IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S8 of 2011

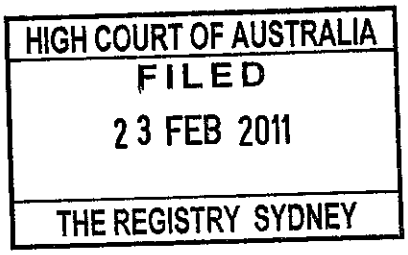
BETWEEN:

ABLE SEAMAN JOSEPH ANTHONY PETER HASKINS
Plaintiff

and

THE COMMONWEALTH OF AUSTRALIA
Defendant

PLAINTIFF'S SUBMISSIONS



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PART I SUITABILITY FOR PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

PART II ISSUES

2. The former Australian Military Court (AMC) functioned between 1 October 2007 [SC 1 at para 3], and 26 August 2009 when this Court held that it had invalidly purported to exercise the judicial power of the Commonwealth contrary to Chapter III of the *Constitution*: *Lane v Morrison* (2009) 239 CLR 230 [SC 7 at para 34].

3. Between 11 December 2008 and 5 January 2009 [SC 6 at para 26] the Plaintiff served a sentence of military detention in a military prison as a result of punishments awarded by the AMC. (This deprivation of the Plaintiff's liberty without his consent is admitted by the Defendant.)

4. On 22 September 2009 the *Military Justice (Interim Measures) Act (No. 2)* 2009 (Cth) ("the Act") came into force [SC 7 at para 35].

5. The Plaintiff now sues in this Court's original jurisdiction for a declaration of right that he was unlawfully imprisoned, and damages for the tort of false imprisonment. By Special Case, the Court is asked two questions, namely [SC 9-10]:

   (a) On its proper construction, does the Act provide lawful authority justifying the detention of the Plaintiff?

   (b) If the answer to that question is 'yes', are items 3, 4 and 5 of Schedule 1 to the Act valid laws of the Commonwealth Parliament?

6. In summary, the Plaintiff submits the answer to each question is 'no' because the terms of the Act, properly construed:

   (a) Do not apply to the immediate legal act purportedly justifying the Plaintiff's incarceration, namely the warrant of commitment;

   (b) Do not and cannot usurp the judicial power of the Commonwealth.

PART III SECTION 78B OF THE JUDICIARY ACT

7. The Plaintiff has given adequate notice of the proceedings to the Attorneys-General, in compliance with s 78B of the *Judiciary Act* 1903 (Cth).

PART IV FACTS

8. The material facts are set out in the *Special Case* stated by the parties.

9. At all relevant times, the Plaintiff was a member of the Royal Australian Navy and a "defence member" within the meaning of the *Defence Force Discipline Act* 1982 (Cth) ("the DFDA") [SC 1 at paras 1 and 2].

10. The Plaintiff was tried and convicted by the AMC of 11 charges of misuse of a Commonwealth 'travel card', contrary to the DFDA s 61(3) and the *Financial Management and Accountability Act* 1997 (Cth) s 60(1) [SC 1 at para 4]. The latter provides that:

> "an official ... must not use a commonwealth credit card ... to obtain cash, goods or services otherwise than for the Commonwealth.[1]"

11. By s 61(4) of the DFDA, the maximum punishment for that offence was a punishment not more severe than the maximum punishment for the relevant territory offence, which was by s 60(1) of the *Financial Management and Accountability Act* 1997 (Cth): "imprisonment for seven years".

12. As to the Plaintiff, before the AMC[2]:
    (a) The AMC held that it had jurisdiction under s 115(1) to try the charge of the service offence;
    (b) The AMC was constituted by a single military judge (s 116(1)), in this case, the Chief Military Judge (s 114(2)) [SC 1 at para 6];
    (c) The military judge sat with a military jury (see s 122-124), and the jury was responsible for deciding, relevantly, whether the Plaintiff was guilty or not guilty (s 124(1)(a)) [SC 2 at para 7];
    (d) The jury found the Plaintiff guilty of all charges [SC 2 at para 9, Annexure A]. That being so, the military judge was required to, and did, convict the plaintiff (s 132B(8)) and consider what action to take under Part IV of the DFDA to in relation to the convicted person: s 132F(1);
    (e) The military judge as a "service tribunal" within the meaning of Part IV (see definition in s 3) was required to make a punishment in respect of each particular conviction, and was limited, relevantly, to the punishments set out in s 68 and Schedule 2;
    (f) Apart from the second charge, where the order was a severe reprimand (see s 68(1)(j)), for every other conviction, the military Judge ordered that the plaintiff undergo detention for periods between 7 and 42 days [SC 2 at para 9, Annexure A];
    (g) Under s 74, the sentences of detention were ordered to be served concurrently [SC 2 at para 9.2, Annexure A];

[1] That being a credit card issued to the commonwealth to enable it to obtain cash, goods or services on credit – see s 60(3).
[2] The former Court was established under the then Division III, Part 7 (ss 114-121) of the DFDA.

(h) Under s 78, the most serious sentences of detention, namely, the orders for detention of 42 days on each of the tenth and eleventh charges, were suspended for seven days [SC 2 at para 9.3, Annexure A];

(i) The punishments took effect forthwith (s 171(1)) [SC 2 at para 9.4];

(j) The military judge, in his capacity as an "authorised officer" within the meaning of s 170 of the DFDA, then issued a warrant of commitment under s 170(1)(b) for the commitment of the Plaintiff, who became a "detainee"[SC 2 at para 9.5].

(k) That warrant relevantly required a specified member of the Australian Defence Force to convey the detainee to a specified military detention centre (at Holsworthy, NSW)[3] to deliver him into the custody of the officer-in-charge of that centre: s 170(3), and for him to be detained "for as long as his ... detention is necessary for the execution of the punishment by reason of which the warrant was issued" [SC 2 at para 9.5, Annexure C];

(l) The officer in charge of the Defence Force Correctional Establishment had no discretion to release the plaintiff without authority. It was an offence for those to whom the warrant of commitment was addressed to release the plaintiff without authority: s 54(2) or (3). That is, it was the warrant, not the order of punishment by the AMC, which was the authority to detain.

13. The Plaintiff served a period of detention from 11 December 2008 [SC 6 at para 26] until 5 January 2009 [SC 7 at para 33] in a Defence Force Correctional Establishment.

PART V APPLICABLE PROVISIONS

14. The relevant constitutional and legislative provisions are identified and set out in *Annexure A* to these submissions.

PART VI ARGUMENT

15. As "[t]he first step in the making of [an] assessment of the validity of any given law is one of statutory construction"[4], the argument is organised as follows to deal first with how the Act should be construed and then with issues of validity:

(a) The decision in *Lane v Morrison*;

(b) Principles for construing the Act;

(c) The terms of the Act;

[3] There is a question whether there was a valid declaration as to DFCE Holsworthy as a detention centre for a member of the Navy as at 11 December 2008, having regard to the documents approved by officers of the defendant: see SC Annexures B, D, E, F, G particularly pages 19, 24, 28, 30 and 32.

[4] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [11] per Gleeson CJ.

(d) The warrant of commitment;

(e) The nature of the proceedings;

(f) Usurpation of the judicial power of the Commonwealth.

Lane v Morrison

16. In *Lane v Morrison* this Court declared the provisions of Division 3 of Part VII of the DFDA invalid [SC 7 at para 34]. The plurality (Hayne, Heydon, Crennan, Kiefel and Bell JJ) so concluded because those provisions breached the prohibition in Chapter III of the *Constitution* that only a court recognised by Chapter III can exercise the judicial power of the Commonwealth, saying:

> "[112] If the impugned provisions are valid, the AMC is given power to make a binding and authoritative determination of the issues of fact and law which are tendered on the trial of an offence the elements of which are identified by the generally applicable criminal law ... , the AMC is given power to punish a person found guilty of that offence [a]nd ... , it follows from its being a court of record that the decision of the AMC would preclude further prosecution for the same offence under the generally applicable criminal law.
> [113] For the AMC to make a binding and authoritative determination of such issues pursuant to the DFDA is to exercise the judicial power of the Commonwealth. There is no dispute that the AMC is not constituted in accordance with Ch III."

17. That is, it is part of the *ratio decidendi* of *Lane v Morrison* that a breach of Chapter III, and consequential invalidity, followed from the invalid conferral of the 'power to punish a person found guilty' of such offences.

18. Evidently, the Plaintiff was a person convicted of an 'offence the elements of which are identified by the generally applicable criminal law', and was punished as a result, relevantly by orders of detention [SC 2 at para 9].

19. That punishment was pursuant to an unconstitutional statute, and was and remains, necessarily, punishment without lawful authority, and the "rights and liabilities of all persons" are to be viewed accordingly, unless the Act both applies to that punishment and is valid.

Principles for construing the Act

20. It is submitted that the Act is to be construed by application of the following principles.

21. First, as French CJ said in *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501:

"[47] There is also a well established and conservative principle of interpretation that statutes are construed, where constructional choices are open, so that they do not encroach upon fundamental rights and freedoms at common law. That is to say, there is a presumption against a parliamentary intention to infringe upon such rights and freedoms. That presumption has been described in the United Kingdom as an aspect of a 'principle of legality' governing the relationship between parliament, the executive and the courts. It was explained by Lord Hoffmann in *R v Secretary of State for the Home Department; Ex parte Simms*[5];

> '[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.'

Gleeson CJ described the presumption as 'a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted'. He added, '[t]he hypothesis is an aspect of the rule of law'."

22. To similar effect the Chief Justice said in *South Australia v Totani* (2010) 85 ALJR 19:

"[31] Applying the 'principle of legality', courts will, of course, construe statutes, where constructional choices are open, so as to minimise their impact upon common law rights and freedoms[6]. That principle, well known to the drafters of legislation, seeks to give effect to the presumed intention of the enacting Parliament not to interfere with such rights and freedoms except by clear and unequivocal language for which the Parliament may be accountable to the electorate."

23. Although sometimes criticised, the well-known statement of O'Connor J in *Potter v Minahan* is apt here. His Honour said[7]:

"It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used."

24. These principles are at their most potent in a case where, as here, the Defendant admitted that the Plaintiff was deprived of his liberty without his consent. In *Trobridge v Hardy* (1955) 94 CLR 147, Fullagar J at 152, in terms directly

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[5] [2000] 2 AC 115 at 131.

[6] *Bropho v Western Australia* [1990] HCA 24; (1990) 171 CLR 1 at 17-18 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1990] HCA 24; *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427 at 436-437 per Mason CJ, Brennan, Gaudron and McHugh JJ; [1994] HCA 15; *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40; (2004) 221 CLR 309 at 329 [21] per Gleeson CJ; [2004] HCA 40; *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4; (2009) 237 CLR 501 at 520 [47] per French CJ; [2009] HCA 4.

[7] (1908) 7 CLR 277 at 304 per O'Connor J. See the 4th edition of Maxwell, *Interpretation of Statutes* (1905) at 122. See also *United States v Fisher* (1805) 2 Cranch 358 at 390.

adopted in *Williams v R* (1986) 161 CLR 278 at 292 by Mason and Brennan JJ, said:

> "The mere interference with the plaintiff's ... liberty constituted prima facie a grave infringement of the most elementary and important of all common law rights."

25. With these principles in mind the submissions now consider the terms of the Act.

The Interim Measures Act

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26. The Explanatory memorandum authorised by the Minister in relation to the Bill for the Act[8], adopted the principle in *The Queen v Humby; ex parte Rooney* (1973) 129 CLR 231 saying that it:

> " ... does not change the status of the punishments and orders invalidly imposed or made by the AMC, but rather effects a direct legislative alteration of rights and liabilities in the exercise of the legislative power conferred on the Commonwealth Parliament under s 51(vi) of *The Constitution* ... [It] provides that the rights and liabilities of all persons are ... the same as if the punishment ... of the AMC had been
> 20 imposed ... by a properly constituted court martial."

27. These submissions later consider whether this model can validly be used in relation to the punishment of detention.

28. Relevantly, the Schedule to the Act:

(a) has as its 'main object' maintenance of 'the continuity of discipline in the Defence Force.': Item 2(1)

30 (b) Insofar as its 'provisions ... declare people to have particular rights or liabilities [they] have effect for Defence Force service purposes only: Item 2(2);

(c) Seeks to give its provisions every valid application, if parts are held invalid: Item 2(3);

(d) Subject to Item 2(2) declares that:

> "[Item 3(2)]
> 40 (a) all persons are, by force of this item, declared to be, and always to have been, entitled to act on the basis that other persons had, and have, the rights and liabilities as declared by the applicable item; and
> (b) a right or liability that a person is declared to have by the applicable item:
> (i) is exercisable or enforceable; and

[8] Military Justice (Interim Measures) Bill (No. 2) Explanatory Memorandum: http://www.austlii.edu.au/au/legis/cth/bill_em/mjmb22009411.txt/cgibin/download.cgi/download/au/legis/cth/bill_em/mjmb22009411.txt.

(ii) is to be regarded as always having been exercisable or enforceable;

as if the assumed matters had in fact been the case."

(e) By Item 4, applies item 5 to 'things purportedly done by the AMC... before the High Court decision date.'

(f) Item 5 is, relevantly, only applicable where the AMC purported to impose a punishment other than imprisonment for life or for a term in a civilian rather than military prison. If applicable it is, relevantly, declared that:

"[Item 5(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 [in effect it had not been set aside or suspended]."

29. It may be noted that the Act does not purport to affect in any way the punishment of civilian imprisonment imposed by the former Court, a punishment which is relevantly indistinguishable in a tortious sense from military detention.

30. The Act, following *The Queen v Humby; ex parte Rooney* model, and to adapt the words of Stephen J in that case at p 243, purportedly:

"declares the rights, liabilities, obligations and status of [all persons] to be and always to have been the same as if purported [punishments] had in fact been made by [General Court Martial]. It does not deem those [punishments] to have been made by [General Court Martial] 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."

31. The Act is thus an example of the principle that, as McHugh, Gummow, Hayne and Heydon JJ said in *Baker v The Queen* (2004) 233 CLR 513 at [43]:

"in general, a legislature can select whatever factum it wishes as the "trigger" of a particular legislative consequence.[9]"

32. This Special Case concerns the limits of that principle.

33. In the case of the Plaintiff, therefore, it speaks as at the time of punishment by the AMC, to declare him liable to the punishment of detention he actually went on to

[9] See, for example, *Re Macks; Ex parte Saint* [2000] HCA 62; (2000) 204 CLR 158 at 178 [25] per Gleeson CJ, 187-188 [59]-[60] per Gaudron J, 200 [107] per McHugh J, 232-233 [208] per Gummow J and 280 [347] per Hayne and Callinan JJ.

undergo, and to give (for example) those who detained him the rights they would have had if that punishment had been imposed by General Court Martial.

34. As to construction, the question becomes whether the words are sufficiently 'clear and unequivocal' retrospectively to adjust the 'rights and liabilities of all persons' so as to provide lawful justification for the detention.

35. As to validity, the question then becomes whether the Act 'offends Ch III or any express or implied prohibition in the Constitution': *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 200 per McHugh J.

36. If the Act does not, as a matter of construction and validity 'speak' as at the time of punishment, but only after punishment, it may in truth be a validating Act and one which purports to extinguish the Plaintiff's choses in action.

37. Before dealing with these matters in turn it is submitted that the Act simply does not deal with the legal act which caused the detention and in that regard does not alter the 'rights and liabilities of all persons'.

The warrant of commitment

38. In *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1, Brennan, Deane and Dawson JJ adopted what :

> "Blackstone wrote ... relying on the authority of Coke ... [namely:]
> 'The confinement of the person, in any wise, is an imprisonment. So that the keeping (of) a man against his will ... is an imprisonment ... To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a habeas corpus.'"

39. In *Williamson v Inspector-General of Penal Establishments* [1958] VR 330 at 334 per Smith J, who delivered the leading judgment of the Full Court, held:

> "It has long been established that in criminal matters the sentence of a superior court is itself the authority for the execution of the punishment directed and that no warrant is necessary to render such execution lawful."[10]

40. Here, the AMC never purported to be (and could not have been) a superior court. It was thus necessary for there to be a 'warrant from some legal officer having authority to commit to prison.' The only authority for the Plaintiff's detention was the s 170 warrant [SC 2 at para 95, Annexure C], which was also the proximate or direct cause of imprisonment.

[10] Cited with approval in *R v Turnbull; ex parte Taylor* (1968) 123 CLR 28 at [45] by Windeyer J. *Cowell v Corrective Services Commission of New South Wales* (1988) 13 NSWLR 714.

41. Under s 170, power to order detention was conferred upon persons so authorised by the Chief of the Defence Force. One such person so authorised was the military judge who issued the warrant. The s 170 warrant authorised the commitment of the plaintiff "for as long as his ... detention is necessary for the execution of the punishment by reason of which the warrant was issued."

42. The officer-in-charge, who was the gaoler, had no discretion to release the plaintiff; indeed, it would have been an offence under the DFDA for him to have done so without authority.

43. The issue of the warrant was without authority and unlawful. Although in *Lane v Morrison* this Court only invalidated Division III, Part 7 (ss 114-121) of the former DFDA, and not s 170, the authority conferred upon the military judge by a combination of ss 3 and 170 of the DFDA was, in his capacity as a judge of a Court, created by those provisions which were invalidated.

44. The issue of the warrant [SC 2 at para 9.5, Annexure C] was not the imposition of 'a punishment' 'by the AMC', as defined in Item 5(1)(a) of the Act, which refers only to the punishments imposed under Part IV of the DFDA. Rather, the issue of the warrant was a separate, albeit consequential, act by an "authorized officer" within the meaning of, and pursuant to, s 170 of the DFDA. Thus it was not an action 'picked up' by the declaration in Items 3-5 of the Act.

45. Equally, the issue now of any notional warrant of detention would not be a punishment imposed by a general court martial within the meaning of Item 5(2)(b) of the Act.

46. For these reasons:

    (a) the warrant [SC 2 at para 9.5, Annexure C], which was the only authority for detention, was unlawful,
    (b) the issue of the warrant, and any authority it might have given to detain, are not legal acts affected by the declaration made by the Act,
    (c) thus, the 'rights and liabilities of all persons' in relation to the absence of the warrant, are unaffected by the enactment of the Act.

47. To the extent there are 'constructional choices' available, the principles discussed above favour the construction just proposed.

48. Accordingly the first question in the special case should be answered 'no'.

49. If this submission is not accepted the following submissions are made.

The nature of the proceedings

50. As noted, the questions for this Court are whether the Act provides lawful justification for the Plaintiff's detention and whether it does so in a valid statute. If the Plaintiff succeeds here in showing no such lawful authority under the Act, it will be necessary to remit the matter to another court for trial.

51. Nevertheless, it is necessary to say something about the relief sought by the Plaintiff, namely a declaration of right that he was unlawfully detained, damages for the tort of unlawful imprisonment,[11] and a declaration 'that the said claim for a declaration and damages is unaffected by the Act' either as a matter of construction or because it is invalid. The Commonwealth meets these claims by asserting the Act is valid and applicable according to its terms.

52. The answers to the questions affect not only the Plaintiff but, at least, the twenty other persons punished with a sentence of military detention by the AMC [SC 8 at para 42, Annexure W], and perhaps all persons punished by the AMC, and in relation to the group of 21 relate to fundamental questions concerning legislative power in relation to liberty. As was the case in *Pape v Commissioner of Taxation* (2009) 238 CLR 1:

> "[158] ... the resolution pursuant to Ch III of the Constitution of the plaintiff's particular controversy acquires a permanent, larger, and general dimension. The declaration would vindicate the rule of law under the Constitution."[12]

53. In those circumstances the grant of the declaration has utility and is directed to the determination of legal controversies: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-2 per Mason CJ, Dawson, Toohey and Gaudron JJ; *Croome v Tasmania* (1997) 191 CLR 119 at 124 per Brennan CJ, Dawson and Toohey JJ; *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) 272 ALR 14 at [103].[13]

54. As submitted above, that there is a right not to be confined without lawful authority. The common law remedies include reasonable self-help, the prerogative remedy of *habeas corpus*, and tortious damages.[14]

55. The Plaintiff did not lose his civil rights when he became a defence member [SC 1 at para 1]. As was said in *White v Director of Military Prosecutions* (2007) 231 CLR 570 by Gummow, Hayne and Crennan JJ:

It is not suggested that there is a right to damages arising from a breach of the Constitution: *Kruger v Commonwealth* (1997) 190 CLR 1.

[12] Citing *Plaintiff S157/2002 v The Commonwealth* 2003) 211 CLR 476 at 513-514 [103]-[104]; see also *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) 272 ALR 14 at [87].

[13] Per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

[14] TLA [33.8.1520], *Laws of Australia* Online, Thomson Reuters.

"[38] ... 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. In relation to the tort of false imprisonment it should be recalled that, as Spigelman CJ said in *Ruddock v Taylor* (2003) 58 NSWLR 269[15]:

"4. False imprisonment is an intentional Tort. Liability turns on an intention to detain. Good faith is not a defence. The only defence is lawful authority." [16]

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57. And Justice Ipp, who agreed with Spigelman CJ, said that[17]:

"It is a fundamental purpose of the common law to protect the personal liberty of individuals. The notion in our society that it is fundamentally wrong to deprive an individual, unlawfully, of his or her liberty is of ancient lineage; it is a basic value with very deep roots. In this case, the appellants unlawfully deprived the respondent of his liberty. Accordingly, [damages should be payable] for normative reasons...."

58. Restraint of personal liberty of movement is admitted in the Defence of the
20 Defendant. As set out in the Special Case, the plaintiff was detained in a Defence Force Correctional Establishment.

59. While detained, it would have been an offence under the DFDA for the Plaintiff to have escaped from such custody: s 51. Furthermore, the Plaintiff was subject to the strict disciplinary regime set out in s 54A of the DFDA, which included 54A(1)(g) which created an offence for a detainee who "without lawful authority enters or leaves his ... cell". Contravention of such a custodial offence was punishable by segregated confinement for ten days. Plainly, there was the total deprivation of liberty required by this tort.

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60. The effect of *Lane v Morrison* is that the invalidated provisions in the DFDA are taken never to have applied. Unless the Act alters the position retrospectively, the right to a declaration existed, and the essential elements of the tort were complete, at the time detention took place. The purported justification for the detention (the onus for which lies on the Defendant as to the claim in tort, and which is not an element of the Plaintiff's cause of action) was always non-existent, although the latent illegality of the assumed justification only became patent when this Court decided *Lane v Morrison*.

40 61. It matters not for the purpose of the tort of false imprisonment whether the purpose of the detention was wholly or partly punitive, although it was described as "punishment" within the meaning of Part IV of the DFDA.

[15] That decision was reversed by the High Court, but not on this point: (2005) 222 CLR 612.
[16] See also *Hutchins v Maughan* [1947] VLR 131.
[17] (2003) 58 NSWLR 269 at [95] per Ipp JA.

62. In fact, just like a punishment of imprisonment in a civilian prison, the purposes of imposition of a term of military detention include at least punishment and rehabilitation.

63. When determining whether to impose punishments or other orders under Part IV of the DFDA, the sentencing tribunal is required to consider both 'the principles of sentencing applied by the civil courts, from time to time; and the need to maintain discipline in the Defence Force': s 70(1), DFDA.

64. The aims of 'the principles of sentencing applied by the civil courts' were summarised by this Court in *Veen v The Queen (No. 2)* (1987) 164 CLR 465 at 476 by Mason CJ, Brennan, Dawson and Toohey JJ as follows:

> "The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case."

65. Evidently, therefore, the purposes of a sentence of military detention include reform as well as punishment.

66. The mixture of those purposes is also irrelevant to the question of the lawfulness of imprisonment. In *Marshall v Watson* (1972) 124 CLR 640, Barwick CJ with whom McTiernan J agreed, said at 643:

> "an imprisonment for the benefit of the person imprisoned is none the less an unlawful imprisonment if not otherwise justified".

The Act usurps judicial power

67. Insofar as the Plaintiff in *Nicholas* contends that Items 3, 4 and 5 of the Act are entirely invalid, the Plaintiff in this matter supports that conclusion. The following submissions are focused on the circumstances of the Defendant, namely his punishment of military detention.

68. As already noted, by operation of Items 3-5 of the Act, the Act:

(a) treats the invalid AMC punishments as historical facts;

(b) by reference to which Parliament itself re-imposes punishments in those terms (except for the case of civil imprisonment by the AMC); by the method of,

(c) declaring the rights and liabilities of all persons to be as if such punishments had been imposed by General Court Martial, provided that such items as 'declare people to have particular rights or liabilities have effect for Defence Force service purposes only': Items 2(2), 3(3), 5.

69. Only a Court contemplated by Chapter III of the Constitution can exercise the judicial power of the Commonwealth. Where the legislature purports to do so itself there is an invalid usurpation of judicial power because:

(a) "the existence in the Constitution of Chap III and the nature of the provisions it contains make it clear that no resort can be made to judicial power except under or in conformity with ss 71-80."[18]

(b) "For its part, the Parliament cannot legislate either to destroy the entrenched safeguards of Ch III or to itself assume the exercise of judicial power."[19]

70. An example of such a usurpation is a bill of pains and penalties: *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 539.9 per Mason CJ; at 645-650 per Dawson J; at 685 per Toohey J; at 721 per McHugh J, see also *International Finance Trust Company Limited v New South Wales Crime Commission* [2009] HCA 49 at [166] per Heydon J; *Liyanage v The Queen* [1967] 1 AC 259 at 291.

71. A Bill of Pains and penalties is outlawed under the United States' Constitution,[20] and has been considered by the United States' Supreme Court, which has held that:

(a) "[the provisions] had their purpose as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply - trial by legislature";[21]

(b) "[the] evil the Framers had sought to bar: [was] legislative punishment, of any form or severity, of specifically designated persons or groups"[22].

(c) "Most bills of attainder and bills of pains and penalties named the parties to whom they were to apply; a few, however, simply described them"[23]; and "It was not uncommon for English acts of attainder to inflict their deprivations upon relatively large groups of people, sometimes by description, rather than name."[24]

(d) Adopted what had earlier been said in *United States v. Lovett*[25] that the provision dealt with:

> "[L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way

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[18] As was said in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 269 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

[19] Similarly in *Kable v DPP* (1996) 189 CLR 51 at 127, Gummow J cited with approval this statement by Deane J in *re Tracey; ex parte Ryan* (1989) 166 CLR 518 at 580.

[20] "No Bill of Attainder or ex post facto Law shall be passed (by the Congress)."Art. I, § 9, cl. 3."No State shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts. ... " Art. I, § 10

[21] *United States v Brown* (1965) 381 US 437 (a case cited with apparent approval in a number of judgments of this court in *Polyukhovich)* per the majority opinion at 442.

[22] 381 US 437 at 447.

[23] 381 US 437 at 442.

[24] 381 US 437 at 461.

[25] 328 US 303 at 449.

as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

72. The Act fits each of these descriptions, in particular:

(a) as the Second Reading Speech of the Bill for the Act stated 'the bill, by its own force, purports to impose disciplinary sanctions' that is, punishment without judicial trial;

(b) the group is ascertainable, namely those persons convicted and punished by the AMC, 21 of whom received orders for military detention. The Act is distinctively different to that considered in *Nicholas v R* (1998) 193 CLR 173 of which Toohey J said at 201 "Just how many persons [to which the Act applies] cannot be known ... There is nothing in the relevant provisions which ... singles out a particular category of persons."

73. The Court should reject the submission[26] - relying upon *Kariapper v Wijesinha*[27] which in turn relied upon what Frankfurter J had said in dissent in *United States v Lovett*[28] - that the Act is not a bill of attainder because it lacks the 'essential characteristic' of a 'legislative judgment of guilt', because:

(a) as can been seen from the quotes from, and examples given in, *United States v Brown*, this is not an "essential characteristic";

(b) in *United States v Lovett* what Frankfurter J was concerned to find in a bill of attainder was "punishment [which] presupposes an offence, not necessarily an act previously declared criminal, but for which retribution is exacted"[29] – in that regard, in the Act, the actions for which punishment is inflicted are evidently those of which each person was convicted by the AMC.

74. Second[30], Item 5 of the Act deals with matters which are uniquely susceptible to judicial determination and insusceptible to legislative determination: see *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88 at 95[31], namely declaring rights and liabilities of all persons to be as if a General Court Martial had imposed:

(a) punishment for an 'offence the elements of which are identified by the generally applicable criminal law', and, in particular,

(b) punishment involving loss of liberty.

[26] Nicholas submissions for the Defendant, pars 26 and 27.
[27] [1967] 2 All ER 485
[28] 328 US 303.
[29] 328 US 303 at 323-4.
[30] Contrary to the Defendant's submissions in *Nicholas* [par 17].
[31] Per Gibbs CJ, Mason, Brennan, Deane and Dawson JJ.

75. The Act provides for Parliament to impose the disciplinary sanction of punishment, including the punishment of detention, directly, where it has already been held in *Lane v Morrison* that exactly that punishment is an attempted exercise of the judicial power of the Commonwealth.

76. Third, the use of the *Humby* model of legislating is no answer to these propositions.[32] As stated by Mason J in *Humby* at [12]:

> "Usurpation of the judicial power" is, as the judgment of the Judicial Committee in *Liyanage v The Queen* (1967) 1 AC 259, at pp 289-290, makes plain, a concept which is not susceptible of precise and comprehensive definition. In the context of the Commonwealth Constitution, it must signify some infringement of the provisions which Ch. III makes respecting the exercise of the federal judicial power

77. In *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 200, McHugh J described *Humby* as standing for the principle that:

> "Subject to the Constitution, it is within the legislative power of either the Commonwealth or of a State 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."

78. Fourth, it is accepted that as Brennan, Deane and Dawson JJ said in *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1:

> "There are some qualifications which must be made to the general proposition that the power to order that a citizen be involuntarily confined in custody is, under the doctrine of the separation of judicial from executive and legislative powers enshrined in our Constitution, part of the judicial power of the Commonwealth entrusted exclusively to Ch.III courts ... [namely] Involuntary detention in cases of mental illness or infectious disease ... the traditional powers of the Parliament to punish for contempt ... and of military tribunals to punish for breach of military discipline."

79. However, it is submitted that these exceptions do not permit Parliament to get around Chapter III by declaring the detention to be as if it were that of a military tribunal's punishment for breaches of military discipline, when in fact that is not what occurred. If that approach were permissible, Parliament could simply pass laws (contrary to the fact) declaring anyone to have been sentenced to

[32] It is also noted that in *Humby* the Court was concerned with invalid orders relating to divorce and maintenance which, it was then found, could be the subject of a direct legislative act: see, for example, Mason J at 248.

imprisonment, or, if there is a difference, detention (the factum) by a military tribunal or indeed a court mentioned in Chapter III, and then ordering the imprisonment itself (the legislative consequence), and if that could be done it would then be an answer not only to the remedies now sought by the Plaintiff, but also to habeas corpus.

80. Such an approach would also be liable to invalidation by application of the principles stated in *Commissioner for Motor Transport v Antill Ranger & Co Pty Ltd*[33], where the Privy Council held invalid the provisions of a State Act which purported to extinguish causes of action and to bar claims in respect of moneys paid under legislation that was invalid under s 92 of the *Constitution*. Viscount Simonds, giving the advice of the Judicial Committee, said, in terms which here could apply to a Commonwealth law:

> "Neither prospectively nor retrospectively (to use the words of Fullagar J)[34] can a State law make lawful that which the Constitution says is unlawful. A simple test thus appears to be afforded. For if a statute enacted that charges in respect of inter-State trade should be imposed and that, if they were held to be illegally imposed and collected, they should nevertheless be retained, such an enactment could not be challenged if the illegality of the charge rested only on the then existing State law ... But it is otherwise if the illegality arises out of a provision of the Constitution itself. Then the question is whether the statutory immunity accorded to illegal acts is not as offensive to the Constitution as the illegal acts themselves ... "

81. Equally, it is submitted that the statement by McHugh J in *Coleman v Power* (2004) 220 CLR 1 at [142-143] is correct and applicable by analogy with the present facts:

> "Moreover, where a law is invalid because it infringes a constitutional prohibition or immunity, there is an unanswerable reason for holding that the arrest [or, in this case, detention] of a person is unlawful if the arrest [or detention] was made in reliance on the law that is constitutionally invalid. The constitutional prohibition or immunity extends to invalidating not only a law directly infringing the prohibition or immunity but also any consequential law that seeks to validate conduct that occurred under the first law."

82. For these reasons, the Act has no valid operation in relation to the 21 persons sentenced to terms of military detention by the AMC, including the Plaintiff [see SC 8, para 42, Annexure W].

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[33] (1956) 94 CLR 177.

[34] 'No State statute can justify either prospectively or ex post facto an act which is at once a wrong at common law and an invasion of an immunity given by the Constitution'. (*Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83 at 108). That is equally true of a Commonwealth law which would contravene an immunity or a prohibition.

s 51(xxxi)

83. Should the Defendant contend that the Act seeks to extinguish a pre-existing cause of action possessed by the Plaintiff (and by the other 20 persons detained)[35], or prevent that cause of action from being brought, maintained or vindicated, in addition to the foregoing arguments, the Plaintiff will contend in reply that such a law would contravene s 51(xxxi) of the *Constitution*. More generally, such a law would also exceed the limitation of operating for service purposes only.

10

PART VII ORDERS SOUGHT

84. The Act itself has a mechanism to limit invalidation in Items 2(2) and (3). Thus the Court could declare the Act invalid only in relation to all persons punished by military detention.

85. Apart from a declaration reflecting the Court's reasoning on validity of the Act and in relation to the s 170 warrant, the Plaintiff seeks the following orders:
    (a) That either or both questions in the *Special Case* be answered 'No';
20 (b) The Defendant pay the Plaintiffs costs; and
    (c) The matter be remitted to the Federal Court of Australia.

86. If the Claim is wholly dismissed the Plaintiff seeks a special costs order, as pleaded.

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[35] Whether the cause of action was complete at the time of detention, or from at least the time *Lane v Morrison* was decided and before the Act came into force.

ANNEXURE A

Relevant constitutional and legislative provisions

(Full copies of the DFDA as it was and as it is together with the Interim Measures Acts, will be provided at the hearing)

Constitution

S 51

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;

71

Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

Defence Force Discipline Act (Cth) as at date of punishment

S 3

authorized officer means 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.

place of confinement means:

(a) a civil detention facility; or

(b) a detention centre.

detainee means a person who is undergoing a punishment of detention in a detention centre.

detention centre means a place, not being a prison, that is operated by the Defence Force as a place for the detention of persons on whom punishments of detention have been imposed.

Territory offence means:

(a) an offence against a law of the Commonwealth in force in the Jervis Bay Territory other than this Act or the regulations;

51 Escaping from custody

A person who is a defence member or a defence civilian is guilty of an offence if the person escapes from custody.

Maximum punishment: Imprisonment for 2 years.

54 Unlawful release etc. of person in custody

(1) A defence member is guilty of an offence if:

(a) a person has been delivered into a member's custody or the member has a duty to guard a person; and

(b) by act or omission, the member intentionally allows the person to escape.

Maximum punishment: Imprisonment for 2 years.

(2) A defence member is guilty of an offence if:

(a) a person has been delivered into a member's custody or the member has a duty to guard a person; and

(b) the member releases the person; and

(c) the member has no authority to release the person.

Maximum punishment: Imprisonment for 2 years.

(3) A person who is a defence member or a defence civilian is guilty of an offence if the person intentionally facilitates the escape of a person from custody or a place of confinement.

Maximum punishment: Imprisonment for 12 months.

(4) A person who is a defence member or a defence civilian is guilty of an offence if, with intent to facilitate an escape from a place of confinement of another person, the first-mentioned person conveys anything into that place.

Maximum punishment: Imprisonment for 12 months.

Division 6A—Custodial offences

54A Custodial offences

(1) A detainee who:

(a) makes any unnecessary noise;

(b) commits a nuisance;

(c) is idle, careless or negligent at work;

(d) without lawful authority, converses or otherwise communicates with another person (whether or not a detainee);

(e) without lawful authority, gives any thing to, or receives any thing from, another person (whether or not a detainee);

(f) without lawful authority, has in his or her possession any thing; or

(g) without lawful authority, enters or leaves his or her cell;

is guilty of an offence.

(2) A detainee who, while on leave of absence from a detention centre, refuses or fails to comply with a condition of the grant of the leave of absence is guilty of an offence.

(2A) An offence under this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(3) It is a defence if a person charged with a custodial offence proves that he or she had a reasonable excuse for engaging in the behaviour to which the charge relates.

Note: The defendant bears a legal burden in relation to the matter in subsection (3). See section 13.4 of the *Criminal Code*.

(4) The maximum punishment for a custodial offence is segregated confinement for 10 days.

(5) Subsection (4) has effect notwithstanding anything contained in section 64.

61(3) (3) A person who is a defence member or a defence civilian is guilty of an offence if:

(a) the person engages in conduct outside the Jervis Bay Territory (whether or not in a public place); and

(b) engaging in that conduct would be a Territory offence, if it took place in the Jervis Bay Territory (whether or not in a public place).

(c) (3) A person who is a defence member or a defence civilian is guilty of an offence if:

(d) (a) the person engages in conduct outside the Jervis Bay Territory (whether or not in a public place); and

(e) (b) engaging in that conduct would be a Territory offence, if it took place in the Jervis Bay Territory (whether or not in a public place).

70 Sentencing principles

(1) A service tribunal, in determining what action under this Part should be taken in relation to a convicted person, shall have regard to:

(a) the principles of sentencing applied by the civil courts, from time to time; and

(b) the need to maintain discipline in the Defence Force.

Division 3—Australian Military Court

114 Creation of the Australian Military Court

(1) A court, to be known as the Australian Military Court, is created by this Act.

Note 1: The Australian Military Court is not a court for the purposes of Chapter III of the Constitution.

Note 2: The Australian Military Court is a service tribunal for the purposes of this Act: see the definition of ***service tribunal*** in subsection 3(1).

(1A) The Australian Military Court is a court of record.

(2) The Australian Military Court consists of:

(a) the Chief Military Judge; and

(b) such other Military Judges as from time to time hold office in accordance with this Act.

115 Jurisdiction

(1) Subject to section 63, the Australian Military Court has jurisdiction to try any charge against any person.

(2) However, the Australian Military Court does not have jurisdiction to try a charge of a custodial offence.

(3) The Australian Military Court has jurisdiction to hear and determine appeals from decisions of summary authorities (including a decision relating to a charge of a custodial offence).

Note: Part IX deals with appeals to the Australian Military Court.

116 Exercise of jurisdiction

(1) For the purposes of the exercise of the jurisdiction of the Australian Military Court (including the Court's jurisdiction to hear and determine appeals from decisions of summary authorities), the Court is to be constituted by a single Military Judge.

Part X—Execution and enforcement of punishments and orders

170 Warrants of commitment

(1) Subject to this section, an authorized officer may:

(a) issue a warrant for the commitment of a prisoner to a prison in a State or Territory; or

(b) issue a warrant for the commitment of a detainee to a detention centre.

(2) A warrant issued under subsection (1) shall specify:

(a) the name of the prisoner or detainee;

(b) the place to which the prisoner or detainee is to be committed; and

(c) the punishment that has been imposed on the prisoner or detainee.

(3) A warrant under subsection (1) may require all police members and members and special members of the Australian Federal Police, or a specified member of the Defence Force who is not a police member, to convey the prisoner or detainee specified in the warrant to such prison or detention centre as is specified in the warrant and there to deliver him or her into the custody of the officer in charge of the prison or detention centre or some other officer doing duty at the prison or detention centre, and the warrant may be executed by any police member or member or special member of the Australian Federal Police or the member of the Defence Force specified in the warrant, as the case requires.

(4) Where a person is delivered into custody at a prison or detention centre in pursuance of a warrant under subsection (1), the person may, subject to this Act, be detained in that prison or any other prison in the same State or Territory as the first-mentioned prison, or that or any other detention centre, as the case requires, for as long as his or her detention is necessary for the execution of the punishment by reason of which the warrant was issued.

(5) In this section, ***detainee*** means a convicted person on whom a punishment of detention has been imposed.

171 Commencement of punishments and orders

(1) Subject to this Act, a punishment imposed, or an order made, by a service tribunal, a reviewing authority or the Defence Force Discipline Appeal Tribunal takes effect forthwith and a punishment for a specific period commences on the day on which it is imposed.

Military Justice (Interim Measures) Act (No. 2) 2009 (Cth) An Act relating to military justice, and for related purposes

[*Assented to 22 September 2009*]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Military Justice (Interim Measures) Act (No. 2) 2009*.

2 Commencement

This Act commences on the day this Act receives the Royal Assent.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Effect of things done by or in relation to the Australian Military Court

Part 1—Preliminary

1 Definitions

In this Schedule:

AMC means the Australian Military Court purportedly established by Division 3 of Part VII of the old Defence Force Discipline Act.

amended Defence Force Discipline Act means the *Defence Force Discipline Act 1982* as amended by the *Military Justice (Interim Measures) Act (No. 1) 2009*.

commencement day means the day on which this Act commences.

DFDAT means the Defence Force Discipline Appeal Tribunal established by the *Defence Force Discipline Appeals Act 1955*.

High Court decision date means 26 August 2009.

liability includes a duty or obligation.

old Defence Force Discipline Act means the *Defence Force Discipline Act 1982* as purportedly in force immediately before the High Court decision date.

Part IV order means a restitution order or a reparation order purportedly made under Part IV of the old Defence Force Discipline Act.

right includes an interest or status.

2 Object and effect of Schedule etc.

(1) The main object of this Schedule is to maintain the continuity of discipline in the Defence Force.

(2) The provisions of this Schedule that declare people to have particular rights or liabilities have effect for Defence Force service purposes only.

(3) If a provision of this Schedule:

(a) would, apart from this subitem, have an application (an ***invalid application***) in relation to:

(i) one or more particular persons, things, matters, places, circumstances or cases; or

(ii) one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases;

because of which the provision exceeds the Commonwealth's legislative power; and

(b) also has at least one application (a ***valid application***) in relation to:

(i) one or more particular persons, things, matters, places, circumstances or cases; or

(ii) one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases;

that, if it were the provision's only application, would be within the Commonwealth's legislative power;

it is the Parliament's intention that the provision is not to have the invalid application, but is to have every valid application.

3 Reliance on, and enforcement of, declared rights etc.

(1) This item applies if, under an item of this Schedule (the ***applicable item***), the rights and liabilities of a person are declared to be, and always to have been, the same as if certain matters (the ***assumed matters***) specified in the applicable item had been the case.

(2) Without limiting the effect of the applicable item:

(a) all persons are, by force of this item, declared to be, and always to have been, entitled to act on the basis that other persons had, and have, the rights and liabilities as declared by the applicable item; and

(b) a right or liability that a person is declared to have by the applicable item:

(i) is exercisable or enforceable; and

(ii) is to be regarded as always having been exercisable or enforceable;

as if the assumed matters had in fact been the case.

(3) This item has effect subject to subitem 2(2).

Part 2—Things done by the AMC, otherwise than on appeal

4 Application of Part

This Part applies to things purportedly done by the AMC, otherwise than under Part IX of the old Defence Force Discipline Act, before the High Court decision date.

Note: Part IX of the old Defence Force Discipline Act dealt with appeals to the AMC. Appeals to the AMC are dealt with in Part 3 of this Schedule.

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.

10 (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.