

Power use troops as strike breakers law constitutional administrative essay

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used for things such as flood mitigation, during industrial disputes, assisting State police, and festive fly-overs, ect. There are limits as to when and where Governments can use the ADF; the Australian Constitution sets limits to its use, where there is no external threat involved, and there are administrative constraints on how legislation may be lay-out. The ADF has its own legislation and guide lines on how it is to operate or provide assistance for civil operations. The High Court, in the case *Re Tracey: Ex parte Ryan*[1] where Justices Brennan and Toohey said " The most important aspect of the discipline which that law was intended to secure was the control of armed forces to ensure that their existence as a permanent armed body under hierarchical command should not threaten the peace and civil order of the Realm." The use of the military in the area of civil authority is a principle recognised in Section 68 of the Australian Constitution where the Governor-General (with guidance by the Government) has the control of the armed forces. Justice Hope observed: " Use of the military other than for external defence, is a critical and controversial issue in the political life of a country and the civil liberties of its citizens. ' An armed disciplined body is in its essence dangerous to Liberty: undisciplined, it is ruinous to Society'. Given that there must be a permanent Defence Force, it is their operation comes from that point. Any laws that regulate the ADF activities need to be consistent and comes from that constitutional authority. The maintenance of law and order critical that it be employed only for proper purposes and that it is subject to proper control." The community was worried when the Bowral call-out at the thought of armed troops in the streets. The defence force is mentioned in the Constitution and the authority for their operation. Any laws

that regulate the ADF must be in line with that constitutional authority. The Federal system of law and order is primarily the States responsibility. The Constitution makes allowance for Commonwealth assistance to the States in the responsibility of law and order.[2]The Commonwealth's Power to callout for Domestic ViolenceThe Commonwealth's has the power to call out the troops using the executive power (Section 61 of the Constitution) also on Section 68 and the legislative powers contained in 51(xxxix) the external affairs power and Sections 51(vi) and (Section 51 (xxix)) supports anti-terrorist measures of the Constitution. The Governor-General may do all things and matters deemed by him or her to be desirable or necessary for the efficient protection and defence of the Commonwealth or of any other State or Territory. Paragraph 63 (l) (f), together with Sections 124 and 51 of the Act (the regulation making the power of the Act) providing the legal basis for creating the AMRs dealing with Section 119 the conduct in domestic and violence situations. It is a provision in both the AFRs and AMRs looks to apply, those bits of the situation where the Commonwealth comes between to protect its own interests. The provisions (AFR 511 and AMR 415) are worth taking note of as they are a legislative concern to Commonwealth's power to protect its own interests. But, the regulations don't produce the power of the source. This is provided from the Constitution.[3]Some constitutional lawyers have suggested that in their opinion this comes about from the Bowral call-out and what was done there; it is highly unlikely that Section 119 would ever be used. Professor Blackshield has argued: " Since almost any social controversy can nowadays be injected with 'national security' implications, it would seem that a way has been found of circumventing Section 119 and

intervening in State affairs whenever the Commonwealth chooses. In the long run, that may be the significant new precedent created at Bowral."^[4]The Commonwealths Power to use Troops as Strike BreakersThe use of ADF in the field of industrial relations, this must have been considered when drafting Section 51 of the Defence Act as this section prohibits the use of Emergency and Reserve Forces in connection with industrial relations. They would not have had to exclude them if it was not of a concern, when it was beyond the use of the regular ADF to be used in an industrial dispute. Sir Robert Mark said " Military aid to the civil power can be an unnecessarily emotive procedure in free societies, especially those in which it has rarely been invoked. Emotion and unease arise almost entirely from two factors. The first is the failure of governments to explain the purpose for which military aid is, or ought to be, acceptable to everyone as representing no threat to civil liberty. The second is the lack of contingency planning which causes military aid to be drawn from sources which even the general public can see are not appropriate." It is was said, that the two causes referred to by Sir Robert Mark are inter-related to an association of a deficiency of unadulterated legislative guidance, a deficiency of the correct legal jurisdiction and the internal secret operating procedure for the ADF. In a free society, there is nothing wrong in using the ADF in dealing with disasters or emergencies such as aircraft crashes, floods, and so on. Most of the public are accepting of their participation in the use of essential services. But the public consider troops should not be used as strike breakers. There comes a point when legal and political aspects merge into one. Quick and Garran's analysis would be a Commonwealth interest is to protect, if an industrial law

of the Commonwealth had been breached. For example an intervention on the waterfront. The Commonwealth would have an interests relating to legislation that uses the commerce power and overseas trade (Section 51(i)) that would be affected by the industrial situation e. g., customs matters. And on Hope's analysis the absence of a relevant Commonwealth Legislation this would still not preclude protecting a Commonwealth interest. The Commonwealth would have a legitimate interest in commerce and overseas trade as this is a matter which the Commonwealth is able to use laws of the Section 51(i) of the Constitution. On the basis of this interest of the executive power of the Commonwealth's (Section 61) would be sufficient to authorise (together with the other Constitutional provisions) action by the Commonwealth. This action could involve the ADF using force legitimately with or without the State Government agreement. Hope said: the execution and maintenance of the Constitution which Section 61 of the Constitution, this would extend the Executive power all though that interference may not cause an offence under the law of the Commonwealth; the Governor-General, having the correct advice could take the necessary steps to make sure there is no interference. Especially if a minister has the authority to deploy the resource, (Hope at 152). H. P. Lee^[5]said Australia can use troops in industrial relation situations. As this author's analysis leads to this conclusion of the Commonwealth has the power to protect its own interests, and that power is the main basis for the Commonwealth interfere to protect its own interests. And the executive power would grant the use of troops if there was breach of a Commonwealth law. It was noted in Davis v. The Commonwealth^[6]that the executive power extends beyond the legislative

power set out in Section 51 of the Constitution. Chief Justice Mason, Justice Gaudron and Justice Deane said: " The scope of the executive power of the Commonwealth has often been discussed but never defined. By Section 61 of the Constitution it extends to the execution and maintenance of the Constitution. In the words of Section 61, the executive power of the Commonwealth extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." In *Victoria v the Commonwealth*^[7] using this authority, " it could be argued that the executive power of the Commonwealth could send the troops in as strike-breakers if the consequences of the industrial dispute had touched on the Commonwealth power over, e. g., commerce and overseas trade, the Section 51 power would allow the executive power to operate. In conclusion the Commonwealth can send in the ADF as strike-breakers intervening in the dispute to protect its own interests but should use this option only after exhausting all other options.^[8]

Deployment of Troops at Nurrungar

In October 1989 the Minister for Defence MR Beazley, called in the ADF as a backup for South Australian (SA) police officers who were enforcing the law in regards to demonstrators at Nurrungar Defence Facility. A spokesman for the Minister of Defence said " There was no precedent in the use of troops against a civilian demonstration. Troops normally only became involved in civilian emergencies at the request of the local authorities under what was known legally as aid to the civil power." The SA Premier was quoted as saying " that the Federal Government had not warned him that it was sending troops to defend the base. However, he was not concerned as he believed that the defence of the base was a Federal issue." The ADF didn't come in contact

with any of the protesters. The protestors were not aware that the troops were already on the base. The troops were armed and ready if they had have been needed to control the protesters, but as it turned out there was no need to rush them to the Nurrungar Defence Facility, they had reports that it was likely that they would have to use force and that the ADF should be prepared for a clash. Four-hundred-and-ninety-two protestors were detained over a five day period. There were forceful clashes with the SA police; the protesters were breaching the security of the base. At times some of the protesters did succeed in breaking through the SA police ranks. There was a discussion between the Government and the ADF as to the legal basis that troops had been moved to Nurrungar. There was some debate as to Sec. 51 of the Defence Act and that the base was prohibited area, and what orders were given to troops which was to use minimum force. The Governments position on the deployment of troops at Nurrungar a Commonwealth Base was given at a Parliamentary question time the Minister for Defence's Mr Beazley answer was: " No specific legislative authority is required for the Government to assign tasks to the Defence Force. This is a normal aspect of the executive power of government. However, it should be borne in mind that, under section 8 of the Defence Act 1903, the Defence Force is subject to the directions of the Minister for Defence." Then a question was asked about what legislative authority do the ADF personnel deployed at Nurrungar have? It was answered with " Under section 23 of the Defence (Special Undertakings) Act 1952, Defence Force personnel at Nurrungar were lawfully entitled to arrest persons who entered the Nurrungar perimeter area without permission and to hand arrested persons to the Federal or State police. In

fact, those powers were not exercised." And noted that the Defence Force has always had the power, under section 82 of the Defence Act 1903, to arrest any persons who trespass on defence installations. The deployment of troops at Nurrungar was one that would fall into the Quick and Garran opinion that the Commonwealth was acting to protect its own property and interests. There had been no request from the SA State Government but that none is required. No proclamation by the Governor-General is required either. The Commonwealth acting to protect its own interests was the legal basis this draws mainly on the provisions of Sections 61, 68 and 51(vi) of the Constitution. This might change if the troops in their situation were outside the base. It would then be unclear if the troops were involved in stopping domestic violence or were being called on to enforce defence legislation.

[9]Conclusion At times the ADF needs to assist the Civic Community especially in times of floods and fires, ect. There can be an issue with the Civic Community perception if the ADF is used as a strike breaker or for political motives. The Australian Constitution sets out conditions on when the ADF can be used. But the High Court tends to read the Constitution widely and there usually is a case to be made for protecting its own assets. Under the powers that it already does have especially under its power of overseas trade and commerce. As Professor Blackshield said " Since almost any social controversy can nowadays be injected with 'national security' implications, it would seem that a way has been found of circumventing Section 119 and intervening in State affairs whenever the Commonwealth chooses. In the long run, that may be the significant new precedent created at Bowral." As to deployment of the ADF at Nurrungar there is no doubt that this incident was

a one that could have been worse with Four-hundred-and-ninety-two protestors who were detained. The Minister of Defence was correct to rush the ADF as back up for the SA police as this is a top secret base that Australia shares with the USA, this could have been a lot bigger international incident than it was. This incident shows the need for the Commonwealth to have these powers but there is a need to be very cautious about using them.