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CONSTITUTIONAL BATTLEGROUNDS: *PRIVATE R V COWEN* (2020) 383 ALR 1

I Introduction

The High Court in *Private R v Cowen* (2020) 383 ALR 1 ('*Private R*') has resolved a longstanding dispute within its constitutional jurisprudence, holding, by majority, that members of the Australian Defence Force ('ADF') may be tried by service tribunal[1] for *any* offence, pursuant to s 61(3) of the *Defence Force Discipline Act 1982* (Cth) ('*DFDA*').[2] That is so in cases where the conduct charged would also constitute an offence under the civilian criminal law, and regardless of how slight or insubstantial the nexus between that conduct and the member's defence service might be. Expressed in point of constitutional principle, the Court has accepted that s 61(3) is, 'in all its applications',[3] a valid law with respect to defence under s 51(vi) of the *Constitution*.

Although *Private R*'s case could have been decided without ruling upon this constitutional issue, it was recognised that to do so 'would effectively perpetuate decades of uncertainty'.[4] Indeed, as Gageler J put it, 'everything that can be said has been said and nothing would be achieved by putting off its resolution to another case'.[5] The reasons of Kiefel CJ, Bell and Keane JJ, however, have thrown up a fresh controversy that, similarly, was not strictly in issue. Their Honours suggested that service tribunals exercise executive, rather than judicial, power. Unlike the principal constitutional issue decided by the Court, however, there was in this instance no longstanding dispute to be settled, and no uncertainty to be resolved. This note interrogates the

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1 A service tribunal may be constituted by a Defence Force magistrate or general court martial: see *Defence Force Discipline Act 1982* (Cth) ss 103(1)(c)–(d) ('*DFDA*').

2 *Private R v Cowen* (2020) 383 ALR 1, 4 [8], 20–1 [78]–[80] (Kiefel CJ, Bell and Keane JJ), 23 [91], 24–5 [95], 29 [108] (Gageler J), 54–5 [186], 57 [194]–[195] (Edelman J) ('*Private R*').

3 Ibid 21 [81] (Kiefel CJ, Bell and Keane JJ), 23 [91] (Gageler J), 57 [195] (Edelman J).

4 Ibid 45 [162] (Edelman J).

5 Ibid 28–9 [107].

joint judgment, and builds upon the contrary and settled[6] view taken by three judges (in particular by Edelman J),[7] that service tribunals exercise judicial power. Despite Gageler J's clarion call for constitutional action, his Honour offered no opinion on the issue.[8] The result in *Private R* was an even 3:3 split,[9] bringing into question a most axiomatic and basic tenet of the Court's constitutional jurisprudence, that is, the principled characterisation of governmental power.

This note unfortunately treads a well-trodden path in refuting the view taken by Kiefel CJ, Bell and Keane JJ.[10] After two of those judges teased the trappings of this

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6 *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452, 466–7 (Starke J), 481 (Williams J) ('*Bevan*'); *R v Cox; Ex parte Smith* (1945) 71 CLR 1, 9 (Latham CJ), 23 (Dixon J) ('*Cox*'); *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 540–1 (Mason CJ, Wilson and Dawson JJ), 564–5, 572–3 (Brennan and Toohey JJ) ('*Re Tracey*'); *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 474–5 (Mason CJ and Dawson J), 479 (Brennan and Toohey JJ) ('*Re Nolan*'); *Re Tyler; Ex parte Foley* (1994) 181 CLR 18, 25–6 (Mason CJ and Dawson J), 29 (Brennan and Toohey JJ), 39 (McHugh J) ('*Re Tyler*'); *White v Director of Military Prosecutions* (2007) 231 CLR 570, 586 [14] (Gleeson CJ), 598–9 [60] (Gummow, Hayne and Crennan JJ) ('*White*').

7 *Private R* (n 2) 45 [163], 47–51 [167]–[176]. See also at 29–34 [112]–[122] (Nettle J), 38 [134]–[135] (Gordon J).

8 Evidently, the irony was not lost on Edelman J, his Honour citing a certain article in which it was said that 'service tribunals … discharge basically judicial functions': Stephen Gageler, 'Gnawing at a File: An Analysis of *Re Tracey; Ex parte Ryan*' (1990) 20(1) *University of Western Australia Law Review* 47, 49, cited in *Private R* (n 2) 45 [163] (Edelman J).

9 That is so despite s 23(2)(b) of the *Judiciary Act 1903* (Cth), which provides that, 'if the Court is equally divided in opinion' on 'any question', 'the opinion of the Chief Justice … shall prevail'. Because the discussion of the nature of the power reposed in service tribunals in *Private R* (n 2) was obiter, it would not seem to amount to an 'opinion … on … [a] question' so as to attract s 23(2)(b). That is because s 23 is the 'expedient … *for pronouncing upon the rights of the litigants*': *Tasmania v Victoria* (1935) 35 CLR 157, 184 (Dixon J), quoted in *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* (1981) 146 CLR 336, 431 (Aickin J) (emphasis added). Indeed, the term 'question' in s 23 'has implicitly been treated as the ultimate question of what order the Court is to make in the disposition of the appeal': *Perara-Cathcart v The Queen* (2017) 260 CLR 595, 623 [77] (Gageler J). See also at 623 [78], citing *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492, 550–3 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

10 Jonathan Crowe and Suri Ratnapala, 'Military Justice and Chapter III: The Constitutional Basis of Courts Martial' (2012) 40(2) *Federal Law Review* 161, 163 n 9, citing Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 2002) 179–80. See also Zelman Cowen, 'The Separation of Judicial Power and the Exercise of Defence Powers in Australia' (1948) 26(5) *Canadian Bar Review* 829; RA Brown, 'The Constitutionality of Service Tribunals under the Defence Force Discipline Act 1982' (1985) 59(6) *Australian Law Journal* 319; Andrew D Mitchell and Tania Voon, 'Defence of the Indefensible? Reassessing the Constitutional Validity of Military Service Tribunals in Australia' (1999) 27(3) *Federal Law Review* 499.

view in obiter in *Lane v Morrison*[11] ('*Lane*'), Jonathan Crowe and Suri Ratnapala warned that developing it further 'would make the rule in the *Boilermakers' Case* vacuous'.[12] That rule, the first limb of the holding in *R v Kirby; Ex parte Boilermakers' Society of Australia*[13] ('*Boilermakers' Case*'), is that the judicial power of the Commonwealth may only be vested in the courts designated by Ch III of the *Constitution*.[14] A consequence of this holding is the need to characterise governmental power as judicial or non-judicial.[15] This note argues that the principled understanding upon which power is so characterised is undermined by the approach of the plurality in *Private R*. In so arguing, this note arrives at the age-old[16] conclusion that, although service tribunals are not Ch III courts, '[t]he investing of judicial power in military tribunals is … *a true exception* [to the first limb of the holding in the *Boilermakers' Case*] that can be explained only on historical grounds'.[17] Before engaging with that discussion, an account is first provided of the decision in *Private R*.

II Private R's Case

A *Facts*

The plaintiff was and is a member of the ADF, specifically a soldier in the Regular Army.[18] It was alleged that, on 30 August 2015, he assaulted the complainant, a member of the Royal Australian Air Force.[19] The offending was said to have occurred in a private hotel room in Brisbane, following a social event attended by the plaintiff and the complainant.[20] Neither the plaintiff nor the complainant was on duty or in uniform at the time.[21] Aside from these general observations,[22] it suffices

11 (2009) 239 CLR 230, 261 [97] (Hayne, Heydon, Crennan, Kiefel and Bell JJ) ('*Lane*').

12 Crowe and Ratnapala (n 10) 174.

13 (1956) 94 CLR 254 ('*Boilermakers' Case*').

14 Ibid 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

15 See, eg, Gabrielle J Appleby, 'Imperfection and Inconvenience: *Boilermakers'* and the Separation of Judicial Power in Australia' (2012) 31(2) *University of Queensland Law Journal* 265, 271.

16 See, eg, *Grant v Gould* (1792) 2 H Bl 69; 126 ER 434, 450 (Lord Loughborough); *Dawkins v Lord Paulet* (1869) LR 5 QB 94, 119 (Mellor J); *Dawkins v Lord Rokeby* (1873) LR 8 QB 255, 266 (Kelly CB); *Ex parte Reed*, 100 US 13, 23 (Swayne J for the Court) (1879).

17 *Re Woolley; Ex parte Applicants M76/2003* (2004) 225 CLR 1, 22 [50] (McHugh J) (emphasis added) ('*Re Woolley*').

18 *Private R* (n 2) 4 [10], 43 [155].

19 Ibid 2 [1], 40 [144], 43 [155].

20 Ibid 4 [11], 43 [155].

21 Ibid 4 [10], 40 [144].

22 The precise circumstances of the alleged offending are described in the decision of the Court: ibid 4 [10]–[12], 40–1 [144]–[145], 43 [155].

to note that the circumstances of the alleged offending were 'serious'.[23] It is also necessary to observe that the conduct in which the plaintiff was said to have engaged was proscribed by s 339 of the *Criminal Code Act 1899* (Qld).

On 12 June 2019, the plaintiff was charged by the Director of Military Prosecutions ('DMP') with one count of assault causing actual bodily harm.[24] The charge was brought under s 61(3) of the *DFDA*, which provides:

> (3) A person who is a defence member or a defence civilian commits 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).[25]

The plaintiff was a 'defence member'.[26] The expression 'Territory offence' is defined in s 3(1) of the *DFDA* as including 'an offence punishable under any … law in force in the Jervis Bay Territory'.[27] Section 24(1) of the *Crimes Act 1900* (ACT), which applies in the Jervis Bay Territory,[28] establishes as an offence assault occasioning actual bodily harm. Thus, such conduct constitutes a 'service offence' under the *DFDA*.[29] Upon being charged by the DMP, therefore, the plaintiff was amenable to trial by Defence Force magistrate.[30]

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23 Ibid 43 [155]. See also at 40–1 [145].

24 Ibid 4 [10].

25 *DFDA* (n 1) s 61(3).

26 Ibid s 3(1).

27 In respect of which Gleeson CJ had the following to say:

> [It] is simply a drafting technique by which the Act, in creating service offences by reference to the content of Australian law, selects one out of the multiplicity of laws potentially available in a federation. It is a form of convenient legislative shorthand which removes the necessity to repeat, in the Act, all the provisions of an Australian criminal statute.

Re Aird; Ex parte Alpert (2004) 220 CLR 308, 311–12 [3] ('*Re Aird*'), citing *Re Tracey* (n 6) 545 (Mason CJ, Wilson and Dawson JJ). On the broader significance of the Jervis Bay Territory within the defence context, see, eg, James Fettes, 'Why Does Canberra Have a Beach at Jervis Bay?', *ABC News* (online, 13 February 2017) <https://www.abc.net.au/news/specials/curious-canberra/2017-02-13/why-does-canberra-have-a-beach-at-jervis-bay/8193752>.

28 *Jervis Bay Territory Acceptance Act 1915* (Cth) s 4A.

29 *DFDA* (n 1) s 3(1).

30 Ibid 103(1)(c). See also at ss 115, 129.

On 26 August 2019, the plaintiff appeared before the first defendant, a Defence Force magistrate.[31] The plaintiff unsuccessfully objected to the first defendant's jurisdiction to hear the charge.[32] Shortly thereafter, he instituted proceedings in the original jurisdiction of the High Court,[33] seeking a writ of prohibition restraining the first defendant from hearing the charge.[34] The Commonwealth was named as second defendant, and it submitted an appearance for the first defendant.

B *Issue and Applicable Law*

The High Court in *Private R* was asked to decide whether s 61(3) of the *DFDA* was, in its application to the plaintiff, supported by s 51(vi) of the *Constitution*, that is, in circumstances where (i) the plaintiff was not on duty or in uniform at the time of the alleged offending, and (ii) the offending charged also constituted an offence under the civilian criminal law, such that trial in the civil courts was available.

Section 51(vi) provides:

> The Parliament shall, subject to this *Constitution*, have power to make laws … with respect to:
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> …
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> (vi) the … defence of the Commonwealth …[35]

The starting point is to observe that s 51(vi) is a purposive power. As was said by Dixon J in *Stenhouse v Coleman*,[36] '"a law with respect to the defence of the Commonwealth" is an expression which seems … to treat defence or war as the *purpose to which the legislation must be addressed*'.[37] The question whether a law is appropriately addressed to that end necessitates an inquiry as to whether the law 'does tend or might reasonably be considered to conduce to … the defence of the Commonwealth'.[38] Relevantly, Mason CJ, Wilson and Dawson JJ in *Re Tracey; Ex parte Ryan* ('*Re Tracey*') observed that 'the … defence of the Commonwealth *demands the*

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31 *Private R* (n 2) 5 [15].

32 Ibid.

33 *Constitution* s 75(v).

34 *Private R* (n 2) 5 [16].

35 *Constitution* s 51(vi).

36 (1944) 69 CLR 457 ('*Stenhouse*').

37 Ibid 471 (emphasis added). See also *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 192–3 (Dixon J), 253 (Fullagar J), 273 (Kitto J). In this, s 51(vi) is to be contrasted with other powers under s 51 of the *Constitution* that deal with a particular subject matter, questions of validity in respect of which may be decided by 'consider[ing] whether the legislation operates upon … the subject matter … [and by] disregard[ing] purpose or object': *Stenhouse* (n 36) 471 (Dixon J).

38 *Marcus Clark & Co Ltd v The Commonwealth* (1952) 87 CLR 177, 216 (Dixon CJ).

provision of a disciplined force'.[39] Thus, as a general proposition, the enactment of a disciplinary code conduces to the defence of the Commonwealth.[40] So too, it has long been held,[41] does the establishment of tribunals composed of defence personnel that are invested with jurisdiction to determine disciplinary breaches, and to impose punishment upon offending defence members.

That being so, two[42] competing approaches to the question raised in *Private R* were expounded in *Re Tracey*. Chief Justice Mason, Wilson and Dawson JJ determined:

> It 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. … [T]he proscription of that conduct is relevant to the maintenance of good order and discipline in the defence forces.[43]

Justices Brennan and Toohey, on the other hand, preferred a more limited view. Their Honours highlighted that s 51(vi) is expressed as being 'subject to' the *Constitution* and, concomitantly, the strict insulation of judicial power mandated by Ch III.[44] Thus, a law proscribing, as a service offence, conduct otherwise amounting to a civil offence, was limited by the requirement that 'proceedings [under such a law] … be brought against a defence member … if, *but only if*, those proceedings can reasonably be regarded as *substantially* serving the purpose of maintaining or enforcing service discipline'.[45] In cases where it remained practical for the ordinary courts to exercise their jurisdiction,[46] the operation of such a law would impermissibly conflict with Ch III, specifically the competing 'constitutional objective …' of Ch III that the

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39 *Re Tracey* (n 6) 540 (emphasis added).

40 Ibid 540–1. See also *Re Aird* (n 27) 313–14 [8] (Gleeson CJ).

41 See above nn 6, 16.

42 It is noted that alternative approaches emerged: see, eg, James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 2nd ed, 2020) 274–6 [5.90]–[5.92]; Crowe and Ratnapala (n 10) 165–6. Justice Edelman in *Private R* (n 2) documented four possible approaches to the issue: at 41–2 [149]–[151]. For expedience, however, the focus remains on the two positions that drew plural support in *Re Tracey* (n 6) and the decisions following.

43 *Re Tracey* (n 6) 545.

44 Ibid 563–4.

45 Ibid 570 (emphasis added).

46 The following factors were offered by their Honours as bearing upon the question whether it remained practical for the ordinary courts to exercise jurisdiction: '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': ibid 563. It would not be practical to exercise jurisdiction, their Honours said, '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': at 563.

jurisdiction of the civil courts remain 'pre-ordinate'.[47] Justices Brennan and Toohey in *Re Tracey* drew upon pre-federation history in support of this finding.[48]

The tussle between these views continued in two subsequent decisions of the Mason Court.[49] More recently, the Court in *Re Aird; Ex parte Alpert* declined to decide which view is to be preferred.[50] By the time of *Private R*, the competing positions in *Re Tracey* had come to be known as the 'service status' test, that being the view of Mason CJ, Wilson and Dawson JJ, and the 'service connection' test,[51] as embodied in the reasons of Brennan and Toohey JJ.[52] While the High Court continued to defer resolution of the question, the Defence Force Discipline Appeal Tribunal in *Williams v Chief of Army*[53] decided that the service status test was to be preferred.[54]

It was against this jurisprudential backdrop that the High Court decided *Private R*'s case. The plaintiff argued that the service connection test should be adopted, while the Commonwealth preferred the service status test.[55] *Private R*'s case demonstrated that the resolution of this question would have real implications for defence members such as the plaintiff, and was far from a matter of mere academic debate. Indeed, were the Court to adopt the service connection test, it remained that the additional finding could be made that the plaintiff's offending did not satisfy that test, such that he was not amenable to trial by the first defendant. In the event that the service status test was adopted, however, he would be amenable to the first defendant's jurisdiction without further inquiry.

47 Ibid 569–70.

48 Ibid 554–63.

49 *Re Nolan* (n 6) 474–5 (Mason CJ and Dawson J), 484 (Brennan and Toohey JJ); *Re Tyler* (n 6) 26 (Mason CJ and Dawson J), 28–9 (Brennan and Toohey JJ).

50 *Re Aird* (n 27) 312–13 [5], 314 [9] (Gleeson CJ), 324 [45]–[46] (McHugh J, Hayne J agreeing at 356 [156]), 330 [69] (Gummow J, Hayne J agreeing at 356 [156]).

51 Although it is noted that this designation is perhaps ill-suited to the view of Brennan and Toohey JJ in view of the centrality afforded by their Honours to the purpose of maintaining and enforcing discipline, rather than the connecting factors: see, eg, Stellios (n 42) 273–4 [5.89], 281 [5.99].

52 See, eg, *Re Aird* (n 27) 321 [36] (McHugh J). While these designations are derived from the United States jurisprudential setting, they serve as a useful shorthand expression of the competing positions: see *O'Callahan v Parker*, 395 US 258, 272–3 (Douglas J for the Court) (1969); *Solorio v United States*, 483 US 435, 440–1, 448–50 (Rehnquist CJ for the Court) (1987).

53 [2016] ADFDAT 3 (Tracey, Brereton and Hiley JJ) ('*Williams*').

54 Ibid [51] (Tracey and Hiley JJ, Brereton J agreeing at [99]), quoted in *Private R* (n 2) 5–6 [18] (Kiefel CJ, Bell and Keane JJ). The decision in *Williams* (n 53) was followed by the first defendant in dismissing the plaintiff's objection to his jurisdiction to hear the charge: *Private R* (n 2) 5 [17], 6 [19].

55 *Private R* (n 2) 3–4 [6]–[7].

III Decision

The Court unanimously decided that s 61(3) of the *DFDA* was valid in its application to the plaintiff.[56] In so holding, Kiefel CJ, Bell and Keane JJ, Gageler J and Edelman J determined that the view propounded by Mason CJ, Wilson and Dawson JJ in *Re Tracey* was to be preferred.[57] Although Nettle J and Gordon J agreed that the plaintiff was amenable to the jurisdiction of the first defendant, their Honours rejected the majority view on the constitutional issue.[58]

A *Majority*

Although members of the majority doubted the utility of shorthand expressions,[59] it may be observed that their Honours have in essence endorsed the service status test.[60] Chief Justice Kiefel, Bell and Keane JJ determined:

> 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.[61]

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56 Ibid 4 [8], 20–1 [78]–[80] (Kiefel CJ, Bell and Keane JJ), 23 [91], 24–5 [95], 29 [108] (Gageler J), 37 [131] (Nettle J), 40–1 [145] (Gordon J), 54–5 [186], 57 [194]–[195] (Edelman J).

57 Ibid 4 [8], 20–1 [78]–[80] (Kiefel CJ, Bell and Keane JJ), 23 [91], 24–5 [95], 29 [108] (Gageler J), 54–5 [186], 57 [194]–[195] (Edelman J).

58 Ibid 34–6 [125]–[128] (Nettle J), 40 [142] (Gordon J).

59 Ibid 11 [42] (Kiefel CJ, Bell and Keane JJ). Their Honours did, however, acknowledge the convenience of those expressions, tracing their use to the decision of the Defence Force Discipline Appeal Tribunal in *Williams* (n 53), among others: *Private R* (n 2) 11 [41]–[42]. Taken together with the plurality's earlier quotation of the policy reasons in favour of the service status test offered by Tracey and Hiley JJ in *Williams* (n 53), and the decision ultimately reached by the majority in *Private R* (n 2), the enduring influence of the late Richard Tracey on Australian military law might be discerned: see *Private R* (n 2) 5–6 [18], quoting *Williams* (n 53) [49]–[51]. See generally Transcript of Proceedings, *Ceremonial Sitting of the Full Court to Farewell the Honourable Justice Tracey* (Federal Court of Australia, Allsop CJ, North, Kenny, Greenwood, Rares, Besanko, Tracey, Logan, McKerracher, Yates, Murphy, Davies, Mortimer, White, Wigney, Beach, Moshinsky, Steward and Colvin JJ, 17 August 2018); Justice Anthony Cavanough, 'Remembering Major General the Hon Justice Richard Tracey AM RFD QC 1948–2019' (2019) 22 (November) *Melbourne Law School News*; *Re Tracey* (n 6).

60 That is to say, their Honours determined that s 61(3) of the *DFDA* (n 1) is valid 'in all its applications' to defence members: *Private R* (n 2) 21 [81] (Kiefel CJ, Bell and Keane JJ), 23 [91] (Gageler J), 57 [195] (Edelman J).

61 Ibid 20–1 [80]. See also at 23 [91], 24–5 [95], 29 [108] (Gageler J), 54–5 [186], 57 [194]–[195] (Edelman J).

In so holding, the plurality, along with Gageler J and Edelman J, rejected the notion that Ch III of the *Constitution* is a limitation upon s 51(vi) in respect of military justice.[62] Justice Gageler and Edelman J may be seen to have refuted any interaction between s 51(vi) and Ch III in their Honours' endorsement of the approach taken by Mason CJ, Wilson and Dawson JJ in *Re Tracey*.[63] Chief Justice Kiefel, Bell and Keane JJ reasoned further that, because 'the system of military justice established under s 51(vi) stands distinctly outside of Ch III',[64] the 'logical implication … [is] that the scope of s 51(vi) … [is] unconstrained by Ch III'.[65] Thus, the plurality rejected the argument that the trial of the plaintiff by Defence Force magistrate — in circumstances where trial in the civil courts was also available — was offensive to Ch III. To this, Kiefel CJ, Bell and Keane JJ said: '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*.'[66] Their Honours took one step further, however, suggesting in obiter that any notion that s 51(vi) and Ch III might intersect could be refuted upon the further basis that 'the power … exercised [by service tribunals] is executive or administrative in character'.[67] Justice Edelman disagreed with this observation,[68] while it was left unaddressed by Gageler J.

The notion that Ch III requires that the jurisdiction of the civil courts remain 'pre-ordinate'[69] was considered in further detail by Gageler J and Edelman J. Their Honours recognised that this proposition had originally been articulated by Brennan and Toohey JJ in *Re Tracey* upon the basis of the historical interaction between service tribunals and the civil courts.[70] To the contrary, Gageler J concluded:

> What … is relevantly to be drawn from the pre-federation constitutional history … 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*

62 Ibid 12 [46]–[47] (Kiefel CJ, Bell and Keane JJ), 26–7 [101]–[102] (Gageler J), 53–5 [181]–[186] (Edelman J).

63 Ibid 24–5 [95] (Gageler J), 54–5 [186] (Edelman J).

64 Ibid 12 [46].

65 Ibid 12 [47].

66 Ibid 14 [51].

67 Ibid 15 [55].

68 Ibid 45 [163], 47–51 [167]–[176].

69 *Re Tracey* (n 6) 570.

70 *Private R* (n 2) 27 [103] (Gageler J), 54–5 [186] (Edelman J). The joint judgment rejected entirely the premise of this argument, determining that 'in point of principle, historical considerations cannot limit the scope of … s 51(vi) of the *Constitution*': at 18 [69]. Their Honours did, however, undertake a historical analysis, reaching the same conclusion as Gageler J and Edelman J: at 18–20 [69]–[77].

> *of the ordinary criminal law against non-compliant naval and military personnel was practicable or convenient*.[71]

His Honour recognised that, historically, the role of the civil courts within this context was reserved for circumstances where defence force command failed to punish offending defence members.[72] To this point, the joint judgment similarly observed that 'the civil justice system … [was] available … as a curb on the mischiefs that might result … from incidents of lawlessness on the part of the members of the standing army'.[73]

B *Minority*

Although their Honours joined in declining to adopt the service status test,[74] and in accepting that there must be some constitutional limitation upon the operation of s 61(3) of the *DFDA*,[75] Nettle J and Gordon J took differing approaches.

Justice Nettle was emphatic in holding that service tribunals exercise judicial power.[76] His Honour said that, consequently, it was necessary to consider the interaction between s 51(vi) and Ch III. His Honour embraced the consequence of Brennan and Toohey JJ's approach in *Re Tracey*,[77] namely, that Ch III of the *Constitution* is a 'competing constitutional objective …' that must be reconciled with the system of military justice.[78] His Honour preferred the reasoning of Deane J in that case, however. Justice Deane had determined that, because the system of military justice is admitted as an exception to Ch III for a specific *purpose*, being the discipline of the defence forces, it remains circumscribed by that purpose.[79] The exercise of

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71 Ibid 28 [105] (emphasis added). See also at 54–5 [186]–[187] (Edelman J). It is noted, however, that s 144(3) of the *DFDA* (n 1) now provides that a person previously tried in a civil court 'is not liable to be tried by a service tribunal for a service offence that is substantially the same offence': see *Private R* (n 2) 48 [170] (Edelman J). Section 190(5) of the *DFDA*, now repealed, similarly prohibited trial in a civil court where action had already been taken by a service tribunal. That provision was ruled invalid in *Re Tracey* (n 6): at 547–8 (Mason CJ, Wilson and Dawson JJ), 576, 579 (Brennan and Toohey JJ).

72 *Private R* (n 2) 27 [103].

73 Ibid 19 [74].

74 Ibid 34 [125] (Nettle J), 40 [142] (Gordon J).

75 Ibid 34–5 [126] (Nettle J), 39–40 [141] (Gordon J).

76 Ibid 29–33 [112]–[121].

77 His Honour said that 'decisions of the Court … [have] in effect accepted the Brennan and Toohey JJ [service connection] test': ibid 34 [123], citing *Re Aird* (n 27) 314 [8] (Gleeson CJ), 322 [37]–[38], 324 [43] (McHugh J), 330 [69] (Gummow J), 356 [156] (Hayne J); *White* (n 6) 589 [24] (Gleeson CJ), 601–2 [73] (Gummow, Hayne and Crennan JJ).

78 *Private R* (n 2) 34–5 [126].

79 Ibid, citing *Re Tracey* (n 6) 584–5 (Deane J).

jurisdiction for an extrinsic purpose, therefore, would impermissibly '*encroach … upon the ordinary administration of criminal justice by courts of law*', contrary to Ch III.[80]

Although Gordon J accepted that s 61(3) was valid in its application to the plaintiff,[81] her Honour maintained that there must be some applications that, as a matter of characterisation, could not reasonably be said to conduce to the defence of the Commonwealth.[82] Her Honour teased out the distinction between the two tests by offering two hypothetical cases. One[83] hypothetical case involved 'accidental …' littering by a defence member.[84] Because an 'inquiry must be made [in each case] in order to demonstrate that the law *in its relevant operation* is supported by the defence power',[85] her Honour rejected the service status test. Justice Gordon would not accept that the defence member in her Honour's hypothetical situation could be amenable to trial by service tribunal, as would follow on application of the service status test.[86] Her Honour joined with Nettle J in making the additional finding that applying s 61(3) in the hypothetical case would be to 'fail to recognise that military discipline is supplementary to, and not exclusive of, the ordinary criminal law'.[87]

IV In Defence of What Matters

It may be observed that, aside from the approach taken by Nettle J, the nature of the power exercised by service tribunals was not an issue bearing upon the result in *Private R*. It is suggested, however, that the view expressed by Kiefel CJ, Bell and

80 *Private R* (n 2) 34–5 [126], quoting *Re Tracey* (n 6) 584–5 (Deane J) (emphasis added). See also *Private R* (n 2) 36 [128] (Nettle J).

81 *Private R* (n 2) 40–1 [144]–[145].

82 Ibid 39–40 [141].

83 The other involved a defence member urinating 'behind a tree on the roadside (for example, because they had a medical condition requiring them to urinate frequently)': ibid. It is noted that warnings have been repeatedly levelled at the use of such 'exercise[s] in imagination' for the purposes of asserting the 'absurd consequences' that might flow from a constitutional holding of the High Court: see *Love v Commonwealth* (2020) 375 ALR 597, 711–12 [455] (Edelman J), citing *Wainohu v New South Wales* (2011) 243 CLR 181, 240 [151] (Heydon J); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 43 [32] (Gleeson CJ, Gummow and Hayne JJ). See also *Western Australia v Commonwealth* (1975) 134 CLR 201, 271 (Mason J). The scenario proffered by Gordon J, however, provides a useful illustration of the situation faced by defence members on application of the service status test.

84 *Private R* (n 2) 39–40 [141].

85 Ibid 40 [142] (emphasis added).

86 Ibid.

87 Ibid.

Keane JJ on that issue is of broader doctrinal significance, and that is the aspect of the decision critiqued herein.[88]

A *The Boilermakers' Case and Characterising Judicial Power*

The starting point in respect of Ch III of the *Constitution* is what was said by Dixon CJ, McTiernan, Fullagar and Kitto JJ in the *Boilermakers' Case*:

> Chap. III … is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested … No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap. III.[89]

As Gabrielle Appleby notes, a consequence of that holding is 'the need to characterise all government powers … into judicial and non-judicial [categories]'.[90] However 'inconvenient' it may be,[91] this task remains the 'starting point'[92] of any Ch III analysis. The 'classic statement of the characteristics of judicial authority',[93] despite that concept being incapable of 'exclusive and exhaustive' definition,[94] is that given by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*[95] ('*Huddart, Parker & Co*'). His Honour said that judicial power would be exercised where 'some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action'.[96] The plurality in the *Boilermakers' Case*, however, maintained that there would be 'subjects which may be dealt with administratively or submitted to the judicial power without offending against any constitutional precept arising from Chap. III'.[97] Thus, there have emerged

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88 It is noted that Edelman J considered the further issue whether the power exercised by service tribunals is 'judicial power of the Commonwealth' within the meaning of Ch III: ibid 52–3 [178]–[180]. Although of interest, this point was discussed only by his Honour and, therefore, is not addressed herein. In any event, Edelman J queried whether the distinction between 'judicial power' and 'judicial power of the Commonwealth' might be 'no more than semantic': at 53 [180]. For the competing views on this issue, see, eg, *Bevan* (n 6) 467 (Starke J); *White* (n 6) 616–21 [123]–[140] (Kirby J). See generally Stellios (n 42) 267–8 [5.86]; Crowe and Ratnapala (n 10) 174–6.

89 *Boilermakers' Case* (n 13) 270. It is noted that that rule had emerged prior to the *Boilermakers' Case*, however: see, eg, Stellios (n 42) 76–9 [3.57]–[3.63].

90 Appleby (n 15) 271.

91 Ibid 286.

92 See, eg, *Thomas v Mowbray* (2007) 233 CLR 307, 413 [304] (Kirby J) ('*Thomas*').

93 *R v Davison* (1954) 90 CLR 353, 387 (Taylor J) ('*Davison*').

94 Ibid 366 (Dixon CJ and McTiernan J).

95 (1909) 8 CLR 330 ('*Huddart, Parker & Co*').

96 Ibid 357.

97 *Boilermakers' Case* (n 13) 278, citing *Davison* (n 93) 366–70 (Dixon CJ and McTiernan JJ). See also *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 178–9 (Isaacs J).

> two related concepts: that some powers are not peculiarly … judicial or executive (innominate powers …); and that a power may be of 'a chameleon-like nature which takes its colour from the character of' the body vested with the power (the chameleon principle). Although these concepts are often run together in the cases, they are separate ideas.[98]

Against this backdrop, the proposition that service tribunals exercise judicial power was accepted by Mason CJ, Wilson and Dawson JJ in *Re Tracey* with no more than a cursory glance: 'There has never been any real dispute about that.'[99] Their Honours added that 'a service tribunal has practically all the characteristics of a court exercising judicial power',[100] in that it 'has the power to determine authoritatively the liability of those charged before it, albeit subject to review or appeal. It makes those determinations in accordance with the law prescribed.'[101] To hold otherwise, their Honours said, would be 'to admit the appearance of judicial power and yet deny its existence'.[102] In so holding, their Honours joined a score of authorities to the point.[103] Indeed, at the time of *Re Tracey* there *had* never been any real dispute about the character of the power exercised by service tribunals. Rather, the contrary view has emerged more recently, beginning with the Court's equivocation in *Lane*.[104]

B *Accelerated Erosion*

The concern in *Lane* was not with service tribunals, but rather with the Australian Military Court ('AMC') established by the *DFDA*, as amended. Although established 'to make binding and authoritative decisions' in the purported exercise of the judicial power of the Commonwealth,[105] the AMC did not comply with the provisions of Ch III in respect of judicial tenure, and the relevant provisions of the *DFDA* were ruled invalid.[106] In characterising the functions reposed in the AMC, Hayne, Heydon, Crennan, Kiefel and Bell JJ highlighted the significance of the fact that it stood outside the chain of command of the defence forces. That made the AMC unlike service tribunals, the decisions of which remained subject to 'review … within the chain of command', thus lacking the binding and enforceable character of judicial power described by Griffith CJ in *Huddart, Parker & Co*, and thus remaining consistent with Ch III.[107]

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98 Stellios (n 42) 152 [4.89], quoting *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542, 552 (Gummow J). See also Crowe and Ratnapala (n 10) 173.

99 *Re Tracey* (n 6) 540.

100 Ibid 537.

101 Ibid.

102 Ibid.

103 See above nn 6, 16.

104 See also *White* (n 6) 649 [240] (Callinan J).

105 *Lane* (n 11) 261 [98].

106 Ibid 266–7 [115].

107 Ibid 261 [97].

Building upon the view expressed by their Honours in *Lane*, Kiefel CJ and Bell J in *Private R* (on this occasion joined by Keane J) said:

> Given that '[a] function may take its character from that of the tribunal in which it is reposed', 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. 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.[108]

While their Honours' reference to s 75(v) of the *Constitution* may swiftly be dispensed with,[109] the invocation of the so-called 'chameleon principle' warrants closer attention.

C *A Nominate, or Not Innominate, Power*

It may be observed that Kiefel CJ, Bell and Keane JJ invoked the chameleon principle without first asking whether the power exercised by service tribunals is one of those innominate powers to which the chameleon principle may apply.[110] Had their Honours undertaken that initial step of characterisation, it would have

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108 *Private R* (n 2) 15 [55] (citations omitted).

109 Federal judicial officers are amenable to review under s 75(v). The authorities for that proposition may well be 'too numerous to mention': *R v Federal Court of Australia; Ex parte Western Australian National Football League Inc* (1979) 143 CLR 190, 215 (Gibbs J) ('*Ex parte WANFL*'). To collate even some of them, however, is to observe at once the difficulty with the view taken by Kiefel CJ, Bell and Keane JJ: at 200–1 (Barwick CJ), 215 (Gibbs J), 241 (Aickin J); Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) 78; Stellios (n 42) 389 [7.59], citing *R v Court of Conciliation and Arbitration (Cth); Ex parte Whybrow & Co* (1910) 11 CLR 1, 22 (Griffith CJ), 33 (Barton J), 41–2 (O'Connor J); *R v Court of Conciliation and Arbitration (Cth); Ex parte Brisbane Tramways Co Ltd [No 1]* (1914) 18 CLR 54, 62 (Griffith CJ), 66–7 (Barton J), 79 (Isaacs J), 82–3 (Gavan Duffy and Rich JJ), 85–6 (Powers J); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 101 [42] (Gaudron and Gummow JJ); Justice Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2nd ed, 2020) 57, citing *R v Court of Conciliation and Arbitration (Cth); Ex parte Ozone Theatres (Australia) Ltd* (1949) 78 CLR 389, 399 (Latham CJ, Rich, Dixon, McTiernan and Webb JJ); *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 263 (Barwick CJ, Gibbs, Stephen and Mason JJ); *R v Cook; Ex parte Twigg* (1980) 147 CLR 15, 25 (Gibbs J).

110 See, eg, *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 360 (Gaudron J). Before referring to the chameleon principle, her Honour emphasised that 'some powers are essentially judicial' and therefore not of the kind that may either be reposed in a Ch III Court or executive body. That qualification was also made in the authorities cited by Kiefel CJ, Bell and Keane JJ: see *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 8 (Jacobs J) ('*Quinn*'), cited in *Private R* (n 2) 15 [55].

been observed, as it was by Nettle J and Edelman J,[111] that the power exercised by service tribunals is in fact '*the classic example*' of that which is 'exclusively … judicial'.[112] Justices Brennan, Deane and Dawson in *Chu Kheng Lim* (with whom Mason CJ agreed) relevantly said: 'There are some functions which … have become established as essentially and exclusively judicial in character. *The most important of them* is the adjudgment and punishment of criminal guilt.'[113] Justice Edelman was the only member of the Court to undertake the requisite analysis to characterise the power conferred by the *DFDA*,[114] concluding by reference to *Re Tracey* that 'a service tribunal has "practically all the characteristics of a court exercising judicial power"'.[115] Among other things, his Honour noted that service tribunals are empowered 'to impose punishments … the most extreme being imprisonment for life or imprisonment for a specific period'.[116] His Honour observed further that the court martial the subject of the decision of the High Court in *R v Bevan; Ex parte Elias and Gordon* had imposed death sentences upon the applicants in that case.[117]

The last bastion of opposition offered by the plurality, that decisions of service tribunals are subject to confirmation within the chain of command established under s 68 of the *Constitution*,[118] and thus 'lack … final authority that usually characterises … judicial power',[119] warrants further discussion. Indeed, it is perhaps the only point taken by their Honours consistent with a principled analysis of governmental power. Justice Edelman responded, again by reference to history, that '[t]he original intention of interposing the authority of the Crown … was assuredly one of mercy. Military tribunals were … prone to severity, and hence the attribute of mercy was

111 *Private R* (n 2) 31 [116] (Nettle J), 47 [168] (Edelman J).

112 *Quinn* (n 110) 11 (Jacobs J) (emphasis added).

113 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (emphasis added) (citations omitted) ('*Chu Kheng Lim*'), quoted in *Private R* (n 2) 47 [168] (Edelman J). Although Nettle J might have regarded the adjudication of criminal guilt as being a purpose extrinsic to that for which military justice is admitted as an exception to Ch III, his Honour nonetheless observed that service tribunals 'determine whether a person has engaged in conduct which is forbidden by law and, if so, … make a binding and enforceable declaration as to the consequences which the law imposes by reason of that conduct', which 'lies at the heart of exclusive judicial power': *Private R* (n 2) 31 [116], quoting *Re Nolan* (n 6) 497 (Gaudron J).

114 *Private R* (n 2) 47–8 [169]–[170].

115 Ibid 48 [170], quoting *Re Tracey* (n 6) 537 (Mason CJ, Wilson and Dawson JJ).

116 *Private R* (n 2) 47 [169], citing *DFDA* (n 1) ss 68(1)(a)–(b).

117 *Private R* (n 2) 46 [164]. See *Bevan* (n 6).

118 That process was explained in further detail by Edelman J: *Private R* (n 2) 50–1 [174]–[176]. The starting point is s 171(1) of the *DFDA* (n 1), which provides that an order made by a service tribunal 'takes effect forthwith'. An exception is an order for imprisonment, which 'do[es] not take effect unless approved by a reviewing authority': at ss 172(1)(a)–(b). See also at s 150. See *Private R* (n 2) 51 [176] (Edelman J).

119 *Private R* (n 2) 14 [52]. See also at 14 [53].

secured to the criminal.'[120] His Honour suggested that such a function is no different to 'the traditional executive prerogative to grant mercy' in respect of decisions of courts,[121] and further that '[t]rials by service tribunals have *always* included such confirmation … yet have *always* been considered as judicial in nature'.[122] Crowe and Ratnapala argue further that the process of review within the chain of command does not amount to a full de novo hearing, and is thus no different to 'ordinary … review upon appeal'.[123] They highlight the qualification made by Griffith CJ in *Huddart, Parker & Co* upon the requirement that the exercise of judicial power is to involve a 'binding and authoritative decision', namely, that such a decision may be 'subject to appeal or not'.[124]

Returning to the starting point of the present discussion, that '[t]he investing of judicial power in military tribunals is … a true exception that can be explained only on historical grounds',[125] it follows that it is neither appropriate nor desirable to depart from a view spanning over a century of legal thinking within Australia,[126] and long pre-dating federation.[127] The reasons of Edelman J in *Private R* demonstrate that, on balance, if not necessarily, the power reposed in service tribunals passes muster under any principled understanding of the nature of judicial power.[128]

D *An Unacceptable Trade-Off*

It might be contended that Kiefel CJ, Bell and Keane JJ in *Private R* were committed to the pursuit of 'maintaining doctrinal purity',[129] or 'constitutional synthesis',[130]

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120 Ibid 50 [174], quoting Charles M Clode, *The Administration of Justice under Military and Martial Law* (John Murray, 1872) 145.

121 *Private R* (n 2) 50–1 [175].

122 Ibid 50 [174] (emphasis added).

123 Crowe and Ratnapala (n 10) 172.

124 Ibid, quoting *Huddart, Parker & Co* (n 95) 357. See also Henry Burmester, 'The Rise, Fall and Proposed Rebirth of the Australian Military Court' (2011) 39(1) *Federal Law Review* 195, 205.

125 *Re Woolley* (n 17) 22 [50] (McHugh J).

126 The earliest Australian source referred to in *Private R* (n 2) was William H Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, 2nd ed, 1910): see *Private R* (n 2) 38 [134] (Gordon J), 45 [163] (Edelman J). It is now recognised that the framers of the *Constitution* 'were well aware of the role and functions of service tribunals': *White* (n 6) 583 [8] (Gleeson CJ). See at 582–3 [7]–[8], quoting *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 10 March 1898, 2255 (Edmund Barton), 2259 (Richard O'Connor).

127 See above n 16.

128 See also *Re Tracey* (n 6) 536–8 (Mason CJ, Wilson and Dawson JJ).

129 Stephen McDonald, '"You CAN Handle the … Trial of Defence Members for Any Offence," High Court Tells Military Tribunals', *AUSPUBLAW* (Blog Post, 25 September 2020) <https://auspublaw.org/2020/09/you-can-handle-the-trial-of-defence-members-for-any-offence-high-court-tells-military-tribunals/>.

130 *Private R* (n 2) 42 [151] (Edelman J).

that is, avoiding the incoherence that may be said to flow from accepting that judicial power may exist outside Ch III.[131] Respectfully, however, their Honours' invocation of the chameleon principle in reaching that view is the kind of reasoning Kirby J in *Thomas v Mowbray* ('*Thomas*') regarded as threatening 'to debase the Court's doctrine',[132] and to render '[t]he separation of the judicial power … a chimera'.[133] His Honour had earlier said:

> [T]he nature of the body in which a function is reposed may assist in determining the 'judicial character' of that function. However, necessarily, this fact cannot eliminate the judicial duty to characterise the function. The most that the 'chameleon doctrine' provides is one way of resolving a *doubt* about the essential nature of the function.[134]

This discussion arose in the context of a submission made by the Commonwealth 'bluntly and with chilling candour … that *Boilermakers* "does not matter much any more"'.[135] Justice Kirby noted that 'the chameleon doctrine explained why … [the Commonwealth] had not, in this or other cases, urged that *Boilermakers* be overruled'.[136] It is most concerning that a similar approach may be seen to suffuse the reasoning of three members of the Court in *Private R*. It may be that, in other settings, the extension of the chameleon principle is a legitimate and desirable end to enhance governmental efficiency and flexibility in the 'modern regulatory state',[137] and, in practice, 'to validate the exercise of what would otherwise be the judicial power of the Commonwealth outside … Ch III'.[138] As Nettle J in *Private R* noted, however, such considerations do not weigh upon the question whether service tribunals exercise judicial or executive power.[139] Rather, the system of military justice has long been

131 See, eg, *White* (n 6), 649 [240] (Callinan J); *Lane* (n 11), 247–8 [47]–[48] (French CJ and Gummow J). But see *Private R* (n 2) 33 [121] (Nettle J): 'the *Constitution* does recognise other forms of judicial power the ultimate source of which is Commonwealth legislative power'. Justice Nettle appeared to have in mind the judicial power of the courts of the territories, which finds its constitutional foundation in s 122: at 33 [121], citing *Spratt v Hermes* (1965) 114 CLR 226, 242–3 (Barwick CJ), 251 (Kitto J), 260–1 (Taylor J), 266 (Menzies J), 278 (Windeyer J), 282 (Owen J).

132 *Thomas* (n 92) 427–8 [344].

133 Ibid 426 [341].

134 Ibid 427 [343] (emphasis in original) (citations omitted). See also *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, 371 [70]–[71] (Kirby J); *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381, 393 [41]–[42] (Kirby J), cited in Crowe and Ratnapala (n 10) 174.

135 *Thomas* (n 92) 426 [340], quoting Transcript of Proceedings, *Thomas v Mowbray* [2007] HCATrans 76, 11295 (DMJ Bennett QC).

136 *Thomas* (n 92) 426 [340].

137 Stellios (n 42) 165 [4.113]. See Appleby (n 15) 272–3, quoting Fiona Wheeler, 'The *Boilermakers Case*' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 160, 171.

138 *Private R* (n 2) 51 [177] (Edelman J).

139 Ibid 33–4 [122].

admitted as an exception to Ch III, so that its validity does not depend upon an application of the chameleon principle.

Contrary to the approach of Kiefel CJ, Bell and Keane JJ in *Private R*, if the chameleon principle is more broadly to continue to gain ascendance within the High Court's Ch III jurisprudence, then there must be proper argument to the point, and considered debate between members of the Court as to the status of the first limb of the holding in the *Boilermakers' Case* if such a course is to be taken. Such detailed examination is surely necessary in respect of a rule that, finding its origins in *Waterside Workers' Federation of Australia v JW Alexander Ltd*,[140] spans over 100 years of the Court's jurisprudence.

[140] (1918) 25 CLR 434. See at 465–6 (Isaacs and Rich JJ).