HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

ABLE SEAMAN JOSEPH ANTHONY PETER HASKINS PLAINTIFF

AND

THE COMMONWEALTH OF AUSTRALIA DEFENDANT

Haskins v The Commonwealth [2011] HCA 28
10 August 2011
S8/2011

ORDER

1. *Order that the questions stated in the special case be answered as follows:*

   Question 1: *On its proper construction does the* Military Justice (Interim Measures) Act (No 2) *2009 (Cth) provide lawful authority justifying the detention of the plaintiff?*

   Answer: *Yes.*

   Question 2: *If the answer to question 1 is "yes", are items 3, 4 and 5 of Schedule 1 to the* Military Justice (Interim Measures) Act (No 2) *2009 (Cth) valid laws of the Commonwealth Parliament?*

   Answer: *Yes.*

2. *The plaintiff pay the defendant's costs.*

Representation

J G Renwick with D H Katter and A M Stewart for the plaintiff (instructed by Wyatt Attorneys)

S J Gageler SC, Solicitor-General of the Commonwealth with S J Free for the defendant (instructed by Australian Government Solicitor)

Intervener

R J Meadows QC, Solicitor-General for the State of Western Australia with A J Sefton intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor for Western Australia)

CATCHWORDS

Haskins v The Commonwealth

Constitutional law (Cth) – Judicial power of Commonwealth – Constitution, Ch III – Validity of laws – Plaintiff defence force member – Plaintiff convicted of disciplinary offences and sentenced to punishment including detention by Australian Military Court ("AMC") established under *Defence Force Discipline Act* 1982 (Cth) ("Discipline Act") – Plaintiff subjected to punishment – High Court subsequently held invalid provisions of Discipline Act establishing AMC – *Military Justice (Interim Measures) Act (No 2)* 2009 (Cth) ("Interim Measures Act"), Sched 1, item 5 applied where AMC had imposed punishment to declare rights and liabilities of all persons to be same as if punishment properly imposed by general court-martial, subject to review under Sched 1, Pt 7 – Whether provisions of Interim Measures Act constituted usurpation of judicial power – Whether provisions had prohibited features of bill of pains and penalties.

Constitutional law (Cth) – Powers of Commonwealth Parliament – Acquisition of property on just terms – Whether acquisition by Commonwealth of plaintiff's cause of action for false imprisonment.

Torts – False imprisonment – Liability of Commonwealth for acts of members of defence force – Detention of plaintiff a disciplinary measure applied by one member of defence force to another – Detention in obedience to command of superior – Command of superior lawful on its face – Whether action for false imprisonment destructive of military discipline – Whether action for false imprisonment available to plaintiff.

Words and phrases – "bill of pains and penalties", "false imprisonment", "military discipline", "usurpation of judicial power".

Constitution, ss 51(vi), 51(xxxi), Ch III.
Defence Force Discipline Act 1982 (Cth), ss 3, 27, 68, 170, Pt VIIIA.
Military Justice (Interim Measures) Act (No 2) 2009 (Cth), Sched 1, items 3, 4, 5, Pt 7.

1 FRENCH CJ, GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ. On 26 August 2009, this Court declared, in *Lane v Morrison*[1], that the provisions of Div 3 of Pt VII of the *Defence Force Discipline Act* 1982 (Cth) ("the Discipline Act") were invalid. Those provisions included s 114, by which a court, to be known as the Australian Military Court ("the AMC"), was created from 1 October 2007. The AMC was empowered, by the provisions held to be invalid, to make binding and authoritative decisions of guilt and determinations about punishment for service offences without further intervention from within the chain of command of the defence force. Neither the manner of appointment nor the tenure of office of the members of the AMC satisfied Ch III of the Constitution.

2 In September 2009, in response to the Court's decision in *Lane v Morrison*, the Parliament enacted two Acts: the *Military Justice (Interim Measures) Act (No 1)* 2009 (Cth) ("the Interim Measures No 1 Act") and the *Military Justice (Interim Measures) Act (No 2)* 2009 (Cth) ("the Interim Measures No 2 Act"). The Interim Measures No 1 Act amended the Discipline Act by providing, in effect, for restoration of the system of military disciplinary tribunals (including courts martial) that had obtained before the coming into force of the legislation that created the AMC. Nothing in this matter was said to turn on the provisions of the Interim Measures No 1 Act.

3 The second of the Acts just mentioned (the Interim Measures No 2 Act) gave[2], as its "main object", "to maintain the continuity of discipline in the Defence Force". The Explanatory Memorandum for the Bill for the Interim Measures No 2 Act described[3] the "principal mechanism" by which this was to be done as:

> "by imposing disciplinary sanctions on persons corresponding to punishments imposed by the AMC and, to the extent necessary, summary authorities in the period between the AMC's establishment and the declaration of invalidity by the High Court."

---

1 (2009) 239 CLR 230; [2009] HCA 29.

2 *Military Justice (Interim Measures) Act (No 2)* 2009 (Cth), Sched 1, item 2(1).

3 Australia, Senate, Military Justice (Interim Measures) Bill (No 2) 2009, Explanatory Memorandum at 2.

The Explanatory Memorandum said[4] that:

> "[T]he Bill does not purport to validate any convictions or punishments imposed by the AMC. Nor does the Bill purport to convict any person of any offence. *Rather, the Bill, by its own force, purports to impose disciplinary sanctions*." (emphasis added)

4 The plaintiff (Able Seaman Haskins) enlisted in the Royal Australian Navy on 5 April 2004. He continued to serve in the Navy at the date the parties stated the special case in this matter. On 11 December 2008, he was found guilty by the AMC of 11 counts of misusing a Defence Travel Card. On one count he was sentenced to a severe reprimand but on the others he was sentenced to detention for various periods. The AMC ordered that the sentences be served concurrently and that seven days of the sentences of 42 days' detention imposed in respect of two charges be suspended. Under the Defence Force Discipline Regulations 1985 (Cth)[5] the plaintiff, as a detainee serving a period of detention of not less than 28 days, was entitled to a remission of one-quarter of the period of detention. The plaintiff served his sentences at the Defence Force Corrective Establishment at Holsworthy, New South Wales between 11 December 2008 and 5 January 2009.

5 After *Lane v Morrison* was decided, and the Interim Measures Acts enacted, the plaintiff brought proceedings against the Commonwealth, in the original jurisdiction of this Court, claiming, among other things: (a) a declaration that insofar as he was imprisoned within the Corrective Establishment he was falsely imprisoned by the Commonwealth, "its officers, representatives, servants and/or agents"; (b) damages; and (c) a declaration that the claims for the first form of declaration and damages are "unaffected by" the Interim Measures No 2 Act. In its defence, the Commonwealth admitted that pursuant to and by force of the orders made by the AMC the plaintiff's detention "deprived him of his liberty without his consent". The Commonwealth denied that the deprivation was wrongful and unlawful imprisonment.

6 The parties joined in stating a special case posing two questions of law:

---

4 Australia, Senate, Military Justice (Interim Measures) Bill (No 2) 2009, Explanatory Memorandum at 2.

5 reg 24.

"1. On its proper construction does the [Interim Measures No 2 Act] provide lawful authority justifying the detention of the Plaintiff?

2. If the answer to question 1 is 'yes', are items 3, 4 and 5 of Schedule 1 to the [Interim Measures No 2 Act] valid laws of the Commonwealth Parliament?"

Both questions should be answered "Yes".

The impugned provisions

7 The plaintiff challenged three provisions of the Interim Measures No 2 Act: items 3, 4 and 5 of Sched 1. Item 3 of Sched 1 provided for reliance on, and enforceability of, rights and liabilities of a person that are rights and liabilities declared by the Act to be and always to have been the same as if certain matters had in fact been the case. Item 4 of Sched 1 provided that Pt 2 of the Schedule (items 4 to 7) applies to things purportedly done by the AMC (otherwise than on appeal) before the date on which this Court decided *Lane v Morrison*.

8 It is item 5 of Sched 1 which must be the chief focus of attention, for it is this provision that was said to be directly engaged in this case. Item 5 of Sched 1 provided:

"**5 Effect of punishments and Part IV orders**

(1) This item applies if the AMC purported to:

(a) impose a punishment, other than imprisonment as mentioned in paragraph 68(1)(a) or (b) of the old Defence Force Discipline Act; or

(b) make a Part IV order.

(2) The rights and liabilities of all persons are, by force of this item, declared to be, and always to have been, the same as if:

(a) the amended Defence Force Discipline Act had been in force on and after the time (the ***punishment time***) when the punishment or order was purportedly imposed or made; and

(b) the punishment or order had instead been properly imposed or made at the punishment time, under that Act as so in force, by a general court martial; and

(c) the following were the case, under Part VIIIA of that Act as so in force, immediately after the punishment time:

(i) a competent reviewing authority had reviewed the punishment or order imposed or made by the general court martial;

(ii) the reviewing authority had approved the punishment or order, or had decided not to quash or revoke the punishment or order;

(iii) any possibility of further review (other than review provided for by Part 7 of this Schedule) had been exhausted; and

(d) if:

(i) the punishment is detention or a fine; and

(ii) the AMC also purported to make an order (the ***suspension order***) under section 78 or 79 of the old Defence Force Discipline Act suspending the whole or part of the punishment;

in addition to paragraphs (b) and (c) of this subitem, the general court martial had, immediately after the punishment time, made an order under section 78 or 79 of the amended Defence Force Discipline Act as so in force in the same terms as the suspension order.

(3) If the punishment is dismissal, and the AMC purported, under subsection 171(1B) of the old Defence Force Discipline Act, to order that the dismissal was to take effect on a specified day, subitem (2) applies as if the general court martial had made an order in the same terms (and had power to make that order).

(4) The rights and liabilities of persons as declared by this item are subject to the outcome of any review provided for by Part 7 of this Schedule."

Item 5 of Sched 1 is engaged in this case because the AMC purported to impose on the plaintiff "a punishment, other than imprisonment as mentioned in paragraph 68(1)(a) or (b) of the old Defence Force Discipline Act". The Interim Measures No 2 Act did not seek to affect the rights and liabilities of a person who had been sentenced to imprisonment.

9 At all times the Discipline Act has distinguished[6] the punishment of "detention" from that of "imprisonment". As documents annexed to the special case reveal, detention is a form of punishment imposed "[w]here there are reasonable grounds for expecting the offender to be rehabilitated" and is intended to serve three purposes: deterrence, punishment and rehabilitation. By contrast, imprisonment is generally a punishment of last resort and must be accompanied by the punishment of dismissal from the defence force[7].

10 The reference in item 5(4) to a review should be explained. Part 7 of Sched 1 permitted a person subject to punishment imposed by the AMC, other than a punishment of imprisonment, to seek a review, under Pt VIIIA of the Discipline Act (as amended by the Interim Measures No 1 Act), of the punishment that had been imposed. Item 25(4) of Sched 1 to the Interim Measures No 2 Act provided for the automatic review of punishments of detention. On a punishment review, by a reviewing authority within the chain of command of the defence force[8], the punishment imposed by the AMC (and declared by the Interim Measures No 2 Act to be a liability of the person in question) could be modified or revoked. The final decision about the imposition of the punishment of detention thus necessarily rested within the chain of command of the defence force; a person subject to any other form of punishment could seek and obtain a review[9]. The availability of such a review within the

---

6 *Defence Force Discipline Act* 1982 (Cth) ("the Discipline Act"), s 68(1)(a), (b) and (d).

7 Discipline Act, s 71(1).

8 Discipline Act, s 150.

9 Item 25(2).

command structure of the defence force emphasises the fact that both the form and extent of the punishments dealt with by the Interim Measures No 2 Act could be, and in cases like the plaintiff's had to be and were, decided within the command structure of the force. Neither the form nor the extent of punishment was finally fixed by the Interim Measures No 2 Act.

11 The plaintiff having been sentenced to detention, item 5(2) of Sched 1 to the Interim Measures No 2 Act provided, in its terms, that "[t]he rights and liabilities of all persons are ... declared to be, and always to have been, the same" as if the four matters stated in item 5(2)(a)-(d) had been the case. Those four matters can be summarised as being: (a) the Discipline Act (as amended by the Interim Measures No 1 Act) had been in force on and after the time the orders for detention were made; (b) the orders for detention had been properly imposed by a general court martial; (c) the review processes provided by the amended Discipline Act for review of the punishment had been completed, and the punishment had not been altered; and (d) there being orders for suspension of part of periods of detention to be served by the plaintiff, the general court martial had made like orders for suspension.

12 On their proper construction, how did the impugned provisions engage with the plaintiff's case?

The construction of the impugned provisions

13 The plaintiff submitted that items 3 to 5 of Sched 1 to the Interim Measures No 2 Act should be construed as not validating the warrant which had required the plaintiff's detention. In particular, the plaintiff submitted that item 5, by dealing with a "punishment" imposed by the AMC, did not have any effect in relation to the warrant. Item 2(2) of Sched 1 to the Interim Measures No 2 Act provided that the provisions of the Schedule that "declare people to have particular rights or liabilities *have effect for Defence Force service purposes only*" (emphasis added). This being so, the plaintiff submitted that the impugned provisions should be construed so as not to interfere with the plaintiff's common law right to be free from involuntary restrictions on his movement.

14 These submissions should be rejected. The construction of the impugned provisions urged by the plaintiff is not open and should not be adopted. Item 3(2)(a), in terms, declared that *all* persons (thereby including the officer who issued the warrant and those who executed it) are and always have been "entitled to act on the basis that other persons had, and have, the rights and liabilities as declared" by the applicable item of the Schedule. Item 3(2)(b)

provided that the rights and liabilities declared (in the plaintiff's case by item 5 of the Schedule) are rights and liabilities that are "to be regarded as always having been exercisable or enforceable" as if the matters assumed (again, in this case, by item 5) had in fact been the case. Fixing the rights and liabilities of the plaintiff as a member of the defence force and of both the officer who issued the warrant and those who executed it cannot be given "effect for Defence Force service purposes only"[10] without validating the warrant which required the plaintiff's detention. Validation of the warrant necessarily affects any common law rights the plaintiff may otherwise have had against other members of the defence force. That the Interim Measures No 2 Act affects the plaintiff's common law rights does not mean that it has effect for purposes beyond defence force service purposes.

15 Are the impugned provisions valid?

The plaintiff's invalidity arguments

16 The plaintiff advanced two lines of argument in support of the submission that the impugned provisions are invalid – one founded in Ch III of the Constitution, the other in the prohibition against acquisition of property otherwise than on just terms derived from s 51(xxxi).

17 The plaintiff submitted that the Interim Measures No 2 Act usurped judicial power. Both in amplification, and as a more specific restatement, of that general proposition the plaintiff submitted that the impugned provisions possessed the prohibited features of a bill of pains and penalties. More particularly, the plaintiff submitted that the Interim Measures No 2 Act provided for legislative punishment of a specifically designated person or group[11] or, put another way, that the impugned provisions were laws directed to a particular group of individuals which punished them without the procedural safeguards involved in a judicial trial. Particular reliance was placed upon what was said in this regard in *Polyukhovich v The Commonwealth (War Crimes Act Case)*[12],

---

10 Item 2(2).

11 *United States v Brown* 381 US 437 at 447 (1965).

12 (1991) 172 CLR 501 at 535-536, 539 per Mason CJ, 645-650 per Dawson J, 685-686 per Toohey J, 721 per McHugh J; [1991] HCA 32.

Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs[13] and *International Finance Trust Co Ltd v New South Wales Crime Commission*[14].

18 The plaintiff further submitted that the system of military justice was to be seen as a confined exception to Ch III which should not be extended beyond the actual, as distinct from deemed or hypothetical, exercise of power by service tribunals. To permit extension of the exception to a legislatively assumed, or hypothetical, exercise of power by service tribunals would offend, so the argument continued, the principle that prevents Parliament from doing indirectly what it is forbidden to do directly. Reference was made in this regard to *Commissioner for Motor Transport v Antill Ranger & Co Pty Ltd*[15] and *Coleman v Power*[16].

19 The second line of argument which the plaintiff advanced was that the impugned provisions effected an acquisition of a valuable chose in action – his asserted common law action for false imprisonment – and did so without provision of any terms, let alone just terms.

20 The plaintiff's arguments will be considered in that order: first, the allegation of invalidity for contravention of Ch III, and second, the allegation of invalidity for contravention of the just terms requirement of s 51(xxxi).

Usurpation of judicial power?

21 It is to be borne at the forefront of consideration of the plaintiff's arguments about the application of Ch III of the Constitution that this Court has repeatedly upheld[17] the validity of legislation permitting the imposition by a

---

13 (1992) 176 CLR 1 at 69-70 per McHugh J; [1992] HCA 64.

14 (2009) 240 CLR 319 at 389 [166]-[167] per Heydon J; [2009] HCA 49.

15 (1956) 94 CLR 177 at 179-180; [1956] AC 527 at 536.

16 (2004) 220 CLR 1 at 63-64 [142]-[143] per McHugh J; [2004] HCA 39.

17 See *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452; [1942] HCA 12; *R v Cox; Ex parte Smith* (1945) 71 CLR 1; [1945] HCA 18; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; [1989] HCA 12; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; [1991] HCA 29; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18; [1994]

(Footnote continues on next page)

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

22 By contrast, the legislation declared invalid in *Lane v Morrison* was held[18] to be an impermissible attempt to provide for the exercise of the judicial power of the Commonwealth by a body that was not established in the manner required by Ch III. As noted at the outset of these reasons, the AMC was empowered by the legislation held invalid in *Lane v Morrison* to make binding and authoritative decisions of guilt, and determinations about punishment for service offences, without further intervention from within the chain of command of the defence force. But the members of the AMC were not appointed in the manner, or with the tenure of office, that s 72 of the Constitution requires. *Lane v Morrison* did not decide that only a Ch III court could impose military punishment on a service member found to have committed a service offence.

23 With these basic considerations in mind, the plaintiff's arguments that the impugned provisions contravene Ch III can be dealt with shortly. It is convenient to deal first with the more general proposition that there was a usurpation of judicial power.

24 The impugned provisions do not usurp judicial power. The argument that the impugned provisions have this effect proceeds from an unstated premise of exclusivity: that *only* a Ch III court could impose the punishment of detention on the plaintiff or others with whom the AMC dealt. Unless that punishment could

---

HCA 25; *Re Aird; Ex parte Alpert* (2004) 220 CLR 308; [2004] HCA 44; *White v Director of Military Prosecutions* (2007) 231 CLR 570; [2007] HCA 29.

18 (2009) 239 CLR 230 at 237 [10] per French CJ and Gummow J, 266 [114] per Hayne, Heydon, Crennan, Kiefel and Bell JJ.

be imposed only in the exercise of the judicial power of the Commonwealth, the declaration of rights and liabilities by the impugned provisions cannot amount to any usurpation of judicial power. As Mason J said in *R v Humby; Ex parte Rooney*[19]: "[i]n the context of the Commonwealth Constitution, [usurpation of judicial power] must signify some infringement of the provisions which Ch III makes respecting the exercise of the federal judicial power." As the earlier decisions upholding the validity of legislation providing for those forms of service tribunals that existed before the creation of the AMC demonstrate, the premise for the plaintiff's argument that there has been a legislative usurpation of judicial power is wrong.

A bill of pains and penalties?

25 The plaintiff submitted that the impugned provisions constitute a bill of pains and penalties because those provisions amount to the legislative imposition of punishment on a designated person or group of persons without the procedural safeguards of a judicial trial[20]. In *Polyukhovich*, it was pointed out that in the Australian constitutional context, an Act that is a bill of pains and penalties is not prohibited merely because it matches that description. As Dawson J said[21], "the real question is not whether the Act amounts to a bill of attainder [or a bill of pains and penalties], but whether it exhibits that characteristic of a bill of attainder which is said to represent a legislative intrusion upon judicial power".

---

19 (1973) 129 CLR 231 at 250; [1973] HCA 63.

20 See *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 172-173 per Latham CJ; [1951] HCA 5; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 535-536, 537, 539 per Mason CJ, 646, 648-649 per Dawson J, 685 per Toohey J, 719-721 per McHugh J; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 69-70 per McHugh J; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 389 [166]-[167] per Heydon J; Reeves, *History of the English Law, from the time of the Saxons, to the end of the reign of Philip and Mary*, 3rd ed (1814), vol 4 at 408-409; Story, *Commentaries on the Constitution of the United States*, (1833), vol 3 at 209-211 §§ 1337-1338; *United States v Lovett* 328 US 303 at 315-316 (1946); *United States v Brown* 381 US 437 at 442, 447 (1965).

21 (1991) 172 CLR 501 at 649-650.

And Mason CJ, Toohey and McHugh JJ each made the same point[22]. It follows that the plaintiff's argument in relation to a bill of pains and penalties necessarily proceeded from the unstated premise that has been earlier identified, namely, that only a Ch III court could impose the punishment of detention on the plaintiff or others with whom the AMC dealt. But as has been pointed out, the premise is wrong and that is reason enough to reject the plaintiff's argument that the impugned provisions are invalid because they have the features of a bill of pains and penalties.

26 Further, the impugned provisions do not have the prohibited features of a bill of pains and penalties. First, it is inapposite to describe the impugned provisions as having imposed a punishment on those with whom the AMC had dealt. Second, the impugned provisions made no legislative determination of guilt and did not make crimes of any acts after they had been done.

27 As explained earlier, the Interim Measures No 2 Act provided[23] that the declaration of rights and liabilities was "subject to the outcome of any review" provided for by Pt 7 of Sched 1. Because the plaintiff was sentenced to detention there was an automatic review of the punishment imposed on him. On 29 March 2010, the reviewing authority upheld the punishment imposed on the plaintiff. The final decision about his punishment was therefore made within the chain of command; the punishment to which he was declared liable by the Interim Measures No 2 Act was not finally fixed by the Act. And because those who had been sentenced to some lesser form of punishment could seek a punishment review, this punishment, too, was not necessarily fixed finally by the Act.

28 The availability of, and in some cases, including the plaintiff's, the requirement for, a punishment review denies that the Interim Measures No 2 Act imposed punishment on those with whom the AMC had dealt. There are, moreover, further reasons to conclude that to describe the Act as imposing punishment is inappropriate.

29 The impugned provisions, and in particular item 5(2) of Sched 1, declare the "rights and liabilities of all persons" to be, and always to have been, the same

---

22 (1991) 172 CLR 501 at 536, 685-686, 721. See also *Chu Kheng Lim* (1992) 176 CLR 1 at 70 per McHugh J.

23 Item 5(4).

as if certain events had occurred. The hypotheses identified as the bases for the declaration of rights and liabilities can be summarised as being that punishment had been validly imposed by a properly constituted tribunal, had been reviewed within the chain of command but had not been varied.

30 In cases where the punishment that was imposed by the AMC had been fully satisfied by the time the impugned provisions came into force (as, for example, by the service of the whole of a period of detention and the expiration of any period for which an order of detention was suspended) it would not be right to describe the effect of the provisions as being a legislative *imposition* of punishment. The better description of the provisions would be that they were in the nature of an act of indemnity intended to preclude liability for past acts. More particularly, in the language of Willes J in *Phillips v Eyre*[24], the impugned provisions sought to "confirm irregular acts", not to void and punish "what had been lawful when done".

31 There is a long history of enactment of statutes which may treat as effective transactions which when conducted lacked legal authority, and may also exempt persons from what otherwise would be liabilities for acts purportedly done in the public service[25]. Thus, the *Indemnity Act* 1920 (UK) restricted the taking of legal proceedings in respect of certain acts done in the Great War and validated sentences, judgments and orders of certain military courts during that conflict.

32 If, as was said to be the plaintiff's case, the punishment imposed by the AMC was not fully satisfied by the time the impugned provisions came into force (there being in his case an unexpired period of suspension[26] of seven days' detention) to describe the provisions as a legislative imposition of punishment would be too compressed a description of their effect. The impugned provisions declared the rights and liabilities of more than those who had been the subject of punishment orders and in that respect were in the nature of an act of indemnity. To say, in those circumstances, that the impugned provisions imposed a punishment on the plaintiff does not accurately reflect the complete operation of those provisions.

---

24 (1870) LR 6 QB 1 at 25.

25 *Phillips v Eyre* (1870) LR 6 QB 1 at 17-18.

26 Discipline Act, ss 78, 81.

33 Nor was there any legislative finding of contravention of a norm of conduct. The impugned provisions said nothing about the contraventions of the Discipline Act that lay behind the punishments with which the Interim Measures No 2 Act dealt. The sole focus of the latter Act, and more particularly the impugned provisions, was punishments that had been imposed, not what had prompted those punishments. Thus, contrary to the plaintiff's submissions, the impugned provisions did not determine any question of guilt, or make crimes of any acts, let alone crimes of acts after they had been committed[27].

34 The impugned provisions do not have the prohibited features of a bill of pains and penalties or in any other way constitute the attempted exercise of the judicial power of the Commonwealth[28].

35 The plaintiff's argument, that the impugned provisions sought to achieve indirectly an object which the Parliament is forbidden to achieve directly, fails because it, too, is an argument that necessarily proceeded from the unstated, but incorrect, premise that the imposition of punishment for a service offence could be effected only in the exercise of the judicial power of the Commonwealth.

An enlarged exception to Ch III?

36 The plaintiff submitted that the impugned provisions were invalid as being contrary to Ch III because the system of military justice is to be seen as a confined exception to Ch III which should not be extended beyond the actual, as distinct from deemed or hypothetical, exercise of power by service tribunals. This manner of putting the argument directed attention away from why it is that the imposition of punishment by a service tribunal on a member of the defence force is not an exercise of the judicial power of the Commonwealth. The proper ambit of what is described as an "exception" or "qualification" to Ch III cannot be identified without close attention to both the reasons for, and the content of, the principle or principles that yield the exception.

37 Two kinds of consideration lead to the conclusion that disciplinary measures can be applied in the defence force without exercise of the judicial

---

27 *Polyukhovich* (1991) 172 CLR 501 at 537, 539.

28 *Chu Kheng Lim* (1992) 176 CLR 1 at 70.

power of the Commonwealth. First, there is not the exercise of the judicial power of the Commonwealth in such a case because the punishment is imposed by the (legislatively regulated) exercise of the power of command that is a necessary and defining characteristic of the defence force: a power of command that is essential to the creation and maintenance of a disciplined and effective fighting force. Second, there is not the exercise of the judicial power of the Commonwealth in such a case because there is not the binding and authoritative decision of guilt or determination of punishment for a service offence that stands apart from the chain of command of the defence force.

38 Once it is observed, as has already been explained, that the impugned provisions focus only upon punishments that have been imposed, and are subject to review within the chain of command of the defence force, it is then apparent that no new or larger exception must be made to the application of Ch III to conclude that the impugned provisions are valid.

39 The imposition of punishment within Australia's defence force and the anterior finding of contravention of some relevant norm of conduct has been regulated by statute since the time of federation[29]. And the history of statutory regulation of naval and military discipline can be traced in Britain to at least the 17th century[30]. What has marked that statutory regulation of naval and military discipline has been the establishment of procedures by which the imposition of punishments for disciplinary offences can be seen not only to have been fair, but also to have rested ultimately in the control by officers of the service more senior than the officer or officers immediately responsible for fixing the punishment in question. The provisions made by the Interim Measures No 2 Act for punishment reviews are wholly consonant with the principles that have informed those earlier statutes.

40 Legislation which seeks (as the impugned provisions seek) to validate the imposition of punishment that has been imposed invalidly does not depend for its validity upon creating any new or larger exception to Ch III. Describing the impugned provisions as depending upon a "deemed" or "hypothetical" imposition of punishment by a service tribunal does not deny that what is done by the

---

29 *Naval Discipline Act* 1866 (Imp) (29 & 30 Vict c 109); *Army Act* 1881 (Imp) (44 & 45 Vict c 58); *Defence Act* 1903 (Cth).

30 *Naval Discipline Act* 1661 (13 Car II c 9); *Mutiny Act* 1688 (1 W & M c 5).

impugned provisions is for the enforcement of discipline within the defence force. Tying the operation of the impugned provisions to the hypothesis that the punishments in question had been validly imposed by a general court martial may be a useful drafting device upon which to base the provisions for punishment reviews but it does not alter the fact that, as has already been observed, the impugned provisions say nothing about the guilt or innocence of any of those with whom the AMC dealt. The impugned provisions make no determination (let alone a binding or authoritative determination) of such an issue. The impugned provisions do not finally fix the punishments that are to be deemed to have been imposed.

An acquisition of property?

41 It is necessary to deal next with the plaintiff's submission that the impugned provisions effected an acquisition of his property without just terms because the impugned provisions acquired his action for false imprisonment. If that is what the impugned provisions did, they would be invalid[31].

42 It is important to begin consideration of this issue by dealing first with whether, in the circumstances he alleges in his pleading, the plaintiff has any action for false imprisonment. If he does not, he has no property that the Interim Measures No 2 Act can be said to have acquired. Consideration of whether he has an action requires consideration of when and in what circumstances one member of the defence force has an action in tort against another member of the defence force on account of things done, or events occurring, in the course of service. It also requires identification of the way in which the plaintiff alleges that the Commonwealth would be liable for what he alleges was his false imprisonment.

---

31 See, for example, *Minister of State for the Army v Dalziel* (1944) 68 CLR 261; [1944] HCA 4; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361; [1961] HCA 21; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297; [1994] HCA 6; *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 559; [1996] HCA 56; *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210; [2008] HCA 7.

Vicarious liability

43 The liability which the plaintiff seeks to attribute to the Commonwealth for what he alleges to be his false imprisonment must be vicarious liability. The Commonwealth would be vicariously liable for false imprisonment under ss 56 and 64 of the *Judiciary Act* 1903 (Cth) only[32] if the plaintiff could succeed in that claim against the officer who detained him: the officer in charge of the Corrective Establishment.

44 Thus, a necessary step in the plaintiff's case would be to demonstrate that the officer in charge of the Corrective Establishment, who acted in obedience to a warrant, regular on its face, which commanded that officer to detain the plaintiff, was liable to the plaintiff for false imprisonment.

The consequences of invalidity

45 The plaintiff submitted that because the AMC was not validly created its order for the plaintiff's detention was itself invalid, and that it followed that his detention was unlawful. That is, the plaintiff's argument was of the kind described by Sir Owen Dixon, writing extra-curially, when he said[33]:

> "In the operation given to the legal conception of a void act, or a nullity, we have an example of this resolute logic which, in our own time when many governmental and other powers are rigidly defined by or under the law, has produced effects well nigh prodigious. The purpose of conferring even the humblest power or authority is that rights and duties of some kind may be called into existence. To treat what purports to be done in the exercise of a power as if it had never taken place, as the theory of invalidity demands, is to affix to acts done and things brought into being upon the assumption that the power has been well exercised, legal qualities and legal consequences which are sometimes as oppressive as

---

32 See, for example, *Shaw Savill and Albion Co Ltd v The Commonwealth* (1940) 66 CLR 344 at 360 per Dixon J; [1940] HCA 40; *Groves v The Commonwealth* (1982) 150 CLR 113 at 121-122 per Stephen, Mason, Aickin and Wilson JJ; [1982] HCA 21.

33 Dixon, "De Facto Officers", (1938) 1 *Res Judicatae* 285 at 285 reproduced in *Jesting Pilate and Other Papers and Addresses*, 2nd ed (1997) at 229.

> they are unexpected. No doubt these difficulties are seen at their worst when an elaborate enactment of a legislature of limited powers is found to be *ultra vires* after a substantial period of time during which its provisions have been administered and enforced by the Executive. Yet such a case is but an impressive example of the general doctrine that when for want of, or excess of, legal power or authority or for non-fulfilment of the conditions required by law, any purported act in the law is invalid, then rights and liabilities are to be ascertained upon the same footing as if the act had not been attempted."

Or as the celebrated dictum of Field J in *Norton v Shelby County*[34] put the same point: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

46 Whether any exception or qualification can be made to the generality of the principles described by Sir Owen Dixon and Field J need not be examined here. Further, no questions arise of the application of the common law "de facto officer doctrine", which operates to render valid in law acts of persons purporting to exercise powers of public offices to the occupation of which they were not entitled, and of any limitation upon that doctrine where the want of authority is the consequence of the operation of the Constitution[35].

47 Subject to one qualification, the general thrust of the plaintiff's argument was that, for want of valid legal power, the orders made by the AMC were invalid and thus the rights and liabilities of the plaintiff are to be ascertained upon the same footing as if the orders had not been made.

48 The qualification that must be made to that general description of the plaintiff's argument is that the plaintiff did not assert, for the purposes of the argument of the special case, that because the orders made by the AMC were invalid, the warrant that was issued pursuant to s 170 of the Discipline Act for the plaintiff's commitment to detention was also invalid. It is necessary to amplify that point.

---

34 118 US 425 at 442 (1886).

35 *Bond v The Queen* (2000) 201 CLR 213 at 224-225 [32]-[34]; [2000] HCA 13.

The warrant for detention

49 In his initial written submissions in this Court, the plaintiff alleged that the issue of the warrant of commitment was "without authority and unlawful". But in his reply, the plaintiff indicated that he did not press that submission (although he sought to reserve the right to raise it as an issue at trial if he succeeded on the constitutional issue).

50 Upon the AMC making orders for the plaintiff's detention, the military judge, who with a military jury had constituted the court that tried the plaintiff, issued a warrant for the commitment of the plaintiff to the Corrective Establishment. The military judge did that as an "authorized officer": "an officer, or an officer included in a class of officers, authorized, in writing, by the Chief of the Defence Force or a service chief for the purposes of the provision in which the expression occurs"[36]. Section 170(1) of the Discipline Act permitted "an authorized officer ... [to] issue a warrant for the commitment of a detainee to a detention centre". A "detainee" was defined generally in the Discipline Act[37] as "a person who is undergoing a punishment of detention in a detention centre". But for the purposes of s 170, "detainee" was defined[38] as "a convicted person on whom a punishment of detention has been imposed". The parties addressed no argument to whether the definition should be understood as confined in its reach to those on whom a punishment of detention has been validly imposed. While there appears much to be said for this construction, the question need not be explored.

51 The warrant took the form of written commands by the authorised officer, who in this case held the rank of Brigadier, first, requiring service police members to convey the plaintiff to the officer in charge of the Corrective Establishment and, second, requiring the officer in charge of the Corrective Establishment to detain the plaintiff "for as long as his detention is necessary for the execution" of the punishment imposed by the AMC's orders. The warrant, in its terms, thus obliged the officer in charge of the Corrective Establishment to

---

36 Discipline Act, s 3(1).

37 s 3(1).

38 s 170(5).

detain the plaintiff. Nothing suggested that the warrant, and the orders it embodied, went beyond what was authorised by s 170 of the Discipline Act.

52 Disobedience of a lawful command of a superior officer was (and remains) an offence under s 27 of the Discipline Act. Even in his initial submission, in which he had challenged the validity of the warrant, the plaintiff accepted not only that the officer in charge of the Corrective Establishment had no discretion to release the plaintiff but that it would have been an offence against the Discipline Act to have done so without authority. It is not necessary to examine the correctness of this proposition. Argument proceeded on the basis that the officer in charge of the Corrective Establishment had no reason to doubt that he was bound to give effect to the warrant's commands.

53 Did the plaintiff have an action against the officer in charge of the Corrective Establishment for false imprisonment?

Availability of an action for false imprisonment

54 A defining characteristic of the defence force is that each service is a disciplined force[39] organised hierarchically. The maintenance of discipline is critical[40] to the efficiency of the services.

55 By joining the defence force, members submit themselves to military law and discipline but do not put off any of the rights and duties of a civilian[41]. As the contributors to the first edition of *Halsbury's Laws of England* rightly said[42], although service personnel:

> "enjoy certain privileges and are subject to certain disabilities created for the purpose of enabling them to discharge their duty to the Crown with greater efficiency ... they are [otherwise] in all respects amenable to, and *entitled to claim the protection of, the civil tribunals and the ordinary law of the land*". (emphasis added)

---

39 *Re Aird* (2004) 220 CLR 308 at 323 [42] per McHugh J.

40 *Re Aird* (2004) 220 CLR 308 at 329-330 [65]-[68] per Gummow J.

41 *Burdett v Abbot* (1812) 4 Taunt 401 at 450 [128 ER 384 at 403].

42 vol 25, par 193 (footnotes omitted).

That is why, as was pointed out in *White v Director of Military Prosecutions*[43], "the civil law of obligations does not cease to run merely because the obligations in question bind or confer rights upon a defence member".

56 As was also pointed out[44] in *White*, the system of military discipline cannot and does not operate beyond the ambit of Ch III of the Constitution. Those who constitute service tribunals are officers of the Commonwealth for the purposes of s 75(v).

57 But it by no means follows that an action for false imprisonment should be found to lie as between service members where the act or omission of which complaint is made was an act or omission in the bona fide execution of a form of military punishment that could be lawfully imposed.

58 In *Parker v The Commonwealth*, Windeyer J said[45]:

> "The courts in England have for nearly two hundred years said, and rightly in my opinion, that to allow a member of the forces to bring an action against another member for an act done in the course of duty would be destructive of the morale, discipline and efficiency of the service, and that for that reason the common law does not give a remedy even if the conduct complained of were malicious. It is not necessary that I trace the line of well-known cases from *Sutton v Johnstone*[46], and including *Heddon v Evans*[47], in which these principles have been discussed. The question in its broader aspect is, the House of Lords said in *Fraser v Balfour*[48], still open, at all events before their Lordships. And I think it is still open before this Court: see *Gibbons v Duffell*[49]. But, whatever be the

---

43 (2007) 231 CLR 570 at 592 [38] per Gummow, Hayne and Crennan JJ.

44 (2007) 231 CLR 570 at 592-593 [39] per Gummow, Hayne and Crennan JJ.

45 (1965) 112 CLR 295 at 302; [1965] HCA 12.

46 (1786) 1 TR 493 [99 ER 1215].

47 (1919) 35 TLR 642.

48 (1918) 87 LJKB 1116.

49 (1932) 47 CLR 520 at 527; [1932] HCA 26.

> true position in relation to malicious injuries and defamation, my present view is that actions of negligence are not maintainable by a member of the forces against a fellow member, whether commander, comrade or shipmate, in respect of acts done by him in the course of duty."

59 This Court's decision in *Groves v The Commonwealth*[50] shows that the statement by Windeyer J was expressed too widely. In *Groves* the Court held that an action in negligence is maintainable against the Commonwealth by a serving member of the defence force for damage caused by the negligence of a fellow service member while on duty in peace time where such an action would be available to a civilian in the same situation as the plaintiff service member. The plaintiff in *Groves* was held to be able to recover damages for personal injury suffered when he fell from a ladder that had not been securely fastened by a crew member on the Royal Australian Air Force aircraft on which both were serving. All members of the Court left open[51] whether some other rule should apply if injury was suffered in warlike operations (including "activities of a purely military character"[52] such as training exercises[53]). And the difficulties presented by acts done in intended enforcement of discipline within the services were also recognised[54].

60 As Gibbs CJ pointed out[55] in *Groves*, the cases to which Windeyer J referred in *Parker* "were all cases in which the conduct of the defendant was intentional and purported to have been done in the course of military duty or discipline, and the plaintiff's case was that there had been an *exercise of authority that was malicious or otherwise wrongful*" (emphasis added). As Gibbs CJ also

---

50 (1982) 150 CLR 113.

51 (1982) 150 CLR 113 at 117 per Gibbs CJ, 125 per Stephen, Mason, Aickin and Wilson JJ (Brennan J agreeing at 137), 136 per Murphy J.

52 (1982) 150 CLR 113 at 119 per Gibbs CJ.

53 (1982) 150 CLR 113 at 134 per Stephen, Mason, Aickin and Wilson JJ, 136 per Murphy J.

54 (1982) 150 CLR 113 at 118 per Gibbs CJ, 130-133 per Stephen, Mason, Aickin and Wilson JJ, 137-138 per Brennan J.

55 (1982) 150 CLR 113 at 117-118.

noted[56], reluctance has more than once been expressed[57] about formulating any general rule excluding from consideration by the courts all cases founded in what is alleged to be the wrongful exercise of military discipline. And the plurality reasons in *Groves* explore and emphasise[58] the difficulties that underpin that reluctance. But a majority of the Court expressly distinguished[59] the negligent conduct at issue in *Groves* from conduct carried out in obedience to a specific order of a superior officer.

61 In *Sutton v Johnstone*[60], the several *Dawkins* cases[61] and *Heddon v Evans*[62], it was held that no action lay (in cases variously for malicious prosecution, defamation and false imprisonment) for certain acts done in the course, or for the purposes, of military discipline, even if malice were proved[63]. In all but *Heddon v Evans*, maintenance of discipline was a critical reason advanced for the conclusion reached. In *Heddon v Evans*, McCardie J concluded[64] that the actions of which complaint was made were not actions done in excess of or without jurisdiction. It is neither necessary nor appropriate, however, to attempt to distil from those decisions, or now state, a general rule to the effect that no action in tort will lie in respect of any act done or omission made in the course of, or for the purposes of, military discipline.

---

56 (1982) 150 CLR 113 at 118.

57 See, especially, *Gibbons v Duffell* (1932) 47 CLR 520 at 527, 531, 534 and *Fraser v Balfour* (1918) 87 LJKB 1116 at 1118.

58 (1982) 150 CLR 113 at 125-133.

59 (1982) 150 CLR 113 at 133-134 per Stephen, Mason, Aickin and Wilson JJ, 137-138 per Brennan J.

60 (1786) 1 TR 493 [99 ER 1215].

61 *Dawkins v Lord Rokeby* (1866) 4 F & F 806 [176 ER 800]; *Dawkins v Lord Paulet* (1869) LR 5 QB 94; *Dawkins v Lord Rokeby* (1873) LR 8 QB 255.

62 (1919) 35 TLR 642.

63 cf *Gibbons v Duffell* (1932) 47 CLR 520.

64 (1919) 35 TLR 642 at 649.

62 A rule cast in those terms directs attention only to the purposes for which an act was done or omission made. That would not address the several difficulties both of principle and application that were explored in *Groves*. A rule of the kind postulated could not meet those difficulties without being the subject of much greater elaboration. How that could be done need not be decided but it is useful to make one point about the subject. Elaboration of the kind required would not be assisted by use of the word "malice", no matter whether that term was intended to describe a matter which, if present, would allow a member of the services to bring an action in tort against another[65], or, as some of the older cases appear to suggest, was intended to identify a consideration that should be held irrelevant to whether or not an action lies. "'Malice' has proved a slippery word in the law of torts"[66].

63 Nor is it appropriate to pursue the path followed by McCardie J in *Heddon v Evans* and seek to frame a rule based only on a distinction between acts done within or without jurisdiction. As will later be explained, a rule of that kind does not meet the need to avoid destruction of military discipline. As already explained, the orders made by the AMC were not validly made. If it is accepted that what was done in execution of those orders was done "without jurisdiction", the question remains whether an action for false imprisonment *should* be found to lie in those circumstances.

64 The present case should be decided on the footing that the acts of which the plaintiff complains were acts done by one member of the defence force to another in obedience to what appeared to be a lawful command. The acts were not done for any reason other than the bona fide application of a kind of disciplinary measure for which the Discipline Act provided. That is, the punishment imposed was a lawful form of punishment. The punishment was executed in the manner prescribed by law. The complaint of false imprisonment is founded wholly on the invalidity of the law that established the body that imposed the punishment. No allegation of improper purpose, "malice" (whether that is understood as spite, ill will, ulterior motive, or otherwise) or oppression is made or was available. The plaintiff's detention was effected in obedience to

---

65 *Gibbons v Duffell* (1932) 47 CLR 520; *Manual of Military Law*, (1941) at 154.

66 Fleming, *The Law of Torts*, 9th ed (1998) at 685; *A v New South Wales* (2007) 230 CLR 500 at 530-532 [88]-[95]; [2007] HCA 10.

commands made by a warrant that those to whom the warrant was directed had no occasion to believe were other than lawful commands.

65 In *Keighly v Bell*[67], Willes J said that:

> "a soldier, acting honestly in the discharge of his duty – that is, acting in obedience to the orders of his commanding officers – is not liable for what he does, unless it be shown that the orders were such as were obviously illegal".

Or as Pollock put the same point, in the first edition of *The Law of Torts*[68]:

> "the subordinate … is protected if he acts under orders given by a person whom he is generally bound by the rules of the service to obey, and of a kind which that person is generally authorized to give, and if the particular order is not necessarily or manifestly unlawful." (footnote omitted)

66 The application of a principle expressed in the form adopted by Willes J or by Pollock to acts done by a member of the defence force to civilians would raise very different issues from those that arise here, but those issues need not be explored. Attention is confined to acts done by one member of the force to another in intended execution of orders that reasonably appeared to be lawful orders of a superior officer.

67 To permit the plaintiff to maintain an action against those who executed that punishment (whether service police or the officer in charge of the Corrective Establishment) would be destructive of discipline. Obedience to lawful command is at the heart of a disciplined and effective defence force. To allow an action for false imprisonment to be brought by one member of the services against another where that other was acting in obedience to orders of superior officers implementing disciplinary decisions that, on their face, were lawful orders would be deeply disruptive of what is a necessary and defining characteristic of the defence force. It would be destructive of discipline because to hold that an action lies would necessarily entail that a subordinate to whom an apparently lawful order was directed must either question and disobey the order, or take the risk of incurring a personal liability in tort.

---

67 (1866) 4 F & F 763 at 805 [176 ER 781 at 800].

68 Pollock, *The Law of Torts*, (1887) at 103-104.

68 In the circumstances of this case, no action for false imprisonment lies against the Commonwealth. It follows that the Interim Measures No 2 Act acquired no property of the plaintiff. His second argument fails.

Conclusion and orders

69 The questions in the special case should both be answered "Yes".

70 The plaintiff sought a special order for costs. He submitted that the question whether an action for false imprisonment will lie in the circumstances of this case is a novel question and for that reason he should have a protective order for costs. The Commonwealth submitted that no order should be made in favour of the plaintiff and submitted that costs should follow the event. No reason is shown to depart from that rule. The plaintiff must pay the Commonwealth's costs.

71 HEYDON J. This is an action seeking damages for false imprisonment. The plaintiff, Joseph Anthony Peter Haskins, is an Able Seaman in the Royal Australian Navy. He was detained from 11 December 2008 to 5 January 2009 under invalidly enacted legislation. The Commonwealth admits that the legislation was invalidly enacted, but relies on the "retroactive operation" of the *Military Justice (Interim Measures) Act (No 2)* 2009 (Cth), which commenced on 22 September 2009.

The background

72 It is characteristic of states governed by the rule of law that substantive laws are prospective, not retrospective. That is particularly so where the criminal law is concerned. The rule of law requires that people are not to be punished for conduct which was not unlawful at the time it was carried out. This case does not concern a retrospective substantive law. The crimes of which the plaintiff was convicted were known to the law at the time of the conduct alleged against him by reason of s 60 of the *Financial Management and Accountability Act* 1997 (Cth) and s 61(3) of the *Defence Force Discipline Act* 1982 (Cth).

73 Instead this case concerns another type of retrospectivity. A free society under the rule of law seeks to control the use of force by conferring a monopoly of it on the state through a "social apparatus of compulsion and coercion"[69]. But coupled with that monopoly is an expectation. The expectation is that, at least in relation to the more extreme forms of force, such as the deprivation of liberty under coercion, the state will supply as part of the social apparatus a system of courts or tribunals in which the allegations against persons allegedly in breach of the law can be heard, relevant factual circumstances proved, relevant rules of law applied to them, and, if guilt is established, relevant criminal sanctions imposed.

74 The plaintiff was subjected to deprivation of liberty under coercion and the threat of coercion. The plaintiff was detained in a cell in the Defence Force Corrective Establishment at Holsworthy in New South Wales. When not in that cell, he was obliged to participate in various training activities and in work. Section 54A(1)(g) of the *Defence Force Discipline Act* 1982 (Cth) made it an offence for the plaintiff to enter or leave his cell without lawful authority, and that offence was punishable by segregated confinement for a maximum of 10 days (s 54A(4)). The state had no legal warrant for treating the plaintiff in this way. That is because the "Australian Military Court" which imposed the relevant orders and sentences was held in *Lane v Morrison*[70] to carry out judicial functions although it was not a court, and hence contravene Ch III of the

---

69 Ludwig von Mises, *Human Action: A Treatise on Economics*, (1949) at 239.

70 (2009) 239 CLR 230; [2009] HCA 29.

Constitution. It was also held to make decisions which were not amenable to intervention from within the chain of command, and hence not to operate validly in accordance with earlier authorities on the court martial system. It had no validity. It had no power to coerce the plaintiff in the way it did. The Commonwealth had failed to supply a court or tribunal in which the allegations against the plaintiff could be heard, the facts found, the rules of law applied and the sanctions imposed.

75 For a body which is not a Ch III court, like the Australian Military Court, to purport to carry out judicial functions is not a breach of a merely formal requirement. It is of fundamental substantive significance. The provisions of s 72 of the Constitution relating to the method of appointment of judges, the duration of their appointment, their removal, and the irreducibility of their remuneration operate so as to create a particular kind of judiciary. It is a kind of judiciary quite distinct from the Australian Military Court. There are circumstances in which retrospective legislation may work no injustice if it has the effect of creating a state of affairs which would have existed but for some purely formal defect. Non-compliance with Ch III is not a defect of that type.

The legislation

76 Instead of providing a lawful court at the time it dealt with the plaintiff, the state enacted two Acts on 22 September 2009. That was after *Lane v Morrison* was decided on 26 August 2009 and after the plaintiff had been sentenced on 11 December 2008.

77 The first Act was the *Military Justice (Interim Measures) Act (No 1)* 2009 (Cth). It amended the *Defence Force Discipline Act* 1982 (Cth) so as to restore the court martial system which had validly operated before the enactment of the legislation declared invalid in *Lane v Morrison*.

78 The second Act was the *Military Justice (Interim Measures) Act (No 2)* 2009 (Cth). Item 4 of Sched 1, which appears in Pt 2, provides that Pt 2 applies to certain things "purportedly done" by the Australian Military Court before the date when *Lane v Morrison* was decided, 26 August 2009. Item 5(1) provides that item 5 applies if the Australian Military Court purported to impose a punishment, other than imprisonment as provided for in s 68(1)(a) or (b) of the *Defence Force Discipline Act* 1982 (Cth) as purportedly in force immediately before 26 August 2009. Item 5(2) provides:

> "The rights and liabilities of all persons are, by force of this item, declared to be, and always to have been, the same as if:
>
> (a) the [*Defence Force Discipline Act* 1982 (Cth) as amended by the *Military Justice (Interim Measures) Act (No 1)* 2009 (Cth)] had been in force on and after the time (the

punishment time) when the punishment or order was purportedly imposed or made; and

(b) the punishment or order had instead been properly imposed or made at the punishment time, under that Act as so in force, by a general court martial; and

(c) the following were the case, under Part VIIIA of that Act as so in force, immediately after the punishment time:

(i) a competent reviewing authority had reviewed the punishment or order imposed or made by the general court martial;

(ii) the reviewing authority had approved the punishment or order, or had decided not to quash or revoke the punishment or order;

(iii) any possibility of further review (other than review provided for by Part 7 of this Schedule) had been exhausted; and

(d) if:

(i) the punishment is detention or a fine; and

(ii) the [Australian Military Court] also purported to make an order (the ***suspension order***) under section 78 or 79 of the [*Defence Force Discipline Act* 1982 (Cth) as purportedly in force immediately before 26 August 2009] suspending the whole or part of the punishment;

in addition to paragraphs (b) and (c) of this subitem, the general court martial had, immediately after the punishment time, made an order under section 78 or 79 of the [*Defence Force Discipline Act* 1982 (Cth) as amended by the *Military Justice (Interim Measures) Act (No 1)* 2009 (Cth)] in the same terms as the suspension order."

Item 5(4) provides: "The rights and liabilities of persons as declared by this item are subject to the outcome of any review provided for by Part 7 of this Schedule."

79 In Pt 7 of Sched 1, item 25(1) provides that item 25 applies in relation to the charges against the plaintiff on which the Australian Military Court purported to convict him. Item 25(2) provides that the plaintiff could lodge with a competent reviewing authority a petition, for punishment review, under s 153 of

the *Defence Force Discipline Act* 1982 (Cth) as amended by the *Military Justice (Interim Measures) Act (No 1)* 2009 (Cth). Item 25(3) provides that the petition had to be lodged within a specified period, or within such extended period as the competent reviewing authority allowed. Item 25(4) provides that, without limiting the right to lodge a petition for a punishment review as provided for by item 25, if item 25 applies in relation to a punishment of detention, a reviewing authority is obliged as soon as practicable to undertake a punishment review in relation to that punishment.

The factual position in relation to the legislation

80 In relation to the factual events referred to in items 5 and 25, the plaintiff's position was as follows.

81 The Australian Military Court purported to impose punishments of the type described in item 5(1)(a). Those punishments were in two categories. The first comprised orders for the plaintiff's detention on 10 charges of contraventions of the relevant legislation pursuant to s 68(1)(d) of the *Defence Force Discipline Act* 1982 (Cth) as purportedly in force immediately before 26 August 2009. The second category comprised an order that the plaintiff be severely reprimanded on an eleventh charge pursuant to s 68(1)(j). So far as the plaintiff was ordered to be detained for 42 days, the orders of detention were suspended as to the last seven days: see item 5(2)(d). The periods of detention were to be served concurrently. The plaintiff was released a few days early. The orders were operative from the moment they were made. They did not depend on confirmation by a reviewing authority: s 172 of the *Defence Force Discipline Act* 1982 (Cth).

82 The plaintiff did not lodge a petition pursuant to item 25(2) within the period provided for in item 25(3). Nor did he seek an extension of that period.

83 An automatic review pursuant to item 25(4) was completed on 29 March 2010. The reviewing authority upheld the punishments imposed on the plaintiff.

The question

84 Thus the Australian Military Court purported to impose punishments on the plaintiff pursuant to a constitutionally invalid statute. The question is whether retrospective legislation validating the invalid criminal punishment of the plaintiff is valid. Even though the legality of the plaintiff's coerced deprivation of liberty does not rest on the decision of a validly constituted court, can it rest on a retrospective decision of the legislature?

R v Humby; Ex parte Rooney

85 Item 5(2) bears some resemblances to the legislation upheld in *R v Humby; Ex parte Rooney*[71]. The background to that case is that in *Knight v Knight*[72] this Court invalidated legislation vesting powers to make maintenance orders in a person (a Master) who was not a judge of the Supreme Court of South Australia. In response the legislature enacted the *Matrimonial Causes Act* 1971 (Cth). Section 5(1) provided that the section applied in any case in which an officer or commissioner of a State Supreme Court had in the past purported to make a decree ("the purported decree") in proceedings under the *Matrimonial Causes Act* 1959 (Cth). Section 5(3) of the 1971 Act provided:

> "The rights, liabilities, obligations and status of all persons are, by force of this Act, declared to be, and always to have been, the same as if –
>
> (*a*) in the case of a purported decree made by an officer of the Supreme Court of a State other than a purported decree to which the next succeeding paragraph applies – the purported decree had been made by the Supreme Court of that State constituted by a single Judge;
>
> (*b*) in the case of a purported decree made by an officer of a Supreme Court of a State, being a decree that was varied on appeal by the Supreme Court of that State constituted by a single Judge – the purported decree as so varied had been made by the Supreme Court of that State as so constituted; and
>
> (*c*) in the case of a purported decree made by a commissioner referred to in paragraph (*b*) of sub-section (1) of this section – the purported decree had been made by the Supreme Court of South Australia constituted by a single Judge."

Section 5(4) provided:

> "All proceedings, matters, decrees, acts and things taken, made or done, or purporting to have been taken, made or done, under the Matrimonial Causes Act or any other law (whether of the Commonwealth or of a State or Territory of the Commonwealth) in relation to a party to the proceedings in which the purported decree was made are, by force of this Act, declared to have the same force and effect after the commencement

---

71 (1973) 129 CLR 231; [1973] HCA 63.

72 (1971) 122 CLR 114; [1971] HCA 21, which followed *Kotsis v Kotsis* (1970) 122 CLR 69; [1970] HCA 61.

> of this Act, and to have had the same force and effect before the commencement of this Act, as they would have, or would have had, if the purported decree had been made as mentioned in the last preceding sub-section."

In *R v Humby; Ex parte Rooney* Stephen J (with whom Menzies and Gibbs JJ agreed) said[73]:

> "sub-s (3) declares the rights, liabilities, obligations and status of individuals to be and always to have been the same as if purported decrees had in fact been made by a single judge of a Supreme Court. It does not deem those decrees to have been made by a judge nor does it confer validity upon them; it leaves them, so far as their inherent quality is concerned, as they were before the passing of this Act. They retain the character of having been made without jurisdiction, as was decided in *Knight v Knight*; as attempts at the exercise of judicial power they remain ineffective. Instead, the sub-section operates by attaching to them, *as acts in the law*, consequences which it declares them to have always had and it describes those consequences by reference to the consequences flowing from the making of decrees by a single judge of the Supreme Court of the relevant State."

To describe as "acts in the law" conduct which was legally invalid is a contradiction in terms. Legally invalid conduct is not "in the law"; it is outside the law or against the law. But this is perhaps only a verbal infelicity. More central to Stephen J's reasoning was the proposition that the impugned provisions did not "[purport] to effect a 'validation' of purported decrees"[74]. The attack on validity was held to be flawed because it was "based upon the erroneous view that the sub-sections are concerned to validate orders made by Masters or commissioners by deeming them to have been orders made by judges."[75] The submissions of the Solicitor-General of the Commonwealth in this Court attributed the fallacy described by Stephen J to the plaintiff in this case. The Solicitor-General laid stress on the absence of any attempt to alter the legal status of an invalid punishment or order, or of an invalid conviction. In a similar vein, the Second Reading Speech in relation to the Bill which introduced item 5 said that the Bill did "not purport to validate any convictions or punishments imposed by the" Australian Military Court[76]. To some this might seem a play on words.

---

73 (1973) 129 CLR 231 at 243 (footnote omitted; emphasis added).

74 (1973) 129 CLR 231 at 242 per Stephen J.

75 (1973) 129 CLR 231 at 243 per Stephen J.

76 Australia, Senate, *Parliamentary Debates* (Hansard), 9 September 2009 at 6072.

The function of item 5 is to hold the Commonwealth and perhaps its officers harmless from the consequence of the invalidity found in *Lane v Morrison*. A distinction between, on the one hand, validating "orders", and, on the other hand, attaching to those "orders" the consequences they would have if they were valid, may be thought to be a distinction of gossamer-like thinness. But for the Commonwealth the consequence of drawing it is that it is the legislature which is punishing those in the position of the plaintiff; it is not the Australian Military Court which punished them through invalid orders later validated by the legislature.

86 In *R v Humby; Ex parte Rooney* Mason J (with whom Gibbs J agreed) stressed that the legislation did not repose the judicial power of the Commonwealth in an officer who was not a member of a State court. He said that s 5(3) defined the rights of the parties, and did so by reference to what their rights would have been had the decree or order been made, not by an officer, but by the Supreme Court. He continued[77]:

> "Sub-section (4) then gives to a purported decree the same effect. Sub-section (4) gives the decree an operation which it would not have had otherwise. In that sense it may be said that the decree is 'validated'; it has a valid operation whereas before it had none. But the sub-section does not attempt to validate the decree as a judicial determination. It lacked that character when it was pronounced and it does not acquire that character merely because the statute attributes to it the effect it would have had, had it been a judicial determination."

But a key element in the background to that reasoning lay in what Mason J said in concluding that the legislation was within s 51(xxii) of the Constitution[78]:

> "The legislative power with respect to divorce is not confined to authorizing a dissolution of the matrimonial relationship by means of a judicial determination in a judicial proceeding. The old procedure of dissolving a marriage by private Act of Parliament is a clear demonstration that the concept of divorce, as traditionally understood, is not limited to a termination of the matrimonial relationship, with consequential provision for the rights and obligations of the parties to the marriage, by means of a judicial determination in a judicial proceeding. It is for Parliament in the exercise of the power to select the means by which the marriage is to be dissolved and the means by which consequential provision is to be made respecting the rights and obligations of the parties.

---

77 (1973) 129 CLR 231 at 248-249.

78 (1973) 129 CLR 231 at 248.

> Subject only to the limitations to be discovered in Ch III, Parliament may provide that a designated tribunal or officer may dissolve a marriage and define the consequential rights and obligations of the parties, or give an invalid decree or order made by an officer of the Supreme Court the same effect it would have had, had it been made by the Court or a judge thereof."

This recognises a qualification to Ch III: the power to divorce is not a power solely capable of being given to Ch III courts.

87 In *R v Humby; Ex parte Rooney*, McTiernan J stated the position simply. He said[79]:

> "The object of the *Matrimonial Causes Act* 1971 is to give binding force of a legislative nature to a 'purported decree'. The Act accomplishes such an object and does so without encroaching on the realm of judicial power. It does not aim at establishing a 'purported decree' as a judicial decree or order."

The prospective character of item 5

88 Item 5 is not entirely retrospective. When enacted, it could have had some future operation. This can be seen in two ways.

89 Some of the plaintiff's sentences were sentences of detention for 42 days. The sentences were suspended as to seven days. Pursuant to s 81 of the *Defence Force Discipline Act* 1982 (Cth) the seven day period which was suspended was not remitted until one year had passed – ie 10 December 2009. Although the plaintiff did not re-offend within that year, if he had done so, he could have been made liable to serve that seven day period of detention at any time up to the day when *Lane v Morrison* was decided on 26 August 2009. He could not have been made to serve that seven day period of detention during the period between 26 August 2009 and the day when the impugned legislation was enacted on 22 September 2009. But his obligation to serve the seven day period would have arisen again in the period between 22 September 2009 and 10 December 2009.

90 Secondly, although once *Lane v Morrison* was decided on 26 August 2009 all persons serving a sentence of detention imposed by the Australian Military Court were released, the enactment of item 5 had consequences for those who had not served their whole terms. Once item 5 came into force on 22 September 2009, those persons were required by operation of law to do something they were

---

79 (1973) 129 CLR 231 at 239.

not previously liable to do – to serve the balance of their invalidly imposed sentences.

91 Hence there were persons – the plaintiff so far as the suspended part of his sentence was concerned, and others with unsuspended parts of their sentences to be served – who were sentenced to detention – prospectively – not by force of any valid court decision, but by force of legislation. The Second Reading Speech fully accepted that consequence when it stated: "the Bill, by its own force, purports to impose disciplinary sanctions."[80] If the plaintiff had had to serve the seven day period of his sentence which was originally suspended and had been asked: "By what right is the Navy doing this to you?" his answer would not have been: "The Australian Military Court convicted and punished me" but: "Parliament by its legislation is punishing me." Persons released on 26 August 2009 but subsequently called on to complete their terms of detention would give the same answer.

92 Is that legislation, whether retrospective or prospective, within the power of the legislature?

The Commonwealth's submissions in outline

93 The Solicitor-General of the Commonwealth began with the legislation which was replaced by that which was declared invalidated in *Lane v Morrison*. It has now been revived. It establishes systems by which service tribunals could punish service members. He submitted that they are valid under s 51(vi) of the Constitution. That is because they are "systems … directed to the maintenance of the defining characteristic of armed forces as disciplined forces organised hierarchically", and are "measures intended to maintain discipline and morale within the forces."[81] Schedule 1 item 2(1) provided that the "main object" of the legislation now challenged by the plaintiff "is to maintain the continuity of discipline in the Defence Force." Item 5 furthers that objective. Thus item 5 is a law with respect to defence.

94 The Solicitor-General then pointed to the terms of Sched 1 item 5. The rights and liabilities of persons as declared by item 5 were also subject to the outcome of any review undertaken pursuant to Pt 7 of Sched 1: item 5(4). He submitted that item 5(1) selected the Australian Military Court's "orders" only as "an historical point of reference for the identification of the rights and liabilities being declared." Item 5 declared new rights and liabilities operating solely by

---

80 Australia, Senate, *Parliamentary Debates* (Hansard), 9 September 2009 at 6072.

81 *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 596 [52] per Gummow, Hayne and Crennan JJ; [2007] HCA 29.

force of item 5 and not by way of "validation" of the invalid decisions. He submitted that that technique had been repeatedly approved. He submitted that the disciplinary measures to which effect was given by item 5 thus operated within the command hierarchy of the defence forces, consistently with the constitutional foundations of military justice identified in *White v Director of Military Prosecutions*[82].

The significance of the *R v Humby; Ex parte Rooney* technique

95 The technique upheld in *R v Humby; Ex parte Rooney* has limits. It operates by attaching to invalid Acts consequences which it declares these invalid Acts always to have had. It does so by providing that rights and liabilities exist "as if" various events had happened. The expression "as if" is an expression which "always introduces a fiction or a hypothetical contrast. It deems something to be what it is not or compares it with what it is not."[83] The employment of that technique is capable of satisfying the following words of McHugh J[84]:

> "Subject to the Constitution, it is within the legislative power of … the Commonwealth … to provide, by legislation, that the rights and liabilities of certain persons will be as declared by reference to the rights and liabilities as purportedly determined by an ineffective exercise of judicial power. 'Subject to the Constitution' means, in the case of the Commonwealth, that there must be a relevant head of power under which the law is enacted and that the law must not offend Ch III or any express or implied prohibition in the Constitution."

But whether the technique does satisfy those words depends on a key issue: whether item 5 offends Ch III.

Acts of Pains and Penalties

96 There is in the Constitution, in contrast to the Constitution of the United States of America, no express prohibition against Acts of Pains and Penalties. Rather the existence in legislation of certain features of an Act of Pains and Penalties can cause it to contravene Ch III[85]. The separation of powers effected

---

82 (2007) 231 CLR 570.

83 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 203 [115] per McHugh J; [2000] HCA 62.

84 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 200 [107].

85 *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 536 and 649-650; [1991] HCA 32.

by the Constitution invalidates laws which inflict punishment, and even non-punitive detention, on specified persons without a judicial trial because those laws involve a usurpation of judicial power[86]. Thus Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* said[87]:

> "In exclusively entrusting to the courts designated by Ch III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth, the Constitution's concern is with substance and not mere form. It would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought *to divorce such detention in custody from both punishment and criminal guilt*."

According to both the Second Reading Speech and the Commonwealth's submissions, item 5 imposes disciplinary sanctions divorced from valid convictions of criminal guilt and punishments for it[88]. And Brennan, Deane and Dawson JJ also said, after listing various well-known exceptions which include "the traditional powers of … military tribunals" but not any legislative power to detain[89]:

> "the citizens of this country enjoy, at least in times of peace, a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth."

Contrary to one of the Commonwealth's submissions, it is not necessary that the laws provide for a finding of guilt. That is certainly the opinion of Mason CJ, Toohey and McHugh JJ. Thus Mason CJ said[90]: "If … [a] law … adjudged

---

86 *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 536, 616-617, 646-648, 706 and 721; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 70; [1992] HCA 64.

87 (1992) 176 CLR 1 at 27 (emphasis added).

88 See above at [91] and [93].

89 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28-29 (footnote omitted).

90 *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 536 (emphasis added).

persons guilty of a crime *or imposed punishment upon them*, it could amount to trial by legislature and a usurpation of judicial power." Toohey J said[91]:

> "[B]ills of pains and penalties … may be defined as *legislative acts imposing punishment* on a specified person or persons or a class of persons without the safeguards of a judicial trial …
>
> Legislative acts of this character contravene Ch III of the Constitution because they amount to an exercise of judicial power by the legislature."

In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, McHugh J said[92]:

> "[A] Bill of Pains and Penalties is a law (1) directed to an individual or a particular group of individuals (2) which *punishes* that individual or individuals (3) without the procedural safeguards involved in a judicial trial."

Item 5 is a law directed to various particular groups of individuals. One of those groups comprised persons on whom punishment was imposed prospectively without the procedural safeguards involved in a judicial trial. Another of those groups comprised persons on whom punishment was so imposed retrospectively. Item 5 declares the rights and liabilities of particular classes of persons who were not in law liable to punishment as being liable to punishment and as having been or being validly punished. It declares that to be so for the whole of the period since the time when the punishment was imposed. Item 5 purported to punish without any trial by a Ch III court.

97 The Solicitor-General of the Commonwealth resisted a conclusion that item 5 was invalid in several ways. He submitted that the mere fact that limited numbers of people were affected did not betoken invalidity. He placed reliance on *Nicholas v The Queen*[93]. But the passages relied on were not directed to the present problem. In large measure, they were concerned with pointing out the differences between the problem in *Nicholas v The Queen* and the problem in

---

91 *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 685-686 (emphasis added).

92 (1992) 176 CLR 1 at 70 (emphasis added).

93 (1998) 193 CLR 173 at 191-193, 203, 211-212, 238-239, 277-278; [1998] HCA 9.

Liyanage v The Queen[94]. And in *Nicholas v The Queen* it was impossible to identify the persons affected by the challenged law[95].

98 The Solicitor-General of the Commonwealth also submitted that a punitive measure directed against a discrete group of people was not in the realm of judicial power where the punitive measure was properly characterised as disciplinary. For this he cited *Kariapper v Wijesinha*[96], which was approvingly discussed by Mason CJ in *Polyukhovich v The Commonwealth* (*War Crimes Act Case*)[97]. Mason CJ said[98]:

> "The view that a statute which contains no declaration of guilt and does not impose punishment for guilt is not a usurpation of judicial power is supported by the reasoning of the Privy Council in its decision in *Kariapper v Wijesinha*[99]. The Privy Council upheld the validity of a statute enacted by the Parliament of Ceylon which imposed civil disabilities on persons to whom the statute applied, namely, persons, including the appellant, named in a schedule to the statute who were found guilty of bribery in a report by a commission of inquiry. The statute also provided for the vacation of the appellant's seat as a Member of Parliament … In *Kariapper v Wijesinha*[100], the appellant argued that the statute was an exercise of judicial power because it imposed punishment for guilt without trial by a competent court and was a bill of attainder, ex post facto legislation having an element of punishment being on the same footing as a bill of attainder."

The Privy Council, speaking through Sir Douglas Menzies, rejected that argument of the appellant[101].

---

94 [1967] 1 AC 259.

95 (1998) 193 CLR 173 at 203 [57].

96 [1968] AC 717.

97 (1991) 172 CLR 501 at 537-538.

98 (1991) 172 CLR 501 at 537.

99 [1968] AC 717.

100 [1968] AC 717 at 721.

101 [1968] AC 717 at 736.

> "It is the commission's finding that attracts the operation of the Act not any conduct of a person against whom the finding was made. Parliament did not make any finding of its own against the appellant or any other of the seven persons named in the schedule. The question of the guilt or innocence of the persons named in the schedule does not arise for the purpose of the Act and the Act has no bearing upon the determination of such a question should it ever arise in any circumstances. Secondly, the disabilities imposed by the Act are not, in all the circumstances, punishment. It is, of course, important that the disabilities are not linked with conduct for which they might be regarded as punishment, but more importantly the principal purpose which they serve is clearly enough not to punish but to keep public life clean for the public good."

The Solicitor-General's submission must be rejected. The legislation in *Kariapper v Wijesinha* was not analogous to item 5: there was no attempt to regularise the consequences of invalid convictions and punishments. Nor is there any analogy between forcible deprivation of liberty and mere disabilities like incapacity to sit in Parliament. In "all the circumstances" of that case the Privy Council did not see the disabilities imposed as being punishment. But in all the circumstances of this case the "rights and liabilities of all persons" were declared to be the same as if "the punishment" on the plaintiff had been properly imposed by a general court martial. Item 5 accepted that that which was declared to have been properly imposed was a punishment. Item 5 drew no distinction between disciplinary and non-disciplinary punishments. That invitation to change Ch III must be rejected.

99 The Solicitor-General also submitted that, while it would contravene Ch III for the legislature to authorise punishment, in circumstances where a military tribunal system had broken down it did not contravene Ch III to rectify and regularise what had happened in the interests of preserving military discipline. However, that circumstance does not make item 5 any the less a provision by which the legislature imposed punishment. That invitation to change Ch III must be rejected.

100 For those reasons, subject to item 25, item 5 offends Ch III.

<u>Item 5(2) is outside the traditional military tribunal structure capable of existing compatibly with Ch III</u>

101 The legislation which was challenged in *R v Humby; Ex parte Rooney* itself did not offend Ch III. That is because, as Mason J pointed out, the legislature has power to grant divorces, and provide for the grant of divorces, independently of any judicial determination. It is therefore necessary to examine whether item 5 is within the traditional sphere of military justice recognised in *White v Director of Military Prosecutions*, and, if not, whether under the

Constitution the legislature has legislative power to punish military personnel by detention, or provide for punishment by detention, outside that traditional sphere.

102 In the mournful words of Maitland, it "has been the verdict of long experience, that an army cannot be kept together if its discipline is left to the ordinary common law."[102] On the other hand, low though the reputation of Cromwell is among those who love human liberty, he made a great negative contribution to that cause after his forces ensured the victory of the House of Commons over King Charles I. During the Commonwealth[103]:

> "England came under the domination of the army, parliament itself becoming the despised slave of the force that it had created. At the Restoration the very name of a standing army had become hateful to the classes which were to be the ruling classes."

From this flowed consequences for English and then for Australian law – what the plaintiff called something which was "finely worked out" – the "adjustment of military and civil law" described in *White v Director of Military Prosecutions*[104]. There is no "military caste with its own set of all-encompassing legal norms"; there is no "place for a general defence … of superior orders or of executive fiat"; "naval and military courts martial [are] liable to the supervisory jurisdiction of the superior courts"; and "the civil law of obligations does not cease to run merely because the obligations in question bind or confer rights upon a defence member."[105] Once the Constitution came into force, Ch III had consequences for service tribunals; their members were officers of the Commonwealth, and thus this Court had power to grant relief under s 75(v) of the Constitution, particularly in relation to excess of jurisdiction, and the s 51(vi) power to legislate in relation to defence is subject to Ch III and capable of supporting legislation not inconsistent with it[106].

---

102 Maitland, *The Constitutional History of England*, (1955) at 279.

103 Maitland, *The Constitutional History of England*, (1955) at 326.

104 (2007) 231 CLR 570 at 592-593 [37]-[39]. The words "adjustment of military and civil law" are not used in *White's* case, but are aptly taken from the marginal note to s 162 of the *Army Act* 1881 (Imp), although that section deals with a very specific problem: *Lane v Morrison* (2009) 239 CLR 230 at 265-266 [111].

105 *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 592 [37]-[38] per Gummow, Hayne and Crennan JJ.

106 *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 592-593 [39].

103 Military discipline is subject to conflicting demands. There is a need for a system which can be speedily administered by officers, sworn to defeat the Queen's enemies, who are appropriately experienced in the servitude and grandeur of arms and the splendours and miseries of military life. That need has helped cause the traditional system of military tribunals to continue. There is also a need for the procedural fairness and expertise built up over many generations in the ordinary courts of the land. It is this which impelled the legislature to enact the legislation invalidated in *Lane v Morrison*, which created the Australian Military Court as a body approaching but not arriving at the status of a Ch III court. These conflicting demands have led to historical compromises. Those compromises have caused traditional military tribunals to be seen as operating by way of exception to Ch III, or operating as a qualification to Ch III, or operating outside Ch III.

104 Is item 5(2) within the conception of traditional military tribunals?

105 Under item 5(2)(a) it is necessary to postulate – or, to use the word repeatedly used by the Solicitor-General of the Commonwealth in explaining item 5(2), to "hypothesise" – that the *Defence Force Discipline Act* 1982 (Cth) as amended by the *Military Justice (Interim Measures) Act (No 1)* 2009 (Cth) was in force on 11 December 2008. It was not.

106 Under item 5(2)(b) it is necessary to postulate that the orders of punishment made against the plaintiff were made by a general court martial. If they had been made in that way, they would have been valid[107]. But they were not made in that way.

107 Under item 5(2)(c)(i) it is necessary to postulate that a competent reviewing authority had reviewed the order made by the general court martial. It had not.

108 Under item 5(2)(c)(ii) it is necessary to postulate that the reviewing authority had approved the punishment or had decided not to quash or revoke the punishment. No reviewing authority had done either thing.

109 Under item 5(2)(c)(iii) it is necessary to postulate that any possibility of further review (other than review provided for by Pt 7 of Sched 1, in which item 25 appears) had been exhausted. There had been no review of any kind, and the possibilities had not been exhausted.

110 The plaintiff did not submit or assume that only a Ch III court could impose a punishment of detention. Indeed the plaintiff made an explicit

---

107 *White v Director of Military Prosecutions* (2007) 231 CLR 570.

submission to the contrary. He submitted that whether the traditional military tribunal system operates as an exception to Ch III, or as a qualification to it, or outside it, there is no doubt it permits a general court martial lawfully to impose a sentence of detention. That is correct. But that is not the imposition of a sentence of detention by the legislature. As the plaintiff submitted, it has never been held that the legislature (as distinct from a military tribunal subject to review in the chain of command) could create a valid sentence of detention on the basis of what a hypothetical general court martial might have ordered but never did, on the basis that a competent reviewing authority had hypothetically reviewed the punishment but never did, and on the basis that possibilities of further review were hypothetically exhausted when they were not. This extensive reliance on false hypotheses went beyond the "adjustment of military and civil law" described in *White v Director of Military Prosecutions*[108]. The traditional military tribunal system shares methods of review with the structure created by items 5 and 25. But the former system reviews real events and constitutionally valid acts. The latter reviews non-existent events and invalid acts. The regime created by items 5 and 25 is intermediate between the valid traditional system and a Ch III court system. The distinct reasons why each of those systems is valid do not apply to the intermediate regime.

111 It is true that the technique upheld in *R v Humby; Ex parte Rooney* employs hypotheses. The words "as if" in the relevant legislation introduced various false hypotheses. It was not in that case a source of invalidity to provide that the rights of persons should be "as if" an invalid decree had been validly made by a Supreme Court judge, even though no such decision had been made. That is because the rights in question flowed from the divorce power, and the legislature's power over divorce extended beyond legislative grants of power to courts to including a power in the legislature itself to divorce. In that field, the selection of hypotheses did not go beyond an exception to or qualification of Ch III. In the field of military justice, it does.

Item 5(2) is incompatible with Ch III

112 To treat the extensive reliance in item 5 on false hypotheses as being compatible with Ch III is to take the step of narrowing the application of Ch III in an entirely novel way. It is not lawful to alter the Constitution in this fashion. But even if it could be done, there is no good reason to take this step. The legislation considered in *Lane v Morrison* went too far in one sense (by creating an "Australian Military Court" the decisions of which were not reviewable in the chain of command). It did not go far enough in another sense (by not making that "Australian Military Court" a Ch III court). But the fatal legislative mingling

---

108 (2007) 231 CLR 570 at 592-593 [37]-[39].

of boldness and pusillanimity is not a good reason to take the novel step which the Commonwealth's submissions call for.

113 For that reason, too, item 5 offends Ch III.

Item 25

114 The effect of item 5(4) is that, even if item 5(1) and (2) operated adversely to the plaintiff, a review under Pt 7 of Sched 1 could have ameliorated his position. The amelioration could have come from the automatic review conferred by item 25(4). It could have come from the right to review on application conferred by item 25(2). The plaintiff received the former review. He did not seek to invoke the latter. The Solicitor-General of the Commonwealth submitted that the legislation containing item 5 lacked the finality which is characteristic of an Act of Pains and Penalties.

> "The orders and punishments imposed by virtue of item 5 are subject to review under Pt 7 of Sch 1. Such a review is carried out within the command hierarchy of the Defence Force. In light of the provision for administrative review, it cannot be said that the legislature has, in the manner of an Act of Pains and Penalties, made a judgment of guilt in respect of certain individuals and imposed penalties upon them."

This submission must be rejected.

115 First, the existence of a right to review, whether automatic or on application, does not trigger the involvement of a Ch III court. The review may change the punishment, but it is only a change by the Executive. If the vice in item 5 lies in the legislature imposing punishments without the involvement of a Ch III court, that vice is not cured by a power to review by a body which is not a Ch III court. If the legislature chose to treat a subject in the manner in which the Earl of Strafford was treated in 1641, its legislation would be invalid. The invalidity would not be cured by providing that the legislative condemnation was subject to review by some person.

116 Secondly, if the vice in item 5 lies in its reliance on false hypotheses, the Solicitor-General's submission did not face up to the difficulties posed by the following questions. What does the item 25 reviewing authority do? Is the reviewing authority to take as the materials to work on and receive the evidence which was, but should never have been, received by the Australian Military Court, and to receive the submissions which were, but should never have been, received by the Australian Military Court, being evidence and submissions which led to the orders which the Australian Military Court should never have made? The reviewing authority would have to assume so many hypotheses which are false, and work with so many materials which are invalid. How can a right to review a punishment which was ordered because of invalidly received evidence

and submissions and invalid procedures give validity to item 5 if it is otherwise invalid because of its dependence on reasoning from false hypotheses alien to the operation of the traditional military tribunal system? Item 25 seeks to introduce an ameliorating element without cutting out the damaging elements.

117 Hence item 25 does not save item 5 from invalidity.

Orders

118 The plaintiff presented arguments to the effect that, contrary to s 51(xxxi) of the Constitution, the Commonwealth had acquired property, namely his right of action for false imprisonment against the Commonwealth, otherwise than on just terms. That assumes an otherwise valid law. Since it has been concluded that item 5 is not valid, no s 51(xxxi) question arises.

119 The plaintiff also presented an argument that, even if it were valid, the relevant law operated, by reason of item 2(2), "for Defence Force service purposes only", and that meant that the legislation did not operate to extinguish his vested common law cause of action in the civil courts. Since the legislation is invalid, it is not necessary to consider this argument.

120 The second question in the Special Case should be answered in the negative. The defendant should pay the plaintiff's costs in this Court. The matter should be remitted to the Federal Court of Australia.