HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

PRIVATE R PLAINTIFF

AND

BRIGADIER MICHAEL COWEN & ANOR DEFENDANTS

Private R v Cowen
[2020] HCA 31
Date of Hearing: 30 June 2020
Date of Judgment: 9 September 2020
S272/2019

ORDER

1. *Application dismissed.*

2. *The plaintiff pay the second defendant's costs of the application.*

Representation

T A Game SC and B L Jones with J Nottle for the plaintiff (instructed by Wyatts Lawyers)

Submitting appearance for the first defendant

S P Donaghue QC, Solicitor-General of the Commonwealth, with J E Davidson and D J Ryan for the second defendant (instructed by Australian Government Solicitor)

CATCHWORDS

Private R v Cowen

Constitutional law (Cth) – Defence – Military discipline – Where plaintiff charged with assault occasioning actual bodily harm – Where plaintiff and complainant members of Australian Defence Force at time of alleged conduct – Where neither plaintiff nor complainant on duty or in uniform – Where plaintiff charged under s 61(3) of *Defence Force Discipline Act 1982* (Cth) – Where s 61(3) provided defence member guilty of offence if engaged in conduct outside Jervis Bay Territory and that conduct would constitute Territory offence if it took place in Jervis Bay Territory – Where plaintiff's conduct also constituted offence under ordinary criminal law and civil courts available – Where plaintiff challenged jurisdiction of Defence Force magistrate to hear charge – Whether s 51(vi) of *Constitution* supported conferral of jurisdiction by *Defence Force Discipline Act* upon service tribunal to hear charge.

Words and phrases – "Ch III court", "Ch III protections", "concurrent jurisdiction", "conferral of jurisdiction", "courts martial", "defence force discipline", "defence force magistrate", "defence power", "judicial power of the Commonwealth", "maintaining or enforcing service discipline", "military discipline", "military jurisdiction", "naval and military defence", "pre-ordinate jurisdiction of the civil courts", "service connection test", "service offence", "service status test", "service tribunal", "sufficient connection".

Constitution, ss 51(vi), 68, 71, 80, 106, Ch III.
Crimes Act 1900 (ACT), s 24.
Defence Force Discipline Act 1982 (Cth), ss 61(3), 63.

1 KIEFEL CJ, BELL AND KEANE JJ. The plaintiff, a member of the Australian Defence Force ("the ADF"), has been charged by the Director of Military Prosecutions ("the DMP") with one count of assault occasioning actual bodily harm. The offence is alleged to have occurred in Brisbane. The charge against the plaintiff is brought pursuant to s 61(3) of the *Defence Force Discipline Act 1982* (Cth) ("the Act").

2 Section 61(3) of the Act provides:

> "A person who is a defence member or a defence civilian[1] 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)."

3 Assault occasioning actual bodily harm is an offence under s 61(3) of the Act because it would be a Territory offence[2] if it took place in the Jervis Bay Territory by reason of s 24 of the *Crimes Act 1900* (ACT), which applies in the Jervis Bay Territory by virtue of the *Jervis Bay Territory Acceptance Act 1915* (Cth)[3].

4 An offence against the Act constitutes a "service offence" that may be tried before a service tribunal established under Pt VII of the Act[4]. A service tribunal includes, among other things, a Defence Force magistrate[5]. Under s 63(1) of the Act, the consent of the Director of Public Prosecutions ("the DPP") is required for

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1 The expression "defence civilian" is defined in *Defence Force Discipline Act 1982* (Cth), s 3(1). The plaintiff is a defence member. The position regarding defence civilians was not the subject of argument.

2 See definition of "Territory offence" in *Defence Force Discipline Act 1982* (Cth), s 3(1).

3 *Jervis Bay Territory Acceptance Act 1915* (Cth), s 4A. See also *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 311-312 [3].

4 See definitions of "charge" and "service offence" in *Defence Force Discipline Act 1982* (Cth), s 3(1). See also ss 103, 115, 129.

5 See definition of "service tribunal" in *Defence Force Discipline Act 1982* (Cth), s 3(1).

the institution of proceedings for certain offences under s 61. The consent of the DPP is not required where the charge is of an offence against s 24 of the *Crimes Act*.

5 The issue before this Court is whether the power conferred on the Commonwealth Parliament by s 51(vi) of the *Constitution* to make laws with respect to "naval and military defence" supports the conferral of jurisdiction by the Act upon a Defence Force magistrate to try the charge against the plaintiff, given that the offence charged is also an offence under s 339 of the *Criminal Code* (Qld) and was allegedly committed in Queensland in a time of peace when recourse to the civil courts is available. This case presents for further consideration the vexed question as to the extent to which the defence power authorises the proscription of conduct on the part of members of the ADF and the establishment of service tribunals to hear and determine charges relating to such conduct.

6 The Commonwealth contends that s 61(3) is wholly valid in all its applications. It was said that there is a sufficient connection between s 51(vi) of the *Constitution* and s 61(3) of the Act in that s 61(3) conduces to the discipline and morale of the ADF as the force responsible for the defence of the nation by requiring members of the ADF to abide by the standards of behaviour prescribed by the criminal law applicable to all citizens, and so conduces to the defence of the nation. That connection is not denied by the availability of the civil courts to hear and determine a similar charge. In the alternative, the Commonwealth argues that s 61(3) can be read down so as to apply validly to the plaintiff. It was said that in the circumstances of this particular case there is a sufficient connection between s 51(vi) and the proceedings before the Defence Force magistrate to support the hearing and determination of the particular charge against the plaintiff as an aspect of the maintenance of the discipline of the ADF as the force responsible for the defence of the nation.

7 The plaintiff argues that the connection propounded by the Commonwealth in its primary argument is insufficient. He argues that a law authorising a proceeding against a member of the ADF for an offence against the law of the land is not reasonably necessary for the defence of the nation because the civil justice system of the State of Queensland is available to hear and determine an equivalent charge under the criminal law. While the plaintiff did not contend that civil jurisdiction must always be given primacy over the exercise of military jurisdiction, it was submitted that, on the facts of this case, the availability of the civil courts to hear the charge was the "determinative" factor as to why s 51(vi) did not support the conferral of jurisdiction on the service tribunal to hear the charge against the plaintiff.

8 The Commonwealth's primary contention should be accepted, and the plaintiff's contention rejected. A law is within the scope of s 51(vi) if the law is

reasonably necessary for the good order and discipline of the ADF. That is because such a law is reasonably necessary to the defence of the nation. It is impossible to say that a law that seeks to ensure that members of the ADF observe the standards of behaviour prescribed by the law of the land cannot reasonably be regarded as conducing to the maintenance of the discipline and morale of the ADF. That the law operates concurrently with the civil justice system is no reason to reach a contrary conclusion. Because the Commonwealth's primary submission should be accepted, it is not necessary to deal with its alternative submission.

9 It is convenient to set out a brief summary of the factual and procedural background before turning to explain these conclusions by reference to the arguments of the parties.

Background

10 On 12 June 2019, the plaintiff was charged by the DMP that on 30 August 2015, in a hotel room in Fortitude Valley, Brisbane, he assaulted the complainant, a woman with whom he had previously been in an intimate relationship. The plaintiff was and is a member of the ADF in the Australian Regular Army; the complainant was, at the time of the alleged assault, a member of the ADF in the Royal Australian Air Force. Neither was on duty or in uniform at the time of the alleged offending.

11 The DMP alleges that the offending occurred after a birthday party held for the complainant in Fortitude Valley. The plaintiff had booked a hotel room for himself and the complainant; the complainant agreed to use the room to get ready for the party. It is alleged that throughout the course of the evening, the plaintiff made unwanted advances towards the complainant, first at the hotel room and later at a nightclub in Fortitude Valley.

12 It is alleged that at the end of the evening, the complainant returned to the hotel room to collect her belongings. The plaintiff arrived shortly thereafter. He was heavily intoxicated and angry. When the complainant sought to order an Uber, the plaintiff threw the complainant's phone across the room, grabbed the complainant by the throat and pushed her against the wall, shaking her and yelling at her. After the complainant broke free, the plaintiff tackled her to the ground, placed his knees on her chest and choked her with both his hands until two security guards entered the room and tackled the plaintiff. The complainant is said to have been treated for bruising to her throat on 1 September 2015.

13 In October 2017, the complainant, in the course of being debriefed in relation to an unrelated traumatic event, disclosed to a superior officer within the chain of command to which she belonged details of the incident involving the plaintiff. Her superior officer then reported it to the Joint Military Police Unit ("the

JMPU") and the ADF Investigative Service ("ADFIS"). As a result of that report, the complainant was interviewed by an investigating officer with the JMPU and ADFIS in relation to the incident.

14 At this time the complainant declined to make a formal complaint, but in March or April 2018 she decided that she wished to pursue a complaint against the plaintiff. As a result, the JMPU commenced an investigation which culminated in the plaintiff being charged by the DMP.

15 On 26 August 2019, the plaintiff appeared before the first defendant, a Defence Force magistrate, to be heard on the charge. At that time, the plaintiff objected to the Defence Force magistrate's jurisdiction to hear the charge. The Defence Force magistrate dismissed the objection.

16 On 13 September 2019, the plaintiff commenced proceedings in the original jurisdiction of this Court pursuant to s 75(v) of the *Constitution* seeking a writ of prohibition against the Defence Force magistrate to prevent his hearing the charge against the plaintiff.

The Defence Force magistrate

17 Before the Defence Force magistrate, the plaintiff argued that the magistrate lacked jurisdiction[6] because what was described as the "service connection" test of jurisdiction was not satisfied on the facts of the case. The Defence Force magistrate observed with regard to the "service connection" test that the assault by a member of the ADF of another member "could be said to be conduct calculated to adversely impact on the good order, discipline, morale, welfare, reputation of a service, or in this case the ADF". The Defence Force magistrate did not, however, reach a concluded view as to whether the "service connection" test was satisfied. The Defence Force magistrate considered himself bound by the decision of the Defence Force Discipline Appeal Tribunal ("the Appeal Tribunal") in *Williams v Chief of Army*[7], in which the Appeal Tribunal approved of what was described as the "service status" test, that is, that it is sufficient to confer jurisdiction on a service tribunal that the accused was a member of the armed forces when the charged offence was allegedly committed.

18 *Williams* was concerned with alleged sexual misconduct by one member of the ADF against another at a private property while both members were off duty

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6 *Defence Force Discipline Act 1982* (Cth), s 141(1)(b)(v).

7 [2016] ADFDAT 3.

and not in uniform. The accused argued that there was an insufficient connection between the charged conduct and the maintenance of military discipline to support the exercise of jurisdiction under the Act. The Appeal Tribunal (Tracey and Hiley JJ, with whom Brereton J relevantly agreed) held that a sufficient "service connection" was established[8], but that, in any event, jurisdiction would be established under the Act on the basis of the "service status" test. In this regard, Tracey and Hiley JJ said[9]:

> "In the military context, the commission of crimes by defence members, even when off duty and extraneous to their service, can reflect on their fitness, and on the reputation of the ADF as a whole. Parliament may thus decide, as it has, that any crime committed by a defence member may be prosecuted as a service offence.
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> Moreover ... the 'service status' test has the advantage of providing a much clearer and cleaner test than that of 'service connection'.
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> The [Act] attaches amenability to service discipline to status as a 'defence member' (and, in certain cases, a 'defence civilian'). In other words, the legislation is framed in terms of the 'service status' test. As explained above, no decision of the High Court rejects the 'service status' test, and it has never been held that, insofar as the [Act] embraces the 'service status' test, it is beyond power. Accordingly, even if the 'service connection' test were not satisfied, in the absence of any decision of the High Court precluding its acceptance, we would find jurisdiction on the basis of the 'service status' test."

19 In the present case, the Defence Force magistrate concluded that the plaintiff's objection to jurisdiction should be dismissed on the footing that the decision of the Appeal Tribunal in *Williams* favoured the application of the "service status" test.

The parties' contentions

20 In this Court, the plaintiff submitted that it is not reasonably necessary for the maintenance of military discipline to make all civil offences committed by defence members subject to military jurisdiction in peacetime when the civil courts are available to deal with those offences. The plaintiff, urging the application of what was described as the "service connection" test, whereby a service tribunal

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8 *Williams v Chief of Army* [2016] ADFDAT 3 at [38].

9 *Williams v Chief of Army* [2016] ADFDAT 3 at [49]-[51]. See also at [99].

may exercise jurisdiction only where the circumstances of the particular case are sufficiently connected to the military service of the accused, argued that this test is not satisfied in the circumstances of the present case.

21 The Commonwealth submitted that the approach urged by the plaintiff is ad hoc and impressionistic, and not capable of drawing a clear line between those circumstances which present a sufficient connection to the requirements of military discipline and those which do not. It was therefore said to be unsuitable as a test to determine the existence of the jurisdiction of a service tribunal to deal with a particular case.

22 The Commonwealth submitted that it is central to the very existence and maintenance of the ADF as a disciplined and hierarchical force[10] that its members be required to observe the standard of behaviour demanded of ordinary citizens, and that those standards be enforced by service tribunals[11]. It was said to be self-evident that soldiers whose conduct amounts to the commission of a criminal offence manifest qualities of attitude and character that may detract from the maintenance of a disciplined and hierarchical defence force[12].

23 The Commonwealth argued that the reasonable and convenient availability of the ordinary civil courts does not deny the clear justification for the conferral of jurisdiction upon service tribunals to deal with offences amounting to breaches of the law of the land as disciplinary matters. The military authorities must be able promptly and effectively to deal with conduct that tends to disrupt the maintenance of discipline and morale within the ADF, whether or not that conduct is also a breach of the civil law. In addition, in the prosecution of service offences that pick up the ordinary criminal law, service tribunals may take into account military-specific considerations, including implications of the alleged conduct for the morale of other ADF members and the need for general deterrence of criminal behaviour within the ADF[13].

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10 *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 596 [52]. See also *Haskins v The Commonwealth* (2011) 244 CLR 22 at 47-48 [67].

11 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 543.

12 *O'Callahan v Parker* (1969) 395 US 258 at 281-282, cited in *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 329-330 [67].

13 Office of the Director of Military Prosecutions, *Director of Military Prosecutions Prosecution Policy* (2015) at 7-10 [1.3].

The authorities

24 It is as well to begin a consideration of the parties' contentions with a review of the decisions of this Court in which similar questions have been agitated.

25 In *Re Tracey; Ex parte Ryan*[14], the jurisdiction of a Defence Force magistrate was challenged after a member of the army was charged with, among other things, making a false entry in a service document. A majority of this Court rejected the challenge to the jurisdiction of the Defence Force magistrate to hear and determine that charge. In holding that the determination of that charge by a service tribunal conduces to the defence of the nation, Mason CJ, Wilson and Dawson JJ said[15]:

> "[B]oth 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 even where the only connexion between the offences and the defence force is the service membership of the offender. Such legislation is based upon the premise that, as a matter of discipline, the proper administration of a defence force requires the observance by its members of the standards of behaviour demanded of ordinary citizens and the enforcement of those standards by military tribunals. To act in contravention of those standards is not only to break the law, but also to act to the prejudice of good order and military discipline. It is appropriate that such conduct should be punished in the interests not only of the community but of the defence force as well. There can be little doubt that in war-time or upon overseas service such considerations warrant the treatment of civil offences as service offences and it is open to the legislature to regard the position in peace-time as warranting similar treatment. Good order and military discipline, upon which the proper functioning of any defence force must rest, are required no less at home in peace-time than upon overseas service or in war-time."

26 Their Honours concluded on this point[16]:

> "The power to proscribe such conduct on the part of defence members is but an instance of Parliament's power to regulate the defence forces and the

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14 (1989) 166 CLR 518.

15 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 543-544.

16 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 545.

> conduct of the members of those forces. In exercising that power it is for Parliament to decide what it considers necessary and appropriate for the maintenance of good order and discipline in those forces. And Parliament's decision will prevail so long at any rate as the rule which it prescribes is sufficiently connected with the regulation of the forces and the good order and discipline of defence members."

27 Brennan and Toohey JJ, who also rejected the challenge, said that "proceedings may be brought against a defence member or a defence civilian for a service offence if, but only if, those proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline"[17]. In so saying, Brennan and Toohey JJ were at odds with the approach of Mason CJ, Wilson and Dawson JJ to the extent that their use of the word "substantially" suggests a higher threshold of validity than the approach of the plurality, and also because Brennan and Toohey JJ insisted that a case by case approach be taken to ascertaining whether s 51(vi) supports the jurisdiction of a service tribunal to hear a particular charge.

28 The approach of Brennan and Toohey JJ in *Re Tracey* resembles what has been referred to as the "service connection" test. Their Honours' approach sought to provide a flexible response attuned to the circumstances of the particular case. In this regard, their Honours said with respect to the history of naval and military courts martial[18]:

> "The scope of disciplinary authority necessarily extended to breaches of the ordinary criminal law, but the exercise of that authority was governed by the nature of the offence, the circumstances in which the offence was committed and the place and circumstances in which the disciplinary powers were invoked. If it was not practicable and convenient for the ordinary courts to exercise their jurisdiction – a situation which existed usually in relation to offences of a specific naval or military character or in relation to civil offences committed outside the territorial jurisdiction of the ordinary courts or in relation to naval or military personnel serving outside the Crown's dominions – the disciplinary powers were exercised."

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17 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 570.

18 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 563.

29 In *Re Tracey*[19], Deane J held that in times of peace, service tribunals have jurisdiction only to deal with "exclusively disciplinary offences". Gaudron J held that "the vesting of jurisdiction in service tribunals to hear and determine service offences which are substantially the same as civil court offences cannot reasonably be regarded as appropriate and adapted to the object of control of the forces"[20].

30 In *Re Nolan; Ex parte Young*[21], a member of the army was charged before a service tribunal with a number of offences contrary to the Act for which there were comparable offences in the *Crimes Act 1914* (Cth). The jurisdiction of the service tribunal was again challenged by the accused. Mason CJ and Dawson J, adhering to the view that their Honours, together with Wilson J, had expressed in *Re Tracey*[22], said that[23]:

> "[I]t is open to Parliament to provide that any conduct which constitutes a civil offence shall constitute a service offence, if committed by a defence member[24]. The proscription of that conduct is relevant to the maintenance of good order and discipline in the defence forces; so long as the rule prescribed is sufficiently connected with the regulation of the defence forces and the good order and discipline of members, it will be valid. Indeed, we do not understand how it can be suggested that the prescription of a rule of conduct to be observed by defence members, when that rule of conduct is required to be observed by the general community for the good of society, is not sufficiently connected with the regulation of the defence forces and the good order and discipline of those forces. Plainly Parliament can take the view that what is good for society is good for the regulation of the defence forces and can give effect to that view by creating service offences which are cumulative upon, rather than in substitution for, civil offences: *McWaters v Day*[25] ... For the reasons then given [in *Re Tracey*],

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19 (1989) 166 CLR 518 at 585-586, 591.

20 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 602.

21 (1991) 172 CLR 460.

22 (1989) 166 CLR 518 at 544-545.

23 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 474-475.

24 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 545.

25 (1989) 168 CLR 289 at 297.

> the exercise of jurisdiction in respect of service offences by service tribunals forming part of the defence forces necessarily stands outside the operation of Ch III[26]."

31 In *Re Nolan*[27], Brennan, Deane and Toohey JJ each adhered to the views that their Honours expressed in *Re Tracey*. McHugh J agreed with Deane J's view in *Re Tracey* and *Re Nolan*[28]. Gaudron J modified her view somewhat[29], but adhered to the substance of the position taken by her Honour in *Re Tracey*. The challenge to jurisdiction again failed, with Deane, Gaudron and McHugh JJ in dissent.

32 In *Re Tyler; Ex parte Foley*[30], a member of the ADF was charged before a service tribunal with dishonestly appropriating a sum of money of the Commonwealth. His conduct constituted an offence against s 47(1) of the Act, which was substantially the same as offences under both the *Crimes Act 1914* (Cth) and the *Crimes Act 1900* (NSW). Once again, a challenge to the jurisdiction of the service tribunal failed. Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ each adhered to their Honours' earlier views[31]. McHugh J, although remaining convinced that the reasoning of the majority in *Re Nolan* and *Re Tracey* was wrong, held that, in the interests of uniformity of judicial decision, those cases should be followed as there was no legally relevant distinction between either of those cases and *Re Tyler*[32].

33 In *Re Aird; Ex parte Alpert*[33], a member of the ADF was charged under s 61 of the Act with rape, alleged to have been committed while he was on recreational leave while posted overseas. Yet again, a challenge to the jurisdiction of the service

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26 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 539-541.

27 (1991) 172 CLR 460 at 484, 490, 493.

28 (1991) 172 CLR 460 at 499.

29 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 498.

30 (1994) 181 CLR 18.

31 *Re Tyler; Ex parte Foley* (1994) 181 CLR 18 at 26, 28-29, 34-35.

32 (1994) 181 CLR 18 at 39-40.

33 (2004) 220 CLR 308.

tribunal failed. Kirby, Callinan and Heydon JJ held that the circumstances of that case did not give rise to a sufficient "service connection", and so only their Honours' reasons turned on disapproval of what has been called the "service status" test[34]. The majority of the Court (Gleeson CJ, McHugh, Gummow and Hayne JJ) held that a sufficient "service connection" existed, and thus the conclusion reached by their Honours did not depend on a rejection of the "service status" test[35]. The significant point is that, once again, the challenge to the jurisdiction of a service tribunal failed.

34 As McHugh J explained in *Re Aird*, none of the cases in the trilogy of *Re Tracey*, *Re Nolan* and *Re Tyler* was decided on the basis of a single "ratio decidendi"[36]. The plaintiff in this case argued that a majority of this Court has not expressly accepted what has been described as the "service status" test. On the other hand, no decision of the Court is inconsistent with that test. Further, to the extent that the plaintiff argued that the concurrent availability of the civil justice system for the punishment of an offence against the ordinary law of the land itself denies the sufficiency of the connection between the defence power and the impugned law, to uphold that argument would require either overruling the decisions in *Re Tracey*, *Re Nolan* and *Re Tyler* or confining them as authority to their own peculiar facts. Neither course is attractive, given both that the challenge to jurisdiction failed in every one of those cases, and that none of the Justices in the majority in any of them held that the concurrent availability of the civil justice system was fatal to the valid conferral of jurisdiction on a service tribunal either as a matter of principle or on the facts of each respective case. In addition, in *White v Director of Military Prosecutions*[37], Gummow, Hayne and Crennan JJ observed that 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".

35 It is evident that the decisions to which reference has been made do not establish a controlling principle as to the approach to determining the extent to which the defence power authorises service tribunals to deal with charges in relation to misconduct by members of the ADF. The resolution of this

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34 *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 337 [90], 355-356 [153], 356 [158], 362 [171].

35 *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 312-313 [5], 314 [9], 324 [45]-[46], 330 [69], 356 [156].

36 (2004) 220 CLR 308 at 321 [35].

37 (2007) 231 CLR 570 at 601-602 [73].

unsatisfactory state of affairs should be approached by reference to the text of the *Constitution*, illuminated by the assistance to be had from the discussion of constitutional principle in the decisions of this Court.

The defence power

36 Section 51 of the *Constitution* provides:

> "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:
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> ...
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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".

37 Section 68 of the *Constitution* provides:

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

38 A discussion of the scope of the legislative powers conferred on the Commonwealth Parliament by s 51 of the *Constitution* must proceed on the footing that the grant of legislative power is to be construed "with all the generality that the words used admit"[38]. In *Re Tracey*[39], Mason CJ, Wilson and Dawson JJ rightly said of s 51(vi) of the *Constitution*:

> "Although the Australian Constitution does not expressly provide for disciplining the defence forces, so much is necessarily comprehended by the first part of s 51(vi) for the reason that the naval and military defence of the Commonwealth demands the provision of a disciplined force or forces."

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38 *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 127-128.

39 (1989) 166 CLR 518 at 540.

39 That s 51(vi) encompasses the making of laws regulating military discipline in peacetime as well as in wartime and at home and abroad is now well settled[40].

40 The law-making power conferred on the Parliament by s 51(vi) of the *Constitution* is a purposive power: laws may be made for the defence of the nation. The subject matter of the power "is not a class of transaction or activity, or a class of public service, undertaking or operation, or a recognized category of legislation, but is a purpose"[41].

41 In the reasons of the Appeal Tribunal in *Williams*, and in the reasons of the Defence Force magistrate in this case, the issue was framed as a contest between the "service connection" test and the "service status" test. These expressions emerged in the jurisprudence of the Supreme Court of the United States[42]. The former test requires a sufficient connection between the particular proceedings under challenge and military service for the conferral of jurisdiction on a service tribunal, whereas the latter test upholds the conferral of jurisdiction on a service tribunal solely on the basis of the status of the accused as a member of the armed forces[43].

42 The expressions "service connection" and "service status", while perhaps convenient shorthand, tend to distract from the question which arises in relation to the scope of s 51(vi) of the *Constitution*. As Griffith CJ explained in *Farey v Burvett*[44], the test of the validity of a law purporting to be made under s 51(vi) is

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40 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 544, 563-564, 570, 585; *Lane v Morrison* (2009) 239 CLR 230 at 251 [63], citing *White v Director of Military Prosecutions* (2007) 231 CLR 570.

41 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 273; see also at 192-193, 253. See also *Stenhouse v Coleman* (1944) 69 CLR 457 at 471; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 89.

42 *O'Callahan v Parker* (1969) 395 US 258; *Solorio v United States* (1987) 483 US 435.

43 *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 321 [36].

44 (1916) 21 CLR 433 at 441. See also *South Australia v The Commonwealth* (1942) 65 CLR 373 at 431-432, 437, 450; *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 155, 162; *Stenhouse v Coleman* (1944) 69 CLR 457 at 464, 466; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 199, 207, 225, 278.

whether the measure can reasonably be seen to conduce to the efficiency of the defence forces of the Commonwealth, and that will not be so where "the connection of cause and effect between the measure and the desired efficiency [is] so remote that the one cannot reasonably be regarded as affecting the other". To similar effect, in *Marcus Clark & Co Ltd v The Commonwealth*, Dixon CJ expressed the test of validity as being whether "the measure does tend or might reasonably be considered to conduce to or to promote or to advance the defence of the Commonwealth"[45]. If that question is answered in the affirmative in relation to the impugned law in the present case, it is valid in all its applications, and there is no occasion to consider whether the "service connection" test is satisfied in the circumstances of any particular case.

The defence power and its relationship to Ch III

43 Within Ch III of the *Constitution*, which vests the judicial power of the Commonwealth exclusively in the courts created by it or brought under its aegis, s 71 provides relevantly:

> "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction."

44 Also within Ch III of the *Constitution*, s 80 provides:

> "The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes."

45 As to the relationship between s 51(vi) of the *Constitution* and the provisions of Ch III of the *Constitution*, in *R v Cox; Ex parte Smith*[46], Dixon J rejected the argument that to allow a court martial to try a prisoner who, having been discharged from the ADF, allegedly joined a mutiny while serving military detention would be contrary to Ch III of the *Constitution*. Dixon J said[47]:

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45 (1952) 87 CLR 177 at 216.

46 (1945) 71 CLR 1 at 23. See also *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 467-468.

47 *R v Cox; Ex parte Smith* (1945) 71 CLR 1 at 23.

> "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."

46 It may be said that this statement by Dixon J is ambiguous. Was his Honour saying that service tribunals exercise a power judicial in nature but not the judicial power of the Commonwealth? Or was he saying that service tribunals exercise a power different from judicial power but which must be exercised judicially so as to ensure that justice is done? However that ambiguity may be resolved, on one point Dixon J was clear: the system of military justice established under s 51(vi) stands distinctly outside of Ch III of the *Constitution*. So much is now well settled[48]. In *Re Tracey*[49], Mason CJ, Wilson and Dawson JJ were clearly correct in saying:

> "Of course, the powers bestowed by s 51 are subject to the Constitution and thus subject to Ch III. The presence of Ch III means that, unless, as with the defence power, a contrary intention may be discerned, jurisdiction of a judicial nature must be created under Ch III and that it must be given to one or other of the courts mentioned in s 71, namely, the High Court, such other courts as the Parliament creates or such other courts as it invests with federal jurisdiction: see *Reg v Davison*[50]. That is because any body exercising such jurisdiction would be exercising judicial power of the kind contemplated by Ch III and must, therefore, form part of the judicature for which that Chapter provides. However, the defence power is different because the proper organization of a defence force requires a system of discipline which is administered judicially, not as part of the judicature erected under Ch III, but as part of the organization of the force itself. Thus the power to make laws with respect to the defence of the Commonwealth contains within it

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48 *Hembury v Chief of General Staff* (1998) 193 CLR 641 at 648 [13], 654 [32], 656 [40], 669 [72], 673 [80]; *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 585-586 [12]-[14], 589 [22]-[23], 595-596 [49]-[52], 597-598 [56]-[59], 646-648 [234]-[238], 650 [246]; *Lane v Morrison* (2009) 239 CLR 230 at 237 [10], 247-248 [48], 257-258 [86].

49 (1989) 166 CLR 518 at 540-541.

50 (1954) 90 CLR 353 at 364-365.

> the power to enact a disciplinary code standing outside Ch III and to impose upon those administering that code the duty to act judicially."

47 In *Re Tracey*, Brennan and Toohey JJ did not expressly disagree with this view; rather their Honours avoided its logical implication, that the scope of s 51(vi) was unconstrained by Ch III, by treating jurisdiction conferred on service tribunals under s 51(vi) as subordinate to that conferred on civil courts pursuant to Ch III of the *Constitution*[51].

A "secondary" jurisdiction?

48 The plaintiff sought support in the reasons of Brennan and Toohey JJ in *Re Tracey* for the proposition that, even though the service tribunal system was never "within the exclusive operation of Ch III"[52], Ch III establishes the primacy of the jurisdiction of the civil courts of the Commonwealth and the States respectively as a limitation upon the power conferred by s 51(vi) of the *Constitution*.

49 So far as the civil courts of the Commonwealth are concerned, this proposition might be said to draw support from the language of Brennan and Toohey JJ in *Re Tracey*[53] and *Re Nolan*[54], where their Honours spoke of the jurisdiction exercised by service tribunals established under ss 51(vi) and 68 as "secondary" and "subordinate" to that exercised by Ch III courts. Consideration of this Court's jurisprudence since those cases shows that the support is illusory. In this regard, in *Re Tracey*, Brennan and Toohey JJ framed the issue as a problem of reconciling two sets of constitutional objectives[55]:

> "The first set of objectives, dictated by s 51(vi), consist of the defence of the Commonwealth and of the several States and the control of the armed forces. To achieve these objectives, it is appropriate to repose in service authorities a broad authority, to be exercised according to the exigencies of time, place and circumstance, to impose discipline on defence members and defence civilians. The second set of objectives, dictated both by Ch III and s 106 of the Constitution and by the constitutional history we have traced, consist of recognition of the pre-ordinate jurisdiction of the civil courts and

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51 (1989) 166 CLR 518 at 571.

52 *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 598 [58].

53 (1989) 166 CLR 518 at 563.

54 (1991) 172 CLR 460 at 480-482.

55 (1989) 166 CLR 518 at 569-570.

> the protection of civil rights which those courts assure alike to civilians and to defence members and defence civilians who are charged with criminal offences. To achieve these objectives, civil jurisdiction should be exercised when it can conveniently and appropriately be invoked and the jurisdiction of service tribunals should not be invoked, except for the purpose of maintaining or enforcing service discipline. These two sets of constitutional imperatives point to the limits of the valid operation of the [Act]. It may not impair civil jurisdiction but it may empower service tribunals to maintain or enforce discipline. Therefore proceedings may be brought against a defence member or a defence civilian for a service offence if, but only if, those proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline."

50 Their Honours, in seeking to reconcile these objectives, were disposed to describe the jurisdiction of Ch III courts as "pre-ordinate"[56] and the system of military justice for which Parliament might provide under s 51(vi) as "a secondary system for enforcing the ordinary criminal law against naval and military personnel where it was not practicable or convenient for the ordinary courts to exercise their jurisdiction to do so"[57]. In light of the exegesis of the constitutional text in subsequent decisions of this Court and a better understanding of the historical context, it can now be seen that the intrusion of the "second set of objectives" referred to by their Honours into the understanding of the scope of s 51(vi) of the *Constitution* cannot be supported.

51 It cannot now be maintained that the jurisdiction of the civil courts is "pre-ordinate" with that of service tribunals established by the exercise of the power conferred by s 51(vi). While there may be an area of concurrent jurisdiction between civil courts and service tribunals, there is no warrant in the constitutional text for treating one as subordinate or secondary to the other. Rather, the two are equally authorised by the *Constitution*[58]. In *White*[59], Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ concluded that service tribunals hearing charges of offences under the Act and imposing punishments for such offences do not exercise the judicial power of the Commonwealth. Rather, such tribunals

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56 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 570.

57 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 563.

58 *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 584 [10].

59 (2007) 231 CLR 570 at 585-586 [12]-[14], 589 [22], 595-596 [49]-[52], 597-598 [56]-[59], 646-648 [234]-[238], 650 [246].

exercise a power concerned with maintaining and enforcing service discipline that is derived from ss 51(vi) and 68 of the *Constitution*. There is therefore no occasion to regard the courts created by or brought within Ch III of the *Constitution* as necessarily having a jurisdiction over service personnel that is superior to service tribunals.

52 It may be noted that in *Re Tracey*[60], Mason CJ, Wilson and Dawson JJ expressed the obiter view that the power exercised by service tribunals under the Act is judicial power. In this, their Honours differed from Brennan and Toohey JJ, who described the power exercised by service tribunals as "sui generis"[61]. In *Lane v Morrison*[62], French CJ and Gummow J were emphatic that "the only judicial power which the *Constitution* recognises is that exercised by the branch of government identified in Ch III". Further, Hayne, Heydon, Crennan, Kiefel and Bell JJ observed that the decisions of courts martial, which were traditionally subject to review and took effect only upon confirmation within the chain of command, lacked the final authority that usually characterises the exercise of judicial power[63], and went on to observe that to say that such tribunals exercised a form of judicial power "may go no further than asserting that courts-martial act judicially[64]"[65].

53 The power conferred by s 51(vi) enables the apparatus of the Executive Government of the Commonwealth established under s 68 of the *Constitution* to exercise the authority by which the armed forces of the nation may be maintained. In *Haskins v The Commonwealth*[66], French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said:

> "Because the decisions made by courts martial and other service tribunals are amenable to intervention from within the chain of command, the steps that are taken to punish service members are taken only for the purpose of, and constitute no more than, the imposition and maintenance of discipline

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60 (1989) 166 CLR 518 at 537, 539-540, 546-547.

61 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 574.

62 (2009) 239 CLR 230 at 248 [48].

63 *Lane v Morrison* (2009) 239 CLR 230 at 256-260 [81]-[93].

64 cf *R v Cox; Ex parte Smith* (1945) 71 CLR 1 at 23.

65 *Lane v Morrison* (2009) 239 CLR 230 at 260 [96].

66 (2011) 244 CLR 22 at 36 [21].

within the defence force; they are not steps taken in the exercise of the judicial power of the Commonwealth."

54 The text of the *Constitution*, and the guidance afforded by the judicial exegesis to which reference has been made, show clearly that it is s 68, and not Ch III, which provides the institutional framework within which the disciplinary code enacted under s 51(vi) is to be enforced. Once it is accepted, as it must be in light of these developments in the understanding of the relationship between s 51(vi) and Ch III, that the system of military justice stands distinctly outside of s 71 of the *Constitution*, there is no warrant to speak of the system of military justice as an exception to the position established by Ch III but somehow subordinate to it. The jurisdiction of service tribunals is not secondary to the jurisdiction of the ordinary courts; rather it is complementary to that jurisdiction for the purposes of the nation's defence. In that regard, the system of military justice pursues the specific purpose of securing and maintaining discipline within the armed forces rather than the general purpose of punishing those guilty of criminal conduct.

55 Given that "[a] function may take its character from that of the tribunal in which it is reposed"[67], and given further the long history of the exercise of disciplinary jurisdiction by service tribunals within the chain of command established under s 68 of the *Constitution*, it may be more accurate to say that the power so exercised is executive or administrative in character[68]. And it is convenient to note here that the circumstance that the decisions of service tribunals are amenable to review under s 75(v) of the *Constitution* "points away" from the conclusion that such tribunals exercise judicial power[69].

56 Whether service tribunals exercise judicial or administrative power, the power is required to be exercised judicially, that is to say, in accordance with the requirements of reasonableness and procedural fairness to ensure that discipline is just. This Court is invested with jurisdiction by s 75(v) of the *Constitution* to supervise the exercise of power by officers of the Commonwealth to ensure that their powers are exercised judicially in that sense.

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67 *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 628. See also *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 8, 10-12.

68 *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 649 [240]; *Lane v Morrison* (2009) 239 CLR 230 at 247 [47].

69 *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 579 [100]. See also at 550 [1], 552 [9].

The defence power and its relationship to s 106 of the *Constitution*

57 The plaintiff argued that because s 51(vi) is expressed to be "subject to this Constitution", and because s 106 of the *Constitution* continues the constitutions of the States, acceptance of the Commonwealth's contention would be contrary to s 106 of the *Constitution* because a service tribunal hearing and determining a charge of an offence against the law of the land is exercising judicial power and thereby usurping the judicial power of the States.

58 Section 106 of the *Constitution* provides:

> "The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State."

59 It should be said that a concern as to the civil courts of the States and service tribunals being capable of hearing and determining charges arising out of the same conduct should not be exaggerated. Section 63 of the Act serves to minimise the extent of the potential for the concurrent exercise of jurisdiction. In any event, it is commonplace in modern life that professional disciplinary bodies entertain and determine charges of misconduct that would amount to offences against the ordinary law of the land on the basis that, if proved, the misconduct warrants the removal of the offender from the practice of his or her profession, whatever punishment might be imposed on the offender by the civil courts.

60 As noted earlier, there can be no doubt that the power exercised by service tribunals is not the judicial power of the Commonwealth[70]. It may well be that the decision-making power conferred on service tribunals should not be characterised as judicial power at all. But it is not necessary to accept that service tribunals do not exercise judicial power at all in order to reject the suggestion that s 106 of the *Constitution* precludes the conferral under s 51(vi) of power on service tribunals to hear and determine charges relating to conduct that constitutes offences within the jurisdiction of the civil courts of the States.

61 The unanimous decision of this Court in *McWaters v Day*[71] established that the system of military justice established under ss 51(vi) and 68 of the *Constitution*

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70 *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 585-586 [12]-[14], 588-589 [21]-[23], 595-596 [49]-[52], 597-598 [56]-[59], 646-648 [234]-[238], 650 [246].

71 (1989) 168 CLR 289 at 299.

operates concurrently with the ordinary civil jurisdiction of the States and is complementary to it. No doubt service tribunals and State courts would take account of any orders made within the other system in dealing with an offender; but to say that is not to suggest that either system purports to control the other. To seek to limit the legislative power conferred on the Parliament of the Commonwealth by s 51(vi) by reference to the co-existence of a concurrent legislative power in the States is to seek to advance an argument inconsistent with this Court's decision in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*[72].

62 As has been seen, the jurisdiction of service tribunals serves the special purpose of maintaining morale and discipline within the ADF. It is this purpose that validates the Act; and that purpose is served by holding members of the ADF to the observance of the law of the land. The validating purpose of the Act means that the jurisdiction of service tribunals does not trench upon the jurisdiction of State courts. In *McWaters v Day*[73] the Court, in a unanimous judgment, said that the disciplinary code established by the Act was "cumulative upon and not exclusive of the ordinary criminal law". Their Honours went on to say of the Act that it did "not seek to do other than enact a system of military law in accordance with the traditional and constitutional view of the supplementary function of such law[74"75].

63 The concern of Brennan and Toohey JJ in *Re Tracey*, which drove their identification and reconciliation of the two sets of constitutional objectives they identified, was that should[76]:

> "service tribunals ... be authorized to trespass upon the proper jurisdiction of the civil courts over defence members and defence civilians ... their civil rights would be impaired. The protection of Magna Charta and the victory of Parliament over the Royal forces which resulted in the Bill of Rights would become the unintended casualties of the Australian Constitution."

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72 (1920) 28 CLR 129.

73 (1989) 168 CLR 289 at 297.

74 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 549.

75 *McWaters v Day* (1989) 168 CLR 289 at 298.

76 (1989) 166 CLR 518 at 569.

64 To argue that the advantages of the civil justice system, such as committal proceedings and trial by jury, should not be denied to an accused citizen-soldier is to fail to appreciate that a soldier accused of an offence against the law of the land did not, as a matter of history, have the choice of a trial within the civil system. It will be necessary to refer in due course to some matters of history in relation to this point.

65 It is true that an individual who enlists in the defence force of the Commonwealth does not cease to be a citizen with rights as such; but it is idle to deny that such an individual incurs additional responsibilities under military law. As Windeyer J said in *Marks v The Commonwealth*[77]:

> "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."

66 It is now recognised that these special duties and obligations may be enforced by a system of military justice established for that purpose. In *White*[78], Gummow, Hayne and Crennan JJ said:

> "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[79]. 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."

67 At the time of federation, a soldier accused of an offence against the civil law had no right to trial in the civil courts. Any wish on the part of a soldier accused of a criminal offence to be tried in the civil rather than military courts depended on the ability and willingness of the civil authorities to bring a prosecution. At this point, it is convenient to refer to some historical considerations.

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77 (1964) 111 CLR 549 at 573.

78 (2007) 231 CLR 570 at 601-602 [73].

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

Historical context

68 The plaintiff argued that prior to federation it was never considered necessary, in either the United Kingdom or the Australian colonies, for a service tribunal to try a defence member for any conduct amounting to an ordinary civil crime committed in peacetime. It was said, citing the historical analysis of Brennan and Toohey JJ in *Re Tracey*[80], that the *Mutiny Acts* and *Articles of War* which applied to govern discipline of the army in the United Kingdom prior to 1879 subjected to military jurisdiction only those offences of a military character; there was no military jurisdiction to try soldiers for ordinary civil offences committed in the United Kingdom in times of peace. The plaintiff argued that the policy of the *Army Discipline and Regulation Act 1879* (Imp) and subsequently the *Army Act 1881* (Imp), which replaced the *Mutiny Acts* and *Articles of War*, was that courts martial should not exercise jurisdiction where the civil courts were reasonably available, "especially [for offences] which would ordinarily be tried by a jury"[81].

69 It should be kept in mind that, in point of principle, historical considerations cannot limit the scope of "defence" in s 51(vi) of the *Constitution*[82]: the exigencies of national defence can be expected to change over time. That said, the plaintiff's account of the history of the jurisdiction of service tribunals fails to recognise that since the beginning of the eighteenth century and the enactment of the *Mutiny Act 1718* (Imp), there has been concurrent military and civil jurisdiction over members of the armed forces of the Crown. While the exercise of ordinary civil jurisdiction was accorded temporal priority over the exercise of military jurisdiction, that depended upon the decision of the civil authorities to bring proceedings in a timely way.

70 The historical analysis of Brennan and Toohey JJ in *Re Tracey*[83] seems to equate the temporal priority accorded to the exercise of civil jurisdiction under the applicable legislation with an exclusion of military jurisdiction in respect of many offences against the civil law. The *Mutiny Acts* contemplated the exercise of military jurisdiction to punish offences against the civil law if the civil authorities chose not to act against a miscreant soldier. In addition, the suggestion by Brennan

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80 (1989) 166 CLR 518 at 559.

81 War Office, *Manual of Military Law*, 4th ed (1899) at 108.

82 *Marcus Clark & Co Ltd v The Commonwealth* (1952) 87 CLR 177 at 226.

83 (1989) 166 CLR 518 at 554-563.

and Toohey JJ in *Re Tracey*[84] that reference to the *Mutiny Acts* showed that "when the ordinary courts were open, there was no occasion for the exercise of martial law (or military law as it is called in modern times)" is not accurate. As Clode explained[85], the exclusion in the *Mutiny Acts* of "martial law" in "time of peace" referred to the use of military law against the civilian population, not the enforcement of military discipline against the soldiery.

71 Immediately prior to federation, the *Army Act* and the *Naval Discipline Act 1866* (Imp) expressly recognised that many ordinary criminal offences committed by members of the armed forces, regardless of whether they were committed abroad or at home, posed a risk to military discipline and were therefore subject to non-exclusive military jurisdiction[86]. Further, by the time of federation there were laws in force in New South Wales, Victoria, South Australia, Queensland, Western Australia and Tasmania which subjected all members of the armed forces to the *Army Act* and the *Naval Discipline Act* for the duration of their enlistment[87].

72 In *White*, Gummow, Hayne and Crennan JJ acknowledged that the history of military justice showed that the applicable legislation had long established the concurrent exercise of jurisdiction by service tribunals and the civil courts. For their Honours[88], the "decisive consideration" was that at federation, under "the applicable statutes, the legislature controlled and regulated the administration by and within the [defence] 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'[89] but also by reference to particular acts which would constitute offences under

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84 (1989) 166 CLR 518 at 557.

85 Clode, *The Military Forces of the Crown; their Administration and Government* (1869), vol 1 at 143.

86 *Army Act 1881* (Imp), s 41(5); *Naval Discipline Act 1866* (Imp), ss 43, 45, 46.

87 *Military and Naval Forces Regulation Act 1871* (NSW), s 5; *Defences and Discipline Act 1890* (Vic), ss 5, 19; *Defences Act 1895* (SA), s 36; *Defence Act 1884* (Qld), ss 26(3), 60, 61; *Defence Forces Act 1894* (WA), s 40; *Defence Act 1885* (Tas), ss 28(3), 62, 63.

88 (2007) 231 CLR 570 at 596 [52].

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

generally applicable laws." The suggestion that military tribunals were historically active in England only where ordinary civil courts were unavailable was also rejected in *Solorio v United States*[90].

73 The history of the relationship between the system of military justice and the civil courts was an aspect of the struggle for supremacy between the Parliament and the Crown: the history is not of a struggle between Parliament and constitutionally guaranteed individual rights of the soldiery to trial by jury in the civil courts. Within the broader struggle between Crown and Parliament, the novel presence within England of a standing army meant that offences by soldiers against the person and property of the civilian population and the failure of military command to curb these offences led to the demands pressed by the Parliament that miscreant soldiers should be delivered up to the civil authorities to ensure that their offences did not go unpunished[91].

74 The success of Parliament over the Crown meant that the military justice system was brought under the control of Parliament, not the Crown. Parliament required that the system of military justice operate concurrently with the civil courts even in peacetime and within the United Kingdom to ensure that members of the new standing army did not become a law unto themselves. The principal concern of the victorious Parliament was that the civil courts should be available to protect the citizenry should there be reason to doubt whether the Crown was sufficiently willing to discipline its troops. Importantly, the question whether a soldier accused of a crime against the law of the land was prosecuted in a civil court was not a matter for the choice of the accused soldier. The abiding concern was that the civil justice system should be available concurrently with the military justice system as a curb on the mischiefs that might result to the civilian population from incidents of lawlessness on the part of the members of the standing army.

75 The considerations that informed the measures established by Parliament upon its victory over the Crown remain of abiding concern today. A modern standing army, like its precursors, consists of people who are empowered with "the skills, knowledge and weaponry to apply lethal force. If Army members engage in ill-disciplined use of violence at home or at work, then Army's confidence in them to execute their duties lawfully and discriminately in circumstances of immense stress on the battlefield is deeply undermined."[92] This consideration may be

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90 (1987) 483 US 435 at 442-444.

91 *Grant v Gould* (1792) 2 H Bl 69 at 99-100 [126 ER 434 at 450].

92 Australian Army, *The Army Family and Domestic Violence Action Plan* (2016) at [2].

thought to be even more compelling today than during the constitutional struggles of the seventeenth and eighteenth centuries.

76 In the long period of peace that began after the end of the Napoleonic Wars, a failure by command to deal promptly, justly and effectively with an outbreak of acts of violence or dishonesty, perhaps motivated by sectarian differences, among personnel of the Royal Navy based at Sydney Cove would have been a matter of grave local concern to be dealt with urgently. But it was unlikely to have had any immediate effect upon discipline or morale in the armed forces located elsewhere in the British Empire. Distance and the difficulties of communication meant that local incidents were likely to remain local. Even in 1989, when *Re Tracey* was decided, it would have been unlikely that the occurrence of acts of violence or dishonesty at Fremantle would have had any immediate effect beyond that locale on the discipline or morale of the Royal Australian Navy more generally.

77 Today, the speed and efficiency of communications, together with the better educated and more diverse membership of the ADF, have given rise to a different milieu in which the likely effect of such disturbances upon discipline and morale within the ADF is to be assessed, and in which the legislative power in s 51(vi) of the *Constitution* falls to be exercised. Such disturbances, and the ADF's response to them, could be expected to be known immediately throughout the ADF, and to be the subject of concern among servicemen and servicewomen until the controversy is resolved. And the strength and urgency of this concern would hardly be less in relation to acts of violence or dishonesty committed by members of the ADF against the civilian population.

Conclusion: the defence power and s 61(3) of the Act

78 It cannot be denied that s 61(3) of the Act conduces to the discipline and morale of the ADF by requiring members of the ADF to abide by the standards of behaviour required of all citizens. That being so, s 61(3) of the Act can reasonably be seen to conduce to the efficiency of the defence forces of the nation and so to conduce to the defence of the nation. It is a wholly valid exercise of the defence power.

79 The plaintiff, in arguing that there is not a sufficient connection between all offences committed by members of the ADF and the discipline and morale of the ADF where the offence could be dealt with by the civil courts, provided the examples of a member of the ADF driving a motor vehicle at an excessive speed while on holiday or chopping down a protected tree in his or her own backyard. Once it is accepted that it is essential to the discipline and morale of the ADF that its members are required to abide by the law of the land, these examples are not compelling. In addition, whether the jurisdiction of a service tribunal should be exercised in cases of minor offences is a question of policy for the civil and military

authorities; but such questions of policy should not be confused with the question of the validity of the conferral of jurisdiction.

80 It may also be said in relation to the examples given by the plaintiff that they invoke the dissenting view of Deane J in *Re Tracey*[93] that in times of peace the Parliament may confer jurisdiction on service tribunals to deal only with "exclusively disciplinary offences". This view, which was never accepted by a plurality in any later decision, was subject to cogent criticism by Gleeson CJ in *White*[94] on the basis that it cannot be said of any given offence that it is "exclusively disciplinary in its nature". It is not possible to chart the metes and bounds of what is an "exclusively disciplinary offence" or an "essentially military offence" or even a "characteristically military offence". Sedition and treason are offences that may be committed by soldiers and citizens alike, in times of peace as in wartime; but it cannot sensibly be supposed that service tribunals could not be vested pursuant to s 51(vi) with jurisdiction to deal with charges of such offences against service personnel. Further, the circumstance that some offences may be trivial does not mean that their commission can have no bearing on military discipline and morale. Trivial breaches of the law of the land, if they occur frequently, may obviously have a serious bearing on discipline and morale within the defence forces. The validity of a law as enacted does not depend upon proof of and the extent of the immediate need for its enactment in proceedings for the enforcement of the law. The relevant question is whether the *rule* prescribed by the law is "sufficiently connected with the regulation of the forces and the good order and discipline of defence members", not whether the circumstances of a particular case have that connection[95]. It is only if the relevant question is answered in the negative that any occasion arises to ask whether there is a sufficient ad hoc connection. A rule that requires defence force personnel always and everywhere to abide by the law of the land is sufficiently connected with s 51(vi) because observance of the law of the land is readily seen to be a basic requirement of a disciplined and hierarchical force organised for the defence of the nation.

The "service connection" test

81 The conclusion that s 61(3) of the Act is wholly valid in all its applications means that it is strictly unnecessary to consider whether the "service connection" test is satisfied here. To note the problems that attend the "service connection" test may, however, tend to confirm and reinforce the conclusion that s 51(vi) extends

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93 (1989) 166 CLR 518 at 585-586.

94 (2007) 231 CLR 570 at 587-588 [18]-[20].

95 *Re Tracey* (1989) 166 CLR 518 at 545.

to authorise the enactment of s 61(3) of the Act. It is, therefore, desirable to note some of the difficulties with the "service connection" test as a test of the validity of an impugned exercise of jurisdiction.

82 In *Re Tracey*, Brennan and Toohey JJ recognised that because the test that they propounded is concerned with the circumstances of each particular case, the outcome may depend upon "matters of impression and degree, especially on the needs of service discipline"[96]. The subjectivity of and the uncertainty attending this approach is undesirable in a test of jurisdiction. In this regard, in *Re Tracey*, Mason CJ, Wilson and Dawson JJ rightly noted[97]:

> "[I]t is not possible to draw a clear and satisfactory line between offences committed by defence members which are of a military character and those which are not."

83 The subjectivity and uncertainty of the "service connection" test weighed heavily with the United States Supreme Court in rejecting that test in *Solorio*[98]. There, the dissenting view of Harlan J in *O'Callahan v Parker*[99] was ultimately vindicated. The majority of an earlier Supreme Court in *O'Callahan v Parker* applied the "service connection" approach to establishing the scope of offences to which service may be appropriate. Harlan J said that the decision of the majority[100]:

> "intimates that it is relevant to the jurisdictional issue in this case that petitioner was wearing civilian clothes rather than a uniform when he committed the crimes ... And it also implies that plundering, abusing, and stealing from, civilians may sometimes constitute a punishable abuse of military position ... But if these are illustrative cases, the Court suggests no general standard for determining when the exercise of court-martial jurisdiction is permissible.
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> Whatever role an *ad hoc* judicial approach may have in some areas of the law, the Congress and the military are at least entitled to know with

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96 (1989) 166 CLR 518 at 570.

97 (1989) 166 CLR 518 at 544.

98 (1987) 483 US 435 at 449-450.

99 (1969) 395 US 258 at 283-284.

100 (1969) 395 US 258 at 283-284.

some certainty the allowable scope of court-martial jurisdiction. Otherwise, the infinite permutations of possibly relevant factors are bound to create confusion and proliferate litigation over the jurisdictional issue in each instance. Absolutely nothing in the language, history, or logic of the Constitution justifies this uneasy state of affairs".

84 The Supreme Court of Canada in *R v Stillman*[101] rejected the impressionistic and ad hoc approach involved in a test similar to that favoured by Brennan and Toohey JJ on the basis that it tends to blur the distinction between the existence of jurisdiction and its exercise and gives rise to conceptual and practical uncertainty.

85 The "service connection" test is not only uncertain in its application, it is also notably unfocused and unwieldy. The plaintiff, in urging the adoption and application of the "service connection" test, submitted that the Court should have regard to the 12 factors formulated by the Supreme Court of the United States in *Relford v US Disciplinary Commandant*[102]:

"1. The serviceman's proper absence from the base.

2. The crime's commission away from the base.

3. Its commission at a place not under military control.

4. Its commission within our territorial limits and not in an occupied zone of a foreign country.

5. Its commission in peacetime and its being unrelated to authority stemming from the war power.

6. The absence of any connection between the defendant's military duties and the crime.

7. The victim's not being engaged in the performance of any duty relating to the military.

8. The presence and availability of a civilian court in which the case can be prosecuted.

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101 (2019) 436 DLR (4th) 193 at 236-238 [103]-[109].

102 (1971) 401 US 355 at 365, cited with approval in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 571 and *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 321-322 [36], 324 [45], 357 [159], 357-358 [161].

9. The absence of any flouting of military authority.

10. The absence of any threat to a military post.

11. The absence of any violation of military property.

One might add still another factor implicit in the others:

12. The offense's being among those traditionally prosecuted in civilian courts."

86 The conscientious application of these factors cannot be relied upon to yield an acceptable result. In *Re Aird*, McHugh J (with whom Gleeson CJ, Gummow and Hayne JJ agreed) held that a sufficient connection to the defence power existed despite the *Relford* factors pointing "strongly against" that conclusion[103]. His Honour said[104]:

> "[T]he twelve factors listed in *Relford* cannot be regarded as an exhaustive indicia of what constitutes a 'service connection'. In any event, as Brennan and Toohey JJ pointed out in *Re Tracey*, a service connection is evidence of but not definitive of what is necessary to maintain discipline and morale in the armed forces."

87 In the dissenting judgment of Marshall J in *Solorio*[105], it was held that the "service connection" test was not satisfied in that case because the crimes of the petitioner "posed no challenge to the maintenance of order in the local command"[106] even though the crimes in question involved the sexual abuse of two young daughters of fellow servicemen assigned to the same command as the petitioner. Stevens J suggested in *Solorio*[107] that this conclusion was "most surpris[ing]". Some might think that is something of an understatement. As

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103 (2004) 220 CLR 308 at 314 [9], 324 [45], 325 [49], 356 [156].

104 *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 324 [45].

105 (1987) 483 US 435 at 462-465.

106 (1987) 483 US 435 at 463.

107 (1987) 483 US 435 at 451.

McHugh J (with whom Gleeson CJ, Gummow and Hayne JJ agreed) said in *Re Aird*[108]:

> "A soldier who rapes another person undermines the discipline and morale of his army. He does so whether he is on active service or recreation leave."

88 That a judge as eminent as Marshall J could reach such a surprising conclusion in the application of the "service connection" test (and also garner the concurrence of Brennan and Blackmun JJ in so doing) tends to confirm that the vagaries of the "service connection" test are too great a price to pay for its only apparent merit, which is the flexibility it brings to the resolution of the problem of concurrent jurisdiction. The majority of the Supreme Court in that case concluded as much[109].

Conclusion and orders

89 Section 61(3) of the Act is valid in all its applications.

90 The plaintiff's application should be dismissed. The plaintiff must pay the second defendant's costs of the application.

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108 (2004) 220 CLR 308 at 314 [9], 324 [45], 325 [49], 356 [156].

109 *Solorio v United States* (1987) 483 US 435 at 448-451.

91 GAGELER J. My opinion is that s 61(3) of the *Defence Force Discipline Act 1982* (Cth) ("the Act") is supported by s 51(vi) of the *Constitution* in all its applications to conduct of defence members. These reasons explain how I form that opinion and why I choose to give effect to that opinion rather than to perpetuate constitutional uncertainty.

92 Section 51(vi) of the *Constitution* confers power on the Commonwealth Parliament to make laws with respect to "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". The power "is not limited to defence against aggression from a foreign nation", "is not limited to external threats", "is not confined to waging war in a conventional sense of combat between forces of nations" and "is not limited to protection of bodies politic as distinct from the public"[110].

93 The multifaceted nature of the power combined with the multifariousness of the circumstances of time and place in respect of which the power can be invoked, or might be sought to be invoked, have been experienced through the vicissitudes of two world wars, a "cold war", and most recently a "war on terror", to generate tension between maintenance of the federal system of government established by the *Constitution* and protection of that system of government through the exercise of the power. The tension has been shown in practice to be incapable of being resolved "by the application of any mechanical hard and fast rule"[111].

94 Mindful of the difficulties experienced in the outworking of the power, I decline the invitation of the Solicitor-General of the Commonwealth to formulate a "test" for the sufficiency of the connection of s 61(3) of the Act with s 51(vi) of the *Constitution* at the level of abstraction of asking whether the law is "'capable of being reasonably considered to be appropriate and adapted to achieving' its constitutional purpose"[112]. Equally, I decline the invitation on behalf of Private R to formulate a rival "test" for the sufficiency of that connection in the more

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110 *Thomas v Mowbray* (2007) 233 CLR 307 at 324 [7].

111 *R v Foster* (1949) 79 CLR 43 at 83; *The Illawarra District County Council v Wickham* (1959) 101 CLR 467 at 485.

112 *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 38 [57], quoting *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 259.

stringent terms of "reasonable necessity"[113]. Nor do I look to derive concrete assistance from judicial pronouncements highlighting the breadth and flexibility of the practical application of the power to control civilian activity in a time of conventional war[114] or in a time of apprehended external danger short of conventional war[115].

95 Not wishing to add to the multiplicity of views expressed over the past three decades on the topic of the capacity of the power conferred by s 51(vi) of the *Constitution* to support the system of defence force discipline established by the Act, I reach the conclusion that s 61(3) of the Act is supported by s 51(vi) in all its applications to defence members adopting the reasoning of Mason CJ, Wilson and Dawson JJ in *Re Tracey; Ex parte Ryan*[116] as reiterated in *Re Nolan; Ex parte Young*[117] in light of the unanimous decision in *McWaters v Day*[118]. In short, that reasoning is as follows:

(a) within the reference in the first part of s 51(vi) to "the naval and military defence of the Commonwealth" is "necessarily comprehended" power to make provision for the good order and discipline of the defence force, because naval and military defence "demands the provision of a disciplined force or forces"[119];

(b) in making provision for the good order and discipline of the defence force, it is open to Parliament in the exercise of the power to enact a "code of disciplinary conduct" binding on defence members and to provide for that

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113 cf *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 226; *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 601-602 [73].

114 eg *Farey v Burvett* (1916) 21 CLR 433 at 441; *Stenhouse v Coleman* (1944) 69 CLR 457 at 471-472; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 254-259.

115 eg *Marcus Clark & Co Ltd v The Commonwealth* (1952) 87 CLR 177 at 215-219.

116 (1989) 166 CLR 518 at 540-541, 545, 547.

117 (1991) 172 CLR 460 at 474-475.

118 (1989) 168 CLR 289 at 297-298.

119 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 540.

code to be "administered judicially, not as part of the judicature erected under Ch III, but as part of the organization of the force itself"[120];

(c) subject to one significant limitation, in framing a code of disciplinary conduct "it is for Parliament to decide what it considers necessary and appropriate for the maintenance of good order and discipline" and "Parliament's decision will prevail so long at any rate as the rule [of conduct] which it prescribes is sufficiently connected with the regulation of the forces and the good order and discipline of defence members"[121];

(d) the one significant limitation is that the power to enact a code of disciplinary conduct does not extend to permit Parliament to prescribe a rule of conduct for defence members that is in substitution for, as distinct from cumulative upon, ordinary criminal law[122];

(e) subject to that limitation, prescription by Parliament of a rule of conduct that defence members act always and everywhere in conformity with the ordinary criminal law (defined in terms of the ordinary criminal law applicable within a designated geographical area of Australia) is sufficiently connected with regulation of the forces and the good order and discipline of defence members[123];

(f) the prescription by s 61 of the Act of the rule that defence members act always and everywhere in conformity with the ordinary criminal law applicable within a specified Territory operates subject to that limitation so as to be supplementary to and not exclusive of ordinary criminal law, and the rule is for that reason supported in all its applications[124].

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120 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 541.

121 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 545.

122 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 547; *McWaters v Day* (1989) 168 CLR 289 at 297; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 475.

123 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 545. See also *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 474-475.

124 *McWaters v Day* (1989) 168 CLR 289 at 297-299; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 475.

96 The *Constitution* is "an instrument framed in accordance with many traditional conceptions"[125]. Amongst them are "established principles ... concerning the position of the armed forces in the community"[126]. The limitation on the legislative power conferred by the first part of s 51(vi), recognised by Mason CJ, Wilson and Dawson JJ in step (d) and applied in steps (e) and (f) to uphold the validity of s 61 of the Act as a rule of conduct binding on defence members in addition to their obligations under the ordinary criminal law, reflects one of those established principles. The limitation is a translation into the Australian federal system of what Professor Albert Venn Dicey described as "[t]he fixed doctrine of English law ... that a soldier, though a member of a standing army, is ... subject to all the duties and liabilities of an ordinary citizen"[127].

97 Although of no present moment, I do not understand steps (c) to (f) in the reasoning of Mason CJ, Wilson and Dawson JJ concerning the scope of the power of Parliament to enact a code of disciplinary conduct binding on defence members to depend on the continuation of the method of enforcement of that code of disciplinary conduct identified in step (b). In particular, I see no reason why the conclusion that s 61 of the Act is within the scope of the power to enact a code of disciplinary conduct would not continue to be reached by the same steps whether the Act were to continue to provide under s 51(vi) of the *Constitution* for the hearing and determination of charges of service offences by service tribunals operating within the chain of defence force command and outside Ch III of the *Constitution*, as it did at the time of *Re Tracey* and as it does again now[128], or whether the Act were to be amended, as one day well it might[129], to provide under s 71 and s 77(i) of the *Constitution* for the hearing and determination of some or all charges of service offences by a court or courts operating outside the chain of defence force command and within Ch III of the *Constitution*.

98 The argument for Private R is grounded in the markedly different approach expounded by Brennan and Toohey JJ in *Re Tracey* and *Re Nolan*. That approach focused less on the scope of the power conferred by s 51(vi) of the *Constitution* to

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125 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193.

126 *The Illawarra District County Council v Wickham* (1959) 101 CLR 467 at 503.

127 *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) at 300-301, quoted in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 546.

128 cf *Haskins v The Commonwealth* (2011) 244 CLR 22 at 30 [1], 36 [22], explaining *Lane v Morrison* (2009) 239 CLR 230.

129 cf *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 593 [40], 595 [48], 619 [134].

support a rule of conduct for defence members than on the scope of that power to support the conferral of jurisdiction to try and punish in contravention of that rule of conduct on a service tribunal operating outside Ch III of the *Constitution*.

99 Their Honours explained the conclusion reached adopting that different approach in terms of the reconciliation of competing constitutional imperatives. On the one hand was the objective "dictated by s 51(vi)" to "repose in service authorities a broad authority, to be exercised according to the exigencies of time, place and circumstance, to impose discipline on defence members" within the chain of defence force command and outside Ch III of the *Constitution*. On the other hand was the objective "dictated both by Ch III and s 106 of the Constitution", as well as by "constitutional history", to recognise "the pre-ordinate jurisdiction of the civil courts and the protection of civil rights which those courts assure alike to civilians and to defence members ... who are charged with criminal offences"[130].

100 The reconciliation of those competing constitutional imperatives was seen by their Honours to lie in recognising that "the relevant power conferred by s 51(vi) does not extend to the making of a law to punish defence members ... unless the proceedings taken in order to punish them can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline"[131]. The "distributive operation" of the Act was accordingly to be confined by s 15A of the *Acts Interpretation Act 1901* (Cth) "so that the jurisdiction conferred on service tribunals is available for exercise only on occasions when there is constitutional support for its exercise"[132].

101 With great respect, I am unable to accept that the second of the constitutional imperatives identified by their Honours truly arises once full weight is given to the limitation that a rule of conduct for a defence member prescribed under s 51(vi) can only ever be cumulative upon ordinary criminal law.

102 Subject to an exception I will mention, I cannot see how an exercise of jurisdiction by a service tribunal to try and punish a breach of a supplementary rule of conduct imposed on a defence member can impair the jurisdiction of any State court that is protected by s 106 of the *Constitution* or can impair any civil right that is assured by Ch III to that defence member or to anyone else who might be charged with an ordinary criminal offence. The exception is that trial or punishment of a service offence by a service tribunal must always have the potential to operate as a practical impediment to the conduct of a criminal proceeding or the imposition

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130 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 569-570.

131 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 484.

132 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 485.

of a criminal punishment, if for no other reason than that one person cannot be physically in two places at the same time. But their Honours did not formulate their constitutional limitation on the jurisdiction of service tribunals to address the potential for an actual exercise of jurisdiction by a service tribunal to impede an actual exercise of jurisdiction by a civil court. No suggestion appearing in their Honours' reasoning that an exercise of jurisdiction by a service tribunal cannot reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline merely because the defence member might be tried and punished for the same or other conduct as a criminal offence in a civil court[133], the potential for practical impediment of an exercise of jurisdiction by a civil court must remain even if their formulated limitation is applied.

103 Nor can I see in the pre-federation constitutional history recounted by their Honours a firm foundation for the emergence of a constitutional principle or constitutional practice of confining the jurisdiction of naval and military tribunals to try and punish disciplinary offences by members of the naval and military forces in order either to preserve the pre-eminence of the jurisdiction of civil courts or to safeguard the concomitant civil rights of persons charged with ordinary criminal offences. In the working out of the constitutional settlement of the seventeenth century by which the Imperial Parliament wrested control over the naval and military forces from the Crown, the "great constitutional dogma"[134] came to be expressed in the recital in the preamble to the annual *Mutiny Acts* that "no man may be forejudged of life or limb, or subjected in time of peace to any kind of punishment by martial law, or in any other manner than by the judgment of his peers and according to the known and established laws of the realm"[135]. But annual *Mutiny Acts* early acknowledged a prerogative power in the Crown[136], and were later taken to confer statutory power on the Crown[137], both to establish Articles of War for the "better government" of the forces and to constitute courts-martial with power to try any offence against those Articles of War. Experience to the end of the eighteenth century had taught not only that "there is nothing so dangerous to the civil establishment of a state, as a licentious and undisciplined army" but also that "[a]n undisciplined soldiery are apt to be too many for the civil power" and

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133 See *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 488-489; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18 at 28-32.

134 *R v Nelson and Brand* (1867) Special Report at 68.

135 Preamble as quoted in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 557.

136 *Mutiny Act 1718* (Imp).

137 See War Office, *Manual of Military Law*, 4th ed (1899) at 17-18 [31]-[32]; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 559.

that it is "under the command of officers ... answerable to the civil power, that they are kept in good order and discipline"[138].

104 I can agree with Brennan and Toohey JJ that the scope of naval and military discipline by the time of federation "reflected the resolution of major constitutional controversies" and that, in accordance with the resolution that had been reached, members of the naval and military forces were subjected to "the processes of the ordinary courts" from which the exercise of disciplinary authority "did not derogate"[139]. But I cannot agree that the historical record justifies characterisation of subjection of naval and military personnel to the jurisdiction of civil courts as the "primary" mechanism by which naval and military discipline was achieved[140]. And I cannot agree that the systems of discipline administered within the naval and military chains of command were each properly characterised in terms of "a system for punishing breaches of the laws peculiarly applicable to those forces" combined with "a secondary system for enforcing the ordinary criminal law against naval and military personnel where it was not practicable or convenient for the ordinary courts to exercise their jurisdiction to do so"[141].

105 What I think is relevantly to be drawn from the pre-federation constitutional history beyond the "fixed doctrine of English law" described by Professor Dicey and recognised in the reasoning of Mason CJ, Wilson and Dawson JJ is the emergence by at least the second half of the nineteenth century of a firm perception that compliance by naval and military personnel with the ordinary criminal law was itself so important to the good order of the naval and military forces as to justify imposition and enforcement of that norm as a matter of naval and military discipline irrespective of whether civil court enforcement of the ordinary criminal law against non-compliant naval and military personnel was practicable or convenient. So much was evident in the terms of s 41(5) of the *Army Act 1881* (Imp), as qualified by the proviso in s 41(b) but not by the proviso in s 41(a)[142]. To the duties and liabilities imposed on members of the naval and military forces in their capacities as ordinary citizens by the ordinary criminal law enforceable through the ordinary system of civil courts, had been added co-extensive and concurrent duties and liabilities imposed on them in their capacities as members

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138 *Grant v Gould* (1792) 2 H Bl 69 at 99-100 [126 ER 434 at 450].

139 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 562-563.

140 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 562.

141 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 563.

142 Set out in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 560-561. See also ss 43, 45 and 46 of the *Naval Discipline Act 1866* (Imp).

of those forces enforceable through the systems of discipline administered within the naval and military chains of command.

106 Unable to accept the second of the constitutional imperatives identified by Brennan and Toohey JJ in *Re Tracey* and *Re Nolan*, I am unable to accept either the need for the reconciliation in which their Honours engaged or the result of that reconciliation. The only relevant limitation on the legislative power conferred by s 51(vi) of the *Constitution*, in my opinion, is that identified by Mason CJ, Wilson and Dawson JJ.

107 Following the example of the majority in *Re Aird; Ex parte Alpert*[143], this case might well be resolved without choosing between the approach of Mason CJ, Wilson and Dawson JJ and the approach of Brennan and Toohey JJ on the basis that trial and punishment by a service tribunal of the specific conduct with which Private R has been charged under s 61(3) of the Act (amounting to an assault by one defence member on another defence member) would satisfy the additional limitation on legislative power identified by Brennan and Toohey JJ in any event. To dispose of this case on that basis would comport with the practice of this Court of declining to answer a constitutional question absent a state of facts making answering that question necessary in order to determine a right or liability in issue[144]. The practice, however, is founded on prudential considerations[145] which do not inevitably weigh in favour of a conclusion that leaving a constitutional issue unresolved is best. To adopt the practice here would add to a longstanding constitutional controversy which has repeatedly been thrown up as a practical problem in the administration of the Act and which would likely continue to be a practical problem unless and until resolved by definitive judicial pronouncement. After three decades of reflection and debate, everything that can be said has been said and nothing would be achieved by putting off its resolution to another case.

108 Section 61(3) of the Act prescribes a rule of conduct for defence members – compliance with the ordinary criminal law – that is conducive to the good order and discipline of the defence force and that is supplementary to the ordinary criminal law. The time has come when it should be determined once and for all that trial and punishment of a contravention of that rule is within the jurisdiction validly conferred by the Act on a service tribunal operating within the chain of defence force command and outside Ch III of the *Constitution*, without any added requirement that the particular exercise of jurisdiction by the service tribunal be

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143 (2004) 220 CLR 308 at 314 [9], 323-324 [42]-[43], 325 [49], 356 [156].

144 *Knight v Victoria* (2017) 261 CLR 306 at 324 [32], quoting *Lambert v Weichelt* (1954) 28 ALJ 282 at 283.

145 *Clubb v Edwards* (2019) 93 ALJR 448 at 465-466 [34]-[36], 479-480 [135]-[138]; 366 ALR 1 at 15, 33-34.

able to be reasonably regarded as substantially serving the purpose of maintaining or enforcing service discipline.

109 Taking and choosing now to act on the view that s 61(3) of the Act is supported in all its applications to conduct of defence members, I agree with the orders proposed by Kiefel CJ, Bell and Keane JJ.

110 NETTLE J. I agree in the orders proposed by the plurality but not with their Honours' reasoning.

Judicial power

111 Previous decisions of this Court establish that the power exercised by service tribunals is judicial power, albeit of a kind that is placed outside the "law of the land" and thus outside the requirements of Ch III of the *Constitution*.

112 In *R v Bevan; Ex parte Elias and Gordon*, in which this Court first upheld the constitutionality of military service tribunals, Starke J stated[146] that, although courts martial under the *Naval Discipline Act 1866* (Imp) exercised judicial power, being that "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", they were not exercising "the judicial power of the Commonwealth" within the meaning of s 71 of the *Constitution*. His Honour relied[147] on decisions of the United States Supreme Court establishing that the power of courts martial was "entirely independent" of the judicial power of the United States established under its constitution.

113 In *R v Cox; Ex parte Smith*, Dixon J observed[148]:

> "In the case of the armed forces, an apparent exception is admitted and the administration of military justice by courts-martial is considered constitutional[149]. 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."

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146 (1942) 66 CLR 452 at 466, 467-468, quoting *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ.

147 *Bevan* (1942) 66 CLR 452 at 467, referring to *Dynes v Hoover* (1858) 61 US 65, *Kurtz v Moffitt* (1885) 115 US 487, Willoughby, *The Constitutional Law of the United States*, 2nd ed (1929), vol 3 at 1542 and Willis, *Constitutional Law of the United States* (1936) at 447.

148 (1945) 71 CLR 1 at 23.

149 *Bevan* (1942) 66 CLR 452 at 467, 468 per Starke J, 481 per Williams J.

114 It has been suggested[150] that Dixon J's observation was ambiguous. But if so, it has not previously been taken to mean that service tribunals do not exercise judicial power. In *Re Tracey; Ex parte Ryan*, Mason CJ, Wilson and Dawson JJ considered[151] it to be uncontroversial that service tribunals exercise judicial power, observing that "[t]here has never been any real dispute about that", and that, rather, the "real question" was whether such tribunals exercise the judicial power of the Commonwealth under Ch III of the *Constitution*. Their Honours went on to observe[152] that, because "the proper organization of a defence force requires a system of discipline which is administered judicially, not as part of the judicature erected under Ch III, but as part of the organization of the force itself", "the power to make laws with respect to the defence of the Commonwealth contains within it the power to enact a disciplinary code standing outside Ch III and to impose upon those administering that code the duty to act judicially".

115 Likewise, Brennan and Toohey JJ were unambiguously of the view[153] that service tribunals exercise judicial power, but not "the judicial power of the Commonwealth". Their Honours reiterated[154] that it was "not open to doubt" that the functions performed by a military tribunal are judicial in character. Deane J, too, was clear that Dixon J's statement in *Cox* should not be taken to mean that Commonwealth service tribunals do not exercise judicial power. As his Honour explained[155]:

> "A Commonwealth military tribunal is a Commonwealth instrumentality acting under the authority of Commonwealth law. When such an instrumentality so acting exercises powers of trial and punishment of a person charged with an offence against a law (albeit a military law) of the

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150 Reasons of Kiefel CJ, Bell and Keane JJ at [46].

151 (1989) 166 CLR 518 at 540.

152 *Re Tracey* (1989) 166 CLR 518 at 541.

153 *Re Tracey* (1989) 166 CLR 518 at 572.

154 *Re Tracey* (1989) 166 CLR 518 at 572, referring to *R v Army Council; Ex parte Sandford* [1940] 1 KB 719 at 725 per Goddard LJ and *Attorney-General v British Broadcasting Corporation* [1981] AC 303 at 342 per Lord Salmon, 360 per Lord Scarman.

155 *Re Tracey* (1989) 166 CLR 518 at 582-583.

> Commonwealth, it is exercising powers which are judicial in character[156] and which appertain to the Commonwealth. *That being so, the legal rationalization of any immunity of those powers from the net cast by Ch III of the Constitution does not lie in a denial of their intrinsic identity either as judicial power or as part of the judicial power of the Commonwealth*. Nor does it lie in reversing the express words of the Constitution and making Ch III 'subject to' s 51(vi) with the consequence that the Parliament has legislative authority to confer upon military tribunals any judicial powers whose conferral might reasonably be seen as appropriate and adapted for the purposes of defence. The legal rationalization of such immunity 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 have traditionally been seen as lying outside what Dixon J described as 'the judicial system administering the law of the land'[157]." (emphasis added)

116 In *Re Nolan; Ex parte Young*, this Court again confirmed[158] that the jurisdiction of service tribunals is supported by s 51(vi) of the *Constitution* as an "apparent exception" to Ch III. Gaudron J, though dissenting in the result, observed[159]:

> "It may not yet be possible to define 'judicial power' in a way that is 'at once exclusive and exhaustive'[160]. But, it is beyond dispute that the power to determine whether a person has engaged in conduct which is forbidden by law and, if so, to make a binding and enforceable declaration as to the consequences which the law imposes by reason of that conduct lies at the heart of exclusive judicial power. The power which the Act confers on service tribunals to hear and determine service offences is a power of that kind. Indeed, I do not understand the judgments in *Re Tracey* or the arguments in this case to suggest otherwise. Rather, as I understand it, it is said that the power which the Act confers on service tribunals stands outside Ch III because it is a power exercised over persons subject to military

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156 See, eg, *R v "Daily Mail"; Ex parte Farnsworth* [1921] 2 KB 733; *Attorney-General v British Broadcasting Corporation* [1981] AC 303 at 360 per Lord Scarman.

157 *Cox* (1945) 71 CLR 1 at 23.

158 (1991) 172 CLR 460 at 474-475 per Mason CJ and Dawson J, 479 per Brennan and Toohey JJ.

159 *Re Nolan* (1991) 172 CLR 460 at 497.

160 *R v Davison* (1954) 90 CLR 353 at 366 per Dixon CJ and McTiernan J.

discipline, and, for historical and practical reasons, military authorities have long exercised a power, like judicial power, over those persons."

117 In a similar vein, in *Re Aird; Ex parte Alpert*, Kirby J acknowledged[161] that the authorities established acceptance of a "legitimate ambit for service justice, including in peacetime, comprising a form of 'judicial power' outside Ch III".

118 Subsequently, in *White v Director of Military Prosecutions*, a majority of the Court re-endorsed[162] the view that, although the power exercised by service tribunals is not "the judicial power of the Commonwealth", it is judicial power. Gleeson CJ characterised[163] Dixon J's statement in *Cox* – that service tribunals "do not form part of the judicial system administering the law of the land" – as echoing Starke J's observation in *Bevan* that "the Supreme Court of the United States had held that courts martial form no part of the judicial system of the United States". His Honour embraced[164] the language of Brennan and Toohey JJ in *Re Tracey*, reasoning that "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'". Likewise, the plurality of Gummow, Hayne and Crennan JJ concluded[165] that the power exercised by service tribunals is judicial power, albeit that it would be contrary to the decisions in *Bevan* and *Cox* to conclude that military tribunals necessarily exercise "the judicial power of the Commonwealth". Only Callinan J was of the opinion that the power of service tribunals is executive power, being "an aspect of the defence and executive powers outside Ch III of the

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161 (2004) 220 CLR 308 at 343 [110].

162 (2007) 231 CLR 570 at 585-586 [12]-[14] per Gleeson CJ, 595-596 [50]-[51] per Gummow, Hayne and Crennan JJ.

163 *White* (2007) 231 CLR 570 at 585 [13].

164 *White* (2007) 231 CLR 570 at 586 [14].

165 *White* (2007) 231 CLR 570 at 595-596 [50]-[51].

Constitution"[166] that "should still be exercised, so far as is reasonably possible, in a proper and judicial way"[167].

119 Granted, in *Lane v Morrison*, French CJ and Gummow J conjectured[168] that Starke J's statement in *Bevan* could be explained by an historical and misguided tendency to fail to distinguish between the obligation of an administrative body to "act judicially" and "the well-settled notion of exercising judicial power"[169]. Their Honours posited[170] that such phraseology was apt to obscure the fact that "the only judicial power which the *Constitution* recognises is that exercised by the branch of government identified in Ch III". But that was not the view of the plurality comprised of Hayne, Heydon, Crennan, Kiefel and Bell JJ. The constitutional question presented for resolution was whether the Australian Military Court ("the AMC") established by s 114 of the *Defence Force Discipline Act 1982* (Cth) exercised the judicial power of the Commonwealth. The Commonwealth had argued that the functions performed by service tribunals previously adjudicated upon involved an exercise of judicial power that was not the judicial power of the Commonwealth[171]. The plurality did not reject that proposition. Rather to the contrary, their Honours observed[172] only that "reference to the exercise of a species of judicial power that is not the judicial power of the Commonwealth does not assist the resolution of the issue in this case", because, by purporting to situate the AMC outside the chain of command that had ensured that service tribunals the subject of the prior regime were subject to review and confirmation, the decisions of the AMC were ostensibly given "binding and authoritative" effect and, therefore, the AMC was impermissibly invested with the judicial power of the

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166 *White* (2007) 231 CLR 570 at 650 [244].

167 *White* (2007) 231 CLR 570 at 649 [240].

168 (2009) 239 CLR 230 at 247-248 [47]-[48], referring to *Kioa v West* (1985) 159 CLR 550 at 583-584 per Mason J and *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 365-366 per Deane J.

169 Quoting *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 365-366 per Deane J.

170 *Lane* (2009) 239 CLR 230 at 248 [48].

171 *Lane* (2009) 239 CLR 230 at 255 [78] per Hayne, Heydon, Crennan, Kiefel and Bell JJ.

172 *Lane* (2009) 239 CLR 230 at 255 [78], 260-261 [96].

Commonwealth[173]. The provisions creating the AMC thus fell outside s 51(vi), which, as French CJ and Gummow J observed[174], does not support the existence of a system of "legislative courts" akin to the tribunals existing in the United States.

120 To the same effect, in *Haskins v The Commonwealth*, six members of the High Court stated[175]:

> "Legislation permitting service tribunals to punish service members has been held to be valid on the footing that there is, in such a case, no exercise of the judicial power of the Commonwealth. Punishment of a member of the defence force for a service offence, even by deprivation of liberty, can be imposed without exercising the judicial power of the Commonwealth. Because the decisions made by courts martial and other service tribunals are amenable to intervention from within the chain of command, the steps that are taken to punish service members are taken only for the purpose of, and constitute no more than, the imposition and maintenance of discipline within the defence force; they are not steps taken in exercise of the judicial power of the Commonwealth."

121 It follows that, apart from the obiter observations of French CJ and Gummow J, *Lane* and *Haskins* do not support the proposition that service tribunals do not exercise judicial power[176]. Nor should their Honours' observations in that respect be regarded as persuasive; for they fail to account for the reality that the *Constitution* does recognise other forms of judicial power the ultimate source of which is Commonwealth legislative power[177]. *Lane* and *Haskins* establish that, should Parliament wish to create a service body with the *character* of a Ch III court, the body must be constituted as a Ch III court. The exercise of judicial power by a service tribunal is distinguishable from that of "the judicial power of the

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173 *Lane* (2009) 239 CLR 230 at 261 [97]-[98] per Hayne, Heydon, Crennan, Kiefel and Bell JJ.

174 *Lane* (2009) 239 CLR 230 at 243 [30].

175 (2011) 244 CLR 22 at 36 [21] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

176 cf reasons of Kiefel CJ, Bell and Keane JJ at [52]-[53].

177 See, eg, *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 613-617 [104]-[118] per Gageler J, 635-637 [174]-[181] per Keane J, citing *Spratt v Hermes* (1965) 114 CLR 226 at 242-243 per Barwick CJ, 251 per Kitto J, 260-261 per Taylor J, 266 per Menzies J, 278 per Windeyer J, 282 per Owen J.

Commonwealth" only so long as the tribunal is of a military character, and, therefore, imbuing such a body with too many trappings of a Ch III court is apt to blur the distinction to an intolerable extent[178]. That reasoning is consistent with, and does not evince an intention to overturn, the longstanding recognition that the exercise of military discipline involves an exception to the exclusive exercise of judicial power by Ch III courts[179].

122 Moreover, with all respect to those who take a different view, I see little of substance to be gained, and the prospect of uncertainty being created, by now reclassifying the power of service tribunals as administrative power. The established position of this Court is that, in the interests of continuity and consistency in the law, previous decisions of the Court are not lightly to be overturned[180] – and almost certainly not where they rest upon a principle worked out in a significant succession of cases; there is no relevant difference between the reasons of the Justices constituting the majority in the earlier decisions; the earlier decisions have achieved a useful result and not caused considerable inconvenience; and the earlier decisions have been independently acted upon in a way that militates against change[181]. Here, the recognition that the power exercised by service tribunals is judicial power is one which was worked out over a succession of cases culminating in *Re Tracey*, *Re Nolan* and *White*; there were no relevant differences between the Justices who so held; the holding has achieved a useful result of balancing the competing constitutional demands of s 51(vi) and Ch III of the *Constitution*; and it has been acted on by service tribunals without difficulty since at least *Re Tracey*[182]. Most pertinently for present purposes, as will be seen[183], it is the recognition of the power exercised by service tribunals as a species of judicial power sitting outside the requirements of Ch III which explains why

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178 See the discussion in Stellios, *The Federal Judicature: Chapter III of the Constitution*, 2nd ed (2020) at 290-291.

179 See [111]-[118] above.

180 See, eg, *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599 per Gibbs J, 602 per Stephen J, 620, 630 per Aickin J; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 352-353 [70]-[71] per French CJ.

181 See and compare *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ.

182 *Re Aird* (2004) 220 CLR 308 at 336 [86] per Kirby J.

183 See [126] below.

determination of whether the jurisdiction of a service tribunal in a given case can be viewed as reasonably appropriate and adapted to the defence of the Commonwealth necessarily depends on the nature and circumstances of the subject offending.

The extent of service tribunals' jurisdiction

123 In *Re Tracey*, Brennan and Toohey JJ propounded[184] as the test of a service tribunal's jurisdiction that service proceedings may be brought against a member of the defence force "if, but only if, those proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline". By contrast, Mason CJ, Wilson and Dawson JJ posited[185] that it is within the legislative competence of the Parliament to provide that conduct on the part of a member of the defence force that would constitute a civil criminal offence shall, regardless of the nature of the offence and the circumstances of its commission, constitute a service offence. Subsequent decisions of the Court in *Re Aird* and *White* in effect accepted[186] the Brennan and Toohey JJ test.

124 Arguably, the position remains now, as it was at the time of *Re Aird*, that "[t]here is no legal principle that binds this Court to the application of a given rule in the present case" and that the test of service tribunals' jurisdiction propounded by Brennan and Toohey JJ in *Re Tracey* is simply "[t]he highest common denominator of agreement established by the earlier authority"[187]. But compared to the alternative proposed by Mason CJ, Wilson and Dawson JJ, it has more to commend it.

125 As McHugh J observed[188] in effect in *Re Aird*, the difference between the two tests is akin to the difference between the "service connection" test previously favoured by the United States Supreme Court, and the "service status" test which that Court adopted in *Solorio v United States*[189]. The essence of the Supreme

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184 (1989) 166 CLR 518 at 570.

185 *Re Tracey* (1989) 166 CLR 518 at 543-545.

186 *Re Aird* (2004) 220 CLR 308 at 314 [8] per Gleeson CJ, 322 [37]-[38], 324 [43] per McHugh J, 330 [69] per Gummow J, 356 [156] per Hayne J; *White* (2007) 231 CLR 570 at 589 [24] per Gleeson CJ, 601-602 [73] per Gummow, Hayne and Crennan JJ.

187 *Re Aird* (2004) 220 CLR 308 at 336-337 [88] per Kirby J.

188 (2004) 220 CLR 308 at 321 [36].

189 (1987) 483 US 435.

Court's reasoning in *Solorio* was that the latter has the advantage of providing a bright line distinction[190]. But as Kirby J (albeit in dissent) demonstrated[191] in *Re Aird*, despite that advantage, the service status test is "incompatible with Australia's constitutional history and text and with the highest measure of agreement to which past judicial concurrence in this Court has extended".

126 The reasons why that is so were explained at length in the judgments of Brennan and Toohey JJ and Deane J in *Re Tracey* and it does not avail to repeat them. Suffice to say that in substance they conduce to the need to reconcile the two competing constitutional objectives of, on the one hand, s 51(vi) of the *Constitution* (for which it is appropriate to repose in service tribunals a broad authority to impose discipline on members of the defence force according to the exigencies of time, place and circumstances), and, on the other hand, Ch III, as informed by its history (which requires that the judicial power capable of being exercised by service tribunals be limited to what can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline). In *Re Tracey*, Deane J compendiously summarised the need for, and dimensions of, that reconciliation as follows[192]:

> "Th[e] traditional confinement of the nature and range of the disciplinary powers of military tribunals has long been rightly recognized as fundamental to our system of government[193]. It avoids the creation of a military class removed from the reach of the ordinary law and courts of the land[194]. It protects the civilian from being subjected to military law and deprived of the benefits and safeguards of the administration of justice by independent courts. It limits the extent to which those subject to military authority are deprived of those benefits and safeguards to what is 'thought necessary' for the maintenance and enforcement of military discipline and

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190 (1987) 483 US 435 at 449-451 per Rehnquist CJ.

191 (2004) 220 CLR 308 at 339 [96].

192 (1989) 166 CLR 518 at 584-585.

193 See, eg, *O'Callahan v Parker* (1969) 395 US 258 at 268 per Douglas J.

194 See, eg, *Burdett v Abbot* (1812) 4 Taunt 401 at 449 per Mansfield CJ [128 ER 384 at 403]; *Pitchers v Surrey County Council* [1923] 2 KB 57 at 75 per Atkin LJ; *Pirrie v McFarlane* (1925) 36 CLR 170 at 227 per Starke J; *The Illawarra District County Council v Wickham* (1959) 101 CLR 467 at 503 per Windeyer J.

> duty[195]. *It is that confinement of the nature and range of the traditional disciplinary powers of such tribunals which has alone enabled them to be rationally seen as not encroaching upon the ordinary administration of criminal justice by courts of law and as beyond the intended reach of Ch III of the Constitution*. In that regard, it should be borne in mind that, in 1900, the unanimous judgment of a very strong Court of Exchequer Chamber (Kelly CB, Martin, Bramwell, Channell, Pigott, and Cleasby BB; Byles, Keating, Brett and Grove JJ) in *Dawkins v Lord Rokeby*[196] stood as authority for the proposition that, when the whole question involved in a cause related to a matter of military discipline ('a military question'), the cause was 'not cognizable in a court of law'[197] for the reason that cases 'involving questions of military discipline and military duty alone are cognizable only by a military tribunal'[198]. As a matter of legal principle, that perception of a dichotomy between the disciplinary functions of military tribunals and the jurisdiction of ordinary courts of law is open to serious question[199]. As a matter of historical fact, however, the perception itself remains of undiminished importance both in understanding why it has been held by the Court that the framers of the Constitution could not have intended to include military disciplinary powers in the judicial power which Ch III exclusively vested in courts which are independent of the Commonwealth Executive and in determining the nature and scope of the military disciplinary powers so excluded." (emphasis added)

127 In *White*, Gleeson CJ affirmed the essential correctness of that approach. As his Honour observed[200], the problem of determining the offences in respect of which Parliament can confer judicial power on service tribunals to try civil criminal offences committed by service personnel is one which necessitates reconciling the need for the armed forces to maintain and enforce service discipline with the protections contained in Ch III and the separation of powers inherent in

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195 *Groves v The Commonwealth* (1982) 150 CLR 113. See also, eg, *MacKay v The Queen* [1980] 2 SCR 370 at 408 per McIntyre J.

196 (1873) LR 8 QB 255.

197 *Dawkins v Lord Rokeby* (1873) LR 8 QB 255 at 270 per Kelly CB.

198 *Dawkins v Lord Rokeby* (1873) LR 8 QB 255 at 271 per Kelly CB.

199 See *Gibbons v Duffell* (1932) 47 CLR 520 at 527 per Gavan Duffy CJ, Rich and Dixon JJ, 531 per Starke J; *Groves v The Commonwealth* (1982) 150 CLR 113 at 127-128 per Stephen, Mason, Aickin and Wilson JJ.

200 *White* (2007) 231 CLR 570 at 589 [24].

the structure of the *Constitution*. And as his Honour concluded[201], the response which Brennan and Toohey JJ posited in *Re Tracey* recognises the impossibility of classifying an offence as either military or civil according only to the technical elements of the offence while ignoring the circumstances in which the offence is committed.

128 By contrast, the idea that it is within the legislative competence of the Parliament to provide that conduct of a member of the defence force which constitutes a civil criminal offence shall constitute a service offence regardless of the nature and circumstances of the commission of the offence presents as oblivious to the effect of the offence on the maintenance and enforcement of service discipline[202], and thus capable of subjecting service personnel to the abnegation of Ch III protections without consequent gain in the maintenance and enforcement of service discipline.

129 True it is that the Parliament has broad power under s 51(vi) of the *Constitution* to determine what is necessary for the purpose of defence of the Commonwealth and thus for the maintenance or enforcement of service discipline. It is not for this Court to substitute for the will of Parliament what the Court may consider to be a preferable solution. But equally, as with any other purposive head of legislative power, so also with the defence power, Parliament cannot determine that something is for the purpose of the power when, on any reasonable view of the matter, it is not[203]. To adopt and adapt the language of Dixon J in *Williams v Melbourne Corporation*[204]:

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201 *White* (2007) 231 CLR 570 at 589 [24].

202 See reasons of Gordon J at [140]-[141].

203 *McCulloch v Maryland* (1819) 17 US 316 at 421, 423 per Marshall CJ for the Court; *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 320-322 per Higgins J, 343-345 per Barton J, 357-358 per O'Connor J; *The Commonwealth and the Postmaster-General v The Progress Advertising and Press Agency Co Pty Ltd* (1910) 10 CLR 457 at 469 per Isaacs J; *Farey v Burvett* (1916) 21 CLR 433 at 440 per Griffith CJ, 460 per Higgins J; *Stenhouse v Coleman* (1944) 69 CLR 457 at 467 per Starke J, 471 per Dixon J; *Wertheim v The Commonwealth* (1945) 69 CLR 601 at 605 per Latham CJ; *Marcus Clark & Co Ltd v The Commonwealth* (1952) 87 CLR 177 at 226 per McTiernan J.

204 (1933) 49 CLR 142 at 155. See also *South Australia v Tanner* (1989) 166 CLR 161 at 165 per Wilson, Dawson, Toohey and Gaudron JJ; *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 574-578 per Gummow J (Hill J agreeing).

> "The true nature and purpose of the [defence] power must be determined, and it must often be necessary to examine the operation of the [law] in the local circumstances to which it is intended to apply. Notwithstanding that *ex facie* there [may seem to be] a sufficient connection between the subject of the power and that of the [law], the true character of the [law] may then appear to be such that it could not reasonably have been adopted as a means of attaining the ends of the power. In such a case the [law] will be invalid, not because it is inexpedient or misguided, but because it is not a real exercise of the power."

130 Ultimately, therefore, it is for this Court to say whether a propounded enactment is within power[205] – which, in this context, means whether the Court is of the view that the law is "necessary" in the sense of reasonably appropriate and adapted[206] or proportionate[207] to the defence of the Commonwealth[208]. And for the reasons given, to the extent that s 61(3) of the *Defence Force Discipline Act* treats as a service offence a civil criminal offence committed by a member of the defence force regardless of the nature and circumstances of the commission of the offence, it cannot reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline, or, therefore, as reasonably appropriate and adapted or proportionate to the defence of the Commonwealth.

Disposition of the matter

131 That said, I accept that s 61(3) is valid in its application to offences which, because of their nature or circumstances of commission, are inimical to the maintenance or enforcement of service discipline, and, therefore, I accept that it is valid in its application to the offence here alleged. Despite the plaintiff and the complainant being on leave and away from their respective units at the time of the alleged offending, in light of this Court's decision in *White* it cannot seriously be doubted that it would be inimical to service discipline for a trained, serving infantryman violently to assault a female member of the defence force because she has spurned his sexual overtures.

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205 See [129] fn 203 above.

206 *Ronpibon Tin NL v Federal Commissioner of Taxation* (1949) 78 CLR 47 at 56 per Latham CJ, Rich, Dixon, McTiernan and Webb JJ.

207 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

208 *Stenhouse* (1944) 69 CLR 457 at 471 per Dixon J.

Conclusion

132 It follows that empowering a service tribunal to deal with the matter can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline, and, on that basis, the application should be dismissed. Orders should be made as proposed by the plurality.

133 GORDON J. The Commonwealth Parliament's capacity to legislate under s 51(vi) of the *Constitution* for the provision of military discipline service tribunals stands outside of Ch III of the *Constitution*[209]. The justification for the Commonwealth Parliament to grant, outside of Ch III, disciplinary powers to be exercised judicially by members of the armed forces is the need to maintain or enforce service discipline. As Gleeson CJ said in *White v Director of Military Prosecutions*[210], "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*'" (emphasis added). And as Brennan and Toohey JJ said earlier in *Re Tracey; Ex parte Ryan*[211], "the imposition of punishments by service authorities ... 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" (emphasis added).

134 Despite the fact that service tribunals exercise disciplinary powers which fall outside of Ch III, those tribunals act judicially[212]. Their function is not merely administrative or disciplinary[213]; they exercise judicial power[214]. That service tribunals exercise judicial power has been recognised for over 100 years in

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209 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 540-541, 564-565, 572-573; *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 586 [14], 597-598 [56]-[58], [60], 647 [236], 650 [246].

210 (2007) 231 CLR 570 at 586 [14], quoting *Re Tracey* (1989) 166 CLR 518 at 574.

211 (1989) 166 CLR 518 at 572. See also *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 497; *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 314 [9], 319 [31], 325 [49], 356 [156]; *White* (2007) 231 CLR 570 at 586 [14], 589 [24].

212 *R v Cox; Ex parte Smith* (1945) 71 CLR 1 at 23; *Re Tracey* (1989) 166 CLR 518 at 539; *Lane v Morrison* (2009) 239 CLR 230 at 237 [10], 255 [77].

213 *Re Tracey* (1989) 166 CLR 518 at 537-538.

214 *R v Army Council; Ex parte Sandford* [1940] 1 KB 719 at 725; *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 466; *Cox* (1945) 71 CLR 1 at 23; *Attorney-General v British Broadcasting Corporation* [1981] AC 303 at 360; *Re Tracey* (1989) 166 CLR 518 at 537-540, 572-573; *White* (2007) 231 CLR 570 at 596-597 [52]-[55]; *Lane* (2009) 239 CLR 230 at 237 [10]. cf *Lane* (2009) 239 CLR 230 at 248 [48], 256-261 [81]-[96].

Australia[215]. They do so under s 51(vi) of the *Constitution* and the *Defence Force Discipline Act 1982* (Cth) ("the DFDA") (and outside of Ch III of the *Constitution*). As Mason CJ, Wilson and Dawson JJ observed in *Re Tracey*[216], "it [is not] 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".

135 But characterisation of power as judicial on the one hand, or as executive or administrative on the other, is not a step that need be taken in considering the question of validity raised in this case. It is sufficient to record that the exercise of the judicial power of the Commonwealth within Ch III and the operation of service tribunals acting judicially outside of Ch III are concurrent; they intersect. Consistent with the history of concurrent jurisdiction of civil courts and service tribunals prior to Federation[217], the DFDA is "supplementary to, and not exclusive of, the ordinary criminal law"[218]. A defence force magistrate or court martial is an officer of the Commonwealth[219] whose decisions are still subject to judicial review under s 75(v) of the *Constitution* even though the service tribunal would not be subject to Ch III requirements, whether or not the tribunal exercises a form of judicial power outside of Ch III.

136 It is for those reasons that applying the descriptor "judicial" on one the hand, or "administrative" or "executive" on the other, to the power exercised by a service tribunal does not assist the inquiry about the validity of s 61(3) of the DFDA in its relevant operation. Validity is determined by asking whether s 61(3) of the DFDA in its application to the charge laid against the plaintiff is a law with respect to defence.

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215 *Re Tracey* (1989) 166 CLR 518 at 573, citing Moore, *The Constitution of The Commonwealth of Australia*, 2nd ed (1910) at 308, 315-316, 321.

216 (1989) 166 CLR 518 at 537.

217 *Bevan* (1942) 66 CLR 452 at 466-467; *Re Tracey* (1989) 166 CLR 518 at 541-543, 562-563, 572-573; *Re Nolan* (1991) 172 CLR 460 at 481-482; *White* (2007) 231 CLR 570 at 596-597 [52]-[55].

218 *McWaters v Day* (1989) 168 CLR 289 at 299. See also DFDA, ss 63, 188GA(1)(b).

219 See *Re Tracey* (1989) 166 CLR 518 at 572.

137 There are two steps in answering that question. First, there was no dispute in this matter that[220]:

> "[i]t is open to Parliament to provide that any conduct which constitutes a civil offence shall constitute a service offence, if committed by a defence member ... [where] the proscription of that conduct is relevant to the maintenance of good order and discipline in the defence forces. The power to proscribe such conduct on the part of defence members is but an instance of Parliament's power to regulate the defence forces and the conduct of the members of those forces. In exercising that power it is for Parliament to decide what it considers necessary and appropriate for the maintenance of good order and discipline in those forces."

This permits Parliament, subject to the next step, to prescribe a norm of conduct; that is, to enact a disciplinary code[221].

138 The next step is that "Parliament's decision will prevail so long ... as the rule which it prescribes is sufficiently connected with the regulation of the forces and the good order and discipline of defence members"[222]. But how is sufficient connection to be assessed?

139 There are numerous cases about the validity of provisions concerning defence force discipline[223]. Those cases use various means of expressing the connection sufficient to bring a particular offence or charge within the defence power[224]. The great variety of expressions used demonstrates that the test of connection cannot be, and should not be, reduced to a single, all-embracing formula. In particular, the shorthand expressions "service status" and

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220 *Re Tracey* (1989) 166 CLR 518 at 545.

221 *Re Tracey* (1989) 166 CLR 518 at 541; *Re Aird* (2004) 220 CLR 308 at 314 [8].

222 *Re Tracey* (1989) 166 CLR 518 at 545. See also *Re Aird* (2004) 220 CLR 308 at 314 [8], 329 [66], 330 [69].

223 *Bevan* (1942) 66 CLR 452; *Cox* (1945) 71 CLR 1; *Re Tracey* (1989) 166 CLR 518; *Re Nolan* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18; *Re Aird* (2004) 220 CLR 308; *White* (2007) 231 CLR 570; *Lane* (2009) 239 CLR 230.

224 See, eg, *Re Tracey* (1989) 166 CLR 518 at 545, 570; *Re Nolan* (1991) 172 CLR 460 at 474; *Re Tyler* (1994) 181 CLR 18 at 30; *Re Aird* (2004) 220 CLR 308 at 312-313 [5], 314 [8]-[9], 323 [40], 324 [43], 325 [49], 329-330 [67]-[69]. See also *Leask v The Commonwealth* (1996) 187 CLR 579 at 591.

"service connection" obscure the nature of the inquiry that must be made[225]: namely, is the law in its relevant application to the offence and charge in issue a law with respect to defence? That demands attention to the connection between the charge that has been laid and defence force discipline.

140 The two separate steps are both necessary and important. The steps recognise that service tribunals sit outside, but operate concurrently with, Ch III. They permit, as has occurred here with ss 61 and 63 of the DFDA, Parliament to establish a code of conduct for the maintenance of good order and discipline in the defence forces and to determine the extent to which that code intersects with Ch III. And no less importantly, they recognise that some forms of conduct proscribed by the ordinary criminal law fall outside of the power in s 51(vi) of the *Constitution* to regulate the defence forces and the conduct of the members of the forces. Thus, the justification for Parliament's capacity to legislate under s 51(vi) and *outside of Ch III* is taken into account.

141 Conduct proscribed by the ordinary criminal law that would likely fall outside s 51(vi) is exemplified by the following. A member of the defence forces driving on a highway while off-duty, who was desperate to relieve themselves and so stopped and left their vehicle to do so behind a tree on the roadside (for example, because they had a medical condition requiring them to urinate frequently), would contravene the *Crimes Act 1900* (ACT) and could be proceeded against in a service tribunal for a charge of urinating in a public place[226]. A member of the defence forces, similarly driving along a highway while off-duty, who opened the window of their vehicle with the result that food packaging sitting in the vehicle was accidentally blown out of the window, could be proceeded against in a service tribunal for a charge of littering[227]. In neither of these examples, however, could the conduct of the member of the defence forces have any bearing on military discipline, morale, efficiency or the ability of the military to carry out its

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225 *White* (2007) 231 CLR 570 at 580 [3], 598-599 [60]-[61]. See also *Re Nolan* (1991) 172 CLR 460 at 489.

226 *Crimes Act 1900* (ACT), s 393A. This is a strict liability offence: s 393A(2). See also DFDA, ss 3(1) definition of "Territory offence", 61(3); *Jervis Bay Territory Acceptance Act 1915* (Cth), s 4A.

227 *Litter Act 2004* (ACT), s 8. This is also a strict liability offence: s 8(8). See also DFDA, ss 3(1) definition of "Territory offence", 61(3); *Jervis Bay Territory Acceptance Act*, s 4A.

functions[228]. The laws in those operations would not be laws with respect to defence.

142 Adopting a "service status" test appears to entail the contrary conclusion. The "service status" test appears to treat all forms of alleged offending by service members as conduct that can be dealt with by service tribunals. So too does an approach that considers s 61(3) of the DFDA in all its applications to be supported by s 51(vi). Under both approaches, no inquiry would be undertaken in respect of the charge that was laid and its connection with defence force discipline. That inquiry must be made in order to demonstrate that the law in its relevant operation is supported by the defence power. Abandoning that inquiry would fail to recognise that military discipline is supplementary to, and not exclusive of, the ordinary criminal law and that military tribunals exercise powers which fall outside of, but operate concurrently with, Ch III. Not only is the intersection of Ch III with disciplinary tribunals created under s 51(vi) and the DFDA consistent with the separation of powers; the point at which they intersect ensures that a member of the defence force receives the benefit of that separation of powers in cases unconnected with military discipline.

143 In this matter, in relation to the first step in assessing constitutional validity, s 61(3) of the DFDA is not challenged in its entirety and nor could it be. The Commonwealth Parliament has the capacity to legislate under s 51(vi) for the provision of service tribunals[229]. As the plaintiff accepted, this extends to the power to enact a disciplinary code[230].

144 It is at the second step that s 61(3) of the DFDA is challenged – that is, in its application to the plaintiff. That challenge is readily answered by reference to the authority of this Court[231]. The plaintiff is charged with assault occasioning actual

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228 See *Re Tracey* (1989) 166 CLR 518 at 545; *Re Aird* (2004) 220 CLR 308 at 312-313 [5] (citing *R v Généreux* [1992] 1 SCR 259 at 293), 314 [8], 323-324 [42], 329 [66], 330 [69].

229 *Re Tracey* (1989) 166 CLR 518 at 540-541, 564-565, 572-573; *Re Nolan* (1991) 172 CLR 460 at 474, 479; *Re Tyler* (1994) 181 CLR 18 at 25-26, 29, 39-40; *Re Aird* (2004) 220 CLR 308 at 314 [8], 319 [31], 325 [49], 343 [109]; *White* (2007) 231 CLR 570 at 586 [14], 598 [60], 647 [236], 650 [246].

230 *Re Tracey* (1989) 166 CLR 518 at 541; *Re Aird* (2004) 220 CLR 308 at 314 [8], 319 [31].

231 *Re Tracey* (1989) 166 CLR 518 at 545; *Re Aird* (2004) 220 CLR 308 at 312-313 [5] (citing *Généreux* [1992] 1 SCR 259 at 293), 314 [8]-[9], [11], 323-324 [42], 325

bodily harm (bruising to the complainant's throat) under s 61(3) of the DFDA, which picks up s 24(1) of the *Crimes Act*. The plaintiff is alleged to have attacked the complainant – grabbing her by the throat and holding her against the wall; shaking her by the throat backwards and forwards against the wall; tackling her to the ground and putting both of his knees on her chest; and choking her. The plaintiff was a member of the Australian Defence Force, though off-duty, at the time of the alleged offence.

145 The alleged offence was one of violence. As McHugh J said in *Re Aird; Ex parte Alpert*, "[i]t is central to a disciplined defence force that its members are not persons who engage in uncontrolled violence"[232]. Conduct that "involves serious violence and disregard for the dignity of the victim ... clearly has the capacity to affect discipline, morale, and the capability of the Defence Force to carry out its assignments ... [I]t is a matter that pertains directly to the discipline, efficiency and morale of the military"[233]. On any view, there is a sufficient connection between the charge laid against the plaintiff and the regulation of the forces for the purpose of maintaining and enforcing good order and discipline of service members[234]. Such violence is inconsistent with a disciplined service; it is a matter that pertains directly to the discipline, efficiency and morale of service members.

Orders

146 For those reasons, the application should be dismissed with costs.

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[49], 329 [66], 330 [69], 356 [156]; *White* (2007) 231 CLR 570 at 581 [4] (quoting *Généreux* [1992] 1 SCR 259 at 294), 588-589 [21].

232 (2004) 220 CLR 308 at 323 [42]; see also 314 [9], 325 [49], 356 [156].

233 *Re Aird* (2004) 220 CLR 308 at 313 [5] (citing *Généreux* [1992] 1 SCR 259 at 293), 314 [9], [11], 323-324 [42], 325 [49], 356 [156]; *White* (2007) 231 CLR 570 at 581 [4], 588-589 [21]; Australian Army, *The Army Family and Domestic Violence Action Plan* (2016) at [2].

234 See, eg, *Re Tracey* (1989) 166 CLR 518 at 545; *Re Aird* (2004) 220 CLR 308 at 314 [8], 329 [66], 330 [69].

EDELMAN J.

Four approaches to the defence power and the judicial power of the Commonwealth

147 The constitutional writ sought in this case concerns the defence power in s 51(vi) of the *Constitution* to make laws with respect to:

> "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".

148 There is no issue in this case concerning the essential meaning of these words of the defence power in s 51(vi). Instead, the issue concerns the extent to which the defence power can support Commonwealth laws that confer judicial power upon service tribunals. For at least three decades the jurisprudence of this Court has been divided upon this issue, with different approaches taken to the application of s 51(vi) to service tribunals. Four different approaches have been taken. None has commanded the acceptance of a majority of the Court as a matter of ratio decidendi.

149 The first approach might be described as a purist approach. On that approach, most of the conferral of judicial power upon service tribunals is invalid because it contravenes the established constitutional implication that the judicial power of the Commonwealth can only be exercised in accordance with the provisions of Ch III of the *Constitution*. This approach is perhaps best illustrated by the reasons of Deane J in *Re Tracey; Ex parte Ryan*[235].

150 The second and third are historical approaches. On those approaches, for historical reasons the judicial power conferred upon service tribunals is an exception to, or not governed by, the implication that such judicial power can only be exercised by a court under Ch III of the *Constitution*. On the historical approaches, the validity of the conferral of such power generally requires the power conferred to conform with the pre-Federation history of its conferral. The two historical approaches are best illustrated by those taken in *Re Tracey; Ex parte Ryan*, by Mason CJ, Wilson and Dawson JJ on the one hand and Brennan and Toohey JJ on the other. On the historical approach of Mason CJ, Wilson and Dawson JJ, s 51(vi) empowers the Commonwealth Parliament to confer power upon service tribunals to discipline for any offence committed by a person with "service status". By contrast, the approach of Brennan and Toohey JJ empowers Commonwealth legislation to confer power upon service tribunals to discipline

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235 (1989) 166 CLR 518 at 585-586.

service personnel only for those offences which have a "service connection", that is, a connection between the offence and the defence power which is more than a mere allegation against a member of the armed services that they committed an offence. Examples of service connection factors were given in *Relford v US Disciplinary Commandant*[236] including matters such as the commission of the offence at a military base or in a time of war. The application of the respective historical approaches has been described by the labels "service status" and "service connection"[237].

151 The fourth approach is one of constitutional synthesis. On this approach, the disciplinary power conferred upon service tribunals is treated as administrative power rather than judicial power. If the disciplinary power conferred on service tribunals is characterised as administrative rather than judicial then it is not governed by the restrictions upon conferral of judicial power in Ch III of the *Constitution*. The historical antecedents of the power of service tribunals would therefore have no bearing on whether that power is conferred consistently with Ch III of the *Constitution*. The issue would be solely whether the law is "with respect to" the head of power contained in s 51(vi) of the *Constitution*. This approach was taken by Callinan J in *White v Director of Military Prosecutions*[238] and it obtained support from members of this Court in *Lane v Morrison*[239].

This case and the approach that should be adopted

152 The particular issue in this case concerns the validity of s 61(3) of the *Defence Force Discipline Act 1982* (Cth), which extends the judicial power to adjudicate upon, and punish, a member of the armed forces to offences provided in the *Crimes Act 1900* (ACT). The plaintiff, Private R, asserted that s 61(3) could not validly apply to the offence with which he was charged, namely assault occasioning actual bodily harm, in the circumstances in which it occurred. He relied upon the historical approach of Brennan and Toohey JJ in *Re Tracey; Ex parte Ryan* and argued that the provision had departed from its historical antecedents and purported to apply to offences with which there was insufficient service connection. The Commonwealth also took the historical approach but

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236 (1971) 401 US 355 at 365. See *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 321-322 [36].

237 *Solorio v United States* (1987) 483 US 435 at 439-441. See also *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 321 [36]; *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 580 [3].

238 (2007) 231 CLR 570 at 649 [240].

239 (2009) 239 CLR 230 at 247-248 [48].

relied upon the approach of Mason CJ, Wilson and Dawson JJ in *Re Tracey; Ex parte Ryan*, to the effect that s 51(vi) empowers the Commonwealth Parliament to confer power upon service tribunals to discipline for any offence committed by a person with "service status".

153 This case could be decided without resolving this issue. It would be enough to say that upon either of the historical approaches which were raised before the Court, s 61(3) of the *Defence Force Discipline Act* is valid in its application to Private R. I was initially attracted to deciding this case on this threshold basis. But, on reflection and in light of the submissions by the Commonwealth urging against the resolution of this dispute on this narrow basis, the better approach is to express a view on the broader issues. After at least three decades of uncertainty there is good reason for this Court to do so.

154 For the reasons which follow, the proper approach to apply is the historical approach of Mason CJ, Wilson and Dawson JJ in *Re Tracey; Ex parte Ryan*.

The alleged assault and Private R's case

155 Private R is a member of the Australian Defence Force, specifically a soldier in the Regular Army, and is therefore a "defence member"[240]. He is alleged to have committed assault occasioning actual bodily harm upon the complainant, another member of the Australian Defence Force with whom he had previously had an intimate relationship. The alleged circumstances of the assault are serious. They are as follows. At an evening social function in Brisbane, Private R made unwanted sexual advances upon the complainant. After the social function, when the complainant went to collect her belongings from a private hotel room, Private R arrived and told her that she was not going home. He grabbed the complainant by the throat and pushed her against the wall. She kept repeating that she wanted to go home. While both of her feet were off the ground, he shook her backwards and forwards against the wall, yelling at her "What is wrong with you!". When she broke free from his grip, he tackled her to the ground and held her there with both of his knees on her chest. He then placed both his hands around her throat, choking her, preventing her from screaming or breathing. She banged her arms against the door and walls of the room to get help. After two security guards entered the room and tackled Private R, she fled the room. Bruises were left around her neck.

156 Private R was charged by the Director of Military Prosecutions under s 61(3) of the *Defence Force Discipline Act*. One effect of s 61 is to apply the provisions of the *Crimes Act* to a defence member who is inside or, in the case of

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240 *Defence Force Discipline Act 1982* (Cth), s 3(1), definition of "defence member".

s 61(3), outside the Jervis Bay Territory[241]. Assault occasioning actual bodily harm is an offence under s 24 of the *Crimes Act* punishable by imprisonment for five years. Private R challenged the jurisdiction of the Defence Force magistrate. That challenge was dismissed by the Defence Force magistrate, who applied the service status test.

157 In this Court, Private R accepted that "unquestionably" the service tribunal exercised judicial power. The Commonwealth adopted the same position. However, Private R submitted that s 61(3) of the *Defence Force Discipline Act* went beyond the permissible limit of judicial power capable of being conferred under s 51(vi) of the *Constitution* because the provision did not have sufficient connection with s 51(vi) in all its applications. He submitted that there was insufficient connection with the defence power merely for a person with "service status" to commit any civil offence. He asserted that there must be an additional service connection between the offence and the purpose connected to s 51(vi) of maintaining or enforcing service discipline. Examples given in Private R's submissions of circumstances that were said to have insufficient "service connection" are speeding in a motor vehicle while a defence member is on holiday or a defence member chopping down a protected tree in their private backyard[242].

The threshold issue

158 A question sometimes to be asked before crossing the threshold to consider the constitutional validity of a statutory provision is whether the provision, if it would otherwise be invalid, could be severed, read down, or partially disapplied[243] so that it would remain valid in its application to the facts before the Court. If so, this Court, in a judgment to which I was a party, has said that it is unnecessary to consider the validity of the provision and that it would ordinarily be inappropriate to do so[244]. Much depends upon the qualifier "ordinarily". In hindsight, this qualification, although flexible, might have been too strict.

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241 Read with *Defence Force Discipline Act*, s 3(1) (definition of "Territory offence") and *Jervis Bay Territory Acceptance Act 1915* (Cth), s 4A.

242 *Road Transport (Road Rules) Regulation 2017* (ACT), s 20; *Tree Protection Act 2005* (ACT), s 15.

243 *Clubb v Edwards* (2019) 93 ALJR 448 at 534-537 [415]-[425]; 366 ALR 1 at 107-111.

244 *Knight v Victoria* (2017) 261 CLR 306 at 324 [33], citing *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 258 and *Tajjour v New South Wales* (2014) 254 CLR 508 at 585-589 [168]-[176].

159 A strict approach to this threshold issue might be seen in statements that a court should never "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied"[245]. In many cases, all that the precise facts will require will be for the Court to say "This provision is valid at least in the circumstances before the Court". Therefore, on a strict view, the Court should always stop at such a conclusion because resolution of the constitutional issue is not necessary for the outcome of the case: "It suffices ... to hold that, as applied to cases like the present, the statute is valid."[246] In my view, however, a less strict approach is more appropriate in light of the role of this Court. This Court would not adequately discharge its functions if it were always, or even ordinarily, to decide constitutional cases on the narrowest basis, which could have the effect of avoiding transparent elucidation of the intellectual principles that provide the foundation for application of the law to different fact scenarios and further development of the law by trial judges and intermediate appellate courts. In my opinion, an assessment of constitutional validity of a challenged provision should be undertaken whenever there is good reason to do so[247]. There may often be good reasons.

160 This proceeding could be easily resolved on the threshold basis, in the same way that a majority of this Court resolved the applications in *Re Aird; Ex parte Alpert*[248]. A provision such as s 24 of the *Crimes Act* lies at the heart of the disciplinary concerns involved in the application of the defence power by s 61(3) of the *Defence Force Discipline Act*. That application recognises the need for members of the Australian Defence Force, who are trained to use force, to comply with proscriptions against force in civil society. Indeed, at the time of the alleged

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245 *Liverpool, New York and Philadelphia Steamship Co v Commissioners of Emigration* (1885) 113 US 33 at 39. See also *United States v Raines* (1960) 362 US 17 at 21 and *Washington State Grange v Washington State Republican Party* (2008) 552 US 442 at 450.

246 *Yazoo and Mississippi Valley Railroad Co v Jackson Vinegar Co* (1912) 226 US 217 at 219-220.

247 *Clubb v Edwards* (2019) 93 ALJR 448 at 534 [411]; 366 ALR 1 at 106. See also (2019) 93 ALJR 448 at 466 [36], 498 [231]-[232]; 366 ALR 1 at 15, 58-59.

248 (2004) 220 CLR 308 at 323-324 [42]-[46] (McHugh J). Gleeson CJ, Gummow and Hayne JJ agreeing at 314 [9], 325 [49], and 356 [156] respectively.

events, the Chief of Army had issued the Army Family and Domestic Violence Action Plan, which provided, in part, that[249]:

> "Army exists for the lawful and disciplined use, or threat of use, of violence to protect Australia and its interests. The ill-disciplined use of violence on operations is a war crime and at home is a criminal offence. Australia empowers its Army members with the skills, knowledge and weaponry to apply lethal force. If Army members engage in ill-disciplined use of violence at home or at work, then Army's confidence in them to execute their duties lawfully and discriminately in circumstances of immense stress on the battlefield is deeply undermined."

161 On the threshold basis, this Court could decide the case on the limited grounds that: (i) the offence of assault occasioning actual bodily harm is a valid application of s 61(3) on either a "service connection" or a "service status" approach; and (ii) it is unnecessary to consider whether the application of s 61(3) to any other offences, such as speeding or cutting down a tree, falls outside the scope of Commonwealth legislative power under s 51(vi) because, to the extent that it does, Parliament has manifested the intent that courts should use a "scalpel rather than a bulldozer" and apply the provision to some offences rather than none[250]. Hence, the possibility that s 61(3) could be disapplied from any circumstances to which it might not have valid application means that those circumstances could be left for another day.

162 There are, however, good reasons not to resolve this case on the threshold basis. If this case were decided on this limited basis it would effectively perpetuate decades of uncertainty until a sufficiently extreme example arose, and was brought to this Court, requiring a choice between the service connection approach and the service status approach. It is unsatisfactory for this Court to perpetuate such a lack of clarity. The Solicitor-General of the Commonwealth was, therefore, correct to abjure any submission that this Court should resolve this case on the threshold basis.

Service tribunals exercise judicial power

163 There are some disciplinary measures under the *Defence Force Discipline Act* that, standing alone, might arguably not have involved the exercise of judicial power. For instance, outside the context of the rest of the *Defence Force Discipline*

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249 Australian Army, *The Army Family and Domestic Violence Action Plan* (2016) at [2].

250 *Seila Law LLC v Consumer Financial Protection Bureau* (2020) 140 S Ct 2183 at 2210-2211. See *Acts Interpretation Act 1901* (Cth), s 15A.

Act, sanctions involving a deduction from a defence member's pay for careless conduct, such as driving a vehicle without due care and attention[251], could arguably be characterised as disciplinary administrative measures rather than as judicial responses to "offences punishable as crimes"[252]. But putting to one side such minor issues of discipline, for more than a century it has been recognised in this country that the power exercised by service tribunals to punish offences is an exercise of judicial power[253]. It is necessary to elaborate upon this point in some detail because of the challenge to this view by the fourth approach to s 51(vi), which I have described as the constitutional synthesis approach.

164 When, in 1942, this Court upheld the death sentences imposed by a naval court martial upon Edward Elias and Albert Gordon[254] there was no suggestion that the sentences were not judicial punishment and were merely an administrative exercise. Starke J accepted that service tribunals exercise judicial power although he asserted that it was not the judicial power "of the Commonwealth"[255]. The approach of Starke J, treating the power as judicial, has been consistently adopted or referred to with approval including by Brennan and Toohey JJ[256], Deane J[257], Gaudron J[258], McHugh J[259], and Gummow, Hayne and Crennan JJ[260].

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251 *Defence Force Discipline Act*, s 40D.

252 *R v White; Ex parte Byrnes* (1963) 109 CLR 665 at 670.

253 Moore, *The Constitution of The Commonwealth of Australia*, 2nd ed (1910) at 308, referring to *Dawkins v Lord Rokeby* (1873) LR 8 QB 255. See also Gageler, "Gnawing at a file: an analysis of *Re Tracey; Ex parte Ryan*" (1990) 20 *Western Australian Law Review* 47 at 49.

254 Their sentences were later commuted. See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 October 1942 at 1395.

255 *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 466-467.

256 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 564-565.

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

258 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 598, 600.

259 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 499; *Hembury v Chief of the General Staff* (1998) 193 CLR 641 at 648 [13].

260 *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 595-596 [50]-[51], 597-598 [57].

It was the approach taken by Mason CJ, Wilson and Dawson JJ in *Re Tracey; Ex parte Ryan*[261], who said "the real question ... 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."[262]

165 The Australian treatment of service tribunals as exercising judicial power has long antecedents in English and United States law. When comparing a military tribunal with the courts of Westminster Hall, Lord Loughborough described the military tribunal as one that "must depend upon the same rules"[263]. English courts have held that service tribunals are courts giving decisions "in a criminal cause or matter"[264] and that, as with any other court of justice, no action for libel or slander lay against the judges, counsel, witnesses or parties giving evidence before a military tribunal since it "has all the qualities and incidents of a court of justice"[265]. By 1872, Clode had written simply of service tribunals that the "State in its Civil aspect delegates Judicial functions to Military Officers"[266].

166 As with English law, courts of the United States have held for well over a century that a service tribunal exercises judicial power: "It is the organism provided by law and clothed with the duty of administering justice in this class of cases" and its judgments "rest on the same basis, and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals"[267]. Hence, as with English law, where a member of the armed services

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261 (1989) 166 CLR 518 at 539-540.

262 (1989) 166 CLR 518 at 540.

263 *Grant v Gould* (1792) 2 H Bl 69 at 100 [126 ER 434 at 450]. See also *Dawkins v Lord Paulet* (1869) LR 5 QB 94 at 119.

264 *R v Army Council; Ex parte Sandford* [1940] 1 KB 719 at 725. See also *Clifford and O'Sullivan* [1921] 2 AC 570 at 581, contrasting a "so-called 'military court'".

265 *Dawkins v Lord Rokeby* (1873) LR 8 QB 255 at 266. See also *Dawkins v Lord Rokeby* (1875) LR 7 HL 744.

266 Clode, *The Administration of Justice Under Military and Martial Law* (1872) at 18.

267 *Ex parte Reed* (1879) 100 US 13 at 23. See also *Grafton v United States* (1907) 206 US 333 at 346; *Ortiz v United States* (2018) 138 S Ct 2165 at 2174.

has been acquitted or convicted of an offence by a civil court[268], in the United States the member cannot be exposed to double jeopardy[269].

167 These historical considerations, by themselves, might have been sufficient for the conclusive characterisation of the power of service tribunals to adjudicate and punish for offences as judicial: "the historical or traditional classification of a function is a significant factor to be taken into account in deciding whether there is an exercise of judicial power involved"[270]. But even apart from this historical treatment, a consideration of the nature of the power exercised and the manner in which it is exercised "would appear to satisfy every analytical test of what is strictly and exclusively judicial" so that service tribunals are "on any view exercising judicial power"[271].

168 As to the nature of the power exercised, a central attribute of judicial power is the imposition of punishment. In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[272], Brennan, Deane and Dawson JJ said that the adjudication and punishment of criminal guilt under a law of the Commonwealth was established as "essentially and exclusively judicial in character". That approach has been taken for more than a century[273] and the statement of their Honours has since been cited with approval in this Court on numerous occasions[274].

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268 Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) at 302, quoted in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 546.

269 *Schlesinger v Councilman* (1975) 420 US 738 at 746; *Ortiz v United States* (2018) 138 S Ct 2165 at 2174, referring to the Double Jeopardy Clause as an independent basis for the conclusion.

270 *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 627, citing *R v Davison* (1954) 90 CLR 353 at 365, 369-370, 381-382 and *Cominos v Cominos* (1972) 127 CLR 588 at 600, 605, 608.

271 Stellios, *Zines's The High Court and the Constitution*, 6th ed (2015) at 299-300.

272 (1992) 176 CLR 1 at 27.

273 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 444.

274 *Magaming v The Queen* (2013) 252 CLR 381 at 399-400 [61]-[62]; *Duncan v New South Wales* (2015) 255 CLR 388 at 407 [41]; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 340 [14]-[15], 357 [88]; *Minogue v Victoria* (2019) 93 ALJR 1031 at 1042 [48]; 372 ALR 623 at 637; *Vella v*

169 A service tribunal such as that created by the *Defence Force Discipline Act* is empowered to make orders upon conviction as punishment. Part IV of the *Defence Force Discipline Act* is entitled "Punishments and orders". It contains provisions concerned with authorised punishments, the scale of punishments, the scale of custodial punishments, concurrent or cumulative punishments, and convictions without punishment. It permits service tribunals to impose punishments in a scale with the most extreme being imprisonment for life[275] or imprisonment for a specific period[276]. In sentencing, the service tribunal must have regard to the principles of sentencing applied by the civil courts from time to time and not merely the need to maintain discipline in the Defence Force[277].

170 As to the manner in which the power is exercised, prior to a trial by a Defence Force magistrate the accused person enters a plea of guilty or not guilty and if the plea is not guilty then the magistrate proceeds to hear evidence[278]. The hearing is generally in public[279], and in the presence of the accused[280]. Evidence may be taken on oath or by affirmation[281]. Court rules of evidence generally apply to the trial as applicable in courts exercising jurisdiction in or in relation to the Jervis Bay Territory[282]. Formal rules of procedure apply[283]. The accused can be represented by a legal practitioner[284]. A record of proceedings is

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Commissioner of Police (NSW) (2019) 93 ALJR 1236 at 1270-1271 [152]; 374 ALR 1 at 43.

275 *Defence Force Discipline Act*, s 68(1)(a). Such punishment may only be imposed where the service tribunal is a general court martial: see Sch 2.

276 *Defence Force Discipline Act*, s 68(1)(b). Not exceeding six months where the service tribunal is a Defence Force magistrate: see Sch 2.

277 *Defence Force Discipline Act*, s 70(1).

278 *Defence Force Discipline Act*, s 135(1).

279 *Defence Force Discipline Act*, s 140.

280 *Defence Force Discipline Act*, s 139(1).

281 *Defence Force Discipline Act*, s 138(1)(a).

282 *Defence Force Discipline Act*, s 146.

283 See *Court Martial and Defence Force Magistrate Rules 2020* (Cth), made pursuant to *Defence Force Discipline Act*, s 149A.

284 *Defence Force Discipline Act*, s 136.

kept[285]. The royal prerogative of mercy is preserved[286]. The accused person is protected against exposure to double jeopardy[287]. A similar approach applies to trials by court martial, although one essential difference is that decisions of fact are made in a manner analogous to a jury by a panel of a President and other members[288]. Unsurprisingly, in *Re Tracey; Ex parte Ryan*[289] Mason CJ, Wilson and Dawson JJ said, with regard to the *Defence Force Discipline Act* in relevantly the same form as present, that a service tribunal has "practically all the characteristics of a court exercising judicial power" and that "no relevant distinction can ... be drawn between the power exercised by a service tribunal and the judicial power exercised by a court".

171 For these reasons, the weight of authority and principle supports the conclusion of Mason CJ, Wilson and Dawson JJ in *Re Tracey; Ex parte Ryan* that service tribunals exercise judicial power. However, from the first decade of this century there have been contrary suggestions that the power might not be judicial but might instead be a mere exercise of administrative power by the executive. One of the first such suggestions was made by Callinan J in *White v Director of Military Prosecutions*[290]. His Honour supported this conclusion by two reasons.

172 The first reason for the suggestion that the power of service tribunals was administrative relied upon the reasons of Starke J in *R v Bevan; Ex parte Elias and Gordon*[291] as precedent. Those reasons were interpreted as suggesting that the discipline and sanctions of military command were matters of executive power to be exercised "judicially" or in a judicial manner. Although, for decades now, it has been customary and convenient to speak of the manner of exercise of administrative power as often requiring procedural fairness rather than requiring exercise in a "judicial" manner or being a "quasi-judicial" power[292], these

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285 *Defence Force Discipline Act*, s 148.

286 *Defence Force Discipline Act*, s 189.

287 *Defence Force Discipline Act*, s 144.

288 *Defence Force Discipline Act*, ss 114, 133. See *R v Stillman* (2019) 436 DLR (4th) 193 at 224 [67].

289 (1989) 166 CLR 518 at 537.

290 (2007) 231 CLR 570 at 649 [240].

291 (1942) 66 CLR 452.

292 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 365-366. See also *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210

confusing descriptions were not uncommon at the time Starke J wrote[293]. However, this was not what Starke J meant by his references to judicial power. His Honour was referring to judicial power in its proper and true sense. He said[294]:

> "This Court has held that the judicial power of the Commonwealth can only be vested in courts and that if any such court be created by Parliament the tenure of office of the justices of such court, by whatever name they may be called, must be for life, subject to the power of removal contained in sec 72 of the *Constitution*. Judicial power for this purpose may be described as '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 binding and authoritative decision (whether subject to appeal or not) is called upon to take action'. Naval courts-martial are set up and they exercise judicial power in the sense already mentioned. But do they exercise the judicial power of the Commonwealth?"

The decision from which Starke J quoted his description of judicial power in this passage was that of Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*[295], whose description of judicial power is one which this Court has consistently referred to as "a classic statement of the characteristics of judicial authority"[296],

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CLR 222 at 232 [25]; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 489-490 [25]; *Lane v Morrison* (2009) 239 CLR 230 at 247 [47].

293 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 365, citing cases including *Board of Education v Rice* [1911] AC 179 at 182 and *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co* [1924] 1 KB 171 at 205.

294 *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 466 (citations omitted).

295 (1909) 8 CLR 330 at 357.

296 *R v Davison* (1954) 90 CLR 353 at 387. See also *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 307; *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 297; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394-395; *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 16. See also *Consolidated Press Ltd v Australian Journalists' Association* (1947) 73 CLR 549 at 561; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 66; *Nicholas v The Queen* (1998) 193 CLR 173 at 187 [17].

"one of the best definitions of judicial power"[297], or the "starting point"[298] for considering whether power is judicial.

173 A second reason for the suggestion that the power of service tribunals might only be administrative power was that the punishments imposed are subject to confirmation by the chain of command, including, ultimately, the Governor-General under s 68 of the *Constitution*[299]. This point attracted some support in *Lane v Morrison*[300], where five members of this Court relied upon the review within a chain of command in support of their Honours' view that "on analysis the observation [that courts martial exercise judicial power] may go no further than asserting that courts-martial act judicially ... That observation may be made of many tribunals."[301] However, the remarks in *Lane v Morrison* have no binding authority as precedent[302]. No party had made such a submission. Indeed, although such a submission would have been a complete answer to the case against the Commonwealth, when the then Solicitor-General of the Commonwealth was asked whether his reference to "judicial power" meant no more than a "duty to act judicially" he rightly referred to the characteristics of the power of service tribunals as judicial, replying that "It goes beyond [a duty to act judicially]. They are applying the facts to the law to determine whether an antecedent event gives rise to a liability under the Defence Force Discipline Code."[303]

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297 *Silk Bros Pty Ltd v State Electricity Commission of Victoria* (1943) 67 CLR 1 at 9, *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 at 215, and *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 395, all quoting *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530 at 542; [1931] AC 275 at 295.

298 *Harris v Caladine* (1991) 172 CLR 84 at 135; *Thomas v Mowbray* (2007) 233 CLR 307 at 413 [304]. See also *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 267-268.

299 *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 649 [240]-[242].

300 (2009) 239 CLR 230 at 257 [84]-[86], 261 [97].

301 (2009) 239 CLR 230 at 260 [96]. See also at 247-248 [47]-[48] (French CJ and Gummow J).

302 *CSR Ltd v Eddy* (2005) 226 CLR 1 at 11 [13]; *Spence v Queensland* (2019) 93 ALJR 643 at 711 [294]; 367 ALR 587 at 667; *Bell Lawyers Pty Ltd v Pentelow* (2019) 93 ALJR 1007 at 1016 [28]; 372 ALR 555 at 562.

303 *Lane v Morrison* (2009) 239 CLR 230 at 233.

174 The need for confirmation of a service tribunal's order from within the chain of command does not prevent the proper characterisation of the function of service tribunals as judicial. Trials by service tribunals have always included such confirmation by the Sovereign, the General, or Commander in Chief, yet have always been considered as judicial in nature. By 1717, when the *Articles of War* had statutory foundation[304], Art 22 required an oath of members of any general court martial not to divulge the sentence of the court "until it shall be approved by his Majesty, the General, or Commander in Chief", nor was the sentence to be put in execution until his Majesty had received a report of the whole proceedings and his directions were signified thereupon. As Clode explained, a report of the Law Officers to George II authored in 1727 by Sir Philip Yorke and Charles Talbot[305] showed that[306]:

> "The original intention of interposing the authority of the Crown, as Confirming Officer before a Court-martial Sentence was carried into execution, was assuredly one of mercy. Military tribunals were (then, at any rate, if not now) prone to severity, and hence the attribute of mercy was secured to the criminal."

175 The interposition of an authority to grant mercy within the chain of command is just as consistent with the exercise of judicial power by the service tribunal as the traditional executive prerogative to grant mercy is with the exercise of judicial power by courts. Although by the time of the *Army Act 1881*[307] the confirmation power was broader than merely a power of mercy, it was still a heavily constrained review power. In cases of a general court martial, it was a power to be exercised by the Sovereign, or some officer deriving authority from the Sovereign, in cases of conviction, but not acquittal[308]. And although it permitted findings or sentences to be sent back for revision, there was no further power of the confirming authority to recommend, or of the court martial to

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304 *Articles of War* (4 Geo I), Art 22, recorded in the *Journals of the House of Commons*, vol 18 at 710.

305 Later, Lords Hardwicke and Talbot. See their report of 10 February 1727, extracted in Clode, *The Military Forces of the Crown; Their Administration and Government* (1869), vol 1 at 510.

306 Clode, *The Administration of Justice Under Military and Martial Law* (1872) at 145.

307 44 & 45 Vict c 58, s 54.

308 *Army Act 1881*, s 54(3).

pronounce, an increase to the sentence upon the remitter[309]. Further, the power of review could not be exercised again after the new decision or sentence. Hence, the review power remained a limited power to review the justice of the conviction. It was not a power to remake the decision. As Clode explained, it was only a check: (i) to confirm that the court martial had jurisdiction; (ii) to ensure that the prisoner had a fair trial on the merits; and (iii) to confirm that the punishment was within the limits of the court martial's statutory power[310].

176 The legislative provision for service tribunals established shortly after Federation also reflected the narrowness of this historical power of confirmation within the chain of command by empowering the Governor-General, or a delegate[311], to "[a]pprove, confirm, mitigate, or remit the sentence of any court-martial"[312]. The *Defence Force Discipline Act* follows a broadly similar approach to the reviewing of convictions. The review process sits alongside an appeal process, which has existed since 1955[313], to a body now entitled the Defence Force Discipline Appeal Tribunal, which is "[f]or all practical purposes ... a court of criminal appeal"[314]. Punishments and orders of a service tribunal take effect forthwith subject to exceptions[315]. One exception is that a sentence of imprisonment by a service tribunal does not take effect unless approved by a reviewing authority[316]. The review operates as a check upon convictions, as it has done historically. It does so in a manner akin to an appeal by way of rehearing[317]. The reviewing authority – an officer or class of officers appointed by the Chief of

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309 *Army Act 1881*, s 54(2).

310 Clode, *The Administration of Justice Under Military and Martial Law* (1872) at 144-147.

311 *Defence Act 1903* (Cth), s 87(1) (as enacted).

312 *Defence Act 1903*, s 86(c) (as enacted).

313 *Courts-Martial Appeals Act 1955* (Cth).

314 *Hembury v Chief of the General Staff* (1998) 193 CLR 641 at 649 [17].

315 *Defence Force Discipline Act*, s 171(1).

316 *Defence Force Discipline Act*, s 172(1)(a) and (b).

317 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 203 [13].

the Defence Force[318] – has similar powers to a court of criminal appeal including very similarly drafted powers such as to quash a conviction, and enter an acquittal or order a new trial, where the conviction is unreasonable or cannot be supported having regard to the evidence or where there is a substantial miscarriage of justice[319].

177 Neither the power of a confirming authority to review the justice of a decision of a service tribunal, nor the power of judicial review described in s 75(v) of the *Constitution* – which applies to service tribunals just as it applies to federal courts – detracts from the conclusion of Mason CJ, Wilson and Dawson JJ in *Re Tracey; Ex parte Ryan* that a service tribunal determines authoritatively the liability of those charged before it[320]. Indeed, if the power of the reviewing authority were sufficient to alter the character of the service tribunal's decision from judicial to merely administrative then it is hard to see why the same expedient could not be applied in other circumstances to validate the exercise of what would otherwise be the judicial power of the Commonwealth outside the constraints of Ch III of the *Constitution*.

Is the judicial power of service tribunals the judicial power "of the Commonwealth"?

178 In *Re Tracey; Ex parte Ryan*, although this Court was unanimous that the power exercised by service tribunals to try and punish offences was a judicial power, there was a division of opinion as to whether the judicial power was "of the Commonwealth". As Mason CJ, Wilson and Dawson JJ said, although there has "never been any real dispute" that a court martial exercises judicial power, the question is whether it exercises "the judicial power of the Commonwealth under Ch III of the Constitution"[321]. They concluded that it does not[322]. Similarly, Brennan and Toohey JJ[323], with whom Gaudron J agreed on this point[324], said that although it was "not open to doubt" that courts martial in England performed

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318 *Defence Force Discipline Act*, s 150.

319 *Defence Force Discipline Act*, ss 158-160.

320 (1989) 166 CLR 518 at 537.

321 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 540.

322 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 541.

323 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 572. See also at 573.

324 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 598.

functions that were judicial in character, the imposition of punishment by service tribunals had never been regarded as an exercise of the judicial power of the Commonwealth. By contrast, Deane J[325], and in later cases McHugh J[326] and Kirby J[327], thought that the conferral of judicial power on a service tribunal was a conferral of the judicial power "of the Commonwealth" although it is an exception to the exclusive vesting of such power in courts designated by Ch III. As Kirby J puzzled: whose judicial power does a service tribunal exercise if it is not that of the Commonwealth? It is not the independent judicial power of a State or Territory, nor is it the judicial power of a foreign nation[328].

179 Part of the explanation for the assertion that the judicial power of service tribunals is not "of the Commonwealth" originated in Australia with Starke J[329]. His Honour said, by reference to a decision of the Supreme Court of the United States concerning the operation of courts martial outside Art III of the *United States Constitution*[330], that service tribunals are not part of the Ch III judicial system. This remark was echoed by Mason CJ, Wilson and Dawson JJ[331] and by Brennan and Toohey JJ[332] in *Re Tracey; Ex parte Ryan*. A curious aspect of this reasoning is that the conferral of judicial power on a subject matter of Commonwealth jurisdiction upon a tribunal outside the judicial system is usually a reason to conclude that the conferral is invalid rather than to conclude that the judicial power is not "of the Commonwealth".

180 Ultimately, however, any debate about whether the judicial power is "of the Commonwealth" is no more than semantic because in *Re Tracey; Ex parte Ryan*, Mason CJ, Wilson and Dawson JJ ultimately justified the exercise of judicial

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325 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 582-583.

326 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 499.

327 *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 616-621 [123]-[140].

328 *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 616 [124]. See also at 616-621 [123]-[140].

329 *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 467. Then picked up by Dixon J in *R v Cox; Ex parte Smith* (1945) 71 CLR 1 at 23.

330 See *Dynes v Hoover* (1858) 61 US 65 at 79.

331 (1989) 166 CLR 518 at 540-541.

332 (1989) 166 CLR 518 at 573-574.

power by service tribunals outside Ch III of the *Constitution* on the basis of historical considerations that would operate equally as an exceptional reason for the existence outside Ch III of the judicial power "of the Commonwealth". Historical reasons for preserving the exercise of judicial power by Commonwealth institutions outside the judicial system, and without being subject to Ch III considerations, may also have played a part in the express reservation to either House of the Commonwealth Parliament in s 47 of the *Constitution* of particular judicial power[333]. Section 47 reserves any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to the House in which the question arises[334]. The same can be said of the power under s 49 of the *Constitution*[335]. And so too, by implication from historical antecedents, for service tribunals exercising power under s 51(vi).

Judicial power of service tribunals and Ch III of the *Constitution*

181 A purist approach to s 51(vi) would preclude Parliament from conferring most judicial power upon service tribunals under s 51(vi) due to conflict with the principle that the judicial power of the Commonwealth can only be exercised by the courts designated by Ch III. The purist conception treats the pre-Federation history of service tribunals as a matter that carries no interpretative weight in the application of s 51(vi). The purist view is effectively that everything adjusted on Federation so that legislation is invalid, no matter how long established its historical antecedents, if it cannot be accommodated to implications derived, independently from that history, from the text and structure of the *Constitution*. No matter how strong the expressed expectations at Federation or how long established the jurisdiction of the service tribunals before Federation, they could not qualify the implication of the exclusivity of the vesting of the "judicial power of the Commonwealth" in courts designated by Ch III with regard to the application of s 51(vi), a provision that is expressly "subject to" the *Constitution*[336].

182 The purist approach inverts the proper process of reasoning by which the scope of a constitutional implication is shaped by historical considerations, not

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333 Moore, *The Constitution of The Commonwealth of Australia*, 2nd ed (1910) at 316.

334 Subject to the provision otherwise by Parliament. Parliament otherwise provided for questions respecting disputed elections by the *Commonwealth Electoral Act 1918* (Cth), Pt XVIII (as enacted).

335 *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 166-167. See *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 574.

336 See, for instance, the approach of Deane J in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 582-583.

superimposed upon them. It denies the usual role of history and associated public expressions of expectations at Federation as a baseline from which the application of essential constitutional meaning develops. Instead, on the purist approach, constitutional implications, even those discovered decades after Federation, cannot be adjusted or tempered by history and expectations prior to Federation and beyond.

183 No party to this application relied upon the purist approach. Rather than adopting the purist approach, the parties adopted the historical approach to the boundaries of s 51(vi). On that approach, Commonwealth legislation can validly confer judicial power upon service tribunals if the scope of that power can be seen to have been intended to continue from its accepted application prior to Federation. The parties all accepted the relevance of publicly expressed expectations at Federation, such as that expressed in Convention Debates by Mr O'Connor that "Parliament would have abundant power to decide how [courts martial] were to be conducted"[337]. However, the difficulty with the historical conception is that members of the Court have differed in their understanding of the historical record. Those differences have led to different scope being given to the service tribunal exception. That was the battleground of the argument in this Court.

184 The view of the historical record taken by Brennan and Toohey JJ in *Re Tracey; Ex parte Ryan*, and subsequently[338], was that prior to Federation there was no military jurisdiction for members of the British army to be tried for ordinary criminal offences committed in the United Kingdom during peacetime. After a lengthy consideration of the history of service tribunals, Brennan and Toohey JJ said[339]:

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

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337 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 10 March 1898 at 2259. See *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 583 [7].

338 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 481-482; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18 at 29.

339 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 563.

185 In contrast, Mason CJ, Wilson and Dawson JJ in *Re Tracey; Ex parte Ryan*, and subsequently[340], considered that it was "open to Parliament to provide that any conduct which constitutes a civil offence shall constitute a service offence, if committed by a defence member"[341]. This was based in part upon their view of the historical record[342]:

> "[B]oth 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 even where the only connexion between the offences and the defence force is the service membership of the offender."

186 The historical approach of Mason CJ, Wilson and Dawson JJ was strongly defended in this application by the Solicitor-General of the Commonwealth. The historical approach of their Honours is to be preferred over that of Brennan and Toohey JJ. As the Supreme Court of the United States observed in *Solorio v United States*[343], even at the time of the American Revolution, British military tribunals had jurisdiction under the *Articles of War* to hear cases such as those concerning destruction of property despite the availability of ordinary civil courts. Indeed, not long after the prerogative basis for the *Articles of War* was placed on the legislative footing of annual *Mutiny Acts*, provision was made for courts martial to deal with any conduct that was an offence under the *Articles of War*. In the *Mutiny Act 1718*[344], the Parliament provided that, subject to the "Party Injured" making an application to a commanding officer or proceeding for the prosecution before a civil court or magistrate, an officer, non-commissioned officer, or soldier could be tried by court martial for any "Offence against the Person, Estate, or Property of any of the Subjects of [the United Kingdom], which is Punishable by the known Laws of the Land".

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340 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 474 (Mason CJ and Dawson J); *Re Tyler; Ex parte Foley* (1994) 181 CLR 18 at 26 (Mason CJ and Dawson J).

341 (1989) 166 CLR 518 at 545.

342 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 543.

343 (1987) 483 US 435 at 443.

344 5 Geo I c 5.

187 With some limited qualifications such as offences committed outside active duty involving treason, murder, manslaughter, treason-felony, or rape[345], that jurisdiction persisted in the *Army Discipline and Regulation Act 1879*[346], which was substantially re-enacted as the *Army Act 1881*[347]. A broad jurisdiction also existed in the *Naval Discipline Act 1866*[348] which, although more constrained by naval-related locations[349], included trials of any offence, whether in England or abroad, which would be punishable by the law of England if committed in England. As Mason CJ, Wilson and Dawson JJ said in *Re Tracey; Ex parte Ryan*[350], these United Kingdom statutes, and their counterparts in the Australian colonies[351], were the forerunners of the provisions of the *Defence Force Discipline Act* conferring broad jurisdiction on service tribunals over civil offences.

188 Provided that a service tribunal is constituted in a manner that is broadly consistent with its core historical antecedents it will not infringe the constitutional implication that the judicial power of the Commonwealth can only be exercised in accordance with Ch III of the *Constitution*. However, where the Commonwealth Parliament confers judicial power that extends beyond those historical roots, that can only be done consistently with the requirements of Ch III. Hence, the purported creation by the Commonwealth Parliament of an Australian Military Court could not be supported by s 51(vi), and independently of Ch III, because it was "established to make binding and authoritative decisions of guilt or innocence independently from the chain of command of the defence forces"[352].

189 The need for laws conferring judicial power upon service tribunals to conform to their historical roots can also be seen in the invalidation of ss 190(3)

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345 *Army Discipline and Regulation Act 1879* (42 & 43 Vict c 33), s 41; *Army Act 1881*, s 41.

346 *Army Discipline and Regulation Act 1879*, ss 41, 155.

347 *Army Act 1881*, ss 41, 162.

348 *Naval Discipline Act 1866* (29 & 30 Vict c 109), ss 43, 45, 46.

349 *Naval Discipline Act 1866*, s 46.

350 (1989) 166 CLR 518 at 542.

351 *Military and Naval Forces Regulation Act 1871* (NSW); *Defences and Discipline Act 1890* (Vic); *Defence Act 1884* (Qld); *Defences Act 1895* (SA); *Defence Forces Act 1894* (WA); *Defence Act 1885* (Tas).

352 *Lane v Morrison* (2009) 239 CLR 230 at 266-267 [115].

and 190(5) of the *Defence Force Discipline Act* in *Re Tracey; Ex parte Ryan*. Those sub-sections sought to deny jurisdiction to State courts where a service tribunal had taken into consideration a service offence that was substantially the same as an offence for which the person was to be tried civilly or if a person had been tried for substantially the same offence as the civil court offence by a court martial. As Brennan and Toohey JJ held, the history of the special judicial power that is authorised by s 51(vi) did not "reveal any impairment of the criminal jurisdiction of the ordinary courts"[353].

190 Section 61(3) of the *Defence Force Discipline Act* operates consistently with its historical antecedents and does not exceed those historical boundaries. For the reasons given by Mason CJ, Wilson and Dawson JJ in *Re Tracey; Ex parte Ryan*, it does not contravene the implied prohibition upon exercise of the judicial power of the Commonwealth other than under Ch III of the *Constitution*.

Sufficient connection between s 61(3) and the defence power

191 There remains the submission by Private R that, independently of historical considerations, there is insufficient connection between s 61(3) of the *Defence Force Discipline Act* in all its applications and s 51(vi) of the *Constitution*. Private R submitted that there could not be sufficient connection between s 51(vi) of the *Constitution* and every offence contained in the legislation of the Australian Capital Territory that is picked up by s 61(3), "however trivial the conduct" and extending to "the most trivial kind of offences". For the reasons explained above, this submission departs from the historical understanding which preceded Federation, and from which there is no suggestion that s 51(vi) showed any intention to depart, concerning the intimate connection between the power of service tribunals to adjudicate upon all offences and the discipline necessary for the control of the armed forces.

192 It can be accepted that the application of a constitutional power is not immutably set according to its historical application. The words "with respect to" require the challenged law to have a relevance to, or connection with, the head of power[354] but, as society changes and develops, new or changed circumstances can alter the relevance to, or connection with, the head of power. Hence, the applications of the essential meaning of the "naval and military defence of the Commonwealth" and the "control of the forces to execute and maintain the laws

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353 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 575.

354 *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at 42 [22], citing *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77.

of the Commonwealth" are not fixed. Nevertheless, no sufficient basis has been shown to depart from the consistent assumption of a connection between the control of the armed forces and the military discipline purpose for a law such as s 61(3) of the *Defence Force Discipline Act* authorising service tribunals to adjudicate upon and punish for all offences against the law of the land, however "trivial".

193 In 1874, Clode wrote of the "habits of obedience" required by discipline[355], saying that "'... nothing (even in Civil affairs) can be more dangerous than to allow the obligations to obey a law to depend on the opinion entertained by individuals of its propriety,' and in military affairs it would be intolerable". A hundred and thirty years later, in the Senate Foreign Affairs, Defence and Trade References Committee's report on the effectiveness of Australia's military justice system, which considered the *Defence Force Discipline Act*, the Committee quoted a public submission by General Cosgrove, then Chief of the Defence Force, who said that in times of both peace and conflict "the margin for error or omission without tragic consequences will often depend upon inculcated habits of discipline to instantly obey lawful directions and orders"[356]. That discipline "is as necessary in small matters such as punctuality and cleanliness as it is in more important ones like the protection of the human rights of non-combatants"[357]. And it is necessary whether the defence member is on leave or on duty. As Harlan J observed in *O'Callahan v Parker*[358], "[t]he soldier who acts the part of Mr Hyde while on leave is, at best, a precarious Dr Jekyll when back on duty".

194 It should, therefore, be accepted that, as Mason CJ, Wilson and Dawson JJ said in *Re Tracey; Ex parte Ryan*[359], the purpose of a provision such as s 61(3), which brings the provision within power, is that:

> "as a matter of discipline, the proper administration of a defence force requires the observance by its members of the standards of behaviour demanded of ordinary citizens and the enforcement of those standards by military tribunals. To act in contravention of those standards is not only to

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355 Clode, *The Administration of Justice Under Military and Martial Law*, 2nd ed (1874) at 73-76 (footnote omitted).

356 Australia, Senate, Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system* (June 2005) at 9-10 [2.11].

357 Tracey, "The Constitution and Military Justice" (2005) 28 *University of New South Wales Law Journal* 426 at 426.

358 (1969) 395 US 258 at 281-282, a dissent ultimately accepted in *Solorio v United States* (1987) 483 US 435.

359 (1989) 166 CLR 518 at 543.

break the law, but also to act to the prejudice of good order and military discipline."

Conclusion

195 After at least three decades of uncertainty, the reasoning of Mason CJ, Wilson and Dawson JJ in *Re Tracey; Ex parte Ryan* should be accepted in its entirety. I therefore agree with the conclusion in the joint judgment that s 61(3) of the *Defence Force Discipline Act* is valid in all its applications and with the proposed orders that the plaintiff's application should be dismissed with the plaintiff to pay the costs of the second defendant.

196 This conclusion about the validity of the application of s 61(3) of the *Defence Force Discipline Act* is a matter of law, not policy. The provision in legislation such as the *Defence Force Discipline Act* for judicial power of service tribunals to extend to all the offences in the *Crimes Act* has been subjected to searching criticisms and expressions of dissatisfaction with the justice that it delivers[360]. The attempt by the Commonwealth Parliament to establish an Australian Military Court was an attempt to "improve upon ... that system with one more nearly approaching, but stopping short of, the Ch III paradigm"[361]. That attempt failed because although "[t]here is absolutely no reason why the functions assigned under the Act to service tribunals could not be performed by a Ch III court"[362], there is no constitutional half-way house between a Ch III court and a service tribunal established consistently with the historical foundations that justify that application of the power in s 51(vi) of the *Constitution*.

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360 See the discussion in Collins, *The Military as a Separate Society: Consequences for Discipline in the United States and Australia* (2019), ch 4.

361 *Lane v Morrison* (2009) 239 CLR 230 at 237 [11].

362 *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 619 [134].