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

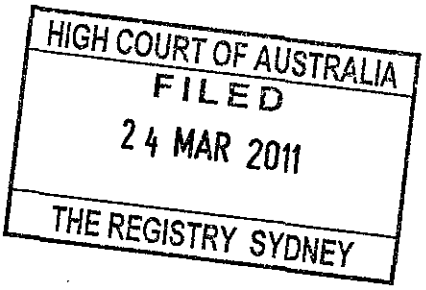
BETWEEN:

ABLE SEAMAN JOSEPH ANTHONY PETER HASKINS
Plaintiff

and

THE COMMONWEALTH OF AUSTRALIA
Defendant

PLAINTIFF'S REPLY SUBMISSIONS



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PART 1 – SUITABILITY FOR PUBLICATION

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

PART 2 – REPLY

2. The Plaintiff does not press the 'warrant point'[1] in this Special Case. In relation to the remainder of the submissions, the Plaintiff joins issue with the Defendant and otherwise submits as follows.

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3. It is submitted that the following propositions are well established. First, under the *Defence Force Discipline Act* 1982 (Cth) ('DFDA'), a properly constituted General Court Martial can impose punishments of detention, indeed, of civilian imprisonment, upon defence members without contravening Chapter III of the *Constitution*: *White v Director of Military Prosecutions* (2007) 231 CLR 570.

4. Second, leaving aside the 'exceptional cases' mentioned, for example, in *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1, punishment involving involuntary detention is uniquely
20 susceptible to judicial determination and insusceptible to legislative determination.[2] That is, the Commonwealth Parliament contravenes Chapter III when it directly legislates to impose a punishment of detention upon an individual or an identifiable group of individuals.

5. Third, in relation to constitutional guarantees and prohibitions 'you cannot do indirectly what you are forbidden to do directly'[3] ... That maxim ... indicating that guarantees and prohibitions are concerned with substance not form'.[4]

6. Fourth, the statutory model based upon *The Queen v Humby; ex parte Rooney*
30 (1973) 129 CLR 231:
   (a) Does not validate invalid acts, but 'operates by attaching to [the invalid acts], as acts in the law, consequences which it declares them to have always had'[5];
   (b) uses the expression "as if" to do so, and that 'expression 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';[6] but, crucially for this matter,
   (c) will not support, as a valid law of the Commonwealth, one which 'offend[s] Ch III or any express or implied prohibition in the Constitution'.[7]

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[1] See paragraphs 38-49 of the Plaintiff's submissions, but reserves the right to raise it as an issue at trial if he succeeds on the constitutional argument.
[2] Cp *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 612 [80] per Gummow J.
[3] *Wragg v New South Wales* (1953) 88 CLR 353 at 387–8. See, with respect to s 51(xxxi), *Bank Nationalisation case* (1948) 76 CLR at 349–50; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR at 371. See, generally, *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 78 and *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516 at 522–3; 97 ALR 217.
[4] *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 per Mason CJ, Deane and Gaudron JJ at p 305.
[5] Per Stephen J at p 243.
[6] *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at [115] per McHugh J.
[7]

7. The ultimate question in this matter is not whether a General Court Martial could validly have imposed these punishments, but whether Chapter III is contravened by a Commonwealth law imposing punishments of detention by the device of declaring the punishments – contrary to the fact – to be and always have been the actions of an entity which could validly impose them. The Plaintiff submits the answer to the latter question is 'yes'.

8. It is notable that Parliament chose not to seek to give a prescribed effect 'as an act in the law' to the single case of civil imprisonment originally imposed by the former Australian Military Court. It is submitted that it could not have validly done so because it would have been an act of legislative punishment. There is no relevant difference, for present purposes, between imprisonment in a civilian or a military gaol: both comprise punishments involving loss of liberty.

9. If the submissions of the Defendant and the Intervener are correct, the potential consequences are far-reaching. For, if the Act is valid, there is no impediment to any:
   (a) Federal legislative declaration, contrary to the fact, by which, based upon any specified factum;
   (b) Parliament directly imposes specified penalties involving loss of liberty upon an identifiable class of individuals;
   (c) by declaring them to be and always have been, *contrary to the fact*, the actions of a body constitutionally authorised to impose detention, whether that is a Court recognised by Chapter III, a military tribunal supported by s 51(vi), (or, indeed, an entity capable of validly ordering preventative detention).

   Such an Act comprises direct legislative punishment contrary to Chapter III.

10. While it is not suggested it is determinative,[8] the Minister's second reading speech accurately stated what was being done when he said the Bill for the Act:[9]
   (a) 'does not purport to validate any convictions or punishments imposed by [the AMC]', nor 'purport to convict any person of any offence'; but
   (b) itself imposes 'disciplinary sanctions on persons corresponding to punishments imposed by [the AMC]'; and
   (c) 'by its own force, purports to impose disciplinary sanctions'.

11. The terms of the Act confirm that these were the manifested intentions of the Parliament.

12. The Commonwealth places great, even determinative, significance[10] on the fact that the Act does not contain express findings of guilt, as English acts of attainder or pains and penalties typically did. But this Court, like the United States Supreme Court,[11] should not be fettered by such historical matters (which would

[8] *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23 at [31-33] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ citing *Re Bolton; Ex Parte Beane* (1987) 162 CLR 514 at 518 per Mason CJ, Wilson and Dawson JJ.
[9] Hansard, House of Representatives, 14 September 2009, The Honourable Dr Kelly, AM, MHR.
[10] *Nicholas* submissions of the Commonwealth at [26]-[27].
[11] *United States v Brown* (1965) 391 US 437 at 442 per Warren CJ.

also permit Parliament easily to circumvent Chapter III), because what matters under the *Constitution* is whether there is a legislative usurpation of judicial power, in particular, whether, in substance, the Act inflicts punishment without a judicial trial: *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319 at [166] per Heydon J. Further, in *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 70, McHugh J did not mention a declaration of guilt as an essential characteristic of a bill of pains and penalties.[12] Passages in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 are to like effect.[13]

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13. The Court has drawn attention[14] to the consideration by the Courts of Queens Bench and Exchequer Chamber in *Phillips v Eyre* (1870) LR 6 QB 1 concerning "the differences between acts of attainder and ex post facto legislation confirming irregular acts". That discussion took place (pp 23-27) in relation to an argument that the Jamaican Act of Indemnity in question was contrary to natural justice as it was retrospective[15]. The Justices noted a number of early United States' cases concerning ex post facto laws[16] but not acts of attainder or bills of pains or penalties,[17] before rejecting the argument because it was a policy matter for parliaments not courts: p 27.5. The case thus concerned 'doctrines devised in other
20 circumstances and for a different system of government'[18], rather than the question whether the Act involves a purported exercise of the judicial power of the Commonwealth contrary to the separation of legislative and judicial powers for which the *Constitution* provides. For the reasons set out above, and in the earlier submissions of the Plaintiff, the Act does so.

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[12] 'a Bill of Attainder or 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.'

[13] 'The application of the doctrine depends upon the legislature adjudging the guilt of a specific individual or specific individuals *or* imposing punishment upon them. If, for some reason, an ex post facto law did not amount to a bill of attainder, yet adjudged persons guilty of a crime *or* imposed punishment upon them, it could amount to trial by legislature and a usurpation of judicial power ... ' [emphasis added] p536 per Mason J. 'Bills of attainder ... and bills 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.' p685-686 per Toohey J.

[14] Facsimile from the Senior Registrar, dated 15 March 2011.

[15] At page 23, per Willes J.

[16] *Calder v Bull* (1798) 3 US (3 Dall.) 386, which was cited, held that a State resolution or law setting aside a decree of a court and granting a new trial to be had before the same court is not void under the Constitution as an *ex post facto* law. In *Kable v DPP (NSW)* (1996) 189 CLR 51 at 99, Gaudron J cited 'the advice of the Privy Council in *Liyanage v The Queen* ... where the Privy Council said of certain statutes of Ceylon: "One might fairly apply to these Acts the words of Chase J, in the Supreme Court of the United States in Calder v Bull: 'These Acts were legislative judgments; and an exercise of judicial power'."

[17] The case did not consider the then recently decided twin post-Civil War cases of *Cummings v Missouri*, 4 Wall. 277 (1867), and *Ex parte Garland*, 4 Wall. 333 (1867), which did concern bills of pains and penalties.

[18] Compare *Commonwealth v Mewett* [1997] HCA 29; (1997) 191 CLR 471 at 548 per Gummow and Kirby JJ.

The History and Character of Military Detention

14. The 7-page Schedule to the Defendant's submissions concentrates upon the historical provisions for military detention (as opposed to penal servitude or imprisonment in a civilian prison) in the Army, but says little about the history of Naval punishments. The Royal Navy was often far from any land and in particular from the United Kingdom, but it was important that discipline could be still be enforced. Thus, if the death penalty and corporal punishment were inapt, it was necessary for offenders to be confined (often onboard), and for considerable periods of time.

15. It is incorrect to state that the 'first express statutory provision for imprisonment as a military punishment was in the Mutiny Act of 1823': Defendant's Schedule [5]. At least from 1661, the first *Articles of War* (13 Charles II, St 1 c 9) provided for punishments of death, imprisonment and fines.[19] The revised *Articles of War* of 1749 (22 George II, c 33) similarly so provided, but limited any sentence of imprisonment by Court Martial to 2 years.

16. By the time of the enactment of the *Naval Discipline Act* 1866 (UK), the list of punishments now to be found in the DFDA was already discernable; in descending order of severity they began with:
    (a) Death;
    (b) Penal Servitude;
    (c) Dismissal with disgrace from Her Majesty's Service;
    (d) Imprisonment or Corporal Punishment;
    (e) Dismissal from Her Majesty's Service.[20]

Part V of the *Naval Discipline Act* 1866 concerned 'Penal Servitude and Prisons' and made provision for service of sentences in naval or other prisons.[21]

17. The Plaintiff accepts that an aim of military detention is rehabilitation, although punishment and deterrence are also present as factors. But, as already noted, '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.'[22]

'Just Terms' and clause 2(2) the Act

18. Clauses 3 and 5 of the Act are expressly limited by Clause 2(2) which states: 'The provisions of this Schedule that declare people to have particular rights or liabilities

[19] Disciplinary matters were also set out in the *Regulations and Instructions relating to His Majesty's Service at Sea* (known as the Admiralty Instructions). See, for example, N.A.M. Rodger, *Articles of war: the Statutes which governed our fighting navies, 1661, 1749, 1886* (1982).
[20] s LII.
[21] It also provided for sentences of Penal Servitude of any Court Martial to be notified to a Justice of Queens Bench, Common Peas or Exchequer, who were then required to make a corresponding order, which was itself then to be obeyed, and executed including by gaolers as if it were an order made by that Justice.
[22] *Veen v The Queen (No. 2)* (1987) 164 CLR 465 at 476 per Mason CJ, Brennan, Dawson and Toohey JJ.

have effect for Defence Force service purposes only.' The explanatory memorandum for the Bill for the Act gives one example of the effect of this clause, namely, where persons 'would be required to disclose a conviction for a criminal offence' they do 'not have to disclose the punishment imposed by' the Act. The words in sub-item 2(2), which are obviously designed to permit the law to be characterised as being with respect to s 51(vi) of the *Constitution*, need to be given effect to, and they have wider effect than that one example. Insofar as the Act would extinguish the Plaintiff's vested *chose in action*, maintainable in the civil courts, for the tort of false imprisonment, the declarations in the Schedule go beyond having effect for 'service purposes only', and do not apply. In the unusual circumstances of this case, it would not 'severely undermine'[23] discipline to permit this to occur: cp *Groves v Commonwealth*.[24]

19. Further, if the Act does apply, and does not contravene Chapter III, it is submitted that Schedule 1 of the Act would not have valid application in relation the 'classes ... of persons, things, matters, places, circumstances or cases' within the meaning of sub-item 2(3)(a)(ii) of the Act, being the 21 persons detained as a result of invalid orders of the former AMC who thus have vested[25] *choses in action*. It would not have that valid application because of the operation of s 51(xxxi) of the *Constitution*.

20. When characterizing the relevant terms of the Act, it must be kept in mind that it uses the *Humby* model to do a wide variety of things. In relation to the 'rights and liabilities' of a previously detained person, which are the subject matter of this Special Case, the Act acquires for the benefit of the Commonwealth a species of property protected by s 51(xxxi), rather than merely regulating a right that is an incident to property. There is a direct correlation between the Act (and what it purports to do) and the advantage obtained by the Commonwealth, by the property right being acquired[26].

21. There is a difference between the circumstance in this matter and the circumstance where the Commonwealth by an enactment removes a right of the Plaintiff against a third party: cf *Nintendo Co Ltd v Centronics Systems Pty Ltd*. There is neither a 'public interest[27]' or a 'common interest[28]' requiring regulation in these specific circumstances; can it really be said that discipline requires the extinguishment of

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[23] Defendant's submissions at [29].

[24] (1982) 150 CLR 113 at 126: 'The effect of the suggested exclusion [if the ability to sue a fellow defence member] is far-reaching. It places the service[person] outside the protection of the common law. To [that service person] the ordinary remedies of the law are to be denied, remedies which are otherwise extended to all within the jurisdiction of our courts, whether subject or alien, and whether free citizens or prisoners serving gaol sentences'.

[25] 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.

[26] *Chapman v Luminis Pty Ltd (No 4) (2002)* 123 FCR 62 at 270 [734] per von Doussa J, cited in *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 180 [84], fn 179 per French CJ, Gummow and Crennan JJ; cf. *Bienke v Minister for Primary Industries and Energy* (1995) 63 FCR 567 at 586-587 per Black CJ, Davies and Sackville JJ.

[27] *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 236 per Mason CJ, Deane and Gaudron JJ. See also *Airservices Australia* at 300 [501] per Gummow J.

[28] *Mutual Pools* at 189-90 per Deane and Gaudron JJ; *Airservices Australia* at 299 [497] and 300 [501] per Gummow J.

causes of action which arose because the Defendant chose to use an unconstitutional method to enforce such discipline?

22. The Act, particularly Item 5 of Schedule 1, cannot be supported by the legislative power in s 51(vi), without regard also to s 51(xxxi). Section 51(xxxi) has a dual function as a 'head of power' and an express constitutional guarantee. If property can be acquired under s 51(vi), then the 'just terms' guarantee would be rendered nugatory: thus the question cannot "be decided by reference solely to s 51(vi)"[29]. The submission that the Act is not subject to s 51(xxxi) because it is a law with respect to 51(vi) should be rejected.

23. This is not a case where the notion of just terms is 'simply inconsistent'[30] with s 51(vi). Nor is it self-evident that the extinguishment of vested causes of action which arose because the Defendant chose to attempt to impose discipline by unconstitutional means would be 'inconsistent with the object of maintaining the continuity of military discipline'[31]; the contrary is likely to be the case.[32]

24. The Court should not accept a construction of s 51(xxxi) which would allow that important constitutional guarantee to be evaded.

25. For the reasons set out above and in the submissions in chief, either question should be answered 'no'.

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[29] *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 293 per McTiernan J.
[30] *ICM Agriculture v Commonwealth* (2009) 240 CLR 140 at [218] per Heydon J.
[31] Defendant's submissions at [40].
[32] The factual circumstances in this matter mean that the acquisition under the Act should not be 'balanced' in favour of a capacity of the Commonwealth to pursue its defence functions under s 51(vi).