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## Australian civil-military relations: distinct cultural and constitutional foundations

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# Australian civil–military relations: distinct cultural and constitutional foundations

*Cameron Moore and Jo Brick*

The truth is that the civil–military relationship in a democracy is almost invariably difficult, setting up as it does opposing values, powerful institutions with great resources, and inevitable tensions between military professionals and statesmen.<sup>1</sup>

Eliot Cohen

Interaction between civilian and military leaders has been the subject of much study in the United States, particularly in more recent times in the context of the Trump Administration and the US armed forces.<sup>2</sup> In contrast, the Australian civil–military experience has not been the subject of much significant assessment at all. As a result, there is no Australian equivalent of either Huntington’s *The Soldier and the State* or Janowitz’s *The Professional Soldier*.<sup>3</sup> Still, even if there are common factors in maintaining a relationship of mutual trust, understanding the Australian cultural context and constitutional framework is essential to understanding the foundations of the Australian civil–military relationship. This paper considers the cultural and constitutional foundations of Australian civil–military relations and argues that they must be understood in their own context. The distinct place of military forces in Australian society, Australian military culture itself, and over a century of Australian foreign policy forms the foundation for

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1 Eliot A Cohen, ‘Why the gap matters’, *The National Interest*, Fall 2000, p 42.

2 See Jim Golby (ed), Special Civil–Military Edition, *Strategic Studies Quarterly*, Summer 2021, 15(2), accessed 1 June 2021.  
<https://www.airuniversity.af.edu/SSQ/Display/Article/documents/Volume–15-Issue-2-summer-2021/>

3 Samuel Huntington, *The Soldier and the State. The Theory and Politics of Civil–Military Relations*, Harvard University Press, 1957; Morris Janowitz, *The Professional Soldier. A Social and Political Portrait*, The Free Press, 1960.

interaction between Australian military and civilian leaders. This relationship relies upon a constitutional and legislative distribution of power between the elected civilian government, the senior leadership of the Australian Defence Force (ADF), and the Governor-General as a check on the use of command power for internal political purposes.<sup>4</sup>

## The theory of civil–military relations

Civil–military relations are the foundation for the articulation of strategy. The relationship and interaction between civilian and military leaders is essential in linking the use of military force with the desired policy ends of the state. ‘Civilian control’ of the military is a central doctrine in liberal democracies and relates to the subordination of the military to elected representatives (not civil servants per se). As noted by Cohen, within democracies, powerful institutions of state – the military and civilian leadership – are forced to work together to formulate viable strategy that guides the use of military force in the national interest. Strategic civil–military interaction within liberal democracies is driven by a number of generally accepted conventions, which are influenced by important factors such as authority under law, national identity and military culture.

The question of the control of military forces by the state accompanied the development of standing armies. SE Finer’s work, *The Man on Horseback*, considered the role of military organisations within different types of political cultures.<sup>5</sup> Generally, Finer argues that some states are not able to maintain the regulatory and administrative functions of state without the intervention or assistance of the military. He also discusses the risk arising from an interventionist military culture, in the form of military dictatorships that have manifested around the world. Finer’s main contribution to the civil–military issue is the identification of power relations between military organisations and the organs of state, including discussion of the ‘proper’ place of the military within society.

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4 The broader historical and political contexts for Australian civil–military relations are examined in: Michael Evans, ‘The civil–military relations bureaucratic machinery in Australia’, in Florina Cristiana Matei, Carolyn Halladay and Thomas C Bruneau (eds), *The Routledge Handbook of Civil–Military Relations*, Routledge, New York, 2021; and Eric Andrews, *The Department of Defence: The Oxford Centenary History of Defence*, vol. 5, Oxford University Press, Melbourne, 2001. See also BB Schaffer, ‘Policy and system in Defense: the Australian case’, *World Politics*, 1963, 15(2):236–260; B D Beddie, ‘Civil–military relations in Australia and the concept of the primacy of the civil power’, in Paul Mench (ed), *The Armed Forces in Australian Society—the Next Decade*, United Services Institute, Canberra, 1974, pp 57–65; Air Commodore Ray Funnell, ‘The professional military officer in Australia: a direction for the future’, *Australian Defence Force Journal*, July/August 1980, 23:23–39, <https://defence.gov.au/ADC/ADFJ>; and TB Millar, ‘The political–military relationship in Australia’ in Desmond Ball (ed), *Strategy and Defence: Australian Essays*, Allen & Unwin, Sydney, 1982, pp 278–290.

5 SE Finer, *The Man on Horseback: The Role of the Military in Politics*, 2nd ed, Westview Press, Boulder, 1998.

The potential for tension within this relationship is caused by divergence of interests between civilian and military leadership. Finer's conception of this tension is the threat that military forces pose to the government itself, because military organisations are postured 'to fight and win wars'.<sup>6</sup> According to Finer, military organisations have three main advantages over civilian organisations: 'a marked superiority in organization, a highly emotionalized symbolic status, and a monopoly of arms ... The wonder, therefore, is not why this rebels against its civilian master, but why it ever obeys them.'<sup>7</sup>

Civil–military relations do not exist in a vacuum. The relationship between civilian leaders and military commanders at the strategic level is a function of individual background and experience, personality and perspective. These individual factors are, in turn, influenced by the prevailing cultural paradigm and habits of interaction that underlie the relationship. The strength of the military is mitigated by strong civilian institutions and norms where a system or process exists for an orderly transfer of power.<sup>8</sup> Further, where there is a commitment to democratic values by civilian and military leaders, any tension and friction is unlikely to threaten society.<sup>9</sup>

This theory describes the civil–military landscape in Australia to some extent but it does not mean that civil–military controversies or issues never arise. In these situations, the issue then becomes *how* military and civilian leadership properly engage with one another. This process determines how military force is to be used effectively in the national interest, with the tension being mitigated by cultural aspects or conventions that govern the civil–military interaction.

## **Civil–military relations and Australian culture**

### **Absence of a 'coup culture' in Australia**

Finer's work focused on the hazard posed by a strong military institution to other organs of state. There have been minor incidents in Australian history that can be loosely considered as military forces challenging civilian power. However, they did not amount to an overthrow of civilian authorities by military forces. During the colonial period, the 'Rum Rebellion' is sometimes characterised as a coup d'état by the New South Wales Corps, led by Major George Johnston in 1808. This event involved 400 officers and men marching to Government House to

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6 Finer, *The Man on Horseback*, p 6.

7 Finer, *The Man on Horseback*, p 5.

8 Finer, *The Man on Horseback*, pp 18–19.

9 James Burk, 'The logic of crisis and civil–military relations theory: a comment on Desch, Feaver, and Dauber', *Armed Forces & Society*, 1998, 24(3):459. <https://doi.org/10.1177/0095327X98024003>

depose Governor Bligh.<sup>10</sup> However, such events were a common occurrence across the British Empire, and were considered to be more an act of officer insubordination rather than a challenge to the legitimacy of the civil power.<sup>11</sup> After Federation in 1901, the unification of state military forces into the Commonwealth Military Force, and the appointment of a single 'General Officer Commanding', created a single officer who could possibly have led a revolt against the civilian government. The first 'GOC' was Major General Sir Edward Hutton, who was often at odds with the civilian leadership due to his autocratic style.<sup>12</sup> This was not a circumstance of revolt against the civilian leadership, but a failure of the human relationships that lie at the heart of effective civil–military interaction.

In the years following the First World War, there was public support for the view that the military leaders of the Australian Imperial Forces during the 'Great War' would be a better leadership alternative than the civilian government.<sup>13</sup> To this end, there were numerous public calls for General Sir John Monash to lead a revolt against the government; calls that Monash publicly rejected.<sup>14</sup> The other significant event was the dismissal of Prime Minister Gough Whitlam by the Governor-General, Sir John Kerr in 1975. The circumstances were that Kerr did not consult his ministerial advisers and dismissed Whitlam, who led a Labor government with a majority in the House of Representatives.<sup>15</sup> There is much speculation as to what coercive measures Kerr may have taken in the event that Whitlam refused to accept the Governor-General's decision. One point of speculation was that Kerr was planning to call out the defence force, supported by a broad reading of the Executive Power under the Constitution, but this contention is not supported by any solid evidence.<sup>16</sup> While Coulthard-Clark concludes that Australian military history reveals 'a remarkable anxiety' about the possibility of a coup in Australia,<sup>17</sup> he further states that there is only a

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10 Chris Coulthard-Clark, *Soldiers in Politics: The Impact of the Military on Australian Political Life and Institutions*, Allen & Unwin, St Leonards, 1986, p 184. See Proclamation of Lachlan Macquarie, Captain-General and Governor in Chief of New South Wales, 4 January 1810, which declared Bligh's arrest and the uprising illegal, and many of the acts of public officials after the coup to be null and void, State Library of New South Wales, *From Terra Australis to Australia: The overthrow and aftermath*, State Library of NSW website, accessed 21 September 2022.

<https://www.sl.nsw.gov.au/stories/terra-australis-australia/overthrow-and-aftermath>

11 Coulthard-Clark, *Soldiers in Politics*, p 185.

12 Coulthard-Clark, *Soldiers in Politics*, p 191. See AJ Hill, 'Hutton, Sir Edward Thomas Henry (1848–1923)', *Australian Dictionary of Biography* website, published online 2006, accessed 21 September 2022. <https://adb.anu.edu.au/biography/hutton-sir-edward-thomas-henry-6779>

13 Coulthard-Clark, *Soldiers in Politics*, p 194.

14 Coulthard-Clark, *Soldiers in Politics*, pp 194–195.

15 Coulthard-Clark, *Soldiers in Politics*, p 197.

16 Coulthard-Clark, *Soldiers in Politics*, p 201.

17 Coulthard-Clark, *Soldiers in Politics*, p 201.

minor degree of ongoing concern that a military coup could occur in Australia, '[w]hat is presently lacking is motivation for such a treasonous venture.'<sup>18</sup> As this historical overview indicates, there have been instances in Australian history where a coup *could have* occurred, however, a coup *did not* occur. This raises questions of culture.

### **The Anzac legend**

The 'Anzac legend' – particularly in relation to the narrative of the bushman as the 'natural' soldier and its focus on tactical deeds rather than strategic plans – is one aspect of Australian military culture that has had a significant impact on perceptions of Australia's military forces.

[T]he dominant image of the Australian soldier is of the citizen in uniform, the volunteer enlisted only for the duration of the war and therefore able to bring the bush-bred qualities of the natural soldier or the cheeky iconoclasm of the urban larrikin to the business of soldiering.<sup>19</sup>

As a cultural narrative, these parts of the 'Anzac legend' have been immortalised by the official history written by Charles Bean, and tend to emphasise:

the experiences and deeds of ordinary soldiers at the expense of grand strategy, the doings of generals, and the military technicalities of logistics, organisation, training and administration ... the ordinary soldier has been celebrated, usually without much thought to strategic context, policy, or even comparison.<sup>20</sup>

However, this tactical focus narrows the aperture for the professional development of Australia's military. It diminishes the perceived ability of military professionals to advise the civilian government regarding the use of force in pursuit of national interests. And, it notably excludes the navy and the air force, the more technical services, which have relied primarily upon career professionals rather than citizen volunteers. This is an important factor in Australian civil–military relations because of its effect over the years on the development of the profession of arms, and the public's perception of it.

The evolution of the profession of arms in Australia commenced with the shifts in perception of the purpose of Australia's military, from a primarily imperial resource towards a greater focus on national defence. This followed the experience in the

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18 Coulthard-Clark, *Soldiers in Politics*, p 202.

19 Jeffrey Grey, *A Military History of Australia*, Cambridge University Press, Cambridge, 1990, p 3.

20 Grey, *A Military History of Australia*, p 2.

Pacific Theatre during the Second World War, and the establishment of a standing military force in the years after that. Prior to this time, Australia maintained both a volunteer force that could be deployed overseas, and a militia that was not eligible for overseas service. From March 1901, colonial armies became the Commonwealth Military Forces (CMF), which was a part-time force of 'citizen soldiers' with a small cadre of permanent military officers. The CMF could only serve on Australian territory. For this reason, the government had to raise volunteer forces, the 1st and 2nd Australian Imperial Force (AIF) to serve overseas during the First World War and Second World War respectively. Legislative changes during the Second World War allowed the CMF to serve in Australian mandated territory (the territories of New Guinea and Papua) during the Second World War.<sup>21</sup> The Australian Regular Army was then formed in 1947, and as Grey notes, '[t]he military profession was to be run by the military professionals'.<sup>22</sup> These developments were the start of the professionalisation of Australia's military forces. The impact of the 'Anzac legend' remains strong, however. This enduring perception of the military as really only being citizen soldiers with a tactical focus means that further evolution in professionalisation is still necessary, particularly with the current focus on air and maritime operations in Australia's near region.<sup>23</sup> If there is to be a mature and robust civil–military relationship at the highest levels of strategic leadership, this means developing military officers with the necessary knowledge and experience, but also a public and political understanding of the ADF that values Australian military professionalism and strategy, not just tactics.

## Constitutional foundations

The civil–military paradigm in Australia has evolved as the nation has developed from a dominion of the British Empire to an independent strategic actor. The constitutional underpinning of this relationship has much earlier origins, however. The achievement of Anglo-Australian history has been to harness military power to underwrite governmental power whilst ensuring that such military power remains under the control of government. In referring to the military government of Oliver Cromwell in the seventeenth century, General Sir John Hackett, the Australian-born former Commander-in-Chief of the British Army of the Rhine, and also Principal of King's College, London, put it this way:

The harmonious relationship between civil and military power, which has persisted in Britain since then, in which the subordination of

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21 Australian War Memorial (AWM), *Australian Army*, AWM website, accessed 21 September 2022. <https://www.awm.gov.au/atwar/structure/army/>

22 Grey, *A Military History of Australia*, p 4.

23 Department of Defence (DoD), 'Defence Policy', *2020 Defence Strategic Update*, DoD, 1 July 2020, pp 21–30. <http://www.defence.gov.au/about/strategic-planning/2020-defence-strategic-update>

the military to the civil is fundamental, owes much to this salutary experience.<sup>24</sup>

There is therefore considerable history behind these constitutional relationships, even if they are not well understood in some respects.<sup>25</sup> This is perhaps because of their centuries-old character and, as discussed, the relatively recent development of Australia as an independent actor in defence matters. East Timor was the first major campaign with Australia as the lead nation and with an all-professional contingent of personnel.<sup>26</sup> Until 1999, and now very recently with the *2020 Defence Strategic Update*,<sup>27</sup> Australia has always participated in campaigns as a junior participant in a bigger force. Arguably then, Australia has not really had to consider the constitutional relationship between the military and the executive very often at all.<sup>28</sup> An improved military professionalism in Australia requires a better understanding of this relationship, both within the ADF and beyond it.

Formal constitutional arrangements cannot prevent militaries from usurping civilian governments. 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. Still, Quick and Garran, the original commentators on the *Australian Constitution*, 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.<sup>29</sup>

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24 General Sir John Hackett, *The Profession of Arms*, Macmillan, 1983, p 174.

25 Hackett, *The Profession of Arms*, pp 191–193.

26 See Commonwealth, Parliamentary Debates, House of Representatives, 21 September 1999, 10047–51 (Alexander Downer) reproduced in ‘Australian troops in East Timor’ in Rod Kemp and Marion Stanton (eds) *Speaking for Australia: Parliamentary Speeches that Shaped Our Nation*, Allen and Unwin, 2004, p 280.

27 DoD, *2020 Defence Strategic Update*, ch 2, pp 21–30; see Anthony Bergin and Cleo Paskal, ‘Australia’s allies and partners can help counter China in the South Pacific’ *The Strategist*, Australian Strategic Policy Institute, 2 June 2022. <https://www.aspistrategist.org.au/australias-allies-and-partners-can-help-counter-china-in-the-south-pacific/>

28 See Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force*, ANU Press, 2017, p 81. <https://press.anu.edu.au/publications/crown-and-sword>

29 John Quick and Robert Garran, *Annotated Constitution of the Australian Commonwealth*, Legal Books, first published 1901, reprint 1995, p 700.



More than this, these arrangements also entrench the principle of military subordination to the civilian government. That these threats have not really materialised in Australia since Federation suggests that, even if not well understood, the current arrangements serve their purpose. It also indicates that the principle of military subordination to the elected civilian government is of fundamental value to the constitutional order.<sup>30</sup> As Michael Howard stated:

The dialectic between freedom and security lies at the basis of all political society; however, it may change its form; and the problems which it raises, both for soldiers and for governments, are likely to remain with us until society itself is dissolved.<sup>31</sup>

## Command and Command-in-Chief of the ADF

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. The *Australian Constitution* reflects this and 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 Chief of the Defence Force, because the Governor-General appoints the military commander. Effectively, the right to exercise military power is granted by the Commonwealth's highest officer.<sup>32</sup> The historical basis of the power of the Crown originally resting on military power is clearly evident in this arrangement.<sup>33</sup> 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.

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, which s 68 then vests in the Governor-General. It is the authority to determine the organisation, structure, placement, arming and equipment of the ADF. Quick and Garran referred to it as follows:

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30 Moore, *Crown and Sword*, p 91.

31 Michael Howard, 'Introduction: the armed forces as a political problem', in Michael Howard (ed) *Soldiers and Governments: Nine Studies in Civil-Military Relations*, Eyre & Spottiswoode, 1957, p 24.

32 See George Winterton, 'Who is our head of state', *Quadrant*, September 2004, XLVIII(9):60; George Winterton 'The evolving role of the Governor-General', *Quadrant*, March 2004, XLVIII(3):42; cf. Mitchell Jones, 'The Governor-General as Commander-in-Chief', *Australian Journal of Administrative Law*, 2009, 16(2):82.

33 Moore, *Crown and Sword*, p 92.

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.<sup>34</sup>

Command-in-chief is 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 government,<sup>35</sup> 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.<sup>36</sup>

Section 68 sits apart from all of the other executive powers contained within s 61 of the *Constitution*. Callinan J was expansive on this point in the High Court in the 2007 military disciplinary case of *White v Director of Military Prosecutions*:

In *R v Bevan; Ex parte Elias and Gordon* Starke J saw that section 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

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34 Quick and Garran (1901), p 713, quoted in Charles Sampford and Margaret Palmer, ‘The constitutional power to make war’, *Griffith Law Review*, 2009, 18(2):350–384, p 350, p 354, <https://doi.org/10.1080/10383441.2009.10854646>; Moore, *Crown and Sword*, p 89. On the prerogative for the control and disposition of the forces more generally, see Noel Cox, *The Royal Prerogative and Constitutional Law: A Search for the Quintessence of Executive Power*, Routledge, 2021, p 13, p 53, pp 136–137 and p 146.

35 *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, St James NSW, 1986, p 10; Quick and Garran, p 406, as cited in Harold E Renfree, *The Executive Power of the Commonwealth of Australia*, Legal Books, Sydney, 1984, p 177; Peter Boyce, *The Queen’s Other Realms: The Crown and its Legacy in Australia, Canada and New Zealand*, Federation Press, 2008, pp 124–135.

36 Moore, *Crown and Sword*, p 93; See Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems*, Cambridge, 2018, pp 76–90; Hugh Smith, ‘A certain maritime incident and political–military relations’, *Quadrant*, June 2002, p 39; Sir Ninian Stephen, ‘The Governor-General as Commander-in-Chief – Address on the occasion of the graduation of course no.27/83 of the joint services staff college, Canberra on Tuesday, 21 June 1983’, *Melbourne University Law Review*, December 1984, vol.14, p 563.

kind, for the reasons that I earlier gave, are matters of executive power ...

The presence of s 68 in the Constitution may even,<sup>37</sup> arguably, have further relevance to military justice, with the result that it may not be subject to judicial supervision under Ch III of the Constitution and is administrable only militarily and not by Ch III courts, whether specially constituted or not ... If anything this is to emphasize rather than to detract from the unique and special nature of military power and control of it.

A point about s 68 is that it vests a power of command which cannot be rejected or diminished, unlike powers exercisable under s 51 of the Constitution which Parliament may choose not to exercise ... there may be a question whether any derogation from the absolute command, including discipline, vested in the Governor-General (in Council) is constitutionally open.<sup>38</sup>

It may be [then] that the means of checking any misuse of that command, or threat of oppression by it, lies with Parliament under ss 64 and 65, in particular in its control of the executive and the raising and appropriation of revenue for the maintenance of the military.<sup>39</sup>

Section 61 vests the executive power of the Commonwealth in the Queen and makes it exercisable by the Governor-General. It includes the powers to conduct war and foreign relations, as well as control the public service and the economic levers of the Treasury.<sup>40</sup> As important as each of these other executive powers are, they are all still susceptible to control and even extinguishment by the parliament.<sup>41</sup> That is to say, the parliament could legislate on any of these

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37 For reference to s 68 see AustLII, Commonwealth Consolidated Acts, *Commonwealth of Australia Constitution Act – Section 68, Command of naval and military forces*. [http://www.austlii.edu.au/au/legis/cth/consol\\_act/coaca430/s68.html](http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/s68.html) For the reference to the *Constitution* see AustLII, Commonwealth Consolidated Acts, *Commonwealth of Australia Constitution Act*. [http://www.austlii.edu.au/au/legis/cth/consol\\_act/coaca430/](http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/)

38 AustLII, Commonwealth Consolidated Acts, *Commonwealth of Australia Constitution Act – Section 51, Legislative powers of parliament*. [http://www.austlii.edu.au/au/legis/cth/consol\\_act/coaca430/s51.html](http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/s51.html)

39 AustLII, Commonwealth Consolidated Acts, *Commonwealth of Australia Constitution Act – Section 64, Ministers of State*. [http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol\\_act/coaca430/s64.html](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/coaca430/s64.html); AustLII, Commonwealth Consolidated Acts, *Commonwealth of Australia Constitution Act – Section 65, Number of ministers*. [http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol\\_act/coaca430/s65.html](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/coaca430/s65.html); *White v Director of Military Prosecutions* (2007) 231 CLR 570, 649.

40 *Williams v Commonwealth* (2012) 248 CLR 156, 184–185 (French CJ) & *Williams v Commonwealth [No 2]* (2014) 252 CLR 416, 465–469 (French CJ, Hayne J, Kiefel J, Bell J and Keane J).

41 *CPCF v Commonwealth* HCA [2015] 1, [141] (Hayne and Bell JJ); [277]–[286] (Kiefel J).

subjects to the point of making all of the relevant powers statutory, and in so doing extinguish executive discretion. It has not done so, but the important point is that the parliament is not able to extinguish the express power of command-in-chief in s 68. This would require a referendum under the procedures for constitutional amendment.<sup>42</sup> This means that command-in-chief under s 68 must be seen as a special and separate power that it is beyond the power of parliament to control directly. As detailed below, parliament can, and has, regulated the exercise of the command power through legislation, but it cannot remove it from the Governor-General. As much as they might exercise significant control, politicians who are civilian ministers therefore cannot command the ADF.

This is reflected in the legislation and serves the important function of providing some protection from drawing the ADF into internal party politics. It is distinctly different to the command arrangements of the United Kingdom, which operate through the Defence Council and include the Prime Minister and Secretary of State for Defence as part of the chain of command, although not with an individual power of command.<sup>43</sup> In Australia, the Governor-General appoints the Chief of the Defence Force (CDF) under s 12 of the *Defence Act*. CDF then has command of the ADF under s 9 of the Act. Section 8 enables the subordination of the military to the civilian government by making the CDF subject to the control of the minister as follows:

- (1) The Minister has general control and administration of the Defence Force.

Note: Command-in-Chief of the Defence Force is vested in the Governor-General: see section 68 of the Constitution.

- (2) In performing and exercising functions and powers under this Part, the Chief of the Defence Force and the Secretary must comply with any directions of the Minister.

Further, s 9(2) of the Act states:

The Chief of the Defence Force must advise the Minister on matters relating to the command of the Defence Force.

Importantly, this does *not* amount to an exercise of command by the minister over the CDF, as the note to this effect in s 8 indicates (referring to the command-in-chief of the Governor-General under s 68). The CDF does not therefore have a

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<sup>42</sup> Australian Constitution s 128.

<sup>43</sup> See Peter Rowe, *Legal Accountability and Britain's Wars 2000–2015*, Routledge, 2016, pp 61–62, pp 252–254.

duty of obedience to the minister enforceable under the *Defence Force Discipline Act*. While the obligation of CDF to advise or comply with the directions of the minister is statutory, it is still administrative in nature. If CDF did not advise the Minister or comply with the minister's directions, the consequences would be administrative, such as termination of appointment as CDF, rather than penal. Under s 14 of the *Defence Act*, the CDF or Vice Chief of the Defence Force (VCDF) also have the option to offer their resignation to the Governor-General, whereas in a disciplinary situation, this would not necessarily relieve the CDF or VCDF from liability to prosecution. The advantage of a control without command relationship between the minister and the CDF would appear to be to assert civilian control whilst, as mentioned above, assisting in keeping the ADF apolitical by reducing the potential to draw the military into internal politics or potentially unlawful action.<sup>44</sup> The significance of this erupted recently. There was controversy over the prime minister on election day instructing the Commander of Maritime Border Command to release information on the detection of a suspected illegal entry vessel, contrary to previous practice. The prime minister's political party then publicised this information by text apparently with a view to influencing the election.<sup>45</sup> The concern was the use of the ADF for party political purposes, and this incident illustrated that this is an issue of serious contemporary relevance.<sup>46</sup>

It is worth considering then that, 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 CDF to obey the commands of his or her superiors,<sup>47</sup> the CDF would be obliged to obey the command of the Governor-General even if it conflicted with the direction of the minister.<sup>48</sup> This would be,

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44 Moore, *Crown and Sword*, pp 92–93; 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, see *Australian Federal Police Act 1979* (Cth) s 37.

45 See Andrew Greene, 'Scott Morrison instructed Border Force to reveal election day asylum boat arrival', *ABC Online*, 27 May 2022. <https://www.abc.net.au/news/2022-05-27/scott-morrison-instructed-border-force-election-day-boat/101101464>

46 Note similar concerns over border protection matters in relation to the Tampa incident and the children overboard affair in 2001. Helen Pringle and Elaine Thompson, 'The Tampa Affair and the role of the Australian Parliament', *Public Law Review (The Tampa Issue)*, 2002, 13(2):128; Hugh Smith, 'A certain maritime incident and political–military relations', *Quadrant*, 2002, 46(6):38; Michael White, 'Tampa incident: some subsequent legal issues', *Australian Law Journal*, 2004, 78:249; Simon Evans, 'The rule of law, constitutionalism and the MV Tampa', *Public Law Review (The Tampa Issue)*, 2002, 13(2):94, 94–6.

47 '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, Moore's own commission, *Order-in-Council of the Governor-General*, 1 November 1991.

48 See discussion in Michael Head, *Calling Out the Troops: The Australian Military and Civil Unrest*, Federation Press, Alexandria NSW, 2009, pp 130–131, quoting Air Vice-Marshal Geoffrey Hartnell, *Canberra Papers on Strategy and Defence No 27*, Australian National University, Canberra 1983, p 88; on the vice-regal office holder dealing with situations of illegality, see Twomey, *The Veiled Sceptre*, pp 691–694.

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 IIIA of the *Defence Act*.<sup>49</sup> The *Defence Force Discipline Act 1982* 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.<sup>50</sup> Even so, it is not enough for the CDF or VCDF to lose the confidence of the minister alone. Notably, since 2016,<sup>51</sup> s 15 of the *Defence Act* has required that termination be by notice in writing on the recommendation of the prime minister. Reserving such a decision to the prime minister strengthens the position of the CDF and VCDF to some extent, without undermining the fundamental principle of military subordination to the civilian government.<sup>52</sup>

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 that 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.<sup>53</sup> 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. This in itself supports the role of the Governor-General as the guardian of the *Constitution*,<sup>54</sup> and with it the principle of military subordination to the *Constitution*.<sup>55</sup>

## Discipline and obedience inherent to command

This leads to the issue of why discipline is 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 DMP*:

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49 See for example *Defence Act 1903* (Cth) s 33.

50 *Coutts v Commonwealth* (1985) 157 CLR 91.

51 *Defence Legislation Amendment (First Principles) Act 2015*.

52 Moore, *Crown and Sword*, pp 93–96.

53 On the Governor-General exercising reserve powers, that is, without ministerial advice, see Twomey, *The Veiled Sceptre*, p 10, pp 90–92; Boyce, *The Queen’s Other Realms*, pp 130–135.

54 See Twomey, *The Veiled Sceptre*, pp 35–37.

55 Moore, *Crown and Sword*, pp 95–96.

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.<sup>56</sup>

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*:

for 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. 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.<sup>57</sup>

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*:

You must have someone Commander-in-Chief, and, according to all notions of military discipline as we aware of, the Command-in-Chief must have control of questions of discipline, or remit them to properly constituted military courts.<sup>58</sup>

In 1944 in the High Court case of *Commonwealth v Quince* ('*Quince*'), Williams J had also supported this view of command and discipline being essential to the constitutional relationship between the armed forces and the government. His Honour stated the following on the power of command, military obedience and the relationship to the Crown:

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56 (2007) 231 CLR 570, 627. For a discussion of this case, see Geoffrey Kennett, 'The *Constitution* and Military Justice after *White v Director of Military Prosecutions*', *Federal Law Review*, 2008, 36: 231.

57 (1792) 2 HBL 69, 99–100; 126 ER 434, 450 quoted in *Re Tracey* (1989) 166 CLR 518, 557. See also John Collins, *Martial Law and English Laws c. 1500–1700*, Cambridge University Press, 2016, pp 270–271.

58 *White v DMP* (2007) 231 CLR 570, 583; Moore, *Crown and Sword*, pp 121–125.

*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.’<sup>59</sup>

Much more recently, in *Haskins v Commonwealth* in 2011, Heydon J also 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’.<sup>60</sup>

Command and discipline, therefore, provide a constitutional mechanism for ensuring executive power can be affected through the ADF and that the ADF does not usurp executive power.<sup>61</sup>

## Parliament

As seventeenth-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*.<sup>62</sup> It developed, presumably, to prevent the Crown influencing the deliberations of parliament through inducements to individual members. In Australia, 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

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59 (1944) 68 CLR 227, 255; Moore, *Crown and Sword*, pp 115–121.

60 *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’ 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 Publishing, Newport NSW, 2014, p 77, p 127.

61 Moore, *Crown and Sword*, p 124.

62 *Act of Settlement 1701* (Imp) 12 & 13 Will 3 c 2.



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.<sup>63</sup> Given the history of the seventeenth 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 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.<sup>64</sup>

Conversely, as the ADF has no role in parliament, the Commonwealth Parliament has no role in decisions to use military force. As mentioned above, 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 peace enforcement operations).<sup>65</sup> Decisions to use military force therefore are made by the executive. This is again different to the United Kingdom, given the emerging convention of the parliament there having to approve decisions to use military force.<sup>66</sup> The constitutional arrangements in Australia in contrast are much as they have been since the Glorious Revolution in 1688: that the executive government can make decisions to use military force without parliamentary approval but is responsible to the parliament for such decisions; that the executive government must rely upon the parliament to approve the funding of such actions; and that the executive government must answer to the electorate at the end of its term.<sup>67</sup>

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63 Quick and Garran have little to say on the point other than that officers or members of the Imperial Navy or Army were qualified to become members of the Federal Parliament because the disability relates to those paid out of revenues of the Commonwealth, 494–494. Harrison Moore does not add anything further, *The Constitution of the Commonwealth of Australia*, W Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed, Maxwell, 1910, p 116, p 128 and p 168. For a more recent discussion 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.

64 Moore, *Crown and Sword*, pp 99–100.

65 See Cameron Moore, 'Military law and executive power' in Robin Creyke, Dale Stephens and Peter Sutherland (eds), *Military Law in Australia*, Federation Press, Alexandria NSW, 2019, p 69.

66 See Rowe, *Legal Accountability and Britain's Wars 2000–2015*, pp 95–99. Also see contemporary discussion of reform of war powers in Australia: Peter E Mulherin, 'War-power reform in Australia: (re) considering the options' *Australian Journal of Politics and History*, 2020, 66(4):633–645.

67 Moore, *Crown and Sword*, pp 100–101.

## Conclusion

Australia's military and constitutional history is distinctly different to that of the United States, and the United Kingdom. To understand civil–military relations in the Australian context it is essential to understand this history and Australia's unique constitutional arrangements. Australia has inherited principles from the United Kingdom and borrowed some from the United States (such as having a written, federal constitution), but its constitutional arrangements for civil and military relationships are unique, because its history is unique. History cannot be borrowed or inherited.

The legacy of the English Civil War underpins the relationship between the government and the ADF. There is a deep-seated principle of ensuring that the armed forces remain under civilian control, the purpose of which is twofold – first, to have an armed force that will follow orders, government or military, to defend against external enemies. Secondly, it 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'.<sup>68</sup>

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 the Defence Force, which reflects the seventeenth century compromise between parliament and the Crown, but have their own Australian structures.

These structures have worked. The military has not overthrown the civilian government. This may be why we do not commonly discuss or understand Australia's formal structures for civil–military relations and the history which underlies them. It may also reflect a general Australian strategic immaturity to some extent. The Anzac legend means that Australians think more of the citizen-soldier than the military professional, the tactical more than the strategic, the army more than the navy or the air force. If Australia is to be an independent strategic actor and to have a mature understanding of civil–military relations, it is necessary for military professionals, civilian politicians and the public to understand Australian civil–military relations in their Australian context. It is not

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68 *Grant v Gould* (1792) 2 HBL 69, 99–100; 126 ER 434, 450 quoted in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 557.

enough simply to look to the United States or the United Kingdom, or just the Anzac tradition, to understand how civil–military relationships have worked and should work in Australia.<sup>69</sup>



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69 The views expressed in this paper are written in the authors' academic capacity only and do not represent any official view.