HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

ANNE MARGARET WHITE PLAINTIFF

AND

DIRECTOR OF MILITARY PROSECUTIONS & ANOR DEFENDANTS

White v Director of Military Prosecutions [2007] HCA 29
19 June 2007
S312/2006

ORDER

Application dismissed with costs.

Representation

A W Street SC with D A McLure and J A Hogan-Doran for the plaintiff (instructed by North & Badgery)

D M J Bennett QC, Solicitor-General of the Commonwealth with T F J Berkley and S B Lloyd for the defendants (instructed by Australian Government Solicitor)

CATCHWORDS

White v Director of Military Prosecutions

Constitutional law (Cth) – Defence – Offences by defence members – Service offences – The *Defence Force Discipline Act* 1982 (Cth) created a range of offences based on offences against the laws of the Australian Capital Territory, and provided for trial and punishment of these offences exclusively by service tribunals – Whether trials for these offences require an exercise of the judicial power of the Commonwealth within the meaning of Ch III of the Constitution – Whether service tribunals can validly exercise jurisdiction over service offences.

Defence and war – Offences by defence members – Service offences – The *Defence Force Discipline Act* 1982 (Cth) created a range of offences based on offences against the laws of the Australian Capital Territory, and provided for trial and punishment of these offences exclusively by service tribunals – Whether trials for these offences require an exercise of the judicial power of the Commonwealth within the meaning of Ch III of the Constitution – Whether service tribunals can validly exercise jurisdiction over service offences.

Words and phrases – "essentially disciplinary", "exclusively disciplinary", "service offence", "Territory offence", "the judicial power of the Commonwealth".

Constitution, Ch III, ss 51(vi), 71, 75(v), 76(ii), 77(i), 80.
Defence Force Discipline Act 1982 (Cth), ss 33(a), 61, 114(3), 115, 129, 190.
Crimes Act 1900 (ACT), s 60.
Defence Force Discipline Appeals Act 1955 (Cth), s 52.

1 GLEESON CJ. The plaintiff, a Chief Petty Officer in the Royal Australian Navy, has been charged with seven offences under the *Defence Force Discipline Act* 1982 (Cth) ("the Act"). The alleged offences are said to have occurred in Victoria. They involve complaints of acts of indecency, or assault, upon five other female members of the Australian Defence Force, all of lower rank. The trial of the charges has not yet occurred, but it will be either by court martial or a Defence Force magistrate. The plaintiff challenges the validity of the provisions of the Act creating the offences with which she has been charged and providing for trial and punishment of such offences. In order to sustain that challenge, the plaintiff invites the Court to overrule its previous decisions in *Re Tracey; Ex parte Ryan*[1], *Re Nolan; Ex parte Young*[2], and *Re Tyler; Ex parte Foley*[3]. For the reasons that follow, the invitation should be declined.

2 Two arguments are advanced on behalf of the plaintiff. The first, which conflicts with the reasoning of all the Justices who participated in the trilogy of cases just mentioned, is that it is contrary to the Constitution, and beyond the power of the Parliament, to establish a system of military justice involving trial and punishment of service offences, being a form of Commonwealth-made criminal law, by tribunals operating outside Ch III of the Constitution. Under pressure of argument, senior counsel for the plaintiff developed a narrower submission, which was said to be supported by some of the dissenting reasoning in those cases. The alternative submission is that no such system of military justice can operate validly in the case of service offences constituted by conduct that would also be an offence against the civil law; that the Act purports to apply to such conduct; that it is impossible by any process of severance to confine its operation to exclusively disciplinary offences; and that the Act is therefore invalid. By an exclusively disciplinary offence, counsel said he meant an offence that has three characteristics: first, it is one for which there is no civilian equivalent; secondly, it pertains to service discipline; and thirdly, it involves no exposure to imprisonment.

3 It is necessary to be clear about an argument the plaintiff did not seek to make. The alleged conduct of the plaintiff occurred at a time when the people involved were not in uniform and not on duty. However, counsel expressly disclaimed any argument that, if the Act were otherwise valid, the alleged offences in this case did not have the necessary service connection which some members of this Court have said is required for the valid application of the Act to

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1 (1989) 166 CLR 518.

2 (1991) 172 CLR 460.

3 (1994) 181 CLR 18.

particular conduct[4]. The defendants made it clear that, if any such argument had been advanced, they would have wished to lead evidence as to facts and circumstances relevant to the point. Because no such point was taken, the case proceeded on the basis of the existing state of the evidence. This matter, therefore, does not raise for decision the difference between what McHugh J, in *Re Aird; Ex parte Alpert*[5], described as the "service status" and the "service connection" view of military jurisdiction. In the Supreme Court of the United States, the former view was adopted in *O'Callahan v Parker*[6], but the latter view prevailed in the later case of *Solorio v United States*[7]. On the plaintiff's argument, both views are wrong, and the difference is presently immaterial. Whether the proceedings against the plaintiff "can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline", to use the test adopted by Brennan and Toohey JJ in *Tracey*[8], is not an issue.

4 Service offences under the Act include many offences constituted by conduct that would constitute an offence against the ordinary civil law. In *Tracey*[9], it was pointed out that "both as a matter of history and of contemporary practice, it has commonly been considered appropriate for the proper discipline of a defence force to subject its members to penalties under service law for the commission of offences punishable under civil law", and reference was made to comparable legislation in the United States, Canada and New Zealand. Cases of sexual assault by one defence member upon another, or of offences involving prohibited drugs, provide examples of circumstances in which the requirements of Defence Force discipline and of the obedience which every citizen owes to the law may overlap. In that respect, it may be necessary to bear in mind that the seriousness of a certain form of misconduct may take on a different aspect if it occurs in the context of military service. In *R v Généreux*[10], Lamer CJ said:

> "Many offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant

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4 See *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 570 per Brennan and Toohey JJ; cf *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 321-322 [36]-[37].

5 (2004) 220 CLR 308 at 321-322 [36]-[37].

6 395 US 258 (1969).

7 483 US 435 (1987).

8 (1989) 166 CLR 518 at 570.

9 (1989) 166 CLR 518 at 543.

10 [1992] 1 SCR 259 at 294.

> more severe punishment. Examples of such are manifold such as theft from a comrade. In the service that is more reprehensible since it detracts from the essential *esprit de corps*, mutual respect and trust in comrades and the exigencies of the barrack room life style. Again for a citizen to strike another a blow is assault punishable as such but for a soldier to strike a superior officer is much more serious detracting from discipline and in some circumstances may amount to mutiny. The converse, that is for an officer to strike a soldier is also a serious service offence. In civilian life it is the right of the citizen to refuse to work but for a soldier to do so is mutiny, a most serious offence, in some instances punishable by death. Similarly a citizen may leave his employment at any time and the only liability he may incur is for breach of contract but for a soldier to do so is the serious offence of absence without leave and if he does not intend to return the offence is desertion."

5 This is a topic to which it will be necessary to return when dealing with the plaintiff's second argument. The difficulty of maintaining a clear distinction between breaches of service discipline and breaches of the civil law is exacerbated in circumstances of military conflict, but it is not limited to such circumstances. This may explain the plaintiff's preference for a challenge that turns upon no such distinction. The plaintiff's primary argument is that the trial and punishment of service offences necessarily involves an exercise of the judicial power of the Commonwealth, and may occur only within the limits imposed by Ch III of the Constitution. This, it is said, is because the power conferred by s 51(vi) of the Constitution, which is the power upon which Parliament relies to create service offences and establish a system of military justice, is given "subject to [the] Constitution", that is, subject to Ch III and to the separation of powers inherent in the structure of the Constitution. The scheme of the Act, it is said, is fundamentally inconsistent with the principles stated in the *Boilermakers' Case*[11].

6 In *Tracey*[12], Brennan and Toohey JJ said:

> "[The Act] confers on service tribunals powers which are to be exercised judicially, which are subject to procedures spelt out in the statute appropriate to the exercise of judicial power, which provide for the imposition of penalties for conduct prohibited by law and which are subject to appeals that, on questions of law, may reach the Federal Court of Australia. The powers are conferred on officers of the Commonwealth by a law of the Commonwealth. These are indicia of the judicial power of

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11 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

12 (1989) 166 CLR 518 at 572.

> the Commonwealth which can be exercised only by Ch III courts. They are not powers ... which [relate] merely to domestic discipline, not to the imposition of punishments as for the commission of criminal offences ... However, the imposition of punishments by service authorities as for the commission of criminal offences in order to maintain or enforce service discipline has never been regarded as an exercise of the judicial power of the Commonwealth. If that view be erroneous, no service tribunal has been validly constituted under a law of the Commonwealth since the Commonwealth assumed responsibility for the armed forces."

7 Their Honours went on to say that the Convention Debates are silent on this point, by which presumably they meant on the relationship between service tribunals and Ch III. The Debates are not silent on the topic of courts martial. During the debate on s 68, which vests the command in chief of the naval and military forces of the Commonwealth in the Governor-General as the Queen's representative, Mr Deakin moved an amendment to put beyond doubt that the Governor-General, as commander in chief, was to act on the advice of Cabinet or the Minister of Defence. Mr Barton opposed the amendment as being unnecessary, and in that context discussed courts martial. He said: "A court-martial is a judicial tribunal, and a Minister cannot affect its decision in any way. He could not dismiss an officer conducting a court-martial, because that man would be acting in a purely judicial capacity."[13] Mr O'Connor said[14]:

> "You must have some one Commander-in-Chief, and, according to all notions of military discipline that we are aware of, the Commander-in-Chief must have control of questions of discipline, or remit them to properly constituted military courts. Dr Cockburn has referred to the trial of breaches of military discipline. Well, I should think that one of the most material parts of any Act constituting the forces of the Commonwealth would be to provide for the mode in which these courts-martial would be conducted, *and the Parliament would have abundant power to decide how these matters were to be conducted, and what the particular form of the court was to be.*" (emphasis added)

8 Not only is there "testimony to the absence of any consciousness on the part of the delegates that they were leaving the naval and military forces of the Commonwealth without authority to maintain or enforce naval and military discipline in the traditional manner"[15], but, rather, it is clear that, as would be

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13 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 10 March 1898 at 2255.

14 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 10 March 1898 at 2259.

15 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 572.

expected, the delegates were well aware of the role and functions of service tribunals, and Mr O'Connor told them that Parliament would have "abundant power" to decide how such tribunals were to be set up for the purposes of the new naval and military defences forces.

9 Five members of the Court in *Tracey* (Mason CJ, Wilson and Dawson JJ, and Brennan and Toohey JJ) examined the history of courts martial in Australia, the United Kingdom, and the United States, before Federation[16]. It is unnecessary to repeat what was there said, but it is necessary to recognise its importance. That history forms part of the context relevant to the construction of the Constitution and, in particular, to an understanding of the relationship between s 51(vi) and Ch III. In the Supreme Court of the United States, an examination of history was central to the reasoning in both of *O'Callahan* and *Solorio*. In the latter case, it was said that the earlier case understated the extent to which, in English and American history, there had been military trial of members of the armed forces committing civilian offences. The majority in *Solorio* said it was wrong to suggest that, at the time of the American Revolution, military tribunals in England were available only where ordinary civil courts were unavailable[17]. As to American practice, they referred to George Washington's statement that "[a]ll improper treatment of an inhabitant by an officer or soldier being destructive of good order and discipline as well as subversive of the rights of society is as much a breach of military, as civil law and as punishable by the one as the other"[18]. It may be added that the separation of powers involved in the structure of the United States Constitution, which served as an important model for the framers of the Australian Constitution, was not regarded in the United States, either before or after 1900, and was not regarded in either *O'Callahan* or *Solorio*, as incompatible with a system of military tribunals operating outside Art III. It should also be noted that the constitutional foundation for the power to establish military tribunals was said in *Solorio*[19] to be Art I, §8, cl 14 which gives Congress power to make Rules for the "Government and Regulation of the land and naval Forces". This grant of power was said to be plenary, and cl 14 was to be given its plain meaning[20]. Reference was made to Alexander Hamilton's description of the power as "essential to the common defense", and to his statement: "These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of

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16 (1989) 166 CLR 518 at 539-543, 554-563.

17 483 US 435 at 444 (1987).

18 483 US 435 at 445 fn 10 (1987).

19 483 US 435 at 441 (1987).

20 483 US 435 at 441 (1987).

national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them."[21] The exemption in the Fifth Amendment of "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" from the requirement of prosecution by indictment and the right to trial by jury was not treated in *Solorio* as the source of the power of Congress to establish military tribunals. The source of the power was the original grant of power, which corresponds with s 51(vi) of the Australian Constitution.

10 Professor W Harrison Moore, writing in 1910[22], described courts martial as tribunals which exercise a judicial function but which stand outside Ch III. He cited an American author[23] who said of such tribunals in the United States that "although their legal sanction is no less than that of the Federal Courts, being equally with them authorized by the Constitution, they are, unlike these, not a portion of the judiciary of the United States. ... Not belonging to the judicial branch of the Government, it follows that Courts martial must appertain to the executive department, and they are in fact simply instrumentalities of the executive power provided by Congress for the President as Commander-in-Chief to aid him in properly commanding the army and navy, and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives."

11 Professor Moore said that it would be dangerous to attempt an exhaustive statement of the cases in which judicial functions may be exercised under the Constitution by authorities other than the courts established or invested with jurisdiction under s 71[24]. He gave three examples: the power of Parliament to deal with disputes as to elections and qualifications of members; the granting and withholding of licences; and the jurisdiction of courts martial. As to the first of those examples, in *Sue v Hill*[25] the majority held that such a power was capable of being conferred, and had been conferred, on a Ch III court (just as it would be possible for Parliament to assign service offences to Ch III courts), but nothing in any of the reasons for judgment in that case casts doubt upon Parliament's power to deal with such matters itself. There was no suggestion by any member of the Court that the principle of the separation of powers obliged Parliament to confer jurisdiction on a Ch III court.

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21 483 US 435 at 441 (1987).

22 *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 316-317.

23 Thayer's *Leading Cases in Constitutional Law*.

24 Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 321.

25 (1999) 199 CLR 462.

12 In *R v Cox; Ex parte Smith*[26], a prisoner objected to the jurisdiction of a court martial on the ground that, because he had become a civilian again, to allow a court martial to exercise jurisdiction over him would be contrary to the principles of Ch III which confides the judicial power of the Commonwealth exclusively to courts of justice. Citing the decision of the Court in *R v Bevan; Ex parte Elias and Gordon*[27], Dixon J rejected the argument, saying[28]:

> "In the case of the armed forces, an apparent exception is admitted and the administration of military justice by courts-martial is considered constitutional ... The exception is not real. To ensure that discipline is just, tribunals acting judicially are essential to the organization of an army or navy or air force. But they do not form part of the judicial system administering the law of the land. It is not uniformly true that the authority of courts-martial is restricted to members of the Royal forces. It may extend to others who fall under the same general military authority, as for instance those who accompany the armed forces in a civilian capacity."

13 Dixon J's statement that military tribunals do not form part of the judicial system administering the law of the land echoes Starke J's observation in *Bevan*[29] that the Supreme Court of the United States had held that courts martial form no part of the judicial system of the United States. Starke J went on to say[30] that a similar construction of the Australian Constitution was necessary from a practical and administrative point of view.

14 To adopt the language of Brennan and Toohey JJ in *Tracey*[31], history and necessity combine to compel the conclusion, as a matter of construction of the Constitution, that the defence power authorises Parliament to grant disciplinary powers to be exercised judicially by officers of the armed forces and, when that jurisdiction is exercised, "the power which is exercised is not the judicial power of the Commonwealth; it is a power sui generis which is supported solely by s 51(vi) for the purpose of maintaining or enforcing service discipline." The plaintiff's primary argument fails.

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26 (1945) 71 CLR 1 at 23.

27 (1942) 66 CLR 452.

28 (1945) 71 CLR 1 at 23.

29 (1942) 66 CLR 452 at 467.

30 (1942) 66 CLR 452 at 467-468.

31 (1989) 166 CLR 518 at 573-574.

15 The plaintiff's second argument depends upon the proposition that, even if it is accepted (as established by an unbroken line of authority in this Court) that, as a matter of construction of the Constitution, military service tribunals do not exercise the judicial power of the Commonwealth within the meaning of s 71, that construction only holds good when such tribunals are dealing with exclusively disciplinary offences, as earlier defined. A somewhat similar, although by no means identical, approach appealed to Deane J and Gaudron J who were in dissent in *Tracey*, and for a time appealed to McHugh J, who later accepted that the weight of authority was against it[32].

16 It is an over-simplification, and an erroneous summary, of the opinion of Deane J in *Tracey* to say that, at least in time of peace and general civil order, and in respect of conduct in Australia, he considered that jurisdiction could be conferred on a service tribunal operating outside Ch III only in respect of exclusively disciplinary offences. To demonstrate that, it is necessary to refer in some detail to his reasoning[33].

17 Having begun his reasons by explaining the importance of the principle of the separation of powers, and of Ch III as a guarantee of due process, Deane J, rejecting by implication the primary argument for the plaintiff in this case, went on to consider the theoretical justification for accepting that in some circumstances service tribunals may be given jurisdiction outside Ch III. He said that a claim to exercise judicial power by any Commonwealth officer or instrumentality other than a court designated by Ch III can be allowed only if justified as a qualification of the provisions of Ch III, and, in the past, the Court had accepted at least two such qualifications: the powers of Parliament to deal with contempt or breach of privilege; and the powers of military tribunals to enforce military discipline. He cited the passage from the judgment of Dixon J in *R v Cox* quoted above, and said that the legal rationalisation for the acceptance of service tribunals outside Ch III "can only lie in an essentially pragmatic construction of the reference to 'the judicial power of the Commonwealth' in Ch III to exclude those judicial powers of military tribunals which [had] traditionally been seen as lying outside ... 'the judicial system administering the law of the land'". Accordingly, he said, it became necessary to identify the critical features of the powers that had traditionally been so regarded. Thus, Deane J saw the question as one of construction of the reference to the judicial power of the Commonwealth in Ch III, and accepted that some judicial powers of military tribunals did not involve the exercise of the judicial power of the

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32 See *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.

33 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 581-592.

Commonwealth. Which powers? The answer he gave was those that have traditionally been seen as lying outside the ordinary civilian judicial system.

18 Deane J did not make the mistake of thinking that traditionally it was only exclusively disciplinary offences, in the sense of offences based on conduct that would not also constitute an offence against civil law, that were dealt with, and seen as properly dealt with, by service tribunals outside the ordinary civilian judicial system. He referred also to another category of offence, which he called service-related offences: offences involving conduct of a type which is commonly an offence under the ordinary criminal law but which takes on a "special character" by reason of the fact that it bears a particular relationship to military discipline. He gave, as an example, an assault on a superior officer[34]. He did not exclude such service-related offences from the matters that were traditionally accepted as falling within the proper jurisdiction of service tribunals. He said that if the legislation in question to deal with such service-related offences could properly be restricted, by a process of reading down or severance, "to a disciplinary jurisdiction, which did not supplant the jurisdiction of the ordinary criminal courts to deal with the general community aspects of such conduct, it would fall within the traditional judicial powers of military tribunals and escape the reach of Ch III of the Constitution"[35]. He returned to this point in *Nolan*[36], where he summarised the view he expressed in *Tracey* as being that Parliament can, consistently with Ch III, confer judicial powers upon service tribunals to deal with offences that were "essentially disciplinary" in their nature, in the sense of being concerned either with "exclusively disciplinary" offences or with the disciplinary aspects of other "service-related" offences. In Deane J's view, offences that were "essentially disciplinary" included, but were not limited to, offences that were exclusively disciplinary. To ignore his acceptance of what he called service-related offences, as well as exclusively disciplinary offences, as falling within the category of essentially disciplinary offences that could be dealt with by service tribunals operating outside Ch III would be to mis-state his reasoning.

19 However, it is this part of the reasoning of Deane J that presents a difficulty. An illustration of the problem of separating essentially disciplinary offences from civil offences may be seen in the archetypal disciplinary offence: mutiny. The essence of mutiny lies in the combination to defy authority. The offence strikes at the heart of a disciplined, hierarchical service. The overt acts that accompany, and may evidence, mutiny will commonly involve conduct that

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34 (1989) 166 CLR 518 at 587.

35 (1989) 166 CLR 518 at 589.

36 (1991) 172 CLR 460 at 489.

is an offence at civil law. Injury to persons or property, or even the taking of life, may be involved. Trial and punishment for mutiny, which may well occur in exigent circumstances, is unlikely to permit a neat distinction between the disciplinary aspects and what Deane J called "the general community aspects"[37] of such conduct. The problem may also be illustrated by considering the example Deane J gave of a "service-related offence" – an assault upon a superior officer. How does a body dealing with such an offence distinguish between the disciplinary aspects and the general community aspects of such conduct? George Washington has a place in tradition, and his views, quoted earlier, about military abuse of civilians are impossible to reconcile with such a distinction. If, as appears to be accepted generally, a given offence, such as theft from a comrade, may have, in a military context, an aspect more serious than the same conduct would have in a civilian context, there appears to be no foundation for the proposition that tradition attempted to distinguish, in terms of procedures or punishment, between the service-related aspects and the general community aspects of such conduct.

20 A similar problem emerges from the more general qualification made by Deane J in introducing his statements of principle by limiting their application to times of peace and general civil order[38], and to offences committed within Australia[39]. Those limitations allow for military tribunals to deal with offences committed during combat, but not with offences committed during training (in Australia) for combat. Military exercises, during peacetime, may require the same kind of discipline as combat in wartime.

21 There are two basic difficulties. The first comes back to what was said by Alexander Hamilton about the nature of the defence power: it is impossible to foresee or define the extent and variety of national exigencies or of the means which may be necessary to satisfy them. The second was identified by Brennan and Toohey JJ in *Tracey*[40]. It is that whether an offence is more properly 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. Assaulting an officer might be identified readily as "essentially disciplinary" in most circumstances, but not in some. The same may be said of a sexual offence against another defence member; or conduct in

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37 (1989) 166 CLR 518 at 589.

38 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 489.

39 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 592.

40 (1989) 166 CLR 518 at 568.

relation to prohibited drugs. This was the point being made by an American author[41] cited in *Tracey*[42], who said:

> "As to whether an act which is a civil crime is also a military offence no rule can be laid down which will cover all cases, for the reason that what may be a military offence under certain circumstances may lose that character under others."

22 In the plaintiff's alternative argument, it is only exclusively disciplinary offences that may be tried by a service tribunal established outside Ch III, and, to decide whether an offence is of that character, one looks at the elements of the offence and asks whether those elements constitute an offence at civil law. The plaintiff's argument was not qualified by considerations of whether the offence occurred in a time of peace or war, or within or outside Australia.

23 Insofar as the justification for the plaintiff's argument is said to be that it limits the jurisdiction of military tribunals to what is necessary for defence purposes, so as to give the exception to Ch III the narrowest scope consistent with its purpose, and thereby to allow the principle of separation of powers, and the protections of Ch III, the fullest scope, then such justification rests upon a bare and unconvincing assertion as to the requirements of necessity. If one were to ignore history, and simply to ask what jurisdiction s 51(vi) requires, as a matter of necessity, for service tribunals, then, for the reason stated by the American author in the passage quoted above, the answer will not be found in a formula that depends solely upon the elements of offences, and ignores the circumstances in which they were committed.

24 There is a serious question of interpretation of the Constitution, involving the need to give due weight to the protections contained in Ch III, and to the separation of powers inherent in the structure of the Constitution, while at the same time acknowledging the considerations of history and necessity referred to by Brennan and Toohey JJ in *Tracey*. Their response to that question was to conclude that proceedings may be brought for a service offence in a tribunal established outside Ch III only if those proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline. That is a response that recognises the impossibility of classifying an offence as either military or civil simply by reference to the technical elements of the offence, ignoring the circumstances in which it is committed. If, contrary to the plaintiff's argument, one were to adopt a different test for conduct in wartime,

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41 Davis, *A Treatise on the Military Law of the United States*, 3rd rev ed (1915) at 437.

42 (1989) 166 CLR 518 at 568.

or overseas, then one would be accepting that on some occasions the circumstances (of time and place) in which conduct occurred would be material, perhaps decisive, and on other occasions the circumstances would be irrelevant. This seems illogical.

25 The plaintiff's alternative argument also fails.

26 The application should be dismissed with costs.

27 GUMMOW, HAYNE AND CRENNAN JJ. The plaintiff is a defence member within the meaning of the *Defence Force Discipline Act* 1982 (Cth) ("the Act"). She is a member of the Royal Australian Navy and a Chief Petty Officer, stationed on HMAS *Manoora*. The long title to the Act is "[a]n Act relating to the discipline of the Defence Force and for related purposes". The Act provides for a range of offences and for trial and punishment by service tribunals. The plaintiff challenges the validity of that system of justice.

The alleged offences

28 Part III (ss 15-65) of the Act is headed "Offences". Reference should be made to those offences which are particularly relevant to this case. Division 3 (ss 25-34) is headed "Insubordination and violence". So far as material, s 33 states:

> "A person who is a defence member ... is guilty of an offence if the person is on service land, in a service ship, service aircraft or service vehicle or in a public place and the person:
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> (a) assaults another person; ...
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> Maximum punishment: Imprisonment for 6 months."

Division 8 (s 61) is headed "Offences based on Territory offences". Section 61(3) provides:

> "A person who is a defence member ... is guilty of an offence if:
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> (a) the person engages in conduct outside the Jervis Bay Territory (whether or not in a public place); and
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> (b) engaging in that conduct would be a Territory offence, if it took place in the Jervis Bay Territory (whether or not in a public place)."

With respect to punishment, s 61(4) states:

> "The maximum punishment for an offence against this section is:
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> (a) if the relevant Territory offence is punishable by a fixed punishment — that fixed punishment; or
>
> (b) otherwise — a punishment that is not more severe than the maximum punishment for the relevant Territory offence."

The expression "Territory offence" is so defined in s 3(1) as to "pick up" offences punishable under the *Crimes Act* 1900 (ACT) ("the Crimes Act"), as a law in force in the Jervis Bay Territory.

29 On 30 June 2006, the plaintiff was charged by the Acting Director of Military Prosecutions with seven offences. All but one of them relied upon s 61(3) of the Act in conjunction with s 60 of the Crimes Act. Section 60(1) states:

> "A person who commits an act of indecency on, or in the presence of, another person without the consent of that person and who knows that that other person does not consent, or who is reckless as to whether that other person consents, to the committing of the act of indecency is guilty of an offence punishable, on conviction, by imprisonment for 5 years."

30 The charges indicate that there are five female complainants, all of inferior rank to the plaintiff; three hold the rank of Able Seaman and two that of Leading Seaman. The one charge of assault under s 33(a) of the Act (Charge 4) is in the alternative to one of the charges (Charge 3) under s 61(3) of the Act in conjunction with s 60 of the Crimes Act.

31 The legislation makes some provision for the relationship between service tribunals and the civil courts and between service offences and civil court offences. Section 190(1) of the Act states:

> "Subject to the Constitution, a civil court does not have jurisdiction to try a charge of a service offence."

The offences with which the plaintiff is charged are "service offences" within the definition of that term in s 3(1). The expression "civil court" is defined in the same section as meaning "a federal court or a court of a State or Territory".

32 Further, civil courts do not have jurisdiction to try charges of civil court offences committed by defence members or "defence civilians" which are "ancillary" to certain offences against the Act (s 190)[43]. A person acquitted or convicted by a civil court for an offence not being a service offence, but being "substantially the same" as a service offence, is not liable to trial by a service

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43 Section 190 was cast in broader terms at the time when what were then sub-ss (3) and (5) were held invalid in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518. These provisions were removed by the *Defence Legislation Amendment Act* 2003 (Cth), Sched 1, Items 42, 43.

tribunal for that service offence (s 144(3)). Neither s 190 nor s 144(3) is directly invoked in the present case.

The High Court litigation

33 By application made to this Court, the plaintiff seeks prohibition against the first defendant, the Director of Military Prosecutions ("the Director"), restraining the Director from requesting the Registrar of Military Justice to refer the charges to a Defence Force magistrate for trial or from requesting the Registrar to convene a general court martial or a restricted court martial to try the charges. Authority to pursue those alternative courses in the various service tribunals is conferred upon the Director by s 103(1) of the Act. Jurisdiction to try charges is conferred by s 115 upon a court martial and upon a Defence Force magistrate by s 129.

34 The plaintiff also seeks a declaration that a trial of the charges against her requires "an exercise of the judicial power of the Commonwealth within the meaning of Ch III of the Constitution". The plaintiff seeks a further declaration that the provisions of the Act purporting to confer jurisdiction on courts martial and Defence Force magistrates (ss 115 and 129 respectively) are invalid because courts martial and Defence Force magistrates are not courts invested with federal jurisdiction within the meaning of s 71 of the Constitution.

35 The Director has undertaken not to pursue prosecution of the charges pending determination of the plaintiff's application by this Court. By order of the Chief Justice, the application was referred to the Full Court.

The place of military law

36 Before turning to consider the submissions by the plaintiff, some general observations should be made. These provide the context in which the issues of validity fall for consideration.

37 First, the English constitutional system as it developed after the turmoil of the seventeenth century did not allow for a military caste with its own set of all-encompassing legal norms, as was found in some other European nation states[44]. Secondly, the ascendency of parliamentary control denied any place for a general defence in the English criminal law of superior orders or of executive fiat, and this remains the case in Australia[45]. Thirdly, naval and military courts

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44 *Groves v The Commonwealth* (1982) 150 CLR 113 at 125-126.

45 *A v Hayden* (1984) 156 CLR 532.

martial were liable to the supervisory jurisdiction of the superior courts[46]. Of the English system as it developed after the Revolution of 1688 the Supreme Court of the United States later said[47]:

> "By the mutiny acts, courts martial have been created, with authority to try those who are a part of the army or navy for breaches of military or naval duty. It has been repeatedly determined that the sentences of those courts are conclusive in any action brought in the courts of common law. But the courts of common law will examine whether courts martial have exceeded the jurisdiction given them, though it is said, 'not, however, after the sentence has been ratified and carried into execution.'"

38 Fourthly, the civil law of obligations does not cease to run merely because the obligations in question bind or confer rights upon a defence member. Thus, *Groves v The Commonwealth*[48] established that at common law an action in negligence is maintainable against the Commonwealth by a defence member for damages caused by the negligence of a fellow defence member while on duty in peace time.

39 Finally, the system established by the Act cannot operate wholly beyond the ambit of Ch III of the Constitution. This is because those constituting the service tribunals under the Act are officers of the Commonwealth for the purposes of s 75(v) of the Constitution. Accordingly, the Constitution mandates one avenue for judicial review, in particular for jurisdictional error. Further, it has never been suggested that the laws made by the Parliament under s 51 of the Constitution, which give rise to matters in which the Parliament may make laws under s 76(ii) and s 77 conferring federal jurisdiction, do not include laws supported by s 51(vi) or that s 51(vi) is so walled-off from Ch III as to deny the competency of such laws. Thus, the Parliament has enlarged the participation of Ch III courts in the procedures for the prosecution of offences under the Act. The *Defence Force Discipline Appeals Act* 1955 (Cth) ("the Appeals Act") establishes a review system which includes provision for an "appeal" to the Federal Court on a question of law involved in a decision of the Defence Force Discipline Appeal Tribunal given on an "appeal" to the Tribunal under that

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46 *Grant v Sir Charles Gould* (1792) 2 H Bl 69 at 100 per Lord Loughborough [126 ER 434 at 450].

47 *Dynes v Hoover* 61 US 65 at 83 (1857).

48 (1982) 150 CLR 113. In their joint judgment (at 134), Stephen, Mason, Aickin and Wilson JJ put to one side the position of defence members engaged in combatant duties in time of war or in training for such activities.

statute (s 52)[49]. The legislation for that system is founded upon s 51(vi), s 76(ii) and s 77(i) of the Constitution.

40 There is an important distinction which should be made before considering the submissions respecting the validity of the Act. No party to the present case contends that it would be beyond the competence of the Parliament, by further reliance upon s 51(vi), s 76(ii) and s 77(i) (and, if need be, upon s 71 to create an additional federal court), to achieve the result that offences under the Act were tried by the exercise of the judicial power of the Commonwealth in a Ch III court. The defendants did not assert that the functions of the service tribunals would have been insusceptible of discharge by a Ch III court if the Act had so provided.

41 Where the parties differ is with respect to a particular submission by the plaintiff. This is to the effect that it is only by the exercise of the judicial power of the Commonwealth that the functions of the service tribunals under the Act may be exercised conformably with the Constitution and that the system established by the Act therefore is invalid.

The plaintiff's first submission

42 As the hearing developed, it became apparent that the plaintiff put her case essentially upon two grounds. The first had been developed in the written submissions. The second emerged in the course of oral argument. It is convenient to deal with these submissions in order.

43 The first submission by the plaintiff is in the broad terms indicated above. It is that the offences which the Act creates, including those with which the plaintiff is charged, may not be tried in the manner for which the Act stipulates. This is for the following reasons:

(i) the proceedings are matters in which the Commonwealth is a party (s 75(iii)) and matters arising under a law of the Commonwealth within the meaning of s 76(ii) of the Constitution;

(ii) they involve the adjudication of guilt and infliction of punishment and this requires the exercise of the judicial power of the Commonwealth;

(iii) none of the service tribunals for which the Act provides is a Ch III court and none may exercise the judicial power of the Commonwealth; and

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49 See *Hembury v Chief of the General Staff* (1998) 193 CLR 641.

(iv) the Act invalidly purports to authorise the service tribunals to exercise the judicial power of the Commonwealth.

44 The relationship between Ch III of the Constitution and service tribunals established in exercise of the legislative power conferred by s 51(vi) of the Constitution is not a straightforward one. At bottom, the relationship turns upon identification of the content of the expression "the judicial power of the Commonwealth" in s 71.

45 In that regard, three observations by Kitto J in *R v Davison*[50] provide an appropriate starting point. His Honour first observed[51]:

> "It is well to remember that the framers of the Constitution, in distributing the functions of government amongst separate organs, were giving effect to a doctrine which was not a product of abstract reasoning alone, and was not based upon precise definitions of the terms employed."

Secondly, he said[52]:

> "[W]hen the Constitution of the Commonwealth prescribes as a safeguard of individual liberty a distribution of the functions of government amongst separate bodies, and does so by requiring a distinction to be maintained between powers described as legislative, executive and judicial, it is using terms which refer, not to fundamental functional differences between powers, but to distinctions generally accepted at the time when the Constitution was framed between classes of powers requiring different 'skills and professional habits' in the authorities entrusted with their exercise."

46 Kitto J reached a conclusion which would seek an answer to the issues in the present case in the consideration of how similar or comparable powers to those exercised under the Act were treated in Australia at the time when the Constitution was prepared. His Honour said in that regard[53]:

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50 (1954) 90 CLR 353.

51 (1954) 90 CLR 353 at 380-381.

52 (1954) 90 CLR 353 at 381-382.

53 (1954) 90 CLR 353 at 382.

> "Where the action to be taken is of a kind which had come by 1900 to be so consistently regarded as peculiarly appropriate for judicial performance that it then occupied an acknowledged place in the structure of the judicial system, the conclusion, it seems to me, is inevitable that the power to take that action is within the concept of judicial power as the framers of the Constitution must be taken to have understood it."

47 The plaintiff seeks to turn to account the following statement by Jacobs J in *R v Quinn; Ex parte Consolidated Food Corporation*[54]:

> "The historical approach to the question whether a power is exclusively a judicial power is based upon the recognition that we have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. But the rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom. The governance of a trial for the determination of criminal guilt is the classic example."

48 There are several difficulties in the path of unconditional acceptance of what Jacobs J called "the historical approach" and Kitto J expounded in the above passages. The modern regulatory state arrived after 1900 and did so with several pertinent consequences. First, modern federal legislation creates rights and imposes liabilities of a nature and with a scope for which there is no readily apparent analogue in the pre-federation legal systems of the colonies. Secondly, any treatment today of Ch III must allow for what has become a significant category of legislation where a power or function takes its character as judicial or administrative from the nature of the body in which the Parliament has located it.

49 Thirdly, one upshot of this state of affairs has been the development of various theories or descriptions of judicial power which are expressed in general and ahistorical terms. Thus, consideration of the nature of the federal conciliation and arbitration system stimulated the development of a discrimen of judicial power as "concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted" and of arbitral power as the ascertainment and declaration (but without enforcement) of "what in the

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54 (1977) 138 CLR 1 at 11.

opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other"[55].

50 In *R v Bevan; Ex parte Elias and Gordon*[56], Starke J referred to a general description of judicial power found in some of the earlier decisions of the Court. This was the identification[57] of judicial power with the exercise of sovereignty in giving binding authority to decisions upon controversies respecting life, liberty or property. The death sentences for murder imposed upon Elias and Gordon at the court martial conducted upon HMAS *Australia* answered that description. But, as Starke J then asked, whilst the court martial had exercised "judicial power", had it exercised "the judicial power of the Commonwealth" identified in s 71 of the Constitution[58]? The answer in the negative given by his Honour was based upon historical considerations. In particular, Starke J[59] referred to the decision of the Supreme Court of the United States in 1857 in *Dynes v Hoover*[60]. Dynes was a seaman serving on the USS *Independence* who had been convicted of attempted desertion by a naval court martial, and sentenced to six months imprisonment. He sued in a civil court, among other things, for false imprisonment. In upholding the dismissal of the civil action, the Supreme Court said[61] that, quite independently of Art III of the United States Constitution:

> "Congress has the power to provide for the trial and punishment of military and naval offences in the manner then [ie in 1789] and now practiced by civilized nations".

51 In this way, generally expressed theories respecting the content of "judicial power" are accommodated to the constitutional term "the judicial power of the Commonwealth". The result of doing so allows for continued significance

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55 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 463.

56 (1942) 66 CLR 452 at 466.

57 In *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357.

58 (1942) 66 CLR 452 at 466.

59 (1942) 66 CLR 452 at 467.

60 61 US 65 (1857).

61 61 US 65 at 79 (1857).

of the historical considerations to which Kitto J referred in *Davison* and Jacobs J in *Quinn*. This brings us to the present case.

52 Here, the decisive consideration is as follows. To the judicial system for the determination of criminal guilt to which Jacobs J referred in *Quinn*, there was the well-recognised exception for legislatively based military and naval justice systems of the kind which the Supreme Court of the United States had recognised in 1857 and which applied in the Australian colonies at federation. Those military and naval justice systems were directed to the maintenance of the defining characteristic of armed forces as disciplined forces organised hierarchically. By the applicable statutes, the legislature controlled and regulated the administration by and within the forces of disciplinary measures intended to maintain discipline and morale within the forces. That regulation proceeded not only by general reference to acts "to the prejudice of good order and military discipline"[62] but also by reference to particular acts which would constitute offences under generally applicable laws.

53 In *Re Tracey; Ex parte Ryan*[63], Mason CJ, Wilson and Dawson JJ gave detailed consideration to the Imperial and Australian colonial legislation in the period leading up to the adoption of the Constitution. This included systems of courts martial based upon those provided by the *Naval Discipline Act* 1866 (Imp) ("the Naval Discipline Act")[64] and the *Army Act* 1881 (Imp) ("the Army Act")[65]. Reference also may be made to the arrival in Sydney in 1891 of an auxiliary fleet to be equipped and maintained at the joint expense of the United Kingdom and the colonies under comprehensive legislative arrangements headed by the *Imperial Defence Act* 1888 (Imp)[66] and to the movement, under the influence particularly of Sir Henry Parkes, for the federation of all the military forces in the Australian colonies[67].

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62 *Army Act* 1881 (Imp), s 41.

63 (1989) 166 CLR 518 at 541-543.

64 29 & 30 Vict c 109.

65 44 & 45 Vict c 58.

66 51 & 52 Vict c 32. See Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 116-117; Todd, *Parliamentary Government in the British Colonies*, 2nd ed (1894) at 401-403.

67 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 117-119; Todd, *Parliamentary Government in the British Colonies*, 2nd ed (1894) at 396-401.

54 With respect to the continued significance of the Imperial legislation, in their joint judgment in *Tracey*, Brennan and Toohey JJ remarked[68]:

> "The *Naval Discipline Act* and the *Army Act* were in force when federation of the Australian colonies was under consideration and when the Constitution came into force on 1 January 1901. After federation, the *Naval Discipline Act* and the *Army Act* as in force from time to time were adopted as the legal foundations for the discipline of the naval and military forces of the Commonwealth: see the *Defence Act* 1903 (Cth), ss 55 and 56. The *Defence Act* made the military forces of the Commonwealth subject to the Imperial *Army Act* as in force from time to time while those forces were on active service, ie, engaged in operations against the enemy including any naval or military service in time of war: ss 4, 55. A similar provision (s 56) was made subjecting naval forces on active service to the *Naval Discipline Act*. In 1910, the naval forces were made subject to the *Naval Discipline Act* generally (*Naval Defence Act* 1910 (Cth), s 36) and in 1964 the application of the *Army Act* to the military forces was extended to service outside Australia: *Defence Act* 1964 (Cth), s 26. When the *Air Force Act* 1923 (Cth) was enacted, its members were not subject to the *Army Act* but in 1939 the Imperial *Air Force Act* (semble, *The Air Force (Constitution) Act* 1917 (UK)) was applied generally to the members of the air force subject to prescribed modifications: *Air Force Act* 1939 (Cth), s 6."

55 That significant elements of Imperial law continued to apply in the system of courts martial, is demonstrated by the procedures followed in the World War II cases, *Bevan* and *R v Cox; Ex parte Smith*[69].

56 We now return to the primary submission for the plaintiff. This is to the effect that the adjudication of the charges presented against her and the infliction of any punishment by the service tribunals provided by the Act necessarily would require the exercise of the judicial power of the Commonwealth.

57 To accept that submission would involve departing from the long-standing decisions in *Bevan* and *Cox*. Upon the correctness of those decisions the Parliament was entitled to rely in enacting the Act and the Appeals Act. In any event, and as indicated above, those decisions were correctly based upon a

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68 (1989) 166 CLR 518 at 561-562.

69 (1945) 71 CLR 1.

consideration of the operation of military justice systems in the Australian colonies and the deep importance attached to the continuation of the Imperial defence connection were the colonies to federate.

58 It is not a matter of whether the service tribunal system was "taken outside Ch III simply by reason of the events of history"[70], but whether that system was ever within the exclusive operation of Ch III. To attribute to the presence in the Constitution of Ch III a rejection of service tribunals of the nature provided by the Naval Discipline Act and the Army Act would be to prefer the "abstract reasoning alone" to which Kitto J referred in *Davison*[71] to an appreciation of the content of "the judicial power of the Commonwealth" which must have been universally understood in 1900.

59 The plaintiff sought to strengthen her primary submission by reference to ss 75 and 76 of the Constitution, particularly s 76(ii). This empowers the Parliament to make laws conferring original jurisdiction on this Court in any matter arising under any laws made by the Parliament. Plainly, with respect to the trial of the offences with which the plaintiff is charged, the Act does not confer the original jurisdiction spoken of in s 76(ii). Nevertheless, the plaintiff sought to draw an implication from s 76(ii) to support her first submission. The alleged implication appears to be that where a matter arises under a law of the Parliament and is "fit for determination" by the exercise of judicial power, it necessarily follows that any resolution of that matter can only be had by the exercise of the judicial power of the Commonwealth. However, the conclusion does not follow from the premise. The circumstance that the Parliament is empowered to confer jurisdiction on this Court in matters arising under laws it makes does not carry any implication that any controversy to which such a law gives rise is susceptible of resolution only by the exercise of the judicial power of the Commonwealth.

The plaintiff's second submission

60 There are in the case law secondary issues. These respect the limits upon the exercise of the legislative power conferred by s 51(vi) of the Constitution to proscribe and provide for the punishment of conduct other than through the engagement of the judicial power of the Commonwealth. Granted the capacity of the Parliament to legislate under s 51(vi) and outside Ch III for the provision of service tribunals, what are the limits of that power? Some of the limiting criteria

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70 cf *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 497.

71 (1954) 90 CLR 353 at 380-381.

have been considered in *Tracey, Re Nolan; Ex parte Young*[72] and *Re Tyler; Ex parte Foley*[73], in particular the so-called "service related" and "service status" tests.

61 It is unnecessary here to recapitulate what was said on these topics. However, what is presently significant is that these secondary issues reflect the importance of what earlier in these reasons is identified as the defining characteristic of armed forces as disciplined forces organised hierarchically.

62 In her second submission, the plaintiff fixes upon another suggested criterion of sufficient connection. This looks to the presence of substantial identity between service and civilian offences or the absence of an "exclusively disciplinary" nature in the service offences as indicative of the invalidity of the service tribunal system in the particular case in question.

63 The offences with which the plaintiff is charged are said to have occurred in the State of Victoria. In her written submissions, the plaintiff emphasised that in Victoria the conduct alleged to found the charge of assault under s 33(a) of the Act would amount to an indictable common law assault[74] and would attract a maximum penalty of five years imprisonment[75]. Further, the "Territory offences" providing for the basis of the charges under s 61(3) of the Act would, if committed in Victoria, be indictable offences under the law of that State[76], with a maximum penalty of 10 years imprisonment.

64 As the oral argument developed, it became apparent that the plaintiff emphasised that the charges based upon the Act involved conduct which could be charged and tried in the ordinary civil courts of the State of Victoria and the punishment of imprisonment was available in respect of both categories of offence. That conjunction of law and circumstance was said to have placed the relevant provisions of the Act outside that area within which the Parliament might legislate with respect to the prosecution of offences created by reliance upon the defence power and without necessarily engaging Ch III.

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72 (1991) 172 CLR 460.

73 (1994) 181 CLR 18.

74 *R v Patton, Caldwell and Robinson* [1998] 1 VR 7 at 21-22.

75 *Crimes Act* 1958 (Vic), s 31; *Sentencing and Other Acts (Amendment) Act* 1997 (Vic), s 60 and Sched 1, Item 16.

76 *Crimes Act* 1958 (Vic), ss 2B, 39.

65 Some footing for the distinction sought to be drawn in this way is provided by statements by Deane J and by Gaudron J in *Tracey*, *Nolan* and *Tyler*, and by McHugh J in *Nolan*. In *Tracey*, Deane J concluded[77]:

> "[T]he comprehensive jurisdiction purportedly conferred by the Act upon service tribunals which are not Ch III courts is valid, in so far as offences committed within an Australian State or Territory in time of peace are concerned, *only to the extent that it extends to dealing with exclusively disciplinary offences*. That being so, the learned defence force magistrate in the present case lacks jurisdiction to deal with the charge under s 55(1)(b) (falsification of service document) but possesses jurisdiction to deal with the two charges under s 24(1) (absent without leave)." (emphasis added)

Then, in *Nolan*, McHugh J said[78]:

> "In my opinion, unless a service tribunal is established under Ch III of the Constitution, it has jurisdiction to deal with an 'offence' by a member of the armed services *only* if such an 'offence' is exclusively disciplinary in character or is concerned with the disciplinary aspect of conduct which constitutes an offence against the general law." (original emphasis)

Thereafter, in *Tyler*, Deane J said that he continued[79]:

> "to reject what [he saw] as an unjustifiable denial of the applicability of the Constitution's fundamental and overriding guarantee of judicial independence and due process to laws of the Parliament providing for the trial and punishment of members of the armed forces for ordinary (*in the sense of not exclusively disciplinary*) offences committed within the jurisdiction of the ordinary courts in times of peace and general civil order". (emphasis added)

66 In *Tracey*, Gaudron J declared[80]:

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77 (1989) 166 CLR 518 at 591.

78 (1991) 172 CLR 460 at 499.

79 (1994) 181 CLR 18 at 34.

80 (1989) 166 CLR 518 at 603-604.

> "In my view the Act, to the extent that it purports to vest in service tribunals jurisdiction in relation to conduct engaged in by defence members in Australia constituting service offences which are *substantially the same* as civil court offences, is, in the present circumstances, beyond legislative power and invalid. ...
>
> [T]he charges of absence without leave have no counterpart under the general law. The order nisi must be discharged so far as it has effect with respect to these charges.
>
> The service offence created by s 55(1)(b) of the Act (falsification of service document) is in a different category." (emphasis added)

In *Tyler*[81], Gaudron J spoke of "charges under the Act in relation to acts or omissions which, although called 'service offences', are, *in essence, the same or substantially the same* as criminal offences under the general law".

67 In *Tyler*[82], McHugh J accepted, with respect correctly, that his views and those of Deane J had been rejected by a majority of Justices in *Tracey* and *Nolan*. Nevertheless, given the significance that the point assumed in oral argument in the present case, it is appropriate to look further to the notions of identity or substantial similarity of "service offences" and criminal offences under the general law.

68 There are several implicit assumptions made here. One is that the service tribunal system established by the Act attempts to displace or overreach obligations imposed upon the population generally by the ordinary civil law. Another is that no more is involved than a comparison between the constituent elements of a service offence and a general law offence.

69 These assumptions do not provide an adequate starting point for an analysis of what is permitted to service tribunals which are not Ch III courts, and the relationship between service and civilian offences.

70 In many instances, service as a defence member involves additional responsibilities whose enforcement calls for more than the application of the general law by civilian courts. The location in particular instances of this intersection and accumulation of responsibilities does not call for determination

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81 (1994) 181 CLR 18 at 35 (emphasis added).

82 (1994) 181 CLR 18 at 38-39.

in the present case. This is because the submissions for the plaintiff were so cast as to deny any inquiry beyond the application of a false distinction based upon identity of constituent elements of two categories of offences.

71 A more adequate starting point for analysis is apparent in the following passage in the title "Royal Forces" in the first edition of *Halsbury's Laws of England*[83]. The passage is as follows:

> "It is one of the cardinal features of the law of England that a soldier does not by enlisting in the regular forces thereby cease to be a citizen, so as to deprive him of any of his rights or to exempt him from any of his liabilities under the ordinary law of the land. He does, however, in his capacity as a soldier, incur additional responsibilities, for he becomes subject at all times and in all circumstances to a code of military law contained in the Army Act, the King's Regulations and Orders for the Army, and Army Orders." (footnotes omitted)

72 The matter was taken up by Windeyer J in the following passage in *Marks v The Commonwealth*[84]:

> "The relationship of members of the armed Services to the Crown differs essentially from that of civil servants whose service is governed by the regulations of the Public Service. The members of the Forces are under a discipline that the others are not: they have duties and obligations more stern than theirs: and rights and privileges that they cannot claim."

73 The identification of that which is reasonably necessary to the regularity and due discipline of the defence force cannot depend simply upon the absence of any counterpart for a particular norm of conduct in the general law[85]. Additional responsibilities of defence members may give to general norms of conduct a distinct and emphatic operation. This may be apt for enforcement in a system of military justice such as that established by the Act.

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83 vol 25, par 79.

84 (1964) 111 CLR 549 at 573. In similar vein, the article contributed by Judge Babington to *The Oxford Companion to Military History*, Holmes (ed), (2001) at 233, defines "courts martial" as:

> "[t]ribunals that enforce the special laws and standards of conduct expected of soldiers, once more lax but now in general more strict than the civil courts governing non-military personnel."

85 cf *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 591, 603-604.

74 Examples, with respect to crimes of personal violence, may be found in the discussion by McHugh J in *Re Aird; Ex parte Alpert*[86]. His Honour discussed, in the factual context of that case, the perception by foreign governments and members of the local population of defence members as representatives of Australia in a way tourist visitors are not. McHugh J also mentioned the reluctance of defence members to serve with personnel who engage in violent conduct, whether that reluctance is from fear of personal safety or rejection of such conduct or both.

75 Thus, it is unsatisfactory to apply as a criterion of constitutional validity in a case such as the present a discrimen which fixes upon offences which can be said to be "exclusively disciplinary in character" and to dismiss from further analysis the significance to be attached to the overlap between service offences and offences under the general law.

76 Undoubtedly difficult questions may arise in considering the significance for a particular case of that overlap. However, these questions need not be pursued in this case. The plaintiff's second submission is cast in a form which denies an occasion here for consideration of the overlap.

Conclusion

77 The application should be dismissed with costs.

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86 (2004) 220 CLR 308 at 323-324 [40]-[42].

78 KIRBY J. These proceedings involve a challenge to the constitutional validity of the trial of charges brought under the *Defence Force Discipline Act* 1982 (Cth) ("the Act"). The case obliges this Court to return to first principles.

79 In the past, there have been holdings, assumptions and dicta concerning the validity of the applicable provisions of the Act and its predecessors. However, the point now presented has not hitherto been decided. In a number of recent cases, it was reserved[87]. Where a challenge of such a kind is presented by a party with the requisite standing, this Court is engaged in the most important function for which it is established by the Constitution[88]. A *laissez faire* attitude to challenged federal legislation is not one that this Court has historically adopted[89]. It is not one that I would adopt now[90].

80 The challenge to the constitutional validity of the provisions in question succeeds on the second argument advanced in the proceedings[91]. Appropriate relief should issue. This would have the beneficial consequence of requiring a restructuring of the Act to confine the exercise of "military justice", outside the courts, to disciplinary offences properly defined, remitting all other contested offences to the independent courts of the Judicature, established in accordance with Ch III of the Constitution. Defence personnel are citizens. They are entitled, as much as any others, to one of the most precious guarantees that the Constitution offers – the resolution of disputed charges of serious criminal conduct before independent courts operating wholly within the Judicature and outside the Executive.

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87 *Hembury v Chief of the General Staff* (1998) 193 CLR 641 at 657 [44]-[45], and see also at 669-670 [72]; *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 326 [57].

88 Constitution, s 71.

89 cf *Bank of NSW v The Commonwealth* (1948) 76 CLR 1, affirmed (1949) 79 CLR 497; [1950] AC 235; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193.

90 cf *New South Wales v Commonwealth* (2006) 81 ALJR 34 at 168 [615]; 231 ALR 1 at 165; *Forge v Australian Securities and Investments Commission* (2006) 80 ALJR 1606 at 1658 [218]; 229 ALR 223 at 286; *Attorney-General (Vic) v Andrews* (2007) 81 ALJR 729 at 758 [164]; 233 ALR 389 at 427.

91 Reasons of Gummow, Hayne and Crennan JJ ("joint reasons") at [60].

The facts

81 *The alleged offences*: Ms Anne White ("the plaintiff") is a defence member[92], being a member of the Permanent Navy of the Commonwealth ("the Royal Australian Navy"). The expression "defence member" includes, in certain circumstances, members of the Reserves[93]. The plaintiff has been charged with seven "service offences"[94].

82 Six of the alleged offences charge that the plaintiff engaged "in conduct outside the Jervis Bay Territory" which is a "Territory offence"[95], being an offence of an act of indecency without consent. The remaining charge, alleged in the alternative to such an offence, asserts that the plaintiff assaulted a named person in a public place. The indecency offences are based on the *Crimes Act* 1900 (ACT), s 60 as applied to a defence member by s 61(3) of the Act. That section extends defined Territory offences to "a defence member or a defence civilian"[96].

83 The plaintiff denies all of the offences. A contest between the first defendant, the Director of Military Prosecutions ("the Director"), and the plaintiff is thus presented as to whether the Director can prove the charges against the plaintiff according to law in a constitutionally valid court or tribunal. Unless restrained by this Court, the Director intends to request the Registrar of Military Justice to refer the charges for trial before a Defence Force magistrate or to convene a court martial for such trial[97]. The determination of the charges at trial has been interrupted by these proceedings.

84 *The surrounding circumstances*: Although this Court has not been asked to determine any contested facts, the record contains an affidavit of the plaintiff, included without stated objection by the Director or the Commonwealth (the latter added as second defendant). The affidavit contains unchallenged assertions which, although not determinative of any constitutional question, illustrate the

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92 As defined in the Act, s 3(1).

93 The Act, s 3(1). See also s 3(4).

94 As defined in the Act, s 3(1).

95 As defined in the Act, s 3(1).

96 As defined in the Act, s 3(1).

97 Under s 103(1)(c) and (d). The jurisdiction of the Defence Force magistrate is provided by the Act, s 129. See also s 135. Trial by courts martial is provided for by the Act, s 132.

kind of circumstance to which the language of the Act lends itself to application, if the Act is valid.

85 Thus, the plaintiff states that she was not in uniform at the time of the alleged offences; nor on duty; nor on the property of the Commonwealth. Moreover, she states that the complainants were not in uniform, not on duty and not on the property of the Commonwealth at such times. As well, she states that no other person who was present at the time of the alleged offences was in uniform or on duty. These facts (and the extension of the Act to defence members in the Reserves as well as to defence civilians) give a clue as to the very wide ambit of the asserted operation of the Act.

86 *The loss of jury trial*: The offences with which the plaintiff has been charged are all alleged to have occurred at a hotel at Williamstown in the State of Victoria. If the offences were prosecuted under the applicable criminal law of the State of Victoria (the *Crimes Act* 1958 (Vic), s 39), the offences of indecent assault would carry a punishment described as "Penalty: Level 5 imprisonment (10 years maximum)". Under s 2B of that Victorian statute, all offences against that Act are, unless a contrary intention appears, "deemed to be indictable offences". It follows that, if the plaintiff had been charged under Victorian law, in respect of the alleged offences, she would have been entitled to trial by jury.

87 Likewise, under the criminal law of the Australian Capital Territory, as applicable in the Jervis Bay Territory, purportedly applied to the plaintiff as a defence member, the charges of indecent assault would involve offences punishable, on conviction, by imprisonment for five years[98]. That fact would similarly entitle the plaintiff to trial by jury, if disputing the charges, or any of them, in either of such Territories.

88 In her affidavit, the plaintiff states that she wishes "to exercise my constitutional right to have the alleged indictable offences the subject of trial by jury". Under the Act, as it stood at the relevant time, the plaintiff purportedly has no entitlement to jury trial by federal law, whether before a jury of fellow citizens, of the kind envisaged by s 80 of the Constitution, or even before a "military jury", subsequently created by amendments to the Act which the parties agreed had not come into operation so as to apply to the plaintiff's case[99].

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98 *Crimes Act* 1900 (ACT), s 60(1).

99 *Defence Legislation Amendment Act* 2006 (Cth), Sched 1, items 9 and 11, inserting in the Act Pt VII, Div 4 ("Military jury") (ss 122-124) to provide for trial by the proposed Australian Military Court.

89 The present proceedings do not call for a decision as to whether the future provisions of the Act for a "military jury" (or for the proposed Australian Military Court outside Ch III of the Constitution) are valid. However, the existence of such provisions, called to the Court's notice during the argument, alerts the Court to the implications of the present case for the future operation of Ch III in the context of military justice. The amendments provide a warning about the importance of this decision for whether criminal laws might be applied, outside the ordinary courts of the land, to citizens who happen to be members of the Defence Force. The Court cannot later complain that it was not warned of the next intended step in military exceptionalism.

The legislation

90 *Service tribunals and offences*: The Act contains many provisions governing the conviction and punishment of defence members. Through the vehicle of s 61 of the Act, such provisions extend to the whole gamut of criminal offences provided by the "Territory offences"[100].

91 In drafting the Act, no attempt was made to confine the "offences" to those that could be characterised as exclusively or essentially related to the discipline of defence members (or other related personnel); to discipline in a time of war, in places of combat or on overseas or remote assignments; or to offences appropriate and adapted (or proportionate) to the disciplinary control of defence members, as such. On the contrary, the Act casts the widest possible net of "offences" to which a defence member is subject. Moreover, it sets up a system of prosecutions by the Director, an office-holder distinct from the Director of Public Prosecutions of the Commonwealth[101]. It provides for "service tribunals", including courts martial and Defence Force magistrates, outside the ordinary courts that exercise federal jurisdiction[102]. Neither of these specified kinds of "service tribunals" is a court within the Judicature for which Ch III of the Constitution provides. Each envisages significant departures from the time-honoured features of such courts. Those features are essential to the independence and impartiality of the courts.

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100 The Act, s 61 and the definition of "Territory offence" in s 3(1) of the Act.

101 The Act, s 103. The Director of Public Prosecutions of the Commonwealth is established by the *Director of Public Prosecutions Act* 1983 (Cth), ss 5 and 18.

102 As to the categories of courts martial and service tribunals established by the Act, see the reasons of Callinan J at [225]-[231].

92 Under the Act, courts martial may be either "general" or "restricted"[103]. To be eligible to be a member of a court martial, a person is not chosen by reference to legal training, skill, experience or competence but by reference to a defined association with the Defence Force and the holding of a specified rank in that Force[104]. Provision is made for a "judge advocate"[105]. However, the President, members, reserve members and the judge advocate are not appointed as part of a permanent court. Instead, they are appointed on an *ad hoc* basis by the Registrar of Military Justice[106] as required for each particular court martial[107]. The lack of the necessity (or actuality) of universal legal training; the *ad hoc* constitution of the tribunal; the lack of tenure of members; and the requirement to select persons who must be associated with the Force (and therefore necessarily interested in the conduct of the accused), all represent very serious departures from the normal features of Ch III courts.

93 Nor is the position of a Defence Force magistrate under the Act designed to remove the defects just mentioned. Despite the use of the word "magistrate", which in Australia (including in the new Federal Magistrates Court) now connotes judicial officers with characteristics of tenure and independence substantially the same as the judiciary of Ch III courts[108], the Defence Force magistrates are quite different. They are not appointed by the Governor-General in Council[109]. Instead, they are appointed by the Judge Advocate General by instrument in writing[110].

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103 The Act, s 114.

104 The Act, s 116(1).

105 The Act, s 117.

106 Appointed under the Act, s 188FB.

107 The Act, s 119 ("Convening order"). All members of courts martial must be chosen by the Registrar from persons nominated by the Judge Advocate General who is appointed under the Act, s 179 and who must be a judge: s 180(1). See also s 129B.

108 Mack and Anleu, "The Security of Tenure of Australian Magistrates", (2006) 30 *Melbourne University Law Review* 370.

109 As are the judiciary of Ch III courts, including Federal Magistrates. See *Federal Magistrates Act* 1999 (Cth), s 9 and Sched 1, Item 1(1).

110 The Act, s 127(1).

94 The only person who can be appointed a Defence Force magistrate is an "officer" who is a member of the judge advocates' panel[111]. The word "officer" is defined in the Act to mean a person so appointed including, in the Royal Australian Navy, a person holding a specified rank[112]. An officer is appointed to the judge advocates' panel not for the normal tenure of a magistrate in Australia (ie to age 70 years)[113] but for the limited period specified in the instrument of appointment which may be no longer than a period of three years (and, by definition, may be shorter and even *ad hoc*)[114]. Provision is made for the reappointment of such a "magistrate" for a further period or periods[115]. This is another feature alien to the judiciary in Ch III. It is a feature susceptible to misuse, with the potential to disadvantage those who perform their duties with complete impartiality but who do not satisfy the expectations of the Executive Government or the Defence Force[116].

95 At the very least, the appointment is therefore subject to the appearance of misuse and disadvantage. Defence Force magistrates must have legal qualifications. They are required to take an oath or affirmation in substantially the form of that taken by federal judges[117]. However, the conditions of appointment, particularly tenure, fall far short of those applicable under Australian federal law to members of the federal judiciary, including the federal magistracy.

96 The importation of an entire criminal statute inevitably presented the risk of overlap between other applicable federal laws (containing criminal offences) and State or Territory laws addressed to the same conduct. The Act contains provisions to reduce the risks of conflict and double jeopardy[118]. Thus, for certain Territory crimes on the part of a defence member (including "treason,

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111 The Act, s 127(2).

112 The Act, s 3(1), definition of "officer".

113 *Federal Magistrates Act* 1999 (Cth), s 9 and Sched 1, item 1(4).

114 The Act, s 196(2A).

115 The Act, s 196(2B).

116 cf *Forge* (2006) 80 ALJR 1606 at 1659 [220]; 229 ALR 223 at 287.

117 The Act, s 196(4), Sched 5. See eg the Schedule to the *Federal Court of Australia Act* 1976 (Cth).

118 The Act, s 144.

murder, manslaughter or bigamy"[119]), the consent of the Commonwealth Director of Public Prosecutions must be secured for a service prosecution. In all non-specified cases, decisions on prosecutions in "service tribunals" are to be made by the Director of Military Prosecutions[120]. Provision is made that "[s]ubject to the Constitution, a civil court does not have jurisdiction to try" a service offence or an offence ancillary to a service offence[121]. Once a person is convicted or acquitted of a service offence, or acquitted or convicted by a civil court of a civil court offence, the person is not liable to be tried by a service tribunal for the same offence or for an offence that is substantially the same offence[122].

97 *Ambit of surrogate Territory offences*: The integration of the "offences" in the Act and the general criminal law applied in civil courts in Australia is made clear by the incorporation, by reference, of the *Crimes Act* of the Australian Capital Territory as applied in the Jervis Bay Territory[123] – a geographic place substantially devoted to Defence Force purposes. Other offences provided by the Act address much more specific service concerns. These include offences relating to operations against the enemy[124]; mutiny, desertion and unauthorised absence[125]; insubordination and service-related violence[126]; offences relating to the performance of duty[127]; and property offences (addressed to destruction, damage or misuse of Defence Force property[128]). As well, the Act provides for various ancillary and miscellaneous offences, mainly connected with procedure, anterior proceedings before service tribunals, personnel matters and the like[129].

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119 The Act, s 63(1).

120 The Act, s 103.

121 The Act, s 190.

122 The Act, s 144.

123 Under the Act, s 61.

124 The Act, Pt III ("Offences"), Div 1.

125 Pt III, Div 2.

126 Pt III, Div 3.

127 Pt III, Div 4.

128 Pt III, Div 5A.

129 Pt III, Divs 6 and 7.

98 At least in certain circumstances, such offences might qualify as offences exclusively or essentially of a disciplinary character. However, even here, the Act is at pains to integrate the offences provided into the general criminal law of the Commonwealth. Thus s 10 of the Act renders Ch II of the *Criminal Code* of the Commonwealth (setting out general principles of criminal responsibility) applicable to "all service offences" other than transitional "old system offences". The provisions of the Act for the investigation of "service offences"[130] follow an altered version of the requirements ordinarily applied to civilian criminal investigation. In a general provision concerning "[s]entencing principles", the Act prescribes that a service tribunal, in determining what action should be taken in relation to a convicted person, shall have regard to "the principles of sentencing applied by the civil courts, from time to time" and "the need to maintain discipline in the Defence Force"[131].

99 *Range of service punishments*: Whilst there are some restrictions, a service tribunal is generally empowered to impose a punishment of imprisonment on a person convicted of a service offence[132]. The maximum punishment provided for in the several service offences varies. Many punishments include imprisonment for a maximum of three months. Others provide for imprisonment for a term of years, typically up to two or five years. However, for several more serious offences, imprisonment for up to fifteen years is provided[133]. And for a limited number of offences a maximum punishment of imprisonment for life is provided[134].

100 Imprisonment for life is now the highest penalty provided under Australian law, whether federal, State or Territory law. Without exception, offences carrying a penalty of imprisonment for life, when provided by federal, State and Territory law, may only be prosecuted on indictment. In accordance with s 80 of the Constitution, a federal offence, prosecuted on indictment, attracts an unquestioned entitlement to jury trial in court.

101 In fact, the offences alleged against the plaintiff do not attract a maximum punishment of life imprisonment. However, by s 61 the maximum punishment

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130 The Act, Pt VI.

131 The Act, s 70.

132 The Act, s 71.

133 The Act, ss 15, 15A, 15D, 15E, 15F, 15G, 16 and 16A.

134 The Act, s 15B ("Aiding the enemy while captured"); s 15C ("Providing the enemy with material assistance"); s 16B ("Offence committed with intent to assist the enemy"); s 20 ("Mutiny").

for an offence based on a Territory offence is the relevant Territory punishment[135]. Had the Director charged the plaintiff only with the offence of assault under s 33 of the Act, the maximum punishment applicable for the specific service offence would have been imprisonment for six months. By electing to pursue charges of offences based on the general Territory offence of indecent assault, the Director has exposed the plaintiff to a maximum punishment of five years imprisonment for each offence of which she may be convicted[136]. But without an indictment, the defendants argue, the plaintiff has no entitlement to jury trial[137].

The issues

102 *The plaintiff's arguments*: The reasons of Gummow, Hayne and Crennan JJ ("the joint reasons") point out[138] that the issues presented by the plaintiff's submissions developed somewhat during the course of oral argument. Ultimately, the two issues that arise for decision are, in the alternative:

(1) *The strict separation issue*: Having regard to the text and structure of the Constitution, are the relevant grants of constitutional power pursuant to which the Act was enacted (notably s 51(vi) [defence] and s 51(xxxix) [incidental powers]) all subjected to the requirements of Ch III of the Constitution, allowing no relevant exceptions? Most especially, having regard to s 71 of the Constitution, and to the true character of the functions committed by the Act to the named service tribunals, has an impermissible attempt been made to vest "the judicial power of the Commonwealth" in bodies other than the courts there described? If so, does such impermissible vesting of jurisdiction render the service tribunals, before one of which the Director proposes to prosecute the offences alleged against the plaintiff, invalid, so as to support the issue of a constitutional writ of prohibition addressed to the Director as an "officer of the Commonwealth"[139], to forbid that course?

(2) *The limited exception issue*: Alternatively to (1), is there a limited exception, consistent with the requirements of Ch III of the Constitution,

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135 The Act, s 61(4).

136 *Crimes Act* 1900 (ACT), s 60 as applied to the Jervis Bay Territory.

137 See eg *Kingswell v The Queen* (1985) 159 CLR 264 at 318-319; *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 421-422 [92]-[95].

138 Joint reasons at [42].

139 Constitution, s 75(v).

so that particular but restricted jurisdiction may be conferred on bodies such as the service tribunals? Do the foregoing grants of federal legislative power support the establishment of a regime for the exercise of disciplinary powers outside the Ch III courts? If such an exceptional disciplinary jurisdiction is valid, what is the ambit of this permissible exception? Does the Act, by its provisions, fall within or outside that ambit? In considering that question, what weight should be given to the provision for jury trial expressed in s 80 of the Constitution? If, in its relevant provisions, the Act falls outside the ambit of the permissible exception, can the offending provisions be severed? Is the plaintiff entitled to the relief sought?

103 *Subsidiary issues*: If a conclusion in favour of the plaintiff appears to arise on a consideration of the arguments presented under one or other of the issues proffered above, the question remains whether relief should nonetheless be withheld upon all, or any, of the following arguments, referred to in the joint reasons:

(3) *The decisional authority issue*: Is the relief claimed by the plaintiff inconsistent with the authority of this Court, in so far as it has hitherto decided or assumed the constitutional validity of service tribunals (especially courts martial) as they have evolved during the history of the Commonwealth?

(4) *The historical exception issue*: Is there an exception that sustains the constitutional validity of service tribunals, supported by the long history of such tribunals in British Imperial provisions, against the background of which the Australian Constitution was written?

(5) *The regulatory state issue*: Does an insistence on the separation of the judicial power overlook the advent of the modern regulatory state that has arisen since the adoption of the Constitution in 1900? May the jurisdiction and powers of the service tribunals, therefore, be seen as a special kind of regulatory order, necessary to the exercise of the defence power, which inherently contemplates a disciplined force?

(6) *The abstract reasoning issue*: Is the supposed inconsistency of the service tribunals with the requirements of Ch III of the Constitution an illustration of the dangers of "abstract reasoning" on the part of the plaintiff and her representatives[140]?

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140 Joint reasons at [45], [58].

(7) *The characterisation of offences issue*: Does the plaintiff's second, or alternative, issue, rely upon a distinction between strictly "disciplinary" and other offences, that is illusory so that it cannot be what the Constitution requires?

The separation of judicial power issues

104 *The plaintiff's arguments*: It is convenient to deal with the first and second issues together. The plaintiff presented the question before the Court as a relatively straight-forward one. Basically, it was to be answered in her favour by the application of no more than the language and structure of the Constitution.

105 She accepted that the Act was an attempt to make a law concerning the discipline of defence members such as herself. On the face of things, it therefore fell within the power which s 51 of the Constitution confers on the Parliament to make laws:

> "for the peace, order, and good government of the Commonwealth with respect to:
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> …
>
> (vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth".

If those words stood on their own, a federal law on the discipline of defence members would, *prima facie*, be within the grant of power.

106 *Breadth of the defence power:* For three reasons, at least, it is self-evident that the grant of power in s 51(vi) of the Constitution should not be narrowly construed. First, it appears in a grant to a Parliament established to serve a new nation intended to take its place amongst the nations of the world. Secondly, in addition to the general principle that such grants of constitutional power should be afforded a full and ample meaning[141], the power in s 51(vi) is particularly apt for such an approach, given its purposive expression. Thirdly, above and beyond the other particular grants of power, that for the naval and military defence of the Commonwealth is in many respects special.

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141 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368; *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225; cf *McCulloch v Maryland* 17 US (4 Wheat) 316 at 406-407 (1819) per Marshall CJ.

107 In *Australian Communist Party v The Commonwealth*[142], Latham CJ observed that the defence power is designed to protect the "continued existence of the community under the Constitution". In a sense, it is thus "a condition of the exercise of all the other powers contained" in the Constitution, including therefore the judicial power. Whilst Latham CJ's words in that case were written in dissent, no one can doubt the very great importance of the grant of legislative power contained in par (vi) of s 51 of the Constitution. The plaintiff did not question the amplitude of the power. But she pointed to the established doctrine that its ambit waxes and wanes according to the necessities of war or the conditions of peace, as presently prevailing[143].

108 Moreover, however wide the ambit of the power may extend, s 51(vi) is still part of the "one coherent instrument"[144] that is the Constitution. The established doctrine of this Court is that a particular head of power is "intended to be construed and applied in the light of other provisions of the Constitution"[145]. Accordingly, the defence power is subject to restrictions such as are contained in s 51(xxxi) [acquisition on just terms][146] and s 92 [interstate trade][147]. It may also be subject, in certain circumstances, to the limitations stated, for example, in s 116 [religion][148].

109 *Express subjection to Ch III*: The subjection of the grant of power in s 51(vi) to other grants of power in s 51, where relevant, and to any express limitations upon law-making appearing in the Constitution, would probably have been inferred from the inclusion in the one constitutional instrument of such potentially overlapping provisions. However, in Australia, the subjection is not

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142 (1951) 83 CLR 1 at 141.

143 cf *Farey v Burvett* (1916) 21 CLR 433 at 441; *R v Foster; Ex parte Rural Bank of NSW* (1949) 79 CLR 43 at 81-82.

144 *Lamshed v Lake* (1958) 99 CLR 132 at 154; cf *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 373-374 [131]-[132]; *New South Wales v Commonwealth* (2006) 81 ALJR 34 at 140 [469]; 231 ALR 1 at 127.

145 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 185 per Latham CJ.

146 *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth* (1943) 67 CLR 314 at 317-318, 325, 331.

147 *Gratwick v Johnson* (1945) 70 CLR 1 at 10-11.

148 cf *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 129, 132, 149, 155, 159-160.

left to inference or implication. It is expressly stated by the opening words of s 51. The Parliament enjoys the powers enumerated, including in s 51(vi), "subject to this Constitution". This includes, relevantly, Ch III ("The Judicature"). Specifically, it includes s 71, by which "the judicial power of the Commonwealth" is vested in this Court, other federal courts created by the Parliament and such other courts as the Parliament invests with federal jurisdiction. It also includes s 80, dealing with trial by jury of certain offences.

110 According to the plaintiff, these provisions of the Constitution, and the relatively strict way in which they have been construed by this Court over the years, mean that it is impossible entirely to detach service tribunals, created pursuant to s 51(vi) of the Constitution for military discipline, and to place them as legislative adjudicators outside the requirements of Ch III and its specific provisions, including s 71 (and s 80). In so far as, properly analysed, such service tribunals exercise any part of the "judicial power of the Commonwealth", they may be created by the Parliament. However, the Parliament must create them in the form of a "court", complying with the strict requirements laid down in Ch III of the Constitution as to the appointment, tenure, remuneration (s 72), appellate supervision (ss 73, 74) and facilities for trial by jury (s 80).

111 Because, manifestly, the service tribunals created by the Act are not "courts" within s 71 of the Constitution, because their members' appointment, tenure and remuneration do not comply with s 72 and because they are not subjected, as such, to the appellate jurisdiction of this Court (s 73), without more they do not comply with the constitutional requirements stated in Ch III. The plaintiff argued that, although on one view the Act was a law with respect to defence, it was such a law as did not comply with the requirements of Ch III. This was so because of the invalid attempts, by federal law, to confer federal judicial power upon bodies not entitled to exercise that power.

112 *An alternative argument*: Alternatively, the plaintiff submitted that, in so far as the grant of power under s 51(vi) necessarily included by implication a limited determination of strictly disciplinary offences by individuals or bodies other than courts, and in so far as, out of necessity, such offences and their determination were impliedly excluded from the requirements of Ch III, notwithstanding the general subjection to that Chapter, the provisions of the Act applicable to her travelled far beyond any such permissible, limited exception. To subject defence members to the comprehensive range of all general criminal offences, and to subject them, upon conviction, to potential punishments up to life imprisonment (and in the plaintiff's case potential cumulative maximum

imprisonment of up to thirty years[149]), went far beyond any necessity or obviousness unstated in the provisions of the Constitution itself[150].

113 According to the plaintiff, this contention was vividly illustrated in her case because the alleged facts bore, on their face, many indications of purely private, non-service features. Moreover, the result of the proceedings under the Act for the "offences" charged would be to deprive the plaintiff of the right to jury trial that would otherwise belong to her as a person subject to Australian law accused of such offences.

114 The plaintiff's primary submission was that there was no relevant "exception" to the application of the provisions of Ch III of the Constitution to military justice. To the extent that past authority of this Court held, or suggested, otherwise, the plaintiff argued that such authority should be overruled. But, faced with the long survival of forms of service tribunals in Australia (notably courts martial) before and after the establishment of the Commonwealth, judicial authority in this and other courts concerning systems of military justice and the absence of any explicit judicial support for her primary proposition, the plaintiff fell back on her secondary submission. This was that, whatever the extent of any permitted exception to the requirements of Ch III, expressed in the language and structure of the Constitution, the provisions in the Act for her trial, and the potential convictions and punishment to which she was exposed, were well outside any such exception. On that ground, she was therefore entitled to relief.

115 *Fresh constitutional consideration*: In effect, the plaintiff invited this Court to take the course followed by the Privy Council in deciding the appeal against this Court's decision in the *Boilermakers' Case*[151]. There, the Privy Council proceeded first to look at the issues raised (likewise concerned with the constitutional separation of the judicial power) as a matter of constitutional text and principle. Having done so, and concluded that this Court had been correct in its decision, and that there was "nothing in Chap III, to which alone recourse can

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149 That is, six offences under the applied Territory provision, each carrying a maximum sentence of five years.

150 The test of necessity and obviousness is normally observed by this Court in deriving constitutional implications. See eg *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 133-138 per Mason CJ.

151 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

be had, which justifies" the validity of the impugned legislation[152], their Lordships said[153]:

> "Little reference has so far been made to the great volume of authority on this subject. Their Lordships have thought it right to make an independent approach to what is after all a short, if not a simple, question of construction of the Constitution."

116 If this Court adopted the same approach as the Privy Council did in the *Boilermakers' Case*, the plaintiff submitted, it would reach a similar outcome. As in that case, years of constitutional assumptions would be disclosed as untenable and therefore unacceptable. Institutions built on those assumptions would be shown to be unsustainable. Some transitional inconvenience would, of course, arise. But this Court, as the only body with the power and duty to do so, would establish the correct constitutional principle. It would uphold the language and design of the Constitution, read in its entirety. Better to do so belatedly than to persist with a "defence of the indefensible"[154].

117 *An exercise of judicial power*: On the face of things, the plaintiff's argument for strict separation of the trial and punishment of "offences" against the Act, and the commitment of such functions exclusively to independent courts exercising federal jurisdiction, is highly persuasive. The content of "judicial power" has not been established in a formula of universal application. However, the definition that captures the main elements in the Australian constitutional context is that stated by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*[155]:

> "[T]he words 'judicial power' as used in sec 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a

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152 *Attorney-General of the Commonwealth v The Queen* (1957) 95 CLR 529 at 539; [1957] AC 288.

153 (1957) 95 CLR 529 at 539; [1957] AC 288 at 314 per Viscount Simonds, delivering the judgment of the Board.

154 Mitchell and Voon, "Defence of the Indefensible? Reassessing the Constitutional Validity of Military Service Tribunals in Australia", (1999) 27 *Federal Law Review* 499.

155 (1909) 8 CLR 330 at 357. See also *Harrington v Lowe* (1996) 190 CLR 311 at 325 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

118 The three features of this definition, pointing to the presence of "judicial power" in the constitutional sense, are thus (1) the existence of controversy[156]; which (2) is about legal rights and duties[157]; and (3) arises in a context where there is a capacity to reach a conclusive determination of such rights and duties[158].

119 By each of these criteria, the functions committed to service tribunals under the Act are indicative of the presence of judicial power. There is a sharply defined controversy presented by the plaintiff's contest of the accusations made against her under the Act. Those accusations are highly specific, carefully defined and made (in all but one instance) pursuant to a Territory law that is rendered applicable to defence members. It is a law otherwise of general operation that, of its character, affects the rights and duties of the individual, potentially including (upon conviction) the loss of personal liberty and of the entitlement to retain a senior employment position in the Defence Force.

120 The determination of contested "offences" and the imposition of "punishment" extending to imprisonment classically involves the exercise of "judicial power". This historical characterisation of the function is a relevant consideration for determining whether the task committed by the Act to the service tribunals is, or involves, the exercise of "judicial power"[159]. In each case, the service tribunals are established to make a binding and authoritative determination. There is no general provision for an "appeal" to a court. There is provision for consideration by a reviewing authority[160]. However, normally, a "punishment imposed, or an order made, by a service tribunal, a reviewing authority or the Defence Force Discipline Appeal Tribunal takes effect forthwith". A punishment for a specified period "commences on the day on

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156 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 267.

157 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 443, 464.

158 *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530 at 543; [1931] AC 275 at 295-296; *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 at 198-199.

159 *Cominos v Cominos* (1972) 127 CLR 588 at 605, 608; *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 627.

160 The Act, s 172(1).

which it is imposed"[161]. Any fine imposed on a person is immediately recoverable by the Commonwealth out of that person's pay (if still in the employ of the Commonwealth). Otherwise, it may be sued for in a civil court[162].

121 It follows that the scheme of the Act commits to the specified service tribunals the exercise of "judicial power". Indeed, three members of this Court accepted that this proposition was virtually unarguable[163]:

> "[N]o relevant distinction can, in our view, be drawn between the power exercised by a service tribunal and the judicial power exercised by a court. Nor do we think it possible to admit the appearance of judicial power and yet deny its existence by regarding the function of a court-martial as merely administrative or disciplinary. …
>
> Thus the real question in this case is not whether a court-martial in performing its functions under the Act is exercising judicial power. There has never been any real dispute about that."

122 I agree with this characterisation. It is reinforced by a study of the Act. The conclusion is put beyond question by the importation into the Act of the whole gamut of criminal offences applicable in the identified Territories, rendering them all applicable to all defence members at all times[164].

123 *Judicial power of the Commonwealth*: The supposed point of distinction, propounded to permit service tribunals to escape from this characterisation in s 71 of the Constitution, is that, whilst they exercise "judicial power", it is not "the judicial power of the Commonwealth under Ch III of the Constitution"[165]. As a matter of language, logic, constitutional object and policy, this supposed distinction should be rejected. It has never hitherto commanded the endorsement of a majority of this Court. It should not do so now.

124 As to *language*, if what is being done is unquestionably the exercise of "judicial power" and if it is being performed under a law of the Commonwealth enacted by the Federal Parliament, that is sufficient to render it an attempted or

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161 The Act, s 171(1).

162 The Act, s 174(1).

163 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 537-540 per Mason CJ, Wilson and Dawson JJ.

164 See s 61(2) and (3); cf s 3(1) definition of "defence member".

165 *Re Tracey* (1989) 166 CLR 518 at 540.

purported exercise of "the judicial power of the Commonwealth". A law of the Commonwealth could not give it any other quality. The adjectival phrase "of the Commonwealth", contained in s 71 of the Constitution, applies to it. The Act is enacted, purportedly, for a purpose of the Commonwealth (namely defence, pursuant to the Constitution, s 51(vi)). It can hardly qualify as being an exercise of "judicial power" of a State or of a Territory (so far as the latter is not itself part of the judicial power of the Commonwealth) or of a foreign nation[166].

125 As to *logic*, it is circular to reason that, because the character of the power committed to a body can vary in accordance with the body exercising the power[167], the power committed to service tribunals could therefore be other than "the judicial power of the Commonwealth". That is the very question presented in these proceedings for this Court's decision. Surely, the so-called "chameleon" doctrine has not so far debased our adherence to logic that the mere choice by the Federal Parliament to vest a power in a named tribunal conclusively avoids the limitations stated in s 71 of the Constitution[168].

126 If this Court were to dismiss the plaintiff's arguments by reference to the chameleon metaphor, it would abandon its function and constitutional duty. It always remains for the Court to examine what the impugned body actually does and then to decide whether what it does offends the constitutional limitations stated in s 71. The mere selection of a service tribunal as the repository for a power does not foreclose the requirement of judicial characterisation. That requirement remains to be discharged. Moreover, in this case, all that is required (there being no real doubt about the exercise of "judicial power") is the determination of whether such "judicial power" is that "of the Commonwealth" or not. Only a sleight of hand, suitable to a street magician, would permit any other characterisation of the "judicial power" committed by the Act to the service tribunals in this case.

127 As for the constitutional *object* of s 71, it has been repeatedly held that its purpose is to confine the assignment of "the judicial power of the Commonwealth" solely to the "courts" listed in that section. During argument of this application, much mention was made of the significance of the separation of

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166 *Ruhani v Director of Police* (2005) 222 CLR 489.

167 eg *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 305 per Kitto J; *Harris v Caladine* (1991) 172 CLR 84 at 122.

168 cf Ratnapala, *Australian Constitutional Law: Foundations and Theory*, 2nd ed (2007) at 136-137; *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* [2007] HCA 23 at [70]; *Visnic v Australian Securities and Investments Commission* [2007] HCA 24 at [41]-[42].

the judicial power in the *Boilermakers' Case*[169]. Although not frontally attacked or questioned by the defendants, the criticisms that have been expressed of the holding in *Boilermakers' Case* were mentioned.

128 Such criticisms certainly exist[170]. However, they are immaterial to the primary issues in these proceedings. The *Boilermakers' Case* concerned essentially an extension of the separation of powers doctrine by expressing a second limb. This was that this Court and other federal courts created by the Parliament may not exercise legislative or executive functions mixed with their judicial functions. That limb, so stated, has been contested since it was established. It has sometimes given rise to difficulty and controversy.

129 However, the first limb of the separation of powers doctrine, although also occasionally the subject of disagreement as to its ambit and availability[171], has not otherwise been questioned. Since the *Wheat Case*[172] in 1915, it has been held by this Court that a body cannot exercise the judicial power of the Commonwealth under federal law if it is not a court, within the meaning of s 71. This first limb of the separation of powers doctrine has been repeatedly affirmed[173] by the Court. Thus, in 1925 it proved the undoing of the Taxation Boards of Appeal, whose members were appointed for seven years. They were held to have been invalidly invested with "the judicial power of the Commonwealth"[174]. The parallels with this case are striking. Indeed, the powers of service tribunals under the Act, to decide whether defined criminal offences have been committed and, if so, the punishment (up to life imprisonment) that should be imposed, are even clearer instances than any earlier, or different, examples of attempted vesting of such power contrary to s 71.

130 As to *policy*, the plain object of the separation of powers doctrine, expressed in s 71 of the Constitution and explained in the cases, is to ensure the

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169 (1956) 94 CLR 254.

170 Starting with the dissents of Williams J, Webb J and Taylor J in the *Boilermakers' Case* (1956) 94 CLR 254, see esp 302, 306, 314, 315, 317. That decision was later criticised by Barwick CJ in *R v Joske; Ex parte Australian Building Construction Employees & Builders' Labourers' Federation* (1974) 130 CLR 87 at 90.

171 *Ruhani* (2005) 222 CLR 489 at 530 [119], 578 [298]; cf at 546 [177].

172 *New South Wales v The Commonwealth* (1915) 20 CLR 34.

173 *J W Alexander* (1918) 25 CLR 434 at 450, 457, 461, 467, 489.

174 *British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1925) 35 CLR 422.

observance of certain basic standards when federal law commits to bodies the conclusive determination of controversies as to legal rights and duties.

131 Where federal offences are involved, the purpose of s 71 is made even clearer by the language of s 80, with its provision for jury trial. The separation of the judicial power is also specially important in a federation because it is the Judicature that has the final say on the constitutional division of powers and on matters of large moment affecting the rights and duties (relating to life, liberty or property) of all persons subject to the laws of the Commonwealth.

132 The scheme of s 71 is thus intended to preserve the vesting of federal judicial power to the nominated courts. In the case of the named federal courts, the Constitution itself assures to its members conditions of appointment, tenure, remuneration and appellate supervision that guarantee the existence of the requisite qualities of independence and impartiality. In the case of State courts invested with federal jurisdiction, this Court has also upheld the constitutional implication that such courts must be constituted in a way that is appropriate to the vesting of federal jurisdiction[175].

133 It follows that this is an integrated constitutional scheme which this Court should uphold. To the extent that, by verbal *formulae* we draw a distinction between "the judicial power of the Commonwealth" and some other kind of "judicial power" that, although under federal law, can be vested in bodies other than the courts named in s 71 of the Constitution, we permit a haemorrhage of federal judicial power to "courts" for which the Constitution does not provide. We open the door to tribunals which, in truth, exercise federal "judicial power" yet are placed outside the properly constituted courts enumerated in s 71. Such a course would, in my view, be contrary to the policy of the Constitution, that the grants of legislative power to the Parliament under s 51 be subject to the requirement that contests about rights and duties under federal law, certainly over broadly stated criminal offences and punishment, be amenable to substantive determination in independent and impartial courts.

134 In defence of the supposed distinction between "judicial power" and "the judicial power of the Commonwealth", mention was made of various activities that State courts may be required to perform by State legislation which could not be required of a federal court. Thus, the provision of an advisory opinion was, it was argued, an instance of "judicial power" that nevertheless fell outside the "judicial power of the Commonwealth"[176]. Whether or not that is so, that argument has no present application. These proceedings are not concerned with

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175 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

176 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266-267.

decision-making activities that are alien to the "judicial power", such as is proper to federal courts. There is absolutely no reason why the functions assigned under the Act to service tribunals could not be performed by a Ch III court. Determining guilt of precisely defined "offences" (including those contained in a general *Crimes Act*) and deciding resulting questions of punishment (up to life imprisonment) are historically core functions of the courts. They are not functions performed in this country by non-court tribunals. Nor should they be.

135 In addition, as the plaintiff pointed out, the International Covenant on Civil and Political Rights[177] ("the ICCPR"), signed by Australia, expresses relevant universal principles of fundamental human rights observed by civilised countries. Thus, Art 14(1) of the ICCPR provides:

> "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

136 The ICCPR does not enjoy a constitutional status in Australia. It has not been expressly incorporated into municipal law. Further, the provisions of Art 14(1) envisage both "courts" and "tribunals". An argument might exist that the determination of a service "offence" before a service "tribunal" is not necessarily the same as the determination of a "criminal charge". However that may be, the requirement that a trial of an "offence" which carries the potential on conviction of substantial imprisonment must be before a competent, independent and impartial tribunal established by law is deeply rooted in the Australian legal system itself[178].

137 The theory of the Constitution propounded by the plaintiff upholds this hypothesis. The theory propounded for the defendants does not. The trial of the plaintiff under the Act, before either of the service tribunals provided in the Act, falls short of the requirements of independence and impartiality for decision-makers. As constituted, the service tribunals have an inherent tendency, missing from the courts, to conform to the views of those higher in the chain of service

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177 Opened for signature 16 December 1966; 999 UNTS 171; [1980] ATS 23; cf *Re Aird* (2004) 220 CLR 308 at 348-350 [126]-[133].

178 cf Abadee, *A Study into Judicial System Under the Defence Force Discipline Act*, (1997) at 138-141. The author of the report, Brigadier the Honourable A R Abadee, RFD, was Deputy Judge Advocate General.

command (or to appear to do so)[179]. The members of service tribunals might be personally acquainted with, or even have command over, the accused or have service associations with relevant personnel and witnesses[180]. The career aspirations of members of service tribunals (for promotion, reappointment or otherwise) might influence, or appear to influence, their conduct in the trial and its disposition[181].

138 Such concerns (and the perceived defects in the outcome of publicised trials before military tribunals in Australia) have occasioned a series of inquiries and reports addressed to the systemic defects of the tribunals created by the Act[182]. Such reports have led, in turn, to a comprehensive report published by the Federal Parliament Joint Standing Committee on Foreign Affairs, Defence and Trade[183]. Further disquiet led to yet another report[184], which chronicled the long-standing institutional weaknesses that it saw in the existing service tribunals. It recorded proposals that they be replaced by "establishing a military bench of the Federal Magistrate's Court, or attributing appropriate status and perceived independence under the auspices of Chapter III of the Commonwealth Constitution (or an otherwise federally recognised court)"[185]. The Committee recommended that a Permanent Military Court "be created in accordance with

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179 Mitchell and Voon, "Defence of the Indefensible? Reassessing the Constitutional Validity of Military Service Tribunals in Australia", (1999) 27 *Federal Law Review* 499 at 504.

180 Heard, "Military Law and the *Charter of Rights*", (1988) 11 *Dalhousie Law Journal* 514 at 525.

181 Note, "Military Justice and Article III", (1990) 103 *Harvard Law Review* 1909 at 1920-1921; with respect to *Singapore Armed Forces Act* Cap 295, 1985, see Kronenburg, Lie and Wong, "Civil Jurisdiction in the Military Courts: An Unnecessary Overlap?", (1993) 14 *Singapore Law Review* 320 at 324.

182 Australia, Ombudsman, *The Australian Defence Force: Own motion investigations into how the Australian Defence Force responds to allegations of serious incidents and offences – Review of Practices and Procedures*, (1998).

183 Australian Parliament, *Military Justice Procedures in the Australian Defence Force*, (June 1999). See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 21 June 1999 at 6813-6816; Senate, *Parliamentary Debates* (Hansard), 21 June 1999 at 5728-5731.

184 Australia, Senate, Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, (June 2005).

185 Australia, Senate, Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, (June 2005) at 80 [5.16].

Chapter III of the Commonwealth Constitution to ensure its independence and impartiality", with judges appointed by the Governor-General in Council, having tenure until retirement age[186].

139 It is wrong to suggest, as some of the defendants' submissions did, that recent decisions of this Court had moved away from the principle of the separation of the judicial power. The Court could hardly do so, given the language and structure of the Constitution itself; the long-standing authority supporting the first limb of the *Boilermakers' Case* doctrine; the recent decisions that have reinforced this aspect of the doctrine[187]; the conformability of the principle with the universal standards of international human rights law; and the practical assurance that the doctrine affords against partisan, or partial tribunals determining outside the regular courts contested controversies affecting life, liberty and property.

140 When a direct challenge to the system of military justice is brought, as in these proceedings, the only response proper to this Court is to return to basics and to test the impugned law against the language and structure of the Constitution itself. This is what the Court and the Privy Council did when a similar challenge was brought in the *Boilermakers' Case*. We should not shrink from performing a similar duty today.

141 *Supposed earlier exceptions*: Yet should an "exception" be accepted that, either wholly or partly, takes service tribunals, as envisaged in the Act, outside the Court's doctrine concerning the requirements of Ch III, and specifically s 71?

142 Several analogies have been advanced to justify such an "exception". All but the last of them fails to withstand even rudimentary analysis:

(1) *Prerogative power*: The earliest sources of military law in British legal history may be traced to the prerogatives of the King as defender of the Realm against its enemies[188]. It has been suggested that military discipline

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186 Australia, Senate, Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, (June 2005) at 102 [5.95].

187 Including *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *Kable* (1996) 189 CLR 51; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *R v Hughes* (2000) 202 CLR 535.

188 cf *Re Tracey* (1989) 166 CLR 518 at 542 per Mason CJ, Wilson and Dawson JJ, 554-562 per Brennan and Toohey JJ; Blackstone, *Commentaries on the Laws of England*, (1768), Bk III at 68, 103-106.

in Australia might constitute a residual prerogative power outside s 51 of the Constitution and, as such, one which, of its nature, is not subject to Ch III[189].

There are many insurmountable difficulties with such an hypothesis. From medieval times, military law has been expressed in statutes and ordinances of war[190]. Necessarily, such provisions have regulated and replaced the Royal prerogative. In any case, for Australia, the Constitution itself regulates and replaces the Royal prerogative. It affords a new and sufficient national source for the governmental powers of the Commonwealth. Such powers are now ultimately derived from the people of the Commonwealth. In certain specific respects, the prerogative powers of the Crown are preserved by the Constitution[191]. However, within the context of the constitutional arrangements expressed in Ch I, including s 51, this is done subject to Ch III of the Constitution. There is no lacuna.

In any event, the service tribunals in question in this application are, and are only, those established by the express terms of the Act. They are not created under any prerogative power. Because expressed legislatively, they must find their source in a grant of federal legislative power. As such, they are subject to whatever Ch III and ss 51 and 71 require.

(2) *Parliamentary and Territory trials*: The defendants pointed to instances where, it was suggested, exceptions to the separation of powers doctrine expressed in s 71 had been recognised by this Court. When examined, however, these "exceptions" do not withstand close scrutiny.

One supposed exception concerned the trial and punishment of persons for breach of the privileges of the Houses of Parliament[192]. There are several answers to this supposed exception. In its decision concerning imprisonment by order of the House of Representatives, this Court denied, in terms, that it was offending the separation of powers doctrine, which it

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189 See Mitchell and Voon, "Defence of the Indefensible? Reassessing the Constitutional Validity of Military Service Tribunals in Australia", (1999) 27 *Federal Law Review* 499 at 509.

190 See generally, Squibb, *The High Court of Chivalry*, (1959); Clode, *The Military Forces of the Crown*, (1869).

191 See eg the Constitution, ss 58, 59, 60 and 74.

192 *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

did not question[193]. The decision was reached before the reinforcement of that doctrine in the *Boilermakers' Case*, decided in the following year. The supposed exception was based on s 49 of the Constitution and the unequivocal preservation there of the ancient powers, privileges and immunities of the Houses of the Parliament. Such an express constitutional source has no equivalent in respect of service tribunals. In any case, the Court's decision upholding the parliamentary power to try and punish persons for contempt (including by imprisonment) has been questioned and doubted[194]. In my view, it does not represent a persuasive exception. It is not analogous to the case in hand.

Similarly, the invocation of the supposed exception of Territory courts, created under s 122 of the Constitution, is unpersuasive[195]. Although authority in this Court lends support for the conclusion that such Territory courts do not exercise the "judicial power of the Commonwealth" (and are therefore not subject to the requirements of Ch III[196]), I will never accept that the Territories are constitutionally disjoined from the Commonwealth, and specifically from the integrated Judicature of the nation for which Ch III provides. The earlier holdings to that effect were influenced by pragmatic concerns about life appointments of judges in the Territories (when that was the federal rule) and over jury trials for native inhabitants of the then Territories of Papua and New Guinea. Such concerns have no modern relevance. The ultimate source of the legislative power in the Territories remains the Constitution of the Commonwealth. It is from that source that the legislative powers in the self-governing Territories derive to establish courts for such Territories[197]. They are therefore federal

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193 (1955) 92 CLR 157 at 167.

194 Discussed in Evans, "*Fitzpatrick and Browne*: Imprisonment by a House of Parliament", in Lee and Winterton (eds), *Australian Constitutional Landmarks*, (2003) 145 at 156. See also *Egan v Willis* (1998) 195 CLR 424 at 494 [136] and McHugh, "Does Chapter III of the Constitution Protect Substantive as Well as Procedural Rights?", (2001) 3 *Constitutional Law and Policy Review* 57 at 62.

195 cf *Boilermakers' Case* (1957) 95 CLR 529 at 545; [1957] AC 288 at 320.

196 *R v Bernasconi* (1915) 19 CLR 629 at 635; *Porter v The King; Ex parte Yee* (1926) 37 CLR 432 at 440-442, 446, 447-449; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 598, 624-625.

197 cf *Ruhani* (2005) 222 CLR 489 at 550 [194].

courts. The stream cannot rise higher than the source. Nor can it deny its origins. On analysis, the supposed exceptions collapse[198].

(3) *Imperial statutes*: Another suggested source for placing service tribunals outside Ch III might be found in a view that they derive their jurisdiction and powers directly from Imperial legislation. On this theory, being co-equal with the *Commonwealth of Australia Constitution Act* 1900 (Imp) and specific to the subject of discipline of the forces of the Crown, it would suffice if they were in accord with the specific Imperial law, although apparently in breach of the separation of powers doctrine contained in the Constitution, also initially established by the Imperial Act of 1900. One can see reflections of this thinking in *R v Bevan; Ex parte Elias and Gordon*[199].

Bevan was a case, decided in 1942, where three members of this Court[200] held that legislation providing for the trial by court martial of two members of the Royal Australian Navy for murder was a valid exercise of the defence power. However, a reading of the reasons demonstrates the great weight given by the Court to the fact that Australian naval personnel had been transferred unconditionally, in time of war, to the King's naval forces and "placed at the disposal of the [British] Admiralty" within the *Naval Discipline (Dominion Naval Forces) Act* 1911 (Imp)[201]. This, it was held, applied the *Naval Discipline Act* 1866 (Imp) to such personnel without any modifications or adaptations made by Australian federal law. This was so, although the *Defence Act* 1903 (Cth), s 98 had provided that no member of the Defence Force of the Commonwealth could be sentenced to death by any court martial (except for certain offences which did not include murder)[202].

The record in *Bevan* suggests that the prisoners, who were sentenced to death by an Australian court martial, did not raise the constitutional question as to the limits of the power of the Federal Parliament to legislate for courts martial[203]. The reasoning of the judges appears to have been

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198 See *Eastman* (1999) 200 CLR 322 at 378-383 [144]-[154].

199 (1942) 66 CLR 452.

200 Starke J, McTiernan J and Williams J.

201 s 1(1).

202 (1942) 66 CLR 452 at 477.

203 (1942) 66 CLR 452 at 482, 487.

influenced by the exigencies of war and more particularly the operation of the Imperial statutes mentioned[204].

However that may be, the disparate analysis in *Bevan* has no relevance to the present proceedings. As noted in the joint reasons[205], significant elements of Imperial law continued to apply in the system of law operating in *Bevan*. Here, there is no applicable, or even surrogate, Imperial law. The only relevant law is the Act. It is unquestionably an Act of the Parliament of the Commonwealth. As such, it must conform to all applicable requirements in Ch III of the Constitution. Specifically it must comply with ss 71 and 80. To the extent that *Bevan*, or the later decision in *R v Cox; Ex parte Smith*[206], are said to bear on the plaintiff's challenge, they have, in my view, little, if any, persuasive force. If they are inconsistent with my conclusion, I would overrule them.

(4) *Military necessities*: The foregoing conclusions bring me to the last, and only persuasive textual foundation for an exception authorising service tribunals outside the courts required by Ch III. This is the argument that, inherent in the grant of legislative power in s 51(vi) of the Constitution, is a necessary and obvious implied exception from the requirement to have all instances of military offences decided by courts conforming to the requirements of Ch III.

Accepting that there is some (but limited) force in this submission, I am led to a conclusion that the plaintiff's alternative argument in the proceedings should be accepted. I must explain why.

Accepting a limited exception for service tribunals

143 *Implications and assumptions*: The grants of legislative power in s 51 of the Constitution, and all of them, are subject to the requirements of the Constitution stated elsewhere, relevantly to provisions in Ch III. The letter of the Constitution therefore appears to be contrary to an "exception" of any kind or degree. Certainly, there is no explicit mention in the Constitution of service tribunals, whether of courts martial or Defence Force magistrates[207].

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204 (1942) 66 CLR 452 at 468.

205 Joint reasons at [55].

206 (1945) 71 CLR 1.

207 As to discussion in the Convention Debates, see the reasons of Gleeson CJ at [7]-[8] and of Callinan J at [237].

144 In this respect, the Australian Constitution took a different direction from the Constitution of the United States of America that preceded it, or the Indian Constitution that followed (and in some particular respects copied) it. In the United States Constitution, the Fifth Amendment expressly states:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger …"

145 This provision affords a textual foundation for some degree of military exceptionalism. The debates in the courts of the United States have concerned the scope of such exceptions from the ordinary requirements of the Constitution. The Fifth Amendment makes it clear that some such exception exists[208]. As was held in *Solorio v United States*[209], the United States Congress may legislate for the exercise of jurisdiction by courts martial over offences committed by military personnel. The *source* of the power for such laws is Art I, §8, cl 14, the defence power of the United States Constitution which broadly corresponds to s 51(vi) of the Australian Constitution. However, it is the Fifth Amendment which has exempted such laws from the requirements of the separation of powers, which would otherwise render them invalid[210].

146 The exception has also encouraged the Supreme Court of the United States to attribute to the President as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States" certain exceptional powers of law-making[211]. It is an exception which the courts of this country have never recognised in the Governor-General, although, as the Queen's representative, he is vested with the command-in-chief of the naval and military forces of the Commonwealth[212].

147 In India, Pt III of the Constitution enshrines certain fundamental rights. Article 13 invalidates all laws if, and to the extent that, they are repugnant to the rights enumerated in Pt III. However, in two cases the Indian Parliament is expressly empowered to restrict or abridge such fundamental rights. One

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208 *Toth v Quarles* 350 US 11 (1955); *O'Callahan v Parker* 395 US 258 at 265 (1969). See discussion in *Re Aird* (2004) 220 CLR 308 at 354-355 [147]-[152].

209 483 US 435 (1987).

210 483 US 435 (1987); cf reasons of Gleeson CJ at [9].

211 As in *Dynes v Hoover* 61 US 65 at 79 (1857).

212 Constitution, s 68.

concerns a restriction while martial law is in force in any area[213]. Article 33 empowers Parliament, by law, to "determine to what extent any of the rights conferred by this Part shall, in their application to", relevantly, "members of the Armed Forces; or … of the Forces charged with the maintenance of public order", be restricted or abrogated "so as to ensure the proper discharge of their duties and the maintenance of discipline among them".

148 The latter provision has been held sufficient to sustain a court martial which otherwise violates a military petitioner's fundamental right under Art 14 of the Constitution. That Article otherwise guarantees "equality before the law or the equal protection of the laws within the territory of India"[214]. The important point is that there is no equivalent to these express constitutional provisions in Australia affording a foundation in the Constitution itself for establishing a court martial (or other service tribunal) outside the ordinary courts referred to in Ch III.

149 *Criteria of necessity and obviousness*: To import an unexpressed exception involves a serious step. Deriving implications from, or finding unexpressed assumptions in, the Constitution has commonly been controversial and often contested. The people of the Commonwealth, who have the final say in any formal amendment of the Constitution, can see the express provisions and judge them for themselves. Implied or assumed provisions, declared by judges, are controversial because of the seriousness of any glossing of the Constitution and the infrequency of opportunities to contest the results. This is why a rigorous criterion is invariably applied to test any such implication[215].

150 Once declared, implications cannot be removed unless this Court changes its mind or, exceptionally, a formal amendment to the Constitution is adopted[216]. All of the foregoing are reasons for hesitation in finding, and expressing, an implied exception to the text and structure of the Australian Constitution to take service tribunals outside the requirements of Ch III.

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213 Indian Constitution, Art 34. See also Arts 136(2) and 227(4) excluding the appellate and supervisory jurisdiction of the Supreme Court. Notwithstanding these provisions, the Supreme Court has held that such provisions do not exclude judicial review of courts martial. See *Ranjit Thakur v Union of India* AIR 1987 SC 2386; *S N Mukherjee v Union of India* AIR 1990 SC 1984.

214 *Ram Sarup v Union of India* AIR 1965 SC 247; cf *Prithi Pal Singh v Union of India* AIR 1982 SC 1413.

215 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 352 [33], 409-411 [240]-[248], 452-454 [385]-[389]; cf *Bennett v Commonwealth of Australia* [2007] HCA 18 at [136].

216 In accordance with the Constitution, s 128.

151 *Implication of military discipline*: Notwithstanding the foregoing reasons for caution in acknowledging an implied exception for service tribunals (or upholding an imputed assumption that some such tribunals might be created and operate compatibly with Ch III of the Constitution), I accept that a limited role for such tribunals may co-exist with the text and structure of the Constitution.

152 First, the grant of power by s 51(vi) of the Constitution, read in the manner proper to its purpose and against the history that preceded it, imports powers for individuals and institutions, as necessary, to ensure the proper functioning of naval and military forces. Such forces were obviously envisaged by the Constitution[217]. 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.

153 Secondly, in the case of discipline, properly so called, this Court has upheld the constitutional validity of charges laid by public service disciplinary tribunals against federal officials outside the courts. By inference, similar rather confined powers would be available in respect of the discipline of other officers of the Commonwealth who serve in the naval, military and air forces where the history of disciplinary provisions and institutions is longer and the need for its maintenance more acute.

154 In *R v White; Ex parte Byrnes*[218] an officer of the federal public service submitted that, in imposing on him a fine of £3 under s 55 of the *Public Service Act* 1922 (Cth), the Chief Officer of the Department concerned (the Department of the Army) was exercising judicial power in breach of the Constitution. He argued that, in upholding the decision of the Chief Officer to impose the fine, the members of the Appeal Board were also exercising federal judicial power, contrary to Ch III. This Court rejected those arguments[219]:

> "Section 55, in creating so-called 'offences' and providing for their 'punishment', does no more than define what is misconduct on the part of a public servant warranting disciplinary action on behalf of the Commonwealth and the disciplinary penalties that may be imposed or

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217 See eg ss 51(vi), 68, 69, 114 and 119.

218 (1963) 109 CLR 665. The case appears to have turned on the fact that the disciplinary penalty was not "final and binding" and hence did not constitute a purported exercise of the judicial power at all.

219 (1963) 109 CLR 665 at 670.

recommended for such misconduct; it does not create offences punishable as crimes."

155 The distinction between "disciplinary penalties" and "offences punishable as crimes" may sometimes be difficult to draw. In the plaintiff's case, because her "offences" are, in substance, defined by way of surrogate provisions of a Territory *Crimes Act*, the distinction appears inapplicable. But for present purposes, it is sufficient to acknowledge that, with the legislative power granted to the Parliament by s 51(vi) of the Constitution, came a power to create disciplinary offences, tried and determined in service tribunals outside the ordinary courts. It is then essential to differentiate wrong-doing proper to "discipline" from "offences punishable as crimes". The former might be committed to service tribunals, established as necessity and obviousness require. Likewise, such tribunals might enjoy a power to maintain the *status quo* in respect of an accused for an essential, but limited, interval. But that would leave "offences", substantially of a criminal character, to be tried and punished in the ordinary courts with all of the protections that those courts afford.

156 Thirdly, there are some features of the defence forces and their mission that, of necessity and obviously, import a need to deal quickly and effectively with challenges to discipline. It is of the nature of such forces that they will sometimes be required to operate in remote places within Australia and overseas. Sometimes, it would be inherent in the needs of discipline in such circumstances for a commanding officer to have effective powers of various kinds. These might include reduction in rank, deprivation of seniority, loss of privileges, administration of a reprimand, dismissal from the service, fines or short-term deprivation of liberty.

157 The advent of fast air travel, including (perhaps especially) to and from theatres of war, armed conflict, peace-keeping and like operations, has changed the content of what is necessary and obvious for the effective achievement of service discipline today. Even in the case of *Bevan* in 1942, the court martial which sentenced the prisoners to death did not assemble on the high seas. It was constituted on the ship in port and, once convicted and sentenced, the prisoners were transferred in custody to the New South Wales State Penitentiary at Long Bay[220].

158 Today, the spectacle of courts martial hastily convened in the field of battle appears a creature of imagination or cinema rather than a procedure for which the Act provides. The determination of a charge, the constitution of a service tribunal and the prosecution of the charge under the Act necessarily take time. In that time, a service member, where appropriate in temporary custody,

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220 (1942) 66 CLR 452 at 456.

could be transferred to a Ch III court or, in really urgent cases, be made to face a hearing by sound or video link by such a court. This obviates today the necessities of drumhead military trials, whatever may have occurred in other, earlier times.

159 Nevertheless, by necessary and obvious implication, the grant of legislative power to the Parliament by s 51(vi) imports a power to deal with disputed cases of discipline, properly so called, for which prompt, local, low-key procedures, with restricted penalties, would be apt. Such cases would not challenge the language of s 71, the scheme of Ch III, or the subjection of the grant of legislative power in s 51(vi) to that Chapter of the Constitution. The difficulty arises in a case, such as the present, where what is involved is undoubtedly a "punishment" for an "offence" that amounts to a "crime", which is defined in a criminal statute and carries, on conviction, the possibility of a significant loss of liberty and, specifically, a penalty described as "imprisonment".

160 Fourthly, in defining the boundary of military discipline proper to a service tribunal outside the courts for which Ch III provides, and distinguishing "offences punishable as crimes", this Court has been divided. In *Re Tracey*[221], Mason CJ, Wilson and Dawson JJ concluded that service tribunals could validly exercise "judicial power" provided the exercise was "sufficiently connected with the regulation of the forces and the good order and discipline of defence members". This view was maintained by Mason CJ and Dawson J in *Re Nolan; Ex parte Young*[222] and *Re Tyler; Ex parte Foley*[223]. However, at least until *Re Aird*[224], it was a view of the power of such tribunals that never gathered a majority of the Court.

161 In each of *Re Tracey*, *Re Nolan* and *Re Tyler*, Brennan and Toohey JJ considered that proceedings before a service tribunal, in relation to a military offence, could only be brought and determined if the proceedings substantially served the purpose of maintaining or enforcing service discipline[225]. Their Honours posed the question "whether the jurisdiction of a competent civil court can conveniently and appropriately be invoked to hear and determine a

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221 (1989) 166 CLR 518 at 545.

222 (1991) 172 CLR 460 at 474-475.

223 (1994) 181 CLR 18 at 26.

224 (2004) 220 CLR 308.

225 *Re Tracey* (1989) 166 CLR 518 at 570; *Re Nolan* (1991) 172 CLR 460 at 486; *Re Tyler* (1994) 181 CLR 18 at 30.

corresponding civil court offence"[226]. By such a criterion in the present case, the plaintiff's "offences" would clearly fall outside the "disciplinary" category postulated by Brennan and Toohey JJ.

162 In her reasons in these cases, Gaudron J suggested that the test for permissible "disciplinary" proceedings was whether, in the particular case, the exercise of the "disciplinary" power was "reasonably capable of being regarded as appropriate and adapted to the object which gives the law in question its character as a law with respect to the relevant head of power"[227].

163 The clearest exposition of the test, in my view, was that stated by Deane J in *Re Tracey*[228]. According to his Honour, the applicable criterion confined the powers of service tribunals to those subjects of military law that are necessary for the enforcement of military discipline[229]. According to this view, only an essentially disciplinary offence fell outside the judicial power of the Commonwealth, reserved to Ch III courts[230]. This would include "exclusively disciplinary" offences, and offences concerned with the disciplinary aspects of other "service-related" offences, but only where they did not "supplant the jurisdiction or function of the ordinary courts in relation to the general community aspects of conduct which also constitutes an offence under the ordinary criminal law"[231]. Deane J called this latter class of offences "essentially disciplinary" offences.

164 In *Re Nolan*[232], McHugh J agreed with Deane J's approach. In *Re Tyler*, McHugh J adhered to his expressed belief that that approach was constitutionally correct and that the reasoning of the majority was erroneous[233]. Nevertheless, for reasons of comity, or perceived authority, McHugh J surrendered his preferred

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226 *Re Tracey* (1989) 166 CLR 518 at 570.

227 *Re Tracey* (1989) 166 CLR 518 at 597. See also *Re Nolan* (1991) 172 CLR 460 at 498; *Re Tyler* (1994) 181 CLR 18 at 35.

228 (1989) 166 CLR 518 at 579-590.

229 (1989) 166 CLR 518 at 587-590.

230 The same view was taken by Deane J in *Re Nolan* (1991) 172 CLR 460 at 490-493 and in *Re Tyler* (1994) 181 CLR 18 at 34.

231 *Re Nolan* (1991) 172 CLR 460 at 489-490 per Deane J.

232 (1991) 172 CLR 460 at 499.

233 (1994) 181 CLR 18 at 39.

view in *Re Tyler* to that of the majority. This was the conclusion with which his Honour persisted in *Re Aird*.

165 In my opinion, for the reasons given by McHugh J in *Re Nolan* (and *Re Tyler*), Deane J's approach is the constitutionally correct one[234]. Only Deane J recognised the special role which Ch III of the Constitution plays as a "general guarantee of due process"[235]. Only Deane J limited military exceptionalism to the essential needs of discipline in the military context, so far as consistent with the functions of the Defence Force and the availability, in most circumstances, of a civilian court. Only Deane J's test is consistent with the long-standing principle of British constitutional law subjecting the military to the civilian power and committing contested military cases to civil courts where such courts are geographically available and can perform their function without unacceptable delay or interference in the military function[236]. It follows that the only military exceptionalism permitted by the Constitution, consistent with the requirements of Ch III, is for exclusively or essentially disciplinary offences, as Deane J suggested. However, there is an additional limitation to which effect must also be given.

166 *The right to trial by jury*: The plaintiff states that she wishes to exercise her "constitutional right" to trial by jury. Provision is made for an entitlement to jury trial in s 80 of the Constitution in respect of "any offence against any law of the Commonwealth". The section posits the availability of that mode of trial where the "offence", so defined, is tried "on indictment". Differences have arisen in this Court as to the meaning of the phrase "trial on indictment".

167 In past cases, a majority of this Court has favoured the tautological[237] view that s 80's guarantee of "trial by jury" is limited to cases in which the Parliament and the Executive provide for the commencement of prosecution by filing an

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234 cf *Re Aird* (2004) 220 CLR 308 at 320-321 [34] per McHugh J.

235 *Re Tracey* (1989) 166 CLR 518 at 580; cf Mitchell and Voon, "Justice at the Sharp End – Improving Australia's Military Justice System", (2005) 28 *University of New South Wales Law Journal* 396 at 407.

236 *Re Aird* (2004) 220 CLR 308 at 352 [139]. One of the complaints that led to the American War of Independence was that George III had "affected to render the Military independent of and superior to the Civil Power": *Declaration of Independence*, 1776.

237 Blackshield and Williams, *Australian Constitutional Law and Theory*, 4th ed (2006) at 1196.

indictment[238]. However, a persistent minority has rejected this view as inconsistent with the function of s 80 as providing a guarantee of jury trial which could not so easily be circumvented[239]. With respect, I favour what is presently the minority view. It is more harmonious with the language, constitutional context, purpose and function of the section[240]. The contrary view renders trial by jury for the applicable federal offences optional in the hands of the very governmental agencies against whom jury trials can be a precious protection for the individual. That cannot be the meaning of the Constitution. When Australian judges and lawyers become more accustomed to reasoning by reference to fundamental rights, they will see the truth of this proposition more clearly.

168 Ordinarily, a judge of this Court, having expressed his or her view about a contested matter of legal authority should accept a majority ruling on the point, where it was necessary to the disposition of a case[241]. In matters of private law, this is the course that I have observed[242]. Sometimes, in constitutional adjudication, it is also the proper course to adopt[243].

169 There are cases, however, where it is appropriate for a judge of this Court to adhere to an expressed view about the meaning of the Constitution[244]. As

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238 *Bernasconi* (1915) 19 CLR 629 at 637 per Isaacs J; *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128 at 139-140 per Higgins J; *Zarb v Kennedy* (1968) 121 CLR 283 at 294 per Barwick CJ; *Kingswell* (1985) 159 CLR 264 at 276-277 per Gibbs CJ, Wilson and Dawson JJ; *Re Colina* (1999) 200 CLR 386 at 396 [24] per Gleeson CJ and Gummow J, 439 [136] per Callinan J.

239 *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 581-582 per Dixon and Evatt JJ; *Li Chia Hsing v Rankin* (1978) 141 CLR 182 at 198 per Murphy J (see also at 193 per Gibbs J); *Kingswell* (1985) 159 CLR 264 at 307 per Deane J.

240 *Re Colina* (1999) 200 CLR 386 at 422-427 [95]-[104].

241 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 417-418 [56].

242 See eg *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 626 [238].

243 *Queensland v The Commonwealth* ("the *Second Territorial Senators Case*") (1977) 139 CLR 585 at 598-601; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 59 [87], 67 [110]; *Singh v The Commonwealth* (2004) 222 CLR 322 at 417 [265]; *Ruhani* (2005) 222 CLR 489 at 551 [196]; *Ruddock v Taylor* (2005) 222 CLR 612 at 659-660 [173].

244 *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 278 per Isaacs J; *Evda Nominees Pty Ltd v*

(Footnote continues on next page)

Barwick CJ remarked in *Victoria v The Commonwealth*[245], "we are not construing judgments. Our task is to construe the Constitution which is always the text." The present is such an occasion. It involves the first direct challenge to the constitutional validity of the system of service tribunals established by the present Act. That system is in some respects different from that existing under earlier federal (and Imperial) statutes. Relevant to the challenge is the meaning and application of Ch III of the Constitution. That Chapter includes s 80. It is an integral part of the constitutional scheme. The terms of s 80 cannot, therefore, be ignored. It is important that that section should be given its proper meaning when resolving the plaintiff's challenge.

170 I have previously expressed my view that the correct meaning of s 80 is that stated by Deane J in *Kingswell v The Queen*[246]. In referring to the entitlement to trial by jury of federal offences prosecuted on indictment, the Constitution meant to distinguish "a serious offence against the laws of the Commonwealth"[247]. To sharpen this expression, Deane J concluded, in *Kingswell*[248], that the section applied where the federal offence in question carried a term of imprisonment of more than twelve months. This is the view that I would endorse. It should be given effect in the present context.

171 *Conclusion: provisions are invalid*: The result is as follows. Because of the necessities of military discipline, strictly so called, the legislative power conferred on the Parliament by s 51(vi) of the Constitution (and other relevant powers including the express incidental power) carries with it the power, by federal law, to establish service tribunals for service discipline. However, their jurisdiction is limited to service discipline as such. That limited function is exceeded where the Parliament purports to confer on them jurisdiction and power to try and punish what are in substance contested criminal offences. Specifically, the power of such tribunals is limited by the requirement in s 80 of the Constitution that any offence against a law of the Commonwealth which carries on conviction a term of imprisonment of more than twelve months shall be, where the accused so requires, tried by jury.

Victoria (1984) 154 CLR 311 at 316 per Deane J; *Stevens v Head* (1993) 176 CLR 433 at 461-462 per Deane J, 464 per Gaudron J.

245 (1971) 122 CLR 353 at 378.

246 (1985) 159 CLR 264 at 318-319; *Re Colina* (1999) 200 CLR 386 at 422 [95].

247 The view of Dixon and Evatt JJ in *Lowenstein* (1938) 59 CLR 556 at 581-582. See also Murphy J in *Beckwith v The Queen* (1976) 135 CLR 569 at 585; *Li Chia Hsing* (1978) 141 CLR 182 at 198.

248 (1985) 159 CLR 264 at 318-319.

172 The Act does not conform to the foregoing constitutional requirements. Whilst provision is made in the Act for service tribunals to hear and determine trials, and to punish defence members upon conviction of conduct which might be described as exclusively or essentially disciplinary in character and carrying penalties of imprisonment for less than twelve months[249] (or a commensurate fine[250]), the Act has not been drafted to comply with the stated constitutional *discrimen*. It makes no provision for trial of serious service offences before a Ch III court. Nor does it include the procedure of indictment in those offences carrying a constitutional right to jury trial. Moreover, by importing the whole gamut of criminal offences based on Territory offences[251], but without the requisite procedural limitations and protections, the Act makes clear what is in any case obvious. It was intended to adopt a scheme for the separate trial and punishment of service members before service tribunals that are not Ch III courts for what are, in terms and substance, criminal offences carrying maximum penalties rising in some cases to life imprisonment.

173 In my opinion, the Constitution forbids such trials in service tribunals which are not courts conforming to Ch III and which do not allow for jury trial in accordance with s 80 of the Constitution, in those cases where that section must be observed.

174 *Severance is unavailing*: In the case of the offences with which the plaintiff has been charged, only one (charge 4[252]) is for an offence which, under the Act, carries a maximum punishment of imprisonment for less than 12 months. However, this offence could not, in my view, be severed from the six other charges laid against the plaintiff. The conditions for severance are not established. The attempt to sever the provision would involve this Court in substantially rewriting the Act: an impermissible judicial function[253].

175 In the result, therefore, the provisions of the Act, invoked to support the charges against the plaintiff, are constitutionally invalid. The plaintiff is entitled to relief. However, before proposing such relief, I will mention some of the

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249 See eg the Act, ss 35, 36A, 36B, 37, 40C, 43(3), 45, 46, 53(4), 54A, 56(4), 57.

250 The Act, ss 40D, 59(6) and (7).

251 The Act, s 61.

252 Based on the Act, s 33(a).

253 See *New South Wales v Commonwealth* (2006) 81 ALJR 34 at 165-166 [595]-[604], 252 [911]-[912]; 231 ALR 1 at 160-162, 274-275 where the relevant principles on severance are stated.

issues raised in the joint reasons. In my view, they do not sustain a conclusion adverse to the plaintiff.

Rejecting the arguments against relief

176 *Past authority of the Court*: The joint reasons reject the plaintiff's challenge on the basis that the system of service tribunals, outside Ch III courts, constitutes an exception to the requirements for the exercise of the judicial power recognised by such "long-standing decisions" as *Bevan* and *Cox*[254].

177 It is true that *Bevan*, for the somewhat unsatisfactory and disparate reasons that I have described, upheld the validity of the court martial that sentenced the accused defence members to death, contrary to the express provisions of Australian federal legislation. However, *Bevan* can best be understood as giving effect to superior Imperial legislation that was treated as standing outside the requirements of the Constitution, then also viewed as an Imperial statute. This is not the view now taken of the Constitution. *Cox* followed *Bevan*. But, in *Cox*[255], Dixon J did not accept the reasoning in *Bevan*. He stated that the "exception" recognised there "is not real". He acknowledged the possible over-reach of courts martial[256]. Yet he declined to elaborate. With respect, the reasoning in these cases is far from sustained or persuasive. In any event, the decisions refer to earlier legislation. The present is the first direct challenge to the validity of the service tribunals under the Act.

178 It is fair to say that several recent decisions of this Court, addressing the present Act, assume the validity of the service tribunals created there[257]. However, not until these proceedings has the Court faced a specific challenge to the validity of the entire legislative scheme. Moreover, the challenge is presented, divorced from any operation of Imperial law or the exigencies of war. It arises after a great deal of elaboration by the Court, including in the *Boilermakers' Case* of 1956, on the importance and function of the separation of the judicial power in Ch III of the Constitution as an institutional means essential to securing the effectiveness of the rule of law in Australia[258].

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254 Joint reasons at [57].

255 (1945) 71 CLR 1 at 23.

256 (1945) 71 CLR 1 at 24.

257 Including *Re Tracey* (1989) 166 CLR 518; *Re Nolan* (1991) 172 CLR 460; *Re Tyler* (1994) 181 CLR 18; *Hembury* (1998) 193 CLR 641 at 694 and *Re Aird* (2004) 220 CLR 308.

258 Itself expressed in the *Communist Party Case* (1951) 83 CLR 1 at 193.

179 Against this background, when, as here, a direct challenge is brought, this Court should give fresh scrutiny to it. If that was good enough for the Court (and for the Privy Council) in the *Boilermakers' Case*, it should be sufficient for us, even if the ultimate conclusion were to go against the plaintiff. The issues presented are serious. They challenge the consistency of the Court's doctrine about Ch III in the context of service tribunals. Such a challenge is not met by an appeal to the unsatisfactory wartime decisions of *Bevan* and *Cox*.

180 The terms of the Act, and in particular s 61 of the Act, under which the plaintiff faces six charges, introduce in the clearest possible way provisions for a parallel system of trial of offences, *eo nomine*, outside the courts involving the trial of Australian citizens who happen to be defence members. It envisages their "punishment", including by very lengthy "imprisonment", without most of the protections that would be afforded to them in the courts, including a right to trial by jury. This is an important issue. It has been recognised as such by scholars[259] and by public inquiries, including in the Parliament itself[260].

181 When an appeal is made to the text and structure of the Constitution, this Court is bound to explain how an apparent anomaly can be sustained and an "exception" reconciled with the constitutional text and its design. This is not a case where there is clear, long-standing authority supporting the validity of the service tribunals under the present Act. Appeals to wartime authority, clearly influenced by events and Imperial statutes, will not quell the controversy presented by the plaintiff arising from the text.

182 *Imperial and other history*: Nor, with respect, is it convincing to say, as the joint reasons suggest, that the exception for service tribunals, and its ambit, can be understood against the background of the history of courts martial in British constitutional law[261].

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259 Kronenburg, Lie and Wong, "Civil Jurisdiction in the Military Courts: An Unnecessary Overlap?", (1993) 14 *Singapore Law Review* 320; Griffith, "Justice and the Army", (1947) 10 *Modern Law Review* 292 at 297-298; Heard, "Military Law and the *Charter of Rights*", (1988) 11 *Dalhousie Law Journal* 514; Note, "Military Justice and Article III", (1990) 103 *Harvard Law Review* 1909.

260 Australia, Senate, Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, (June 2005) at 101-102 [5.92]-[5.96]. See also earlier Australian Parliament, *Defence Force Disciplinary Code: Report of the 1973 Working Party*, Parliamentary Paper No 48, (1974).

261 Joint reasons at [36]-[37], [51]-[52].

183 There are many features of English law that are copied by, or implied or assumed within, the Constitution of the Commonwealth. There are others that have no place in the system of government established by the Australian Constitution. Thus, the notion of positioning a court within the Parliament, say as a Committee of the Senate (such as the judicial sitting of the House of Lords) or within the federal Executive (such as a local equivalent of the Judicial Committee of the Privy Council) is totally alien to Australian constitutional arrangements as expressed in the language and structure of the Constitution. In this sense, the Constitution represented a new beginning for a new nation. Subject to any applicable express provisions[262], the separation of the federal judicial power, and the reservation of its exercise to Ch III courts, was a requirement intended to be observed.

184 Moreover, it is a requirement the importance of which extends far beyond formalities. In the case of service tribunals, it keeps military exceptionalism to a minimum. To that extent, it actually preserves an important general feature of our constitutional arrangements, inherited from the United Kingdom[263]. It protects fundamental rights, now recognised by civilised nations and international law and, for much longer, inherent in our own legal system. It prevents any attempts of the other branches of government to expand the exceptions. When pressed, the defendants would not disclaim the possibility of relying on a precedent, established by this case, to attempt to expand such exceptions to other disciplined agencies (police, firemen, counter-terrorism and security agencies spring to mind)[264]. Confining the "exceptions" discourages the creation of new federal "courts" outside the integrated Judicature of the Commonwealth for which Ch III provides.

185 The fact that courts martial have existed for centuries and were in place before and after the Constitution came into effect, is a reason to pause before requiring their elimination, or the restriction of their jurisdiction and powers, by reference to Ch III of the Constitution. But so it was when the challenge was brought in 1956 to the Commonwealth Court of Conciliation and Arbitration. It had then existed since 1904[265]. So it was in 1997 when the use of a serving

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262 eg the Constitution, s 74.

263 *Re Aird* (2004) 220 CLR 308 at 352 [139].

264 [2006] HCATrans 026 at 3260; cf Head, "Calling Out the Troops – Disturbing Trends and Unanswered Questions", (2005) 28 *University of New South Wales Law Journal* 479 at 487; Laing, "Call-Out the Guards – Why Australia Should No Longer Fear the Deployment of Australian Troops on Home Soil", (2005) 28 *University of New South Wales Law Journal* 507.

265 *Conciliation and Arbitration Act* 1904 (Cth), s 11.

Federal Court judge as *persona designata* to conduct an inquiry for the Executive was forbidden by this Court[266], despite a history of such use stretching back to the early days of the Commonwealth and, before that, to colonial times[267].

186 If anything, the Court's holdings on Ch III have become stricter in recent years[268]. This is not an occasion for changing course. To the extent that an appeal is made to the "chameleon" doctrine, by which a particular power may take its character from the body to which the power is committed[269], this does not avail the defendants. The trial of criminal "offences" and the imposition of "penalties" and "punishments", extending to substantial imprisonment, remain inherently "judicial" in character. The Commonwealth conceded as much in argument during the recent case of *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board*[270]. They do not lose that character simply by being reposed in a service tribunal.

187 The least persuasive and most dangerous argument of all, in my respectful opinion, is the suggestion that there is a peculiar variety of "judicial power" under federal legislation which is not "the judicial power of the Commonwealth"[271]. This was the way Starke J reasoned in *Bevan*[272]. I have already explained why such reasoning should be rejected[273].

188 In *Bevan*[274], Starke J referred to United States jurisprudence[275]. A similar approach is reflected in the joint reasons[276]. However, with all respect, it

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266 *Wilson* (1996) 189 CLR 1.

267 (1996) 189 CLR 1 at 32-34. These included an inquiry into the Great War conducted in 1918 for the Executive by Griffith CJ: see Joyce, *Samuel Walker Griffith*, (1984) at 354.

268 eg in *Kable* (1996) 189 CLR 51; *Wilson* (1996) 189 CLR 1; *Re Wakim* (1999) 198 CLR 511.

269 Joint reasons at [48].

270 [2007] HCA 23 at [94].

271 Joint reasons at [50].

272 (1942) 66 CLR 452 at 466.

273 See above these reasons at [177].

274 (1942) 66 CLR 452 at 467.

275 *Dynes* 61 US 65 (1857).

overlooks the express exception in the Fifth Amendment to the United States Constitution for "cases arising in the land or naval forces, or in the Militia". As well, it overlooks the law-making power attributed to the President of the United States as "Commander in Chief", a view that has never been accepted of the Governor-General of Australia[277]. And if such a view were now belatedly accepted in Australia, the powers would, in any case, be subject to Ch III of the Constitution because Ch II, like Ch I, is subject to the separated judicial power in Ch III.

189 *Emergence of a regulatory state*: In so far as the joint reasons suggest that an exception for service tribunals must be accepted because inherent in the "modern regulatory state [which] arrived after 1900"[278], I beg to differ. Certainly, the Constitution, as a functional instrument of government of a modern nation, adapts to the needs and circumstances of changing times. Although others have been ambivalent about this, I have been consistent in accepting a functional, rather than an originalist, interpretation of the Constitution and its meaning. I have acknowledged the fact that constitutional language may take on different meanings over time so as to fulfil functions enlivened by changed social conditions[279].

190 Nevertheless, when it comes to a feature of the Constitution that is fundamental, defensive of the rule of law and protective of the rights of persons to have serious controversies about life, liberty and property settled conclusively by independent and impartial courts, this Court must be vigilant to uphold the constitutional provisions.

191 It is not convincing to sideline such arguments by a reference to generalities about the "modern regulatory state". Executive government, in particular, will constantly complain about the subjection of its decisions to judicial scrutiny and disallowance. The constitutional writs are an important protection[280]. However, under current doctrine, for the most part, they are confined in the remedies that they provide to cases of "jurisdictional error". The

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276 Joint reasons at [50]-[52].

277 *Coutts v The Commonwealth* (1985) 157 CLR 91 at 109 per Deane J; cf White, "The Executive and the Military", (2005) 28 *University of New South Wales Law Journal* 438 at 442-444.

278 Joint reasons at [48].

279 See eg *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 522-523 [111]-[112].

280 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513-514 [103]-[104].

facility of access to the courts for the resolution of controversies under federal law is a much larger and more valuable protection.

192 No necessity of the modern state removes this protection altogether. Certainly it does not do so in cases involving the determination of "offences", criminal in character, subject to significant "penalty" and "punishment", including in a case such as the present a lengthy loss of liberty. If this Court allows such questions to be decided outside Ch III courts because of the supposed necessities of the "modern regulatory state", there will remain virtually nothing that *must*, by Australian constitutional law, be dealt with by Ch III courts. This country will accept military commissions and military "courts"[281].

193 In my opinion, the Australian Constitution holds too precious the determination of controversies over life, liberty and property to permit such a conclusion. That is why the objection raised by the present plaintiff is a very important one. To dismiss it on the basis of a supposed exception applicable to service tribunals requires, at the very least, a justification by those of that view of the exception that will not undermine the function that Ch III is intended to perform in this and other cases[282].

194 *Abstract reasoning objection*: Is the conclusion that I favour to be dismissed as "abstract reasoning alone" inapposite to the Constitution as a practical instrument of government[283]? The joint reasons answer the plaintiff's submissions by rejecting her argument in such terms[284]. They refer to how "the judicial power of the Commonwealth", as an expression, "must have been universally understood in 1900"[285].

195 Understandings of constitutional expressions in 1900 do not control the attribution of meaning to them today. If it had been otherwise, decisions such as *Sue v Hill*[286] and *Shaw v Minister for Immigration and Multicultural Affairs*[287],

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281 cf *Hamdan v Rumsfeld* 165 L Ed 2d 723 (2006). See also *Military Commissions Act of 2006* (US), §2, and 10 USC Ch 47A, §948i, §948j, §949d, §949m(a), §950f, §950g, inserted by that Act.

282 cf *Albarran* [2007] HCA 23 at [58]-[67].

283 cf *R v Davison* (1954) 90 CLR 353 at 380-381.

284 Joint reasons at [58].

285 Joint reasons at [58]; cf *Ruhani* (2005) 222 CLR 489 at 553 [205].

286 (1999) 199 CLR 462.

287 (2003) 218 CLR 28.

and many others, would have been differently resolved. Common assumptions about the meaning, and content, of the federal judicial power in 1900 must be measured against the elucidation of the provisions of the Constitution and their purposes over more than a hundred years. This incorporates reference to the growing elaboration by the Court of the importance to the operation in the Constitution of the separation of the judicial power and of the requirement that certain exercises of governmental power, under federal legislation, are reserved to Ch III courts.

196 There is nothing at all "abstract" about depriving an individual of liberty in a tribunal that is not constituted so as to be manifestly impartial and independent. There is nothing "abstract" in subjecting a defence member, exceptionally, to a different kind of prosecution, trial and punishment from that which would apply to any other Australian citizen in the same circumstances. Nor is it "abstract" to deny a defence member the protection of jury trial for the determination of charges for serious offences carrying, upon conviction, penalties of imprisonment.

197 *Characterisation and bright lines*: The reasons of Gleeson CJ and the joint reasons finally object that the adoption of a criterion that would confine the constitutional exception for military discipline, permissible for trial in service tribunals, to offences that are "exclusively disciplinary in character" is unsatisfactory and therefore, by inference, outside the constitutional scheme[288].

198 In constitutional adjudication, difficult cases inevitably arise, as the joint reasons themselves acknowledge[289]. The desire for a "bright line" is understandable; but such clarity is often elusive. As Hayne J pointed out in *Re Refugee Review Tribunal; Ex parte Aala*[290], this does not necessarily undermine a propounded taxonomy. One of the functions of courts in constitutional cases is to draw lines and to decide on which side of the line, so drawn, the case falls.

199 Even before this litigation, it has long been recognised in the Defence Force that difficult questions must sometimes be answered in deciding whether a particular offence should proceed in the general courts or before a service tribunal (or both). Criteria have been developed to permit that to happen[291]. It is

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288 Reasons of Gleeson CJ at [19]-[21]; joint reasons at [73]-[75].

289 Joint reasons at [76].

290 (2000) 204 CLR 82 at 141 [163].

291 See eg amendments made to the Defence Instructions (General) on 17 February 1999, List B – Issue No PERS B/5/99.

not a complaint against the correctness of the plaintiff's submissions that they would require re-expression of those criteria and, consequently, different outcomes.

200 When effect is given to the operation of s 80 of the Constitution, as part of the scheme of Ch III of the Constitution, the delineation between the proper functions of service tribunals and those of the general courts is comparatively clear. The former might deal with contested issues that are "exclusively disciplinary" or "essentially disciplinary" in character but which attract, on conviction, a maximum punishment of less than twelve months imprisonment. Anything else must be prosecuted in a court of the integrated Judicature for which Ch III provides[292]. Of course, provisions for the arrest, detention and transmission of an accused service member to the courts, as soon as practicable, would be within power. But subjecting service members to the risk of imprisonment (as in the plaintiff's case, a potential aggregate maximum of thirty years imprisonment) is inconsistent with the constitutional scheme.

201 In recent decades, many countries have abolished their separate military justice system, at least outside times of war or national emergency[293]. According to commentaries, Sweden has "had no serious difficulty in returning servicemen accused of crimes to Sweden for trial in a civilian court."[294] Where a constitutional imperative intervenes, as in my view it does here, sensible practical arrangements are invariably devised without delay[295].

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292 cf Mitchell and Voon, "Justice at the Sharp End – Improving Australia's Military Justice System", (2005) 28 *University of New South Wales Law Journal* 396 at 418.

293 Sweden, Germany, Austria and Denmark have abolished their courts martial systems. See Kilimnik, "Germany's Army after Reunification: The Merging of the *Nationale Volksarmee* Into the *Bundeswehr*, 1990-1994", (1994) 145 *Military Law Review* 113 at 131-133; Lindeblad, "Swedish Military Jurisdiction", (1963) 19 *Military Law Review* 123 at 126; cf Sherman, "Military Justice Without Military Control", (1973) 82 *Yale Law Journal* 1398 at 1398, 1411-1415.

294 Sherman, "Military Justice Without Military Control", (1973) 82 *Yale Law Journal* 1398 at 1415.

295 Such as immediately followed the decisions in *British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1925) 35 CLR 422, the *Boilermakers' Case* in 1956, and *Re Wakim* (1999) 198 CLR 511 (see eg *Hughes* (2000) 202 CLR 535); cf Groves, "The Civilianisation of Australian Military Law", (2005) 28 *University of New South Wales Law Journal* 364 at 375 citing *R v Pinney* (1832) 5 Car & P 254 [172 ER 962].

202 *Conclusion: constitutional invalidity*: The result is that none of the arguments that have found favour in the joint reasons persuades me to withhold the remedies to which, by the application of the Constitution's text and structure, the plaintiff is entitled. The time has come for this Court to limit the "exception" for military justice to "offences" that are exclusively or essentially disciplinary in character and which carry a punishment of less than one year's imprisonment. All other "offences" presently included in the Act must, by the Constitution, be tried in the ordinary courts as envisaged by Ch III. Measured by these criteria, the sections of the Act providing for the trial of the plaintiff in service tribunals are invalid. It is impossible to sever the provisions that are incompatible with Ch III from those that are not. The plaintiff has established her constitutional right to relief, based on these conclusions.

Orders

203 The following orders should be made:

(1) Declare that a trial of the charges identified in the summons against the plaintiff, under the *Defence Force Discipline Act* 1982 (Cth), is invalid in accordance with the Constitution of the Commonwealth;

(2) Order that prohibition issue to the Director of Military Prosecutions restraining the Director from requesting the Registrar of Military Justice to refer the charges against the plaintiff to a Defence Force magistrate for trial or to request the Registrar of Military Justice to convene a general court martial or a restricted court martial to try the charges; and

(3) Order that the Commonwealth pay the plaintiff's costs of the application.

204 CALLINAN J. The issues in this case are whether there is a federal military judicial power exercisable otherwise than by courts constituted under Ch III of the Constitution and, if there is, the nature and extent of that power.

The facts

205 The plaintiff is a Chief Petty Officer in the Royal Australian Navy. She was charged on 30 June 2006 by the Acting Director of Military Prosecutions under the *Defence Force Discipline Act* 1982 (Cth) ("the Act") with seven offences: the commission of acts of indecency without consent and, in the alternative, assault, against five women, all of whom were sailors. The offences were alleged to have been committed in Victoria when neither the plaintiff nor the servicewomen were on duty or in uniform. The plaintiff expressly disavowed reliance upon any insufficiency of connexion between the acts alleged and the service as a member of the Navy[296].

206 Section 61(3) of the Act, under which six of the charges were laid, applies s 60 of the *Crimes Act* 1900 (ACT)[297]:

> "A person who is a defence member or a defence civilian is guilty of an offence if:
>
> (a) the person engages in conduct outside the Jervis Bay Territory (whether or not in a public place); and
>
> (b) engaging in that conduct would be a Territory offence, if it took place in the Jervis Bay Territory (whether or not in a public place)."

207 Section 60 of the *Crimes Act* 1900 (ACT) prohibits an act of indecency without consent. It carries a maximum penalty of five years imprisonment.

208 The other charge, an alternative to one of the charges under s 60, was laid under s 33(a) of the Act. It provides that a member of the defence forces, or a

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296 See *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 359 [163] per Callinan and Heydon JJ.

297 The Jervis Bay Territory is a part of the Australian Capital Territory ("the ACT"), having been annexed in 1915 to provide the ACT with access to the sea. The agreement for the land to be ceded by New South Wales to the Commonwealth to incorporate it into the ACT was ratified by the *Seat of Government Surrender Act* 1915 (NSW) and the *Jervis Bay Territory Acceptance Act* 1915 (Cth). Section 4A of the latter provides that the laws of the Australian Capital Territory apply in the Jervis Bay Territory.

defence civilian (a defined term), who assaults another person on service land, in a service ship, aircraft or vehicle, or in a public place is guilty of an offence carrying a maximum penalty of six months imprisonment.

209 The action in this Court has interrupted the prosecution of the charges which otherwise would be proceeding in accordance with ss 87 and 103 of the Act. Because the charges under s 61(3) are "prescribed offences", they may only be tried by court martial or a Defence Force magistrate.

210 The plaintiff seeks an order prohibiting the first defendant from requesting the Registrar of Military Justice to refer the charges to a Defence Force magistrate, restricted court martial or general court martial for trial. She seeks, further, declarations that she may only be tried by a federal court exercising the federal judicial power under Ch III of the Constitution and that s 103 of the Act, and those provisions purporting to vest jurisdiction in a Defence Force magistrate or a court martial, are invalid.

The plaintiff's arguments

211 It is relevant to note that there was no issue raised as to the amenability of military tribunals to prerogative or other judicial supervision under Ch III of the Constitution, or the possibility of the establishment of special courts under Ch III of the Constitution to try members of the Australian Defence Force ("the ADF").

212 The plaintiff's argument has these as its components. There are some limited types of military discipline that can be imposed without invoking or trespassing upon the judicial power of the Commonwealth: military discipline is divisible. If the discipline goes beyond what she would describe as the "purely disciplinary" or an administrative check, which the plaintiff was reluctant to describe as punishments, for example reduction in rank, docking of pay, confinement to barracks for minor instances of misbehaviour, or other lesser infractions, then only federal courts may deal with them. An exclusively disciplinary offence is one, the plaintiff submits, that has no equivalent in the non-military law, does not involve exposure to imprisonment and is ancillary to, or serves some, disciplinary end. The alleged crimes are creatures of Commonwealth law. As such they may only be dealt with by federal courts. The defence power under s 51(vi) of the Constitution, as with all other powers exercisable under s 51, is subject to all of the other relevant provisions of the Constitution.

213 The Act purports to vest service tribunals with the jurisdiction to make binding decisions as to the plaintiff's guilt and to resolve controversies between parties with respect to their rights and obligations arising under a law of the Commonwealth: it purports therefore to vest service tribunals with the judicial power of the Commonwealth.

214 The tribunals constituted under the Act undoubtedly exercise a form of judicial power. That judicial power, the plaintiff submits, can only be a form of federal judicial power and one that accordingly cannot be exercised by a court martial or any other tribunal that the Act seeks to establish.

215 The text of s 51 and Ch III cannot be circumvented by characterizing the exercise of judicial power by service tribunals as a "recognized exception". Either the Constitution permits departure from Ch III or it does not.

216 Save possibly for Parliament's power to punish for contempt (depending upon its correct characterization), there are no true exceptions to the vesting of the judicial power of the Commonwealth exclusively in Ch III courts. In *Chu Kheng Lim v Minister for Immigration*[298] some "exceptions" were said to have been identified, namely: arrest and custody pursuant to warrant pending trial, detention because of mental illness or infectious disease and detention of aliens for the purposes of deportation and extradition. On examination, however, these do not constitute exceptions at all. Properly understood, none of them involve the exercise of the actual judicial power of the Commonwealth as is the case here: judicial power that involves the making of binding decisions to resolve controversies arising under the Constitution or a law of the Commonwealth.

217 The plaintiff, in support of this last submission, sought to rely on some passages in the judgment of Gummow and Hayne JJ in *Vasiljkovic v Commonwealth*[299] in which their Honours said that detention for extradition purposes was valid even though there had not been prior adjudication of guilt by a domestic court, and the detention was not with a view to the conduct of such a trial by a domestic court[300]: detention of that kind pending determination or surrender, and its judicial processes, stands outside Ch III, rather than as an exception to its application.

218 The position is different in the case of service tribunals. Their purpose is to adjudicate upon guilt and impose punishment.

219 The plaintiff accepts that the cases in this Court upon which the defendants rely, beginning with *Re Tracey; Ex parte Ryan*[301], do hold that there is a military judicial power standing outside Ch III but, she argues, these have no common *ratio*. Alternatively, and if necessary, she submits, they were wrongly

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298 (1992) 176 CLR 1 at 28.

299 (2006) 80 ALJR 1399; 228 ALR 447.

300 (2006) 80 ALJR 1399 at 1422-1423 [116]; 228 ALR 447 at 476.

301 (1989) 166 CLR 518.

decided and are irreconcilable with this Court's more recent jurisprudence concerning Ch III of the Constitution, particularly the apparent recognition in *Vasiljkovic* that there are not, in fact, any true exceptions to the vesting of federal judicial power in Ch III courts exclusively, except for Parliament which may punish for contempt.

220 The arbitrary and harsh excesses of the English military discipline contemplated by the *Naval Deserters Act* 1847 (UK), the *Naval Discipline Act* 1866 (UK) and the *Army Discipline and Regulation Act* 1879 (UK) are not only currently unacceptable but are also inconsistent with the Australian Constitution.

221 The plaintiff also refers to ss 75(iii) and 76(ii) of the Constitution. She submits that, because the Commonwealth is a party and the subject matter of the charges made against her falls within the Act, a law made under the Constitution, the charges must be tried by a Ch III court. The argument is that if the executive (here, the ADF) seeks to exercise power of a judicial kind, conferred by legislation made under the Constitution, that power can only be exercised by a federal court or, presumably, a State court vested with federal judicial power.

222 Before dealing with the plaintiff's submissions it is necessary to consider the scope of the Act, the provisions of which have been summarized by the second defendant substantially as I set them out.

223 The Act provides for a formal system for the maintenance of military discipline in the ADF. It applies to "defence members" (officers, soldiers, sailors and airmen, including Reservists on duty or in uniform) and "defence civilians" (persons accompanying the ADF outside Australia or on operations against an enemy anywhere, who have *consented* to be subject to the Act)[302]. It also applies to prisoners of war as if they were defence members[303]. Any of these can commit a "service offence", which is defined essentially as an offence against the Act or the Defence Force Discipline Regulations 1985 (Cth), or is an ancillary offence to such an offence[304]. Some service offences are peculiarly and historically of a military kind, such as absence without leave[305] and insubordinate conduct[306]. Some offences do have equivalents in non-military law, including assault[307],

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302 s 3.

303 s 7.

304 s 3.

305 s 24.

306 s 26.

307 s 33.

theft[308] and dealing in, or possessing, narcotic goods[309]. Section 61 incorporates in the definition of a service offence any conduct that would be an offence in the Jervis Bay Territory[310]. As a general rule, service offences punishable by more than two years of imprisonment are "prescribed offences" and cannot be tried by service tribunals exercising summary jurisdiction[311].

224 Service tribunals may impose punishments ranging from imprisonment for life (general court martial) to a reprimand (all service tribunals)[312]. Sentences are imposed having regard to sentencing principles applied by civilian courts from time to time, as well, significantly, as to the need to maintain discipline in the ADF[313].

225 There are three categories of service tribunals: summary authorities, courts martial, and Defence Force magistrates (Pt VII).

226 There are three types of summary authority:

(1) **subordinate summary authority**: an officer appointed by a commanding officer under s 105(2), who has jurisdiction to deal with (including try) a charge against a class of defence members and specified classes of offences but cannot try a prescribed offence (s 108). The subordinate summary authority is usually a Major in the Army or of equivalent rank in the other branches[314] and deals with minor offences;

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308 s 47C.

309 s 59.

310 Primarily the *Criminal Code* 2002 (ACT) and the *Crimes Act* 1900 (ACT).

311 Sections 104, 107 and 108 and reg 44 of the Defence Force Discipline Regulations 1985 (Cth).

312 s 68(1).

313 s 70.

314 The Defence (Personnel) Regulations 2002 (Cth), reg 4, Sched 1 sets out the corresponding ranks in the ADF. For example, the equivalent of the rank of Major in the Army is the rank of Lieutenant Commander in the Navy or Squadron Leader in the Air Force.

(2) **commanding officer**: an officer who has the jurisdiction to deal with any charge against any person and to try a charge of a service offence:

(i) against any member of the ADF who is two or more ranks junior to the commanding officer; or

(ii) against a person who is not a member of the ADF;

unless that offence is a prescribed offence (s 107). Commanding officers usually hold the rank of Lieutenant-Colonel (or equivalent) and command a unit, ship or detachment of the ADF;

(3) **superior summary authority**: an officer who has jurisdiction to try a charge of a service offence against an officer who is two or more ranks junior to him or her, a warrant officer and a person who is not a member of the ADF unless the offence is a prescribed offence[315].

227 A summary service tribunal sits *ad hoc* as required, upon the alleged detection of the commission of a service offence by a person subject to the Act, and in the exercise of a commander's discretion to proceed against the accused person.

228 There are two types of courts martial:

(1) **restricted court martial** ("RCM"): a legally qualified officer nominated by the Judge Advocate General ("JAG") from the judge advocates' panel sits as a judge advocate with at least three other officers, one of whom is the President, nominated by the Registrar of Military Justice ("RMJ")[316]. An RCM has jurisdiction to try charges for service offences against any person, but the maximum punishment that can be awarded for a service offence is restricted to six months imprisonment or detention[317]. The judge advocate gives binding directions on law and the President and members of the RCM determine the questions of fact[318];

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315 s 106.

316 ss 114, 117, 119.

317 Sched 2.

318 s 134.

(2) **general court martial** ("GCM"): a GCM is constituted in the same way as an RCM except that the judge advocate sits with a panel of at least five other officers[319]. A GCM has jurisdiction to try charges for service offences against any person[320].

229 A court martial sits *ad hoc*. It is constituted by the RMJ[321] upon a request from the Director of Military Prosecutions ("DMP")[322]. Both the RMJ and the DMP are statutory appointments by the Minister for Defence and operate independently from the military chain of command[323].

230 The third category of service tribunal is a Defence Force magistrate, who must be a legally qualified officer nominated by the JAG from the judge advocates' panel[324]. A Defence Force magistrate sits alone and has the same jurisdiction and powers of punishment as an RCM[325]. A Defence Force magistrate assumes jurisdiction in relation to a particular charge when the DMP has requested the RMJ to refer it to a Defence Force magistrate for trial[326].

231 All service tribunals apply the criminal standard and onus of proof[327]. A prosecutor and a defending officer are appointed for each service tribunal at each level. The rules of evidence in force in the Jervis Bay Territory apply to a service tribunal as if that service tribunal were a criminal court in the Territory[328].

232 The defence power is stated, as are most of the provisions of s 51, in general terms:

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319 ss 114(2), 119.

320 s 115.

321 s 119.

322 s 103(1)(d).

323 ss 188FB and 188GF.

324 s 127.

325 ss 67, 129 and Sched 2.

326 s 103(1)(c).

327 Section 10 of the Act and ss 13.1-13.6 of the *Criminal Code* (Cth).

328 s 146.

> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> …
>
> (vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth."

Disposition of the case

233 There can be no doubt, to use the introductory language of s 51, that the "order and good government" of the forces required to defend the Commonwealth depend upon the establishment and maintenance of a relatively strict system of discipline. At the heart of this is the crucial and indubitable understanding that personnel must operate in circumstances of grave danger in which reliance upon one another and instantaneous obedience of orders are essential. The implication of this is that inevitably some discipline may have a more summary complexion, may attract somewhat more harsh penalties than, and may encompass conduct of different kinds from those found in civil life.

234 The defendants do not shrink from the proposition that the tribunals established by the Act exercise a form of judicial power. This judicial power, however, the defendants argue, stands apart from conventional judicial power: this, they say, has been so from the beginning of organized military forces and was certainly so at the time of federation.

235 It is unnecessary to restate all of that history. It is fully surveyed in the reasons for judgment of Brennan and Toohey JJ in *Re Tracey; Ex parte Ryan*[329]. Their Honours conclude that survey with this statement, which must now be read subject to the reasoning of the Court in *Aird*[330] but which relevantly requires no different a result here[331]:

> "The power to punish conferred by naval and military law extended to the most serious crimes in the criminal calendar, but those crimes were not to be tried by court-martial unless they were committed on active service outside the jurisdiction of the ordinary courts or in circumstances and

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329 (1989) 166 CLR 518 at 554-563.

330 *Re Aird; Ex parte Alpert* (2004) 220 CLR 308.

331 (1989) 166 CLR 518 at 563 per Brennan and Toohey JJ.

> places where the jurisdiction of the ordinary courts could not be conveniently exercised."

236 Nor is it necessary to repeat the review of the authorities in this Court as they stood in 1989, including *Bevan*[332] and *Cox*[333] undertaken by their Honours in *Tracey*. Their conclusion about them is unquestionable[334]:

> "The view which has hitherto commanded assent in this Court is that Ch III of the Constitution does not preclude the making of a law which provides for the imposition of punishments by service tribunals to effect the discipline of the defence forces of the Commonwealth."

237 In this matter the second defendant refers to the absence of express reference in the Convention Debates to the disciplining of the defence forces. It is almost always instructive to refer to the Debates and their historical setting. Certainly, the British Empire which flourished then was seen by the United Kingdom and its dependencies, not only as a trading network, but also as a mutual defence organization, the latter in part at least in order to protect the former. What was apt for the Imperial forces would have been regarded as apt for the Australian defence forces at the time, and they might expand and be required to meet different threats in the future. I respectfully agree with what Brennan and Toohey JJ said of the history in *Tracey*[335]:

> "The Convention Debates are silent on this point and their silence is testimony to the absence of any consciousness on the part of the delegates that they were leaving the naval and military forces of the Commonwealth without authority to maintain or enforce naval and military discipline in the traditional manner. It could hardly have been intended by the framers of the Constitution that, in times, places or circumstances in which it would be impracticable for the ordinary courts to exercise their jurisdiction – eg, during service in a theatre of war outside Australia – the discipline of the armed forces should be imperilled by want of power to impose penalties for breaches of service law, even though those are the times, places and circumstances in which the armed forces stand in most urgent need of such powers. Contemporary writers did not understand that such a radical change had occurred. Professor W Harrison Moore, writing in 1902 (*Constitution of the Commonwealth of*

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332 *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452.

333 *R v Cox; Ex parte Smith* (1945) 71 CLR 1.

334 (1989) 166 CLR 518 at 564 per Brennan and Toohey JJ.

335 (1989) 166 CLR 518 at 572-573 per Brennan and Toohey JJ.

Australia, 1st ed, pp 280, 281), regarded courts-martial as not being within the provisions of Ch III of the Constitution. In the second edition (1910), Professor Moore treated the subject more extensively, asserting that proceedings before courts-martial were strictly judicial but referring to courts-martial as an instance of judicial functions being exercised otherwise than by Ch III courts: see pp 308, 321. The rationale for this view appears at pp 315-316:

> 'Even in those Constitutions in which the separation of powers has been accepted as fundamental, by no means every function which is in its nature judicial is exclusively assigned, or permitted, to the judicial organ. Therefore, although neither history nor usage nor practical convenience can determine the nature of "judicial power", logical consistency may have to yield something to history and familiar and established practice in determining what is the judicial power of the Commonwealth committed to the Courts by sec 71.'"

238 It follows that the plaintiff's arguments are foreclosed by the earlier decisions of the Court.

239 There are however two further matters of importance favouring the defendants' stance. The presence of s 68 in the Constitution is the first of these[336]:

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336 The Constitution of the United States of America makes different provision. Although the President is, by virtue of Art II, §2, cl 1, Commander in Chief, power "[t]o declare War … and make Rules concerning Captures on Land and Water" (Art I, §8, cl 11), "[t]o raise and support Armies" (Art I, §8, cl 12), "[t]o define and punish … Offenses against the Law of Nations" (Art I, §8, cl 10), and "[t]o make Rules for the Government and Regulation of the land and naval Forces" (Art I, §8, cl 14) are vested in Congress. In *Hamdan v Rumsfeld* 165 L Ed 2d 723 at 781 (2006), Kennedy J (Souter, Ginsburg and Breyer JJ relevantly concurring) said:

> "Trial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review. Cf *Loving v United States*, 517 US 748, 756-758, 760 (1996). Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid. It is imperative, then, that when military tribunals are established, full and proper authority exists for the Presidential directive."

"**Command of naval and military forces**

The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative."

240 In *R v Bevan; Ex parte Elias and Gordon*[337] 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 kind, for the reasons that I earlier gave, are matters of executive power, albeit that the power should still be exercised, so far as is reasonably possible, in a proper and judicial way, adapted as necessary to the special circumstances of military service, as I take the second defendant to accept. The presence of s 68 in the Constitution alone provides an answer to the plaintiff's submission that by necessary implication military judicial power may only be exercised by a Ch III court.

241 The presence of s 68 in the Constitution may even, 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. The Convention Debates did not address this question. Their preoccupation was with the role of the Governor-General. Section 68 was left in the form that it has because the founders were content to read Governor-General as meaning Governor-General in Council[338]. If anything this is to emphasize rather than to detract from the unique and special nature of military power and control of it.

242 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. Section 71 vests the judicial power of the Commonwealth in Ch III courts and whether that vesting can include military judicial power may be a question. It is certainly true that s 75 begins with the words "In all matters" and in s 75(v) refers indiscriminately to "an officer of the Commonwealth" but, again, there may be a question whether any derogation from the absolute command, including discipline, vested in the Governor-General (in Council) is constitutionally open.

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337 (1942) 66 CLR 452 at 467-468. Note that his Honour's reference to s 69 in that passage is in all likelihood a typographical error and should be a reference to s 68.

338 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 10 March 1898 at 2249-2264.

243 It may be 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[339]. These are not matters which were argued and therefore are not ones on which it would be right to express even a tentative view.

244 The other matter is one accepted by the plaintiff: that a sufficient service connexion is present in this case, a matter which might otherwise be controversial. Because it is not here, necessarily implicit in that acceptance is the proposition that the charges laid are for the proper disciplining of a member of the ADF for misconduct (alleged but not yet proved) in the course of, or in sufficient connexion with, the plaintiff's service in the ADF. The charges accordingly call for the exercise, in a judicial manner, of an aspect of the defence and executive powers outside Ch III of the Constitution.

245 I would dismiss the plaintiff's application with costs.

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339 The raising and granting, or withholding, of funds for military purposes has been the means via which the Parliament has exercised control over the military since the Bill of Rights in 1689.

246 HEYDON J. Subject to the qualifications set out below, I agree with Callinan J's account of the background[340], and with his view[341] that the authorities, as analysed by Brennan and Toohey JJ in *Re Tracey; Ex parte Ryan*[342], foreclose acceptance of the plaintiff's arguments. Those authorities should not be reopened in this case. On those grounds I agree that the application should be dismissed with costs.

247 The qualifications referred to above are:

(a) When Brennan and Toohey JJ referred to the teachings of "history", "established practice" and "necessity", they are to be understood as referring to history up to the time of federation, established practice as at that time, and necessity as understood at that time[343]; for later history and practice, and later perceptions of what was or is necessary, cannot affect the construction of at least those parts of the constitutional language as enacted in 1900 which are relevant to the present problem.

(b) When Brennan and Toohey JJ referred to what the framers of the Constitution did or did not intend[344] they are to be taken to have referred to what the language drafted by the framers meant.

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340 At [205]-[210].

341 At [233]-[238].

342 (1989) 166 CLR 518 at 554-563.

343 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 573.

344 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 572.