

MILITARY JUSTICE AND CHAPTER III: THE CONSTITUTIONAL BASIS OF COURTS MARTIAL

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ABSTRACT

The High Court has long struggled with the constitutional status of military tribunals established to hear disciplinary charges against service personnel. The Court's judgments reveal three distinct theories on this issue. The first view holds that military tribunals exercise judicial power, but not 'the judicial power of the Commonwealth' within the meaning of s 71 of the *Constitution*. The second view holds that the power in question is not judicial power at all for constitutional purposes. The third view holds that the power is 'the judicial power of the Commonwealth', but can be exercised by courts martial under a limited exception to the rules set out in Chapter III of the *Constitution*. The first view dominated the High Court's reasoning until *Lane v Morrison* (2009) 239 CLR 230, where the judges endorsed the second view. This article contends that the first and second views pose insuperable difficulties when placed in their broader constitutional context. The authors therefore argue for the third interpretation. They further argue that the constitutional basis for the third view strongly implies that military tribunals may only exercise jurisdiction over offences by military personnel that relate to service discipline.

I INTRODUCTION

Chapter III of the *Commonwealth Constitution* contains the *Constitution's* express requirements and directives concerning the administration of justice. The first section, s 71, is a pivotal provision of the *Constitution*. It states that '[t]he 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.' The only clear injunction in s 71 is to the effect that the judicial power of the Commonwealth shall be vested in the courts mentioned in that section. However, the High Court has derived from provisions of Chapter III and the structure and theory of the *Constitution* as a whole a doctrine that, subject to certain exceptions, seeks both to vest the judicial power of the Commonwealth in the courts specified in s 71 and to prevent the vesting of non-judicial powers in the High Court and other federal courts. In recent years, the High

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Court has also ruled that State courts must not be vested with powers that are incompatible with their constitutional position as courts exercising federal judicial power.¹

The first major question of interpretation arising from s 71 is whether the affirmative character of the words that vest judicial power in the relevant courts negates the capacity of Parliament to vest such powers in other bodies. In the first case on judicial power decided by the High Court, Griffith CJ decided without discussion that '[i]t follows [from the words of s 71] that the Parliament has no power to entrust the exercise of judicial power to any other hands.'² In *R v Davison*,³ the question was thought to have been settled by *Waterside Workers' Federation of Australia v J W Alexander Ltd* ('*Alexander's Case*'), although that case, too, failed to discuss reasons for the interpretation.⁴ It was not until *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers' Case*')⁵ that the interpretive question was addressed squarely by the Court.

In reiterating the position stated in earlier cases, the majority held that Chapter III 'is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested' and hence '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'.⁶ On appeal, the Privy Council reached the same conclusion, again treating the question as one of interpretation. Their Lordships agreed with the High Court majority that the affirmative language of s 71 negated the possibility of vesting judicial power in other courts or bodies. They held that Chapter III 'is in its terms detailed and exhaustive'; hence, it is not open to Parliament 'to turn from Chap. III to some other source of power'.⁷

The rule in the *Boilermakers' Case* has been stringently enforced by the High Court for more than fifty years with only a very limited number of exceptions. However, the rule has posed significant problems for the High Court's approach to military tribunals established under Commonwealth legislation to hear criminal and other disciplinary charges against service personnel. The High Court has acknowledged that Parliament may grant military tribunals not constituted in accordance with Chapter III the power to try military offences, subject to certain limitations. However, the nature of this exception and the precise limits of the power that may be granted have not been fully spelt out. In particular, the High Court has found it difficult to settle on a coherent rationale for its decisions in this area.

¹ See, eg, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *South Australia v Totani* (2010) 242 CLR 1; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; *Wainohu v New South Wales* (2011) 243 CLR 181. For further discussion, see Suri Ratnapala and Jonathan Crowe, 'Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36 *Melbourne University Law Review* (forthcoming).

² *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 355.

³ (1954) 90 CLR 353, 364.

⁴ (1918) 25 CLR 434, 442, 467, 480.

⁵ (1956) 94 CLR 254.

⁶ *Ibid* 270.

⁷ *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529, 538.

This article critically reviews the High Court's jurisprudence on the constitutional status of military tribunals. The Court's judgments reveal three distinct theories on the crucial question of whether military tribunals exercise 'the judicial power of the Commonwealth' within the meaning of s 71. The first view holds that the power exercised by military tribunals is judicial power, but not 'the judicial power of the Commonwealth'. The second view holds that the power in question is not judicial power at all for constitutional purposes. The third view holds that the power is 'the judicial power of the Commonwealth', but can be exercised by military tribunals under an exception to the rule in the *Boilermakers' Case*. The first view dominated the High Court's reasoning until the recent case of *Lane v Morrison*,⁸ where the judges unanimously adopted the second view. The third view has significant academic support and was endorsed by Kirby J in two recent cases.

This article examines the doctrinal consistency of each of these approaches. We argue that the first theory is unsatisfactory, since the power of military courts to try and punish service personnel meets all the usual criteria for 'the judicial power of the Commonwealth' within s 71. The theory effectively creates a sui generis form of judicial power beyond the reach of constitutional guarantees, contrary to the terms and spirit of Chapter III. It also yields a strained and artificial view of the relationship between service and civil offences arising from the same conduct. We criticise the second theory on similar grounds. The power of military tribunals displays all the features of a central case of judicial power. Any attempt to exclude it from that category rests on a dangerous and unsound theory of chameleon powers. It follows that the first and second theories pose insuperable difficulties when placed within the wider context of Chapter III jurisprudence. The third theory, by contrast, is more consistent with established doctrine and more forthright in its acceptance of the pragmatic historical reasons for the constitutionality of courts martial.

The third view described above has previously been advocated by a number of academic commentators, including one of the authors of this article.⁹ However, the article builds on the existing literature in two important ways. First, it reconsiders the issue in light of the High Court's recent decisions on military justice in *White v Director of Military Prosecutions*¹⁰ and *Lane*,¹¹ which have seen a notable shift in the judges' lines of reasoning. Second, it draws out the connection between the Chapter III issue raised above and the parallel debate about the types of offences that can legitimately be tried by military tribunals. The High Court has been divided on the issue of whether military tribunals can constitutionally try any offence committed by service personnel (the *service status theory*) or whether a more substantial connection to military discipline is required (the *service connection theory*). We argue that the constitutional reasoning behind our preferred view on the judicial power question strongly supports the service

⁸ (2009) 239 CLR 230 (*Lane*).

⁹ Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 2002) 179-180. See also Zelman Cowen, 'The Separation of Judicial Power and the Exercise of Defence Powers in Australia' (1948) 26 *Canadian Bar Review* 829; R A Brown, 'The Constitutionality of Service Tribunals under the *Defence Force Discipline Act 1982*' (1985) 59 *Australian Law Journal* 319; Andrew Mitchell and Tania Voon, 'Defence of the Indefensible? Reassessing the Constitutional Validity of Military Service Tribunals in Australia' (1999) 27 *Federal Law Review* 499.

¹⁰ (2007) 231 CLR 570 (*White*).

¹¹ (2009) 239 CLR 230.

connection theory. The two issues are therefore more tightly connected than it might at first appear.

II TWO COMPETING THEORIES

The High Court has long accepted that military tribunals have the constitutional power to try military offences. The historical legitimacy of courts martial springs from the operational requirements of a military force. In the early case of *Dynes v Hoover*, the United States Supreme Court affirmed that the *United States Constitution* empowers Congress to 'provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations'.¹² As the Supreme Court noted in a later decision, 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise'.¹³ The organisational readiness and operational effectiveness required of a military force demands a special brand of discipline. The military has effectively become a 'specialized society separate from civilian society'.¹⁴ Hence, the capacity to enforce discipline through its own tribunals is an inherent feature of a military force.

The High Court followed the United States authorities to uphold the constitutionality of courts martial in *R v Bevan; Ex parte Elias & Gordon*¹⁵ and *R v Cox; Ex parte Smith*.¹⁶ Williams J observed in *Bevan* that '[a]s the establishment of courts-martial is necessary to assist the Governor-General, as Commander-in-Chief... to control the forces and thereby maintain discipline, I think it must follow that the Commonwealth Parliament, like Congress, can legislate for such courts'.¹⁷ Similarly, Dixon J remarked in *Cox* that '[t]o ensure that discipline is just, tribunals acting judicially are essential to the organization of an army or navy or air force'.¹⁸ The legitimacy of military tribunals as part of the Australian constitutional order has therefore never really been in doubt.

The precise constitutional justification for military justice to be administered by military tribunals, however, has long been unsettled. In particular, the High Court needed to overcome the injunction in the *Boilermakers' Case* that only courts established according to the provisions of Chapter III may exercise the judicial power of the Commonwealth. The defence power in s 51(vi), which was relied upon to establish courts martial, is granted 'subject to this Constitution'.¹⁹ The power is therefore subject to Chapter III. In *Bevan*, Starke J addressed this issue, although the parties in the case did not raise it. His Honour found that the courts martial under the *Navy Discipline Act 1866 (Imp)* exercised judicial power²⁰ but, following *Dynes v Hoover*, proceeded to hold that they were not exercising 'the judicial power of the Commonwealth' within the meaning of s 71.²¹

¹² 61 US (20 How) 65, 79 (1858).

¹³ *United States ex rel Toth v Quarles*, 350 US 11, 17 (1955).

¹⁴ *Parker v Levy* 417 US 733, 743 (1974).

¹⁵ (1942) 66 CLR 452 ('*Bevan*').

¹⁶ (1945) 71 CLR 1 ('*Cox*').

¹⁷ (1942) 66 CLR 452, 481.

¹⁸ (1945) 71 CLR 1, 23.

¹⁹ *Australian Constitution* s 51.

²⁰ (1942) 66 CLR 452, 466.

²¹ *Ibid* 467-8.

In *Cox*, Dixon J considered the nature of the argument that justifies the establishment of courts martial. His Honour took the view that the apparent exception recognised with respect to the armed forces is, in fact, not a real exception.²² Establishment of these tribunals does not derogate at all from the constitutional injunctions regarding judicial power because 'they do not form part of the judicial system administering the law of the land'.²³ Dixon J's terse comments in *Cox* are open to two interpretations. His Honour might be read as agreeing with Starke J in *Bevan* that military tribunals do not exercise 'the judicial power of the Commonwealth'.²⁴ Alternatively, he might be interpreted as holding that the power exercised by military tribunals is not judicial power at all.

The constitutional status of courts martial was revisited by the High Court in *Re Tracey; Ex parte Ryan*.²⁵ In that case, the Court considered whether Parliament could establish service tribunals for the trial and punishment of service personnel accused of committing 'civil offences' that are ordinarily triable by regular civil courts. These courts martial were not constituted in accordance with Chapter III. Parliament's competence to vest such powers in the courts martial was claimed under s 51(vi) of the *Constitution*. The Court had no difficulty in finding that these tribunals exercised judicial power. As Mason CJ, Wilson and Dawson JJ put it in their joint judgment, '[t]here has never been any real dispute about that.'²⁶ Their Honours then restated the established rule that judicial powers relating to subject matters specified in s 51 must be created under Chapter III. They said:

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... courts as the Parliament creates or such other courts as it invests with federal jurisdiction.²⁷

Their Honours proceeded to hold that 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'.²⁸ This statement is open to two interpretations. It could mean that the relevant disciplinary power, though judicial power, is not within the concept of the 'judicial power of the Commonwealth' for s 71 purposes. Alternatively, it could mean that the power is part of 'the judicial power of the Commonwealth', but may nevertheless be vested in a tribunal outside Chapter III, under an exception to the *Boilermakers'* rule. The joint judgment of Brennan and Toohey JJ in *Re Tracey*, however, was less ambiguous. Their Honours were clearly inclined to adopt the view of Starke J

²² (1945) 71 CLR 1, 23.

²³ *Ibid.*

²⁴ This interpretation is adopted without much discussion by Mason CJ, Wilson and Dawson JJ in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 540 ('*Re Tracey*'). See also *White* (2007) 231 CLR 570, 585 (Gleeson CJ). For a different view, see *Re Tracey* (1989) 166 CLR 518, 582 (Deane J).

²⁵ (1989) 166 CLR 518.

²⁶ *Ibid.* 540.

²⁷ *Ibid.*

²⁸ *Ibid.* 541.

in *Bevan* that courts martial exercise judicial power, but not 'the judicial power of the Commonwealth'.²⁹

Brennan and Toohey JJ reasoned that if the power exercised by military tribunals was 'part of "[t]he judicial power of the Commonwealth" within the meaning of that phrase in s. 71... the jurisdiction can be validly vested only in a court mentioned in s. 71 of the Constitution – a Ch. III court – but, if it is not, there can be no objection to the vesting of that jurisdiction in service tribunals'.³⁰ This led them to embrace the conclusion that the power was not 'the judicial power of the Commonwealth'. Their Honours reasoned as follows:

As the defence power authorizes the Parliament to establish the permanent armed forces of the Commonwealth and to employ them in different times and places and in a variety of circumstances, a grant of disciplinary powers to be exercised judicially by officers of the armed forces is – as it has historically been regarded – an essential concomitant. Just as the scope of s. 51(vi) changes according to time, place and circumstance, so does the jurisdiction of service tribunals. But, when that jurisdiction falls to be 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.³¹

Deane J, adopting what he termed 'an essentially pragmatic construction', held that the term "the judicial power of the Commonwealth" in Ch. III 'excluded '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".³² Gaudron J drew a similar distinction between what she called 'military judicial power' and 'the judicial power... comprehended in the expression "the judicial power of the Commonwealth" as used in Ch. III of the Constitution'.³³ Thus, a clear majority in *Re Tracey* held that the power exercised by courts martial, although strictly judicial in character, does not fall within the concept of 'judicial power of the Commonwealth'.

The proposition that the traditional power of military tribunals to hear charges against service personnel is not 'judicial power of the Commonwealth' within the meaning of s 71 was reiterated by a majority of the High Court in the 2007 case of *White v Director of Military Prosecutions*.³⁴ Six of the judges in that case (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ; Kirby J dissenting) confirmed that the exercise of this power is not subject to the requirements of Chapter III, even if the offences being tried are not purely disciplinary in nature. The case involved charges of indecency and assault brought against a Chief Petty Officer in the Royal Australian Navy based on acts committed when the accused was off duty and out of uniform.

The joint judgment of Gummow, Hayne and Crennan JJ in *White* endorsed Starke J's view in *Bevan* that the power exercised by service tribunals is judicial power, but not 'the judicial power of the Commonwealth'.³⁵ This also seems to be the view of Gleeson

²⁹ (1989) 166 CLR 518, 572.

³⁰ Ibid 564.

³¹ Ibid 574. Their Honours reiterated this position in *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 479.

³² (1989) 166 CLR 518, 583.

³³ Ibid 598.

³⁴ (2007) 231 CLR 570.

³⁵ Ibid 595–8.

CJ.³⁶ A clear majority of the Court therefore endorsed this interpretation. Callinan J, however, described the power exercised by service tribunals as a special sort of 'executive power' which should nonetheless be exercised 'in a proper and judicial way'.³⁷ His Honour therefore seems to have thought that the power is not 'the judicial power of the Commonwealth' because it is not judicial power at all. Heydon J's very short judgment endorsed Callinan J's analysis of the authorities, but did not express an opinion on the precise line of reasoning that should be adopted to support those past decisions.³⁸

The issue arose again in the recent High Court case of *Lane v Morrison*.³⁹ That case concerned the validity of amendments to the *Defence Force Discipline Act 1982* (Cth) creating a new body – the Australian Military Court (AMC) – to administer military justice. The High Court held unanimously that the AMC was exercising the judicial power of the Commonwealth within the meaning of Chapter III. Since the AMC did not comply with the requirements of Chapter III regarding the appointment and tenure of judges, the relevant parts of the Act were constitutionally invalid. In reaching this conclusion, the members of the Court emphasised the fact that the AMC was a 'court of record' set up as a conclusive arbiter of guilt or innocence of those charged with service offences. This contrasted with the earlier system of courts martial, whose decisions were subject to review and enforcement by higher levels of the military hierarchy.⁴⁰

All the judges in *Lane* seemed inclined to the view that the traditional courts martial which the AMC replaced did not exercise judicial power at all for constitutional purposes. This was despite the fact that Hayne, Crennan and Gummow JJ had previously suggested in *White* that the power was judicial power, but not 'the judicial power of the Commonwealth'. One of the defining characteristics of a judicial decision set out in the oft quoted judgment of Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead* is its 'binding and authoritative' effect.⁴¹ The High Court held in *Lane* that decisions of courts martial lacked this quality, as they were subject to review and confirmation by the military hierarchy. As the joint judgment of Hayne, Heydon, Crennan, Kiefel and Bell JJ noted:

A court-martial did not make a binding and authoritative decision of guilt or determination of punishment. A court-martial did not enforce its decisions. Enforcement of any decision, other than acquittal of the accused, depended upon the outcome of review of the decision within the chain of command.⁴²

The superior military authority that automatically reviewed the judgment of a court martial was not bound to act in the manner of an appeals court within the civilian system. Rather, it was empowered to make any decision that could 'reasonably be regarded as substantially serving the purpose of maintaining or enforcing service

³⁶ Ibid 585–6.

³⁷ Ibid 649.

³⁸ Ibid 650.

³⁹ (2009) 239 CLR 230.

⁴⁰ (2009) 239 CLR 230, 248 (French CJ and Gummow J), 256–7 (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

⁴¹ (1909) 8 CLR 330, 357 ('*Huddart, Parker*').

⁴² (2009) 239 CLR 230, 261.

discipline'.⁴³ Their Honours therefore agreed with the characterisation of military tribunals given by Platt J of the Supreme Court of New York in *Mills v Martin*:

The proceedings of the Court-Martial were not definitive, but merely in the nature of an inquest, to inform the conscience of the commanding officer. He, alone, could not condemn or punish, without the judgment of a Court-Martial; and, it is equally clear, that the Court could not punish without his order of confirmation.⁴⁴

The joint judgment of French CJ and Gummow J adopted a similar analysis. Their Honours cited the statement of Starke J in *Bevan* that although military tribunals did not exercise 'the judicial power of the Commonwealth', they did exercise judicial power. However, they went on to note that 'the only judicial power which the *Constitution* recognises is that exercised by the branch of government identified in Ch III.'⁴⁵ The power of courts martial is therefore not judicial power for constitutional purposes, due to its traditional exercise by the military hierarchy, even though the officers wielding it have a duty to 'act judicially'.⁴⁶ The decisions of the AMC were subject only to the appellate jurisdiction of the Defence Force Discipline Appeal Tribunal and the Federal Court, placing them outside the chain of command.⁴⁷ Their Honours concluded that the AMC, unlike traditional courts martial, exercised the judicial power of the Commonwealth.

The prevailing view of the High Court until *Lane* was clearly in line with Starke J's approach in *Bevan*. It should be noted, however, that until *Re Tracey* this position had never been unequivocally endorsed by a majority of the Court. The judgments in *Lane* then moved away from this position in favour of the view that the power traditionally exercised by courts martial is not judicial power at all, due to its place within the military hierarchy. This stance echoed the view suggested earlier by Callinan J in *White*. In the following sections, we will show that both these positions encounter serious difficulties. We will then argue that these problems are avoided by a third possible view: that the power of military tribunals is 'the judicial power of the Commonwealth', but can be exercised by courts martial under an exception to the rules set out in Chapter III.

III THE PROBLEM OF PARALLEL JURISDICTION

The view preferred by most High Court judges until *Lane* – that while the power exercised by courts martial is judicial power, it is not 'judicial power of the Commonwealth' – causes a great deal of conceptual difficulty. In the first place, if it is not 'judicial power of the Commonwealth', then what type of judicial power is it? The wording of s 71 seems primarily intended to distinguish 'the judicial power of the Commonwealth' from the judicial power of the States. However, it is clear that the High Court judges do not regard the power of military tribunals as falling within the latter category. Indeed, it would make no sense to do so, since military tribunals are established under the Commonwealth defence power in s 51(vi) of the *Constitution*. Prosecutions before courts martial are matters '[i]n which the Commonwealth, or a

⁴³ Ibid 239, quoting Department of Defence, *Government Response to the Senate Report on the Effectiveness of Australia's Military Justice System*, Parl Paper No 134 (2005).

⁴⁴ Ibid 257, quoting 19 Johns 7, 30 (1821).

⁴⁵ Ibid 248.

⁴⁶ Ibid 247.

⁴⁷ Ibid 248.

person suing or being sued on behalf of the Commonwealth, is a party'. They therefore involve the original jurisdiction that s 75(iii) of the *Constitution* vests in the High Court. They are also matters '[a]rising under any laws made by the Parliament' as stated in s 76(ii) of the *Constitution*. In what sense, then, can it be said that the judicial power of such tribunals is not 'judicial power of the Commonwealth'?⁴⁸

A number of High Court judges have purported to answer this question by saying that the judicial power in question is *sui generis*.⁴⁹ It belongs to neither the Commonwealth nor the States. However, it is difficult to find any basis in constitutional law or theory for this kind of free floating judicial power. Indeed, the notion of a *sui generis* judicial power seems fraught with danger. The judicial power of the Commonwealth is governed by Chapter III, while State courts are governed by State law and the High Court's emerging jurisprudence on institutional integrity.⁵⁰ The notion of a special form of judicial power wholly unfettered by the usual constitutional guarantees seems contrary to the spirit of both Chapter III and the High Court's jurisprudence since the *Wheat Case*.⁵¹

The decision of the judges cited above to create an entirely new category for the judicial power of military tribunals therefore smacks of ad hocery. The position also leads to other difficulties. One of the consequences of treating the power of courts martial as judicial power outside Chapter III is that it cannot be vested in Chapter III courts according to the rule confirmed in *Re Wakim; Ex parte McNally*.⁵² Thus, if a particular offence is triable by a court martial as involving power that lies outside Chapter III, a serious question arises whether an offence cast in the identical terms could be made triable by a Chapter III court as a civil offence. This difficulty is eliminated if the High Court frankly concedes that it is recognising, in the case of courts martial, a limited exception to the general rules regarding judicial power based on historical and practical considerations.

The High Court has built up a considerable body of jurisprudence dealing with the relationship between military tribunals and civil courts, but it fails to adequately dispose of the above difficulty. An act that constitutes a punishable breach of military discipline may also be an offence under general State or Commonwealth law. Under s 61 of the *Defence Force Discipline Act*, acts of defence members and defence civilians are service offences if they are Territory offences under the law applicable to the Jervis Bay Territory. Offences such as rape, murder, looting and assaulting a superior officer will not only be serious military offences, but also civil offences under State and Territory law. To take an example with respect to Commonwealth law: drug trafficking is a service offence under s 59(1) of the *Defence Force Discipline Act* and a civil offence under the *Customs Act 1901* (Cth). The High Court's jurisprudence makes it clear that

⁴⁸ For related criticisms, see *White* (2007) 231 CLR 570, 616–17 (Kirby J).

⁴⁹ See, eg, *Re Tracey* (1989) 166 CLR 518, 574 (Brennan and Toohey JJ); *White* (2007) 231 CLR 570, 586 (Gleeson CJ).

⁵⁰ See, eg, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *South Australia v Totani* (2010) 242 CLR 1; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; *Wainohu v New South Wales* (2011) 243 CLR 181. For discussion, see Ratnapala and Crowe, above n 1.

⁵¹ *New South Wales v Commonwealth* (1915) 20 CLR 54.

⁵² (1999) 198 CLR 511 ('*Re Wakim*').

the two jurisdictions may exist simultaneously. However, it is important to work out all the implications of this proposition.

Often, the service offence and the civil offence will be identical, particularly where the service offence is created by direct reference to a civil offence. However, they need to be conceptually distinguished if the theory that the power with respect to the service offence is judicial power that lies outside Chapter III is correct. One may argue that an act is a service offence owing to its prejudicial impact on the service and a civil offence because of its impact on a wider community interest. If so, it could be contended that the jurisdiction to try the service offence cannot be vested in a federal court, for that would involve the exercise of judicial power outside Chapter III. State courts would also lack jurisdiction over such offences, because any State law purporting to confer such jurisdiction will fail for inconsistency with a valid Commonwealth law.⁵³

The view that the power exercised by military tribunals is not 'the judicial power of the Commonwealth' therefore means that Commonwealth and State courts are constitutionally barred from trying service offences. It also entails that military tribunals lack constitutional jurisdiction over civil offences. Parliament cannot confer on a court martial the power to try a civil offence under Commonwealth law, because such power will almost certainly fall within s 75(iii) of the *Constitution* (dealing with matters to which the Commonwealth is a party) and thus be required to be exercised by the High Court or another federal court established according to Chapter III. The Commonwealth Parliament lacks the constitutional power to confer on courts martial jurisdiction to try civil offences under State law. More significantly, having regard to s 106 of the *Constitution*, any attempt to do so is likely to be treated as an impermissible invasion of State judicial power.⁵⁴

In *Re Tracey*, Brennan and Toohey JJ made plain their view that the fact that an act may be tried as a service offence by a court martial does not 'impair civil jurisdiction' over the corresponding civil offence.⁵⁵ They reasoned:

The purpose of criminal proceedings in the civil courts is far wider and the exercise of jurisdiction by civil courts may properly embrace considerations which have no relevance to service discipline. It is the difference between the purpose of proceedings before service tribunals and the purpose of proceedings before civil courts that justifies the subjection of service personnel to the jurisdiction of both.⁵⁶

This theory seeks to distinguish the service jurisdiction of military tribunals from the civil jurisdiction of Commonwealth and State courts based on the purpose of the prosecution. If the purpose is military discipline, the jurisdiction lies solely with courts martial. If the purpose is civil order more generally, the jurisdiction lies solely with the civil courts. However, these purposes are vague and will surely overlap in many cases. A purposive delineation of these two types of offences therefore fits uneasily with the High Court's construal of the constitutional framework, according to which there is a strict separation between the two forms of jurisdiction.

It bears emphasising that a military offence and a civil offence will often be constituted by exactly the same conduct. The High Court has found no reason to examine the validity of s 190(1) of the *Defence Force Discipline Act*, which provides that

⁵³ *Australian Constitution* s 109.

⁵⁴ *Re Tracey* (1989) 166 CLR 518, 547, 575.

⁵⁵ *Ibid* 570.

⁵⁶ *Ibid* 571.

'subject to the Constitution, a civil court does not have jurisdiction to try a charge of a service offence'. However, the corresponding civil offence will be triable by a Chapter III court or a State court, depending on the law under which it arises. In *Re Tracey*, the High Court considered s 190(3) and (5) of the *Defence Force Discipline Act*, which sought to deprive civil courts of jurisdiction to try a person for a civil offence where a court martial had exercised jurisdiction in relation to 'substantially the same offence'. All the judges who considered the issue found these ouster clauses to be unconstitutional.⁵⁷

We are therefore left with the position that the same conduct may give rise to two incompatible forms of jurisdiction, which cannot validly be exercised by the same tribunal. These two forms of jurisdiction appear to be inherently overlapping and intertwined, due to their purposive definitions. Nonetheless, the first theory treats them as entirely separate forms of power: one falls within the general judicial power of the Commonwealth or the States, while the other is *sui generis*. A body that exercises one form of jurisdiction is therefore constitutionally barred from exercising the other. This framework seems artificial in the extreme. It posits a clear and rigid jurisdictional delineation where none exists, purely for the purposes of doctrinal convenience.

IV THE PROBLEM OF CHAMELEON POWERS

The conceptual difficulties discussed above pose serious problems for the theory that power with respect to military offences is judicial power, but not 'judicial power of the Commonwealth'. The alternative theory that the power of courts martial is non-judicial does not fare any better. According to the latter view, the power in question should be exercised 'judicially', but it is not strictly judicial in character.⁵⁸ This is the position adopted by all the High Court judges in *Lane* and Callinan J in *White*. It is also consistent with Dixon J's brief comments in *Cox*,⁵⁹ although those remarks have usually been interpreted as agreeing with Starke J's approach in *Bevan*. The view that the power exercised by military tribunals is not judicial power at all avoids the need to recognise a *sui generis* category of free floating judicial power. However, it creates other difficulties.

The first of these is that the determination of criminal guilt is generally regarded as a central case of judicial power. The High Court has strongly signalled that punitive detention by a non-judicial body violates Chapter III. In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, the Court held by majority that executive detention of illegal aliens for the purpose of deportation did not involve judicial power.⁶⁰ However, Brennan, Deane and Dawson JJ said that if the power to detain was not limited to 'what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered', the detention 'will be of a punitive nature and contravene Ch. III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates'.⁶¹

⁵⁷ (1989) 166 CLR 518, 547 (Mason CJ, Wilson and Dawson JJ), 575 (Brennan and Toohey JJ), 602-3 (Gaudron J).

⁵⁸ See *White* (2007) 231 CLR 570, 649 (Callinan J); *Lane* (2009) 239 CLR 230, 247 (French CJ and Gummow J).

⁵⁹ (1945) 71 CLR 1, 23.

⁶⁰ (1992) 176 CLR 1.

⁶¹ *Ibid* 33.

This reasoning was subsequently followed by a majority of the High Court in *Al-Kateb v Godwin* where the judges remarked that detention of persons other than for the purposes of deportation would violate Chapter III.⁶² As Gummow J observed, a law falling into this category is invalid 'because the detention for which it provides is but an incident of the essential judicial function of adjudging and punishing criminal guilt'.⁶³ These observations support the conclusion that detention other than for a legitimate executive purpose such as deportation of an alien is punitive and involves the exercise of judicial power. The trial and punishment of service personnel for breaches of discipline, according to this line of reasoning, is clearly judicial in character.

The High Court in *Lane* took the view that traditional courts martial exercise non-judicial power because of the non-conclusive nature of their decisions. However, this position raises serious difficulties. We have seen that a key requirement in Griffith CJ's famous definition of judicial power in *Huddart, Parker* is its 'binding and authoritative' character.⁶⁴ However, his Honour was careful to immediately qualify this element by the words 'whether subject to appeal or not'.⁶⁵ The Federal Court and other federal and State courts clearly exercise judicial power, although their decisions are subject to ordinary (as opposed to *de novo*) review upon appeal. The decisions of courts martial under the *Defence Force Discipline Act* and preceding legislation were arguably conclusive in this sense, contrary to the arguments put forward in *Lane*. The decisions could not be re-litigated, varied by the same tribunal or questioned in collateral proceedings. The reviewing authorities within the military chain of command did not conduct *de novo* hearings as defined unanimously by the High Court in *Brandy v Human Rights and Equal Opportunity Commission*.⁶⁶

Henry Burmester has recently argued – correctly, in our view – that the susceptibility of military tribunal decisions to review within the chain of command on strictly limited grounds does not in substance change the authoritative and therefore judicial character of the decisions.⁶⁷ Burmester further argues that the reviewing authorities within the chain of command themselves exercise judicial power.⁶⁸ This argument draws support from the opinion of Hayne, Heydon, Crennan, Kiefel and Bell JJ in *Lane* that such authorities made final, binding and enforceable decisions about guilt and punishment and that they did so on limited grounds 'expressed in terms very like those found in common form criminal appeal statutes' conferring appellate jurisdiction on criminal appeal courts.⁶⁹ The traditional military justice process is therefore not relevantly distinguishable from the civil system of criminal justice. There is a right of appeal from a decision of a criminal court, whereas a decision of a court martial is automatically reviewed within the chain of command. However, this distinction, in our view, is not significant.

⁶² (2004) 219 CLR 562.

⁶³ *Ibid* 605. Cf 582 (McHugh J), 650 (Hayne J), 657 (Callinan J).

⁶⁴ (1909) 8 CLR 330, 357.

⁶⁵ *Ibid*.

⁶⁶ (1995) 183 CLR 245, 263 (Mason CJ, Brennan and Toohey JJ), 271 (Deane, Dawson, Gaudron and McHugh JJ).

⁶⁷ Henry Burmester, 'The Rise, Fall and Proposed Rebirth of the Australian Military Court' (2011) 39 *Federal Law Review* 195, 205.

⁶⁸ *Ibid* 206.

⁶⁹ (2009) 239 CLR 230, 259.

If our argument that the power of courts martial is indistinguishable from judicial power is correct, the question arises whether its treatment as non-judicial in the hands of military tribunals can be justified by the so-called chameleon theory adopted by the High Court in *R v Quinn; Ex parte Consolidated Food Corporation*.⁷⁰ The chameleon theory holds that there is a category of powers that may be regarded as judicial when exercised by the courts and non-judicial when exercised by other tribunals. However, the theory suffers from the same artificiality as the attempt to establish a category of free floating judicial power discussed in the previous section. Moreover, the theory of chameleon powers strays into dangerous constitutional territory, since it opens the door for the legislature to take strictly judicial power outside the reach of Chapter III simply by conferring it upon a non-judicial body.

It is important to distinguish the theory of chameleon powers from the interpretive technique used by the High Court to determine the nature of a power when the language of the enabling provision leaves it in doubt. This problem arises most often when it is not clear whether a tribunal must make its decision according to established law, thereby giving effect to existing rights and obligations, or is empowered to modify existing legal relations. The answer to this question depends on the width of the statutory discretion conferred on the tribunal. Where the language of the statute leaves the nature of the power unresolved, the High Court correctly looks for clarification of Parliament's intention by considering the body that is chosen to exercise it. Kitto J explained this method in *R v Spicer; Ex parte Australian Builders' Labourers' Federation* as follows:

The reason for concluding in some such cases that the judicial character of the repository imparts a judicial character to the power is simply that the former provides a ground for an inference, which in those cases there is nothing or not enough in other considerations to preclude, that the power is intended and required to be exercised in accordance with the methods and with a strict adherence to the standards which characterise judicial activities.⁷¹

Mason J was referring to this interpretive technique when he remarked in *R v Hegarty; Ex parte City of Salisbury* that '[a] function may take its character from that of the tribunal in which it is reposed', adding that 'if a function is entrusted to a court, it may be inferred that it is to be exercised judicially'.⁷²

The methodology described above allows the location of the power to determine its nature. Power will be wider and more accommodating of policy considerations when placed in the hands of an administrative agency, while it will be treated as strictly judicial if vested in a court. The chameleon theory is different, since it does not determine the nature of the power, but merely how it is characterised. Thus, in *Quinn*, the power to cancel the registration of trademarks was considered to be administrative in the hands of the Registrar of Trade Marks,⁷³ while in *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd*⁷⁴ the power to determine opposed applications for the registration of trademarks was held to be judicial power in the hands of the judges of the High Court.

⁷⁰ (1977) 138 CLR 1 ('*Quinn*').

⁷¹ (1957) 100 CLR 277, 305.

⁷² (1981) 147 CLR 617, 628.

⁷³ (1977) 138 CLR 1, 7-12 (Jacobs J).

⁷⁴ (1959) 101 CLR 652.

The chameleon theory has been previously criticised by one of the authors of this article.⁷⁵ It was judicially condemned by Kirby J in two recent cases. In *Visnic v Australian Securities and Investments Commission*, his Honour stated:

There has been a clear tendency on the part of the Commonwealth of late to meet virtually every appeal to the separation of powers doctrine in the Constitution by an invocation of the "chameleon" principle. The Commonwealth then says that it can solve virtually all supposed infractions of the doctrine by the decision that it makes to assign the functions in question to courts or to executive bodies at its own pleasure. We need to be careful lest this "doctrine", taken too far, destroys the important objectives which the constitutional separation of powers serves. It is of the nature of executive government (and sometimes parliaments) to be impatient with the requirements of such separation. However, the separation can sometimes protect the interests of the people and serve important constitutional ends that this Court should be vigilant to safeguard.⁷⁶

Kirby J reiterated his criticism in *Albarran v Companies Auditors and Liquidators Disciplinary Board*, stating that '[i]f it were left uncontrolled, this principle could have a tendency to subvert the constitutional separation of powers'.⁷⁷ His Honour further affirmed that '[i]n every case, it is for the courts (ultimately this Court) to characterise the federal law in question and to decide whether it involves the vesting of federal judicial power in an impermissible repository'.⁷⁸ We respectfully endorse Kirby J's position as indispensable to the preservation of the separation of powers envisaged in the *Constitution*.

The argument that a power is not judicial when it is not vested in a Chapter III court is a *petitio principii*. It would make the rule in the *Boilermakers' Case* vacuous. Moreover, State courts indisputably exercise judicial power, although that power cannot be vested in federal courts, as authoritatively stated in *Re Wakim*.⁷⁹ We therefore reject the chameleon theory as a foundation for the constitutional validity of courts martial. The better approach is to recognise frankly that courts martial exercise the judicial power of the Commonwealth. The constitutionality of such tribunals lies in a historically mandated and pragmatically justified exception to the rule that judicial power of the Commonwealth must be exercised by the courts designated in Chapter III.

V A THIRD ALTERNATIVE

We have argued that attempts to characterise the power of courts martial as either a *sui generis* form of judicial power or not judicial power at all are unconvincing. This leaves us with the third theory outlined at the start of this article, according to which the power exercised by courts martial is 'the judicial power of the Commonwealth' within the meaning Chapter III, but can be exercised by military tribunals under a limited exception to the rule in the *Boilermakers' Case*, justified by the defence power granted by s 51(vi) viewed in light of historical and pragmatic considerations.

The third view described above was advocated in an early article on military justice by Zelman Cowen. Cowen supported the High Court's decisions in *Bevan* and *Cox* on

⁷⁵ Ratnapala, above n 9, 142–3.

⁷⁶ (2007) 231 CLR 381, 393.

⁷⁷ (2007) 231 CLR 350, 371.

⁷⁸ *Ibid.*

⁷⁹ (1999) 198 CLR 511.

practical grounds, but questioned their theoretical soundness. He pointed out that, unlike the Fifth Amendment to the *United States Constitution*, the *Australian Constitution* does not explicitly exempt courts martial from the normal rules regarding judicial power.⁸⁰ Nonetheless, he argued that the High Court's court martial cases are best viewed as 'an anomalous exception to the provision of the *Constitution* concerning judicial power, based, no doubt, on practical grounds'.⁸¹ In other words, while courts martial exercise judicial power within the normal constitutional meaning of that term, their legitimacy is preserved by a pragmatic exception to the rule in the *Boilermakers' Case*.

Cowen's view has been taken up by a number of academic authors.⁸² Until recently, however, it had not gained any traction in the High Court. This changed with the judgments of Kirby J in *Re Colonel Aird; Ex parte Alpert*⁸³ and *White*.⁸⁴ Kirby J's judgment in *White* rejected the majority position that military tribunals exercise judicial power, but not 'the judicial power of the Commonwealth'. He stated his view as follows:

The supposed point of distinction, propounded to permit service tribunals to escape from this characterisation in s 71 of the Constitution, is that, whilst they exercise "judicial power", it is not "the judicial power of the Commonwealth under Ch III of the Constitution". As a matter of language, logic, constitutional object and policy, this supposed distinction should be rejected. It has never hitherto commanded the endorsement of a majority of this Court. It should not do so now.⁸⁵

According to Kirby J, the power historically exercised by military tribunals is *both* judicial power and 'judicial power of the Commonwealth'. The rule in the *Boilermakers Case* holds that such power may only be exercised by Chapter III courts. However, Kirby J concedes that a limited exception to this rule is necessary in order to support the historical jurisdiction of courts martial in disciplinary matters.⁸⁶

The third theory has a number of advantages. In the first place, it is more conceptually straightforward than the alternatives. It avoids an artificial and strained construction of the phrase 'judicial power of the Commonwealth' in s 71. It avoids creating a *sui generis* form of free floating judicial power allegedly beyond the jurisdiction of both the Commonwealth and the States. It does not create an artificial exception to long-held understandings of judicial power. Instead, it adopts the commonsense view that the power to try service offences is a paradigmatic form of judicial power according to the definition of Griffith CJ in *Huddart, Parker and*, since it is conferred by Commonwealth legislation authorised by s 51(vi), it is 'the judicial power of the Commonwealth'.

The main disadvantage of the third theory is that it involves creating an exception to one of the High Court's most long standing and fundamental constitutional doctrines: namely, the strict separation of judicial power from other powers. In this respect, though, it is not alone. Both of the other views canvassed above also involve

⁸⁰ Cowen, above n 9, 842–3.

⁸¹ *Ibid* 843.

⁸² See, eg, Ratnapala, above n 9, 179–80; Brown, above n 9; Mitchell and Voon, above n 9.

⁸³ (2004) 220 CLR 308 (*Re Aird*).

⁸⁴ (2007) 231 CLR 570.

⁸⁵ *Ibid* 616. Cf *Re Aird* (2004) 220 CLR 308, 332.

⁸⁶ For an earlier argument along these lines, see Ratnapala, above n 9, 179–80.

creating an exception to the normal rules on judicial power. Rather than confronting the exception directly, however, they obscure it behind artificial reasoning about the meaning of 'judicial power of the Commonwealth' or the definition of judicial power itself. It would be better, in our view, to confront the nature of the exception as clearly and coherently as possible. This can only be done by acknowledging that an exception to the general rule is being created, then looking frankly at the reasons for the exception and examining its limits.

The justification for recognising this exception was carefully considered by Kirby J in *White*. His Honour was mindful of the seriousness of drawing implications from the text and structure of the *Constitution*. However, he saw sufficient reason to draw the implication from the nature of the defence power in s 51(vi) understood against its historical background. His Honour stated his principal reason as follows:

[T]he grant of power by s 51(vi) of the Constitution, read in the manner proper to its purpose and against the history that preceded it, imports powers for individuals and institutions, as necessary, to ensure the proper functioning of naval and military forces. Such forces were obviously envisaged by the Constitution. It is of the nature of naval and military (and now air) forces that they must be subject to elaborate requirements of discipline. This is essential both to ensure the effectiveness of such forces and to provide the proper protection for civilians from service personnel who bear, or have access to, arms.⁸⁷

His Honour saw a parallel for this line of reasoning in the High Court's validation in *R v White; Ex parte Byrnes*⁸⁸ of the exercise by administrative authorities of disciplinary powers over public servants.⁸⁹

We might flesh out this reasoning as follows. The defence of the Commonwealth and States is a responsibility that the *Constitution* has reposed in the Commonwealth executive. Even if we disregard the words of s 51(vi), this responsibility may be inferred from s 61 read with s 51(xxxix), as well as from the establishment of the Federation as a self-governing polity. The defence responsibility presupposes the maintenance of a military force. It is evident from tradition and pragmatic experience that the capacity, albeit within limits, to discipline its members without recourse to the civil courts is an intrinsic quality of a military force. Hence, such capacity is constitutionally mandated. When the judicature provisions are read in the light of this necessity, it is not unreasonable to infer that they admit, in the case of military justice, a limited exception to the rule confining the judicial power of the Commonwealth to courts established in accordance with Chapter III.

VI THE SERVICE CONNECTION IMPERATIVE

Kirby J combines his support for the third theory in *Re Aird* and *White* with a strong endorsement of the view that military tribunals may only hear charges connected to service discipline.⁹⁰ In other words, he endorses the service connection theory over its service status counterpart. This is far from coincidental. The constitutional reasoning underpinning the third view on the judicial power issue renders the service status theory implausible, since it relies on drawing a necessary implication from s 51(vi). The

⁸⁷ *White* (2007) 231 CLR 570, 627. Cf Ratnapala, above n 9, 179–80.

⁸⁸ (1963) 109 CLR 665.

⁸⁹ (2007) 231 CLR 579, 627.

⁹⁰ (2004) 220 CLR 308, 327–30; (2007) 231 CLR 570, 616–21.

implication, as we have seen, is founded on the idea that a system of military discipline is an intrinsic feature of a military force. This justifies a limited exception to the requirements of Chapter III regarding the exercise of the judicial power of the Commonwealth.

However, this reasoning only extends as far as is necessary to give effect to the power conferred by s 51(vi). We noted previously that the power is granted 'subject to this Constitution'. Any attempt to use s 51(vi) to create an exception to the requirements of Chapter III must therefore rely on drawing necessary implications from the nature of the power granted by that provision. A strong argument can be made that the establishment and maintenance of a military force necessarily requires an internal system of military discipline. It is much harder to argue that the existence of such a force requires that military tribunals be granted jurisdiction over any offence, disciplinary or otherwise, committed by a service person. The power of military tribunals to try offences unrelated to military discipline does not fall within the necessary scope of s 51(vi). It is therefore not covered by the exception to Chapter III arising from that power.

There are other compelling reasons that support this view. Any crime committed by a defence member or a defence civilian (whether it has a service element or not) will have a negative effect on the military service, just as much as criminal actions of a public servant in private life will affect the public service to some degree. This does not mean that the object of maintaining service discipline is always better served by the trial of the offender by a service tribunal. The needs of military discipline may in fact be better served in some cases by the trial of offences in the ordinary courts. The greater independence and competence of courts and the wider scope for appellate review within the civil system can only enhance the confidence within service ranks of fair treatment in criminal matters – a factor that is more likely than not to improve service morale. As Kirby J noted in *Re Aird*:

The culture of the military is not one in which independent and impartial resolution of charges comes naturally. These considerations reinforce the need for great caution in expanding the reach of the system of service tribunals, particularly in time of peace.⁹¹

The 2005 Senate Report on *The Effectiveness of Australia's Military Justice System* accepted Kirby J's view in recommending the establishment of the more independent AMC, whose constitutional status was later considered by the High Court in *Lane*.⁹² Such concerns, the Committee noted, led to reforms of military justice in Canada and the United Kingdom and caused debate in the United States.⁹³

There is another reason to limit the jurisdiction of military tribunals to offences that peculiarly affect military discipline. The victims of offences committed by service personnel may be members of the general public. Consider the following scenarios. In the first, a service member is accused of assaulting a superior officer. If proved, this is a serious breach of military discipline and a service offence that, by any theory, will fall within the jurisdiction of a court martial. In the second, a service member is accused of assaulting a member of the public. This will be a crime under State law and a federal offence by virtue of the *Defence Force Discipline Act*. In this case, the interests of the

⁹¹ (2004) 220 CLR 301, 341.

⁹² Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *The Effectiveness of Australia's Military Justice System* (2005) 88–89.

⁹³ *Ibid* 90–96.

victim and of the public are likely to be best served by the investigative and judicial processes of the civil system.

The traditional system of military justice has come under critical scrutiny in recent decades. In *Findlay v United Kingdom*, the European Court of Human Rights held that the United Kingdom counterpart to the *Defence Force Discipline Act* contravened Article 6(1) of the *European Convention on Human Rights* by denying a service member's entitlement to trial by 'an independent and impartial tribunal established by law'.⁹⁴ The Canadian Supreme Court held in *R v Généreux* that a general court martial under the *National Defence Act 1985* (Canada) was not an independent and impartial tribunal for the purposes of s 11(d) of the *Canadian Charter of Rights and Freedoms*.⁹⁵ In the Australian context, the 2005 Senate Report cited above observed that '[i]t is becoming increasingly apparent that Australia's disciplinary system is not striking the right balance between the requirements of a functional Defence Force and the rights of Service personnel'.⁹⁶

The establishment of the AMC was an attempt to strike this balance. In designating the AMC as a court of record and making its decisions reviewable only by the Appeals Tribunal and the Federal Court, Parliament sought to insulate the process of adjudication from the chain of command without actually bringing the system within Chapter III. The attempt failed because the High Court thought the elimination of the chain of command from the process made the AMC's power part of the judicial power of the Commonwealth. The AMC could not exercise the power, since it was not a validly constituted Chapter III court. However, the constitutional objection to the AMC dissipates under the third theory. If military jurisdiction with respect to service connected offences is regarded as judicial power of the Commonwealth, but may nevertheless be vested in military courts as an exception to the general rule, a body such as the AMC may validly exercise that power.

This framework has the advantage of removing any constitutional barriers to civil courts trying Commonwealth or State criminal offences with a connection to military discipline. The third alternative, when coupled with the service connection requirement of military jurisdiction, also offers a logical way of dealing with service and civil offences constituted by the same actions. The principal argument against the service connection theory, as Geoffrey Kennett highlights, is the difficulty of separating service connected offences from other offences.⁹⁷ Gleeson CJ in *White* found the problem insuperable. His Honour noted that a service offence cannot be defined solely by reference to the elements of the offence, but depends on other circumstances such as the place and time of commission. Conduct that constitutes a civil offence may become a service offence if it is committed in wartime or overseas. His Honour stated:

If, contrary to the plaintiff's argument, one were to adopt a different test for conduct in wartime, or overseas, then one would be accepting that on some occasions the circumstances (of time and place) in which conduct occurred would be material, perhaps

⁹⁴ (1997) 24 EHRR 221, 243-6.

⁹⁵ [1992] 1 SCR 259.

⁹⁶ Senate Foreign Affairs, Defence and Trade References Committee, above n 92, 98.

⁹⁷ Geoffrey Kennett, 'The Constitution and Military Justice after *White v Director of Military Prosecutions*' (2008) 36 *Federal Law Review* 231, 240.

decisive, and on other occasions the circumstances would be irrelevant. This seems illogical.⁹⁸

However, this argument is unpersuasive. There is no illogicality in identifying service offences according to circumstances in which they are committed. Unless the separation of powers in the *Commonwealth Constitution* is disregarded, the responsibility of determining whether an offence should be tried by a civil court or by a military tribunal is unavoidable. If a service member robs a civilian in Sydney, the offence falls within the jurisdiction of the New South Wales Supreme Court and ultimately of the High Court in appeal. The protection of Chapter III extends to all citizens, including victims of crime. If the military authorities decide to try the offence by a court martial, that decision will be reviewable by the High Court in proceedings under s 75 of the *Constitution*.

As Brennan and Toohey JJ said in *Re Nolan; Ex parte Young*, the High Court in such proceedings will read down the power given to military authorities by the *Defence Force Discipline Act* in accordance with s 15A of the *Acts Interpretation Act 1901* (Cth) so as not to exceed the power of the Commonwealth.⁹⁹ This is a decision that cannot be avoided unless the view is taken that a military decision to prosecute a defence member or defence civilian always trumps the jurisdiction of civil courts. If it cannot be avoided, then the duty of the military authorities and, ultimately, the courts is to examine each case to determine whether an offence affects military discipline. We therefore agree with Brennan and Toohey JJ's statement that '[t]he general provisions conferring jurisdiction can and must be read down so that the powers conferred by the Discipline Act are exercised only for the purpose of maintaining and enforcing military discipline'.¹⁰⁰

We note that at the time of writing the Commonwealth government has responded to the decision in *Lane* by introducing the Military Court of Australia Bill 2012 (Cth) with the object of establishing the Military Court of Australia (MCA) as a Chapter III court. Part 2 of the Bill seeks to make the appointment, remuneration and dismissal of the judges of the AMC and the Federal Magistrates (who are also vested with military jurisdiction) fully compliant with s 72 of the *Constitution*. The MCA will be vested under Part 5 Division 2 of the Bill with original jurisdiction in respect of service offences under the *Defence Force Discipline Act*. It has appellate jurisdiction under Part 6 Division 2 to hear appeals from the judgments of a single judge of the MCA or of a Federal Magistrate. The whole scheme therefore envisages the vesting of complete jurisdiction over military offences in a Chapter III court and is designed to make the MCA independent of the military chain of command.

There is no scope in this article to make a comprehensive analysis of the Bill in its present form. However, it seems that the constitutional validity of such an enactment will depend on judicial acceptance of our argument that the trial and punishment of strictly military offences involves the judicial power of the Commonwealth within Chapter III. If the jurisdiction to try these offences is a power *sui generis*, as some judges have suggested, its vesting in a Chapter III court will be invalid under the rule in the *Boilermakers' Case*. The Commonwealth may seek to rely on the dubious and dangerous chameleon theory, arguing that military jurisdiction is judicial in nature

⁹⁸ (2007) 231 CLR 570, 589.

⁹⁹ (1991) 172 CLR 460, 485.

¹⁰⁰ *Ibid* 487.

when vested in a Chapter III court and non-judicial when vested in a traditional court martial. Such an argument is conceptually untenable, as we have argued, and also unnecessary. If the administration of military justice under federal law is part of the judicial power of the Commonwealth, it is exercisable by Chapter III courts. Nevertheless, as we argue, if Parliament chooses to vest such power in military tribunals outside Chapter III, it may be justified as an historical exception to the general constitutional rule.

VII CONCLUSION

The High Court has never really wavered in its view that the power to hear disciplinary offences by service personnel may be vested in military tribunals. However, it has long struggled with the constitutional basis for this position. This article has identified three distinct approaches to this issue in the Court's jurisprudence. The first theory treats the power of military tribunals as judicial power, but not 'the judicial power of the Commonwealth', while the second theory holds that the power is not judicial power at all. We have argued that both these positions encounter serious difficulties. They involve artificial reasoning on the scope of key constitutional concepts and fail to deal coherently with the relationship between service and civil offences.

The more compelling view is that military tribunals exercise 'the judicial power of the Commonwealth', but operate under an exception to the usual rules on the exercise of judicial power contained in Chapter III. This stance now has judicial support from Kirby J in *Re Aird*¹⁰¹ and *White*.¹⁰² The exception supported by this position is a limited one. As we have seen, it involves drawing a necessary inference from the power conferred upon the Commonwealth in s 51(vi). The reasoning underpinning this inference strongly supports a robust service connection requirement.

The relationship between the judicial power and service connection issues can only be fully appreciated once the constitutional and historical basis for the power exercised by military tribunals is acknowledged. Depicting the power as outside 'the judicial power of the Commonwealth', as the High Court has traditionally done, only obscures the central constitutional question raised by military justice: namely, to what extent the existence of service tribunals exercising federal judicial power outside Chapter III properly falls within the defence and nationhood powers of the Commonwealth. The approach advocated in this article has the advantage of clearly exposing that question. It also supplies a principled framework for answering it.

¹⁰¹ (2004) 220 CLR 301, 332.

¹⁰² (2007) 231 CLR 570, 616-21.