service.\(^ {204}\) A majority of the High Court found that the decision to terminate was not reviewable, even though *Coutts v Commonwealth*\(^ {205}\) did not concern defence of the realm at all but a rather routine termination of service in what was really a period of deep peace. While Deane J, with Mason ACJ concurring, saw the termination as statutory and therefore reviewable,\(^ {206}\) Wilson J saw Flight Lieutenant Coutts’s termination as squarely within nonjusticiable subject matter: ‘In my opinion, the answer to the problem in the present case is dictated by the operation of well-established principles governing the relation to the Crown of members of the armed services’.\(^ {207}\)

Brennan J saw a power to dismiss at pleasure as effectively unreviewable:

> The power to dismiss an officer of the Defence Force, whether it flows from statute or the prerogative, is a power to dismiss at pleasure. That is, the power to dismiss may be exercised at any time and for any reason, or for no reason or for a mistaken reason. In point of law, an officer has no security of appointment.\(^ {208}\)

Dawson J decided for similar reasons.\(^ {209}\)

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\(^{202}\) *(1964) 111 CLR 549, 597.*
\(^{203}\) *(1985) 157 CLR 91.*
\(^{204}\) *Ibid* 92–3.
\(^{205}\) *Ibid* 110.
\(^{206}\) *Ibid* 111.
Coutts has been the subject of academic criticism yet as recent a case as Jarratt v Commissioner of Police for New South Wales in 2005 has touched on it and left the principle undisturbed. There, Gleeson CJ made very clear that the relationship of the Crown to the armed forces is still special and outside the rules for other public officials:

‘The general rule of the common law is that the King may refuse the services of any officer of the Crown and suspend or dismiss him from his office’. It is no longer appropriate to account for the rule in terms of redolent monarchical patronage. The rule has a distinct rationale in its application to the armed forces, but in its application to the public service generally it is difficult to reconcile with modern conceptions of government employment and accountability.

His Honour did not elaborate on what that distinct rationale was but, in the context of a termination decision, it may be that members of the ADF must obey the lawful directions of the government and, if they do not, that they can be removed from service readily. To have it otherwise may undermine the subordination of the military to the civilian government.

In Bromet v Oddie in 2002, Finn J applied the observations of Dixon J in Commonwealth v Welsh, that:

[I]n considering the meaning and effect of the Air Force Regulations their purpose cannot be neglected, namely to provide rules to govern one of the armed forces of the Crown. The relation to the Crown of members of the armed forces is no new subject; the rules of the common law define it. The regulations are not to be read in disregard of those rules and of the long tradition to which they have contributed.
Logan J referred extensively to these cases and to Clode with approval in *Millar v Bornholt* in 2009.\(^\text{216}\)

As discussed above, the *Defence (Personnel) Regulations 2002* modify the common law but do not fundamentally alter the relationship between members of the ADF and the Crown. As Logan J said:

> [O]nce it is appreciated that … a Service Chief … may terminate the service of an enlisted member for reasons as ephemeral as that which formed the basis of CPL Millar’s termination or that ‘the retention of the enlisted member is not in the interest of Australia; or the Defence Force; or the Chief’s Service’ (reg 87(1)(g), *Defence (Personnel) Regulations*), the heritage of the common law remains evident.\(^\text{217}\)

Where a decision as to the service of a member of the ADF is not directly covered by the regulations then these common-law principles could apply. This could be when the decision is to transfer a very senior officer to the reserve as discussed above or is made by the Governor-General personally, which would be exceptional situations. As a matter of course however, routine decisions made by delegates of the Governor-General or a service chief, as the case may be, are statutory in character. They are also still subject to judicial review, even if not often successfully, on grounds such as the requirement to afford procedural fairness.\(^\text{218}\) Even so, Logan J noted in *Millar v Bornholt* that:

> [There should be] a principled restraint on a court conducting judicial review lest the appearance be given that, in respect of the making of value judgements in relation to the Defence Force, command has impermissibly passed from those to whom that task has been consigned by the Governor-General under parliamentary authority to the Judiciary … Deference is called for in relation to the value judgment [to terminate Corporal Millar’s service] made by that military officer.\(^\text{219}\)

This deference leaves the ADF as an anomaly in administrative law. The *Report on Australia’s Military Justice System* of 2005 indicated that this anomalous position has been under significant scrutiny, at least in the


\(^{217}\) Ibid 87.


Parliament. It is far from certain whether the High Court will continue to treat the ADF as unique in administrative law terms or subject it to the same degree of scrutiny as any other agency of the executive. As Deane J stated in dissent in *Coutts*:

The fact that an appointment is during pleasure does not mean that the exercise of a statutory power to terminate it will necessarily be immune from attack even where the power is a truly discretionary one which may be exercised at any time and without reason being assigned.

Perhaps more tellingly, Major General Sir Victor Windeyer, as Windeyer J of the High Court stated in *Marks v Commonwealth*, ‘Duty and Discipline do not march well with Discontent’.

Whether service in the ADF continues to receive judicial deference, these cases illustrate the constitutional relationship of members of the ADF to the Crown which underpins and informs the *Defence (Personnel) Regulations 2002*. Service in the ADF is service of the Crown. There is a clear obligation on the part of members of the ADF to serve the will of the Crown, and the Crown may readily dispense with the services of a member. This is no ordinary employment relationship. History defines this legal relationship to a large extent, and the common law reinforces it. It is unique and in itself provides a limit on the usurpation of executive power by the ADF.

**B Discipline and Obedience Connected to Command**

This discussion of the character of service in the ADF says much about obedience and for this reason it is important to consider the place of discipline and obedience in the relationship between members of the ADF and the Crown.

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221 (1985) 157 CLR 91, 114.
222 (1964) 111 CLR 549, 576.
Clode observed in 1874 that:

The discipline, as incident to the Command, of the Army is vested in the Sovereign. Unity is the very essence of Military Command; and therefore all authority … is derived only from one source, viz, the Crown.224

A power of discipline is fundamental to command, that is, to demand obedience under threat of punishment. The duty of obedience is reflected in the following indicative list of offences under the Defence Force Discipline Act 1982 (Cth):

- s 15F—Offence of failing to carry out orders (with respect to operations against the enemy, which includes pirates and mutineers (s 3));
- s 15G—Imperilling the success of operations (against the enemy);
- s 27—Disobeying a lawful command; and
- s 29—Failing to comply with a general order.

Why is discipline so closely related to command? The reasons appear twofold. Any military force, whether subject to civilian control or not, requires discipline to maintain military effectiveness. In the course of duty, a member of the ADF may have to risk his or her own life or take that of another. Further, a key element of civilian control over the military is that the military has to do what the civilian government tells it to do. As Kirby J put it in 2007 in White v Director of Military Prosecutions (‘White’):

It is of the nature of naval and military (and now air) forces that they must be subject to elaborate requirements of discipline. This is essential both to ensure the effectiveness of such forces and to provide the proper protection for civilians from service personnel who bear, or have access to, arms.225

Therefore to have members of military forces subject to a duty of obedience assists in direct control of military power. As Lord Loughborough said in the 1792 case of Grant v Gould:

[O]r there is nothing so dangerous to the civil establishment of a state, as a licentious and undisciplined army; and every country which has a standing army in it, is guarded and protected by a mutiny act.

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An undisciplined soldiery are apt to be too many for the civil power; but under the command of officers, those officers are answerable to the civil power, that they are kept in good order and discipline.226

The Australian Constitution reflects this relationship between command, discipline and obedience being essential to the constitutional relationship between the armed forces and the government. A connection between command and discipline is clearly drawn in White by Gleeson CJ and Callinan J, in addition to the point by Kirby J stated above. Gleeson CJ quoted with apparent approval this contribution of Mr O’Connor’s in the Official Record of the Debates of the Australasian Federal Convention:227

You must have someone Commander-in-Chief, and, according to all notions of military discipline as we are aware of, the Command-in-Chief must have control of questions of discipline, or remit them to properly constituted military courts.228

Callinan J stated:

In R v Bevan; Ex parte Elias and Gordon229 Starke J saw that section [s 68] as an instance of the ‘special and peculiar’ provision contemplated for the management and disciplining of the defence forces and so do I. Another way of putting this is to say that the command and that which goes with it, namely discipline and sanctions of a special kind … are matters of executive power.230

The reference to Clode by Williams J in Quince quoted above on obedience being the first, second and third duty of a soldier also supports this view of command and discipline being essential to the constitutional relationship between the armed forces and the government.231

The issues in White,232 Re Tracey233 and later Lane v Morrison,234 and other High Court cases relating to the Defence Force Discipline Act, related to the extent of the jurisdiction of the ADF to discipline its members under

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226 (1792) 2 HBL 69, 99–100; 126 ER 434, 450 quoted in Re Tracey (1989) 166 CLR 518, 557.
227 Vol 2, 2259.
228 White (2007) 231 CLR 570, 583.
229 (1942) 66 CLR 452.
231 Quince (1944) 68 CLR 227, 255.
233 (1989) 166 CLR 518.
this Act, as well as whether this Act is contrary to the requirements for exclusive judicial power under Chapter III of the Constitution. The majority judgments in White explain the source of authority for military judicial power being in s 51(vi), and outside Chapter III, by reference to legal history. They rely on a number of previous High Court authorities. The essence of this position is that the defence power is a special and distinct power among the other 39 legislative powers provided for in s 51. The system of offences, trials, punishments and appeals provided by the Defence Force Discipline Act 1982 derives from a longstanding system of statutory control over military discipline dating back to 1688. Lane v Morrison strongly reinforced this in striking down the Australian Military Court as unacceptably interposing itself in the relationship between command and discipline. In Haskins v Commonwealth, Heydon J recalled the reasons that military discipline laws are necessary: ‘In the mournful words of Maitland, it “has been the verdict of long experience, that an army cannot be kept together if its discipline is left to the ordinary common law”’. 


236 White (2007) 231 CLR 570, 586, 598.

237 Most notably Re Tracey (1989) 166 CLR 518; Re Aird; Ex parte Alpert (2004) 220 CLR 308; R v Bevan; Ex parte Elias and Gordon (1942) 66 CLR 452; R v Cox; Ex parte Smith (1945) 71 CLR 1 among others.

238 White (2007) 231 CLR 570, 583, 586, 589.

239 Ibid 592.


241 Haskins v Commonwealth (2011) 244 CLR 22, 60, quoting Maitland, The Constitutional History of England (1955) 279. On the critical operational need for effective disciplinary law and processes in the Second Australian Imperial Force, and the serious underestimation of this issue at the beginning of the Second World War, see Lieutenant Colonel Lachlan Mead, ‘We are more Concerned with the Good Soldier Than the Bad One in War: the Australian Army Legal Department 1939–1942’ in Bruce Oswald and Jim Waddell (eds) Justice in Arms: Military Lawyers in the Australian Army’s First Hundred Years (Big Sky, 2014) 77; and ‘Not Exactly Heroic but Still Moderately Useful: Army Legal Work During the Second World War 1939–1945’ in Bruce Oswald and Jim Waddell (eds) Justice in Arms: Military Lawyers in the Australian Army’s First Hundred Years (Big Sky, 2014) 127.
It is also important to recognise that there is an implicit requirement of trust in the duty of obedience. ADF members carrying out apparently lawful orders have to trust that such orders are lawful and will not expose them personally to prosecution or suit. It is not likely or perhaps even possible that an ADF member involved in an operation would be able to assess the nuances of the lawful authority to act under executive power. Were ADF members to be prosecuted or sued for doing what they reasonably believed to be their duty though, it would almost certainly undermine their trust in their superiors and their willingness to obey the command of those superiors. This could, in turn, undermine the constitutional principles of military obedience and military subordination to the civilian government. A Minister or CDF that gave legally questionable directions or orders and was reckless or indifferent to this trust in doing so may well then undermine these principles. This was the potential risk in the Tampa incident discussed above and perhaps partly explains the need for the Border Protection (Validation and Enforcement Powers) Act 2001. The Defence Force Discipline Act partly addresses this issue in providing, at s 14, that a person is not liable to be convicted of a service offence for an act or omission that was in obedience to a lawful order, or even an unlawful order, which the ‘person did not know, and could not reasonably be expected to have known, was unlawful’. This provision cannot immunise an ADF member from prosecution or suit in a civilian court however.\textsuperscript{242}

Command and discipline, therefore, provide a constitutional mechanism for ensuring executive power can be effected through the ADF and that the ADF does not usurp executive power, but it does rely to some extent on commands being lawful in order to maintain the obedience of members of the ADF. This reinforces the principle of legality but it can be difficult to fix the boundaries of legality in an area of such inherent uncertainty as ADF operations under executive power. This may be an argument for a broader defence of superior orders which are not manifestly unlawful. These are points to which this book will return in subsequent chapters.

VI Conclusion

The spectre of the English Civil War still hangs over the relationship between the government and the ADF. There is a deep concern to ensure that the armed forces remain under control, which is twofold: first, is to have an armed force that will follow orders, government or military, to defend against external enemies; second, is to ensure that the armed forces remain under the control of the government and not threaten it. These concerns go to the heart of the existence of an independent state and the existence of constitutional government. As Lord Loughborough stated, it is ‘for the peace and safety of the kingdom’.

Not only does the relationship between the government and the ADF go to the very existence of the legal system, it is also uniquely concerned with life and death. A member of the ADF has a duty to kill and risk his or her own life at the command of his or her superiors. There is no other legal relationship like this in our society. It is perhaps not surprising that the courts have seen it as special.

The direct relationship with the Sovereign is cast in terms of command. The command relationship is a personal relationship. It is perhaps emotionally more meaningful to owe obedience and loyalty to a person rather than a concept. As Sir Ninian Stephen put it in his article on ‘The Governor-General as Commander-in-Chief’, ‘it is a close relationship of sentiment’. Command is a personal manifestation of the more conceptual higher-level prerogative power. Statute describes and regulates the relationship but does not ultimately provide the source of the powers or the obligations. It is unlike the corporate authority of the cabinet, the Parliament or an appeal court. It is exercisable by an individual with the power to exercise it and carries with it an implicit obligation to maintain the trust of those who must obey those commands.

What does this say about the limits of the exercise of executive power by the ADF? There are limits inherent in the place of the ADF within the constitutional structures for subordination of the military to the civilian government. These include the distinct nature of command, as well as the relationship between the Minister, Governor-General and the Chief of

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243 Grant v Gould (1792) 2 HBL 69, 99–100; 126 ER 434, 450 quoted in Re Tracey (1989) 166 CLR 518, 557.
244 Stephen, above n 65, 571.
the Defence Force which reflects the 17th-century compromise between Parliament and the Crown. Seventeenth-century principles also limit the ability of the ADF to be part of Parliament and subject the ADF to the general law. Within these bounds, however, Parliament and the courts have left considerable authority in the hands of the Crown in the form of prerogative power to defend the realm and to control the forces. Despite the profound importance of the principle of military subordination to the civilian government, the authority remaining with the Crown may still actually extend to displacing civilian authority in certain circumstances. This will be the subject of Chapter 3 on martial law.
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