



HIGH COURT OF AUSTRALIA

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ANNE MARGARET WHITE v DIRECTOR OF MILITARY PROSECUTIONS AND COMMONWEALTH OF AUSTRALIA

Offences committed by Australian Defence Force personnel can be tried by Defence disciplinary bodies rather than by civilian courts, the High Court of Australia held today.

Ms White is a chief petty officer in the Royal Australian Navy, serving on HMAS Manoora. At a house and then a hotel at Williamstown in Victoria in June 2005, she allegedly engaged in acts of indecency, or assaults, against five other navy women. The women were all off duty and not in uniform and the incidents did not occur on Commonwealth property. Ms White has been charged under the *Defence Force Discipline Act*. She denies the charges.

Before the charges could be heard, Ms White brought a challenge in the High Court to the Act's provisions which create the offences and lay down the procedure for trial and punishment of such offences. She asked the High Court to overrule three previous decisions. Ms White seeks an order prohibiting the Director of Military Prosecutions from proceeding with the charges, a declaration that she may only be tried by a federal court exercising the judicial power of the Commonwealth under Chapter III of the Constitution, and a declaration that provisions of the Act purporting to confer jurisdiction on courts martial and defence force magistrates are invalid because they are not courts invested with federal jurisdiction in accordance with section 71 of the Constitution.

Ms White argued that trial and punishment involve an exercise of the judicial power of the Commonwealth and may occur only within the limits of Chapter III. She claimed that this is because the defence power conferred by section 51(vi) of the Constitution is subject to Chapter III and the separation of powers inherent in the Constitution. Secondly, she argued that only exclusive disciplinary offences could be dealt with by the military justice system. These are offences which have no civilian equivalent, pertain to service discipline, and involve no exposure to imprisonment. Ms White said that even if accepted that military tribunals do not exercise the judicial power of the Commonwealth, this only applies when such tribunals deal with disciplinary offences.

The Court unanimously rejected Ms White's first argument, rejected the second by a 6-1 majority and declined to overrule any earlier decisions. In respect of the first argument, the Court held that the defence power authorises Parliament to grant disciplinary powers to be exercised judicially by officers of the armed forces. The power exercised is not the judicial power of the Commonwealth but is supported solely by section 51(vi) to maintain or enforce discipline. In relation to the second argument, the majority held that the distinction between exclusive disciplinary offences and other offences is not feasible. Whether an offence is to be regarded as an offence against military discipline or a breach of civil order will often depend, not upon the elements of the offence, but upon the circumstances in which it is committed. Proceedings may be brought for a service offence in a tribunal established outside Chapter III if those proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*