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

DEFENDANT'S SUBMISSIONS

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PART I SUITABILITY FOR PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES

2. The questions of law stated for the opinion of the Full Court are:

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

   2.2. If yes, are items 3, 4 and 5 of the *Interim Measures Act* valid laws of the Commonwealth Parliament?

PART III SECTION 78B OF THE JUDICIARY ACT

3. The plaintiff has given adequate notice of the proceedings to the Attorneys-General in compliance with s 78B of the *Judiciary Act 1903*: Special Case Book (**SCB**) Vol 1 pp 9 and 17.

PART IV FACTS

4. The material facts are set out in the special case (**SC**) stated by the parties and filed on 21 February 2011: SCB Vol A p 1. The facts are summarised in Pt IV of the plaintiff's submissions.

5. The plaintiff suggests, without developing the proposition, that there is a question about whether the Defence Force Corrective Establishment (**DFCE**) at Holsworthy Military Base was validly declared as a DFCE, for the purposes of the *Defence Force Discipline Act 1982* (***DFD Act***) and the *Defence Force Discipline Regulations 1985* (***DFD Regulations***): footnote 3 of the plaintiff's submissions. There is no substance to the suggestion of invalidity. During the period of the detention of the plaintiff (between 11 December 2008 and 5 January 2009), the DFCE at Holsworthy was declared as a corrective detention centre for the purposes of cl. 5 of the *DFD Regulations*. The declaration was made on 21 February 2008 by Major General Morrison, the Deputy Chief of Army: SCB Vol A p 28. That declaration remained in force during the period of the plaintiff's detention: SC Vol A p 3, [13]. As far as that declaration is concerned, no significance attaches to the fact that the Chief of the Defence Force subsequently varied

the designation of "authorized officers" for various purposes including cl. 5 of the *DFD Regulations*: SCB Vol A p 19.[1]

PART V APPLICABLE PROVISIONS

6. Subject to the following, the relevant constitutional and legislative provisions are identified and set out in Annexure A to the plaintiff's submissions.

7. The rights and liabilities of persons declared in item 5 of Sch 1 to the *Interim Measures Act* are subject to the outcome of any review provided for by Pt 7 of Sch 1: item 5(4). Pursuant to Pt 7 of Sch 1, a person (such as the plaintiff) who has been subject to a purported punishment or Pt IV order by the Australian Military Court (**AMC**) may lodge a petition for punishment review with a competent reviewing authority: item 25(2).

8. The plaintiff did not lodge a petition for a punishment review within the time permitted under Pt 7 of Sch 1 and has not sought an extension to lodge such a petition outside the standard time period: SC [40] and [41], SCB Vol A pp 7-8.

9. In addition, punishments of detention are subject to automatic review: item 25(4). The plaintiff's punishment of detention was reviewed and the reviewing authority upheld the punishment imposed on the plaintiff: SC [39], SCB Vol A p 7.

PART VI PART VI: ARGUMENT

10. In addition to the submissions set out below, the Commonwealth relies on its submissions in the matter of *Nicholas v Commonwealth* (S183 of 2010) (**Nicholas**).

Construction

11. The plaintiff submits that (1) the only relevant source of authority to detain him was the warrant of commitment issued on 11 December 2008 and (2) the *Interim Measures Act* has no relevant operation in relation to the warrant of commitment such as to render it legally effective. Both propositions should be rejected.

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[1] If the plaintiff, by referring to SCB Vol A p 32, seeks to rely on the fact that DFCE was not declared as a detention centre specifically by a Navy officer the argument is misconceived. The *DFD Act* does not distinguish between detention centres declared by the various services. The DFD Act authorises detention in a detention centre as defined in s 3(1), being "a place ... that is operated by the Defence Force as a place for the detention of persons on whom punishments of detention have been imposed." The Holsworthy DFCE was such a detention centre.

Authority to detain

12. Contrary to paragraph 40 of the plaintiff's submissions, it does not logically follow that because the sentence of a superior court of record itself constitutes the authority for the execution of a punishment of imprisonment, as held in *Williamson v Inspector-General of Penal Establishments* [1958] VR 330 at 334, in all other cases a warrant of commitment is the only source of authority to detain. As to the significance of warrants of commitment generally and the lawful authority to detain, see *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 464 per Starke J; *R v Mount* (1875) LR 6 PC 283 at 305; *Parker's Case* (also known as the *Canadian Prisoner's Case*) 5 M&W 32 at 49-50; *R v Taylor* (1826) 7 Dow. & Ry. 622.

13. In the case of the *DFD Act*, the Act itself indicates that the punishments imposed by, relevantly, service tribunals have effect, including by providing lawful authority to detain persons in custody.

14. Section 171(1) of the *DFD Act* relevantly provides that, subject to the Act, a punishment imposed by a service tribunal (which includes a court martial) "takes effect forthwith". Certain types of punishments imposed by service tribunals, such as segregated confinement for a period exceeding 3 days, do not take effect unless approved by a reviewing authority: s 172(1). A standard punishment of detention imposed by a service tribunal takes effect immediately by virtue of s 171 without qualification by anything in s 172.

15. Where a punishment of detention is imposed on a person the authority to detain the person is therefore conferred by the punishment of detention imposed by a relevant authority, being in this case the hypothesised punishment taken to have been imposed by a general court martial by virtue of the declaration of rights and liabilities in item 5 of Sch 1 of the *Interim Measures Act*.

16. The provision for warrants of commitment which "may" be issued by authorized officers does not detract from this proposition or indicate that the warrant itself provides the only source of authority to detain a person subject to a punishment of detention. Section 170(4) confirms that the Act confers authority, where relevant, for a person to be detained in any detention centre for as long as the person's detention is necessary "for the execution of the punishment". Although s 170(4) refers to a person being detained "[w]here a person is delivered into custody ... in pursuance of a warrant under subsection (1)", that does not indicate that the warrant itself is the source of authority to detain or that the issue of a warrant is a necessary precondition to the authority, otherwise conferred by the subsection and s 171, to detain a person who is subject to a punishment of detention. Other provisions of the Act assume that a person may be kept in custody pursuant to a relevant punishment without reference to any warrant of commitment: see ss 172(3A), 172(4), 172(5). Those provisions cannot be reconciled with the plaintiff's

contention that a warrant of commitment is an essential source of authority to detain a person who has been subject to a punishment of detention.

17. Contrary to the suggestion in paragraph 12(l) of the plaintiff's submissions, s 54 of the *DFD Act* does not provide support for the proposition that a warrant of commitment, as opposed to the punishment of detention imposed by the relevant authority, provides the source of authority to detain. Section 54 creates certain offences relating to conduct when a person is in custody or in a place of confinement. According to the definitions in s 3 of the *DFD Act*, "custody" means custody under the Act and "place of confinement" relevantly means a detention centre.

Validity of warrant

18. The warrant of commitment issued by Brigadier Westwood on 11 December 2008 requiring the plaintiff to be conveyed to the Officer in Charge of the Holsworthy DFCE and detained there for as long as his detention was necessary for the execution of the punishment imposed upon him by a military judge of the AMC (SCB Vol A p 26) was in any event rendered legally effective by the *Interim Measures Act*.

19. The warrant of commitment that was in fact issued by Brigadier Westwood was issued in respect of the punishment of detention purportedly imposed by the AMC. However, item 5 of Sch 1 of the *Interim Measures Act* has the relevant effect that the liabilities of the plaintiff (including the liability to be conveyed to the DFCE at Holsworthy in accordance with the warrant and detained there), as well as the corresponding rights of others, including those who detained the plaintiff, are declared to be, and always to have been, the same as if the warrant had been issued in respect of a punishment of detention imposed by a general court martial. The warrant of commitment must therefore be read as if it had been issued by Brigadier Westwood in respect of a punishment of detention validly imposed by a general court martial, acting pursuant to s 132 and Pt IV of the *DFD Act*, as amended.

20. The warrant of commitment was issued by Brigadier Westwood in his capacity as an authorized officer for the purposes of s 170(1) of the *DFD Act*. According to the definition in s 3 of the *DFD Act*, an "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. Relevantly for the purposes of the warrant of commitment, the Chief of the Defence Force, by instrument dated 27 August 2008, appointed officers "holding an appointment from the Governor-General as the Chief Military Judge or a Military Judge of the Australian Military Court" as authorized officers for the purposes of s 170 of the *DFD Act*: SCB Vol A pp 19 and 23. Brigadier Westwood was such an officer. Accordingly, he was at the time of issuing the warrant of commitment an authorized officer for purposes of s 170 of the *DFD Act*.

21. Brigadier Westwood's authority as an authorized officer for the purposes of s 170 of the *DFD Act* is not affected in any way by *Lane v Morrison* (2009) 239 CLR 230 (***Lane***). The orders made in *Lane* dealt only with the validity of Pt VII Div 3 of the *DFD Act*, which created and conferred jurisdiction on the AMC. It does not follow from either the result or the reasoning in *Lane* that the office of Chief Military Judge was itself invalid for all purposes. The office of Chief Military Judge was established under s 188AA of the *DFD Act* (as then in force) and the appointment was made pursuant to s 188AC. Pursuant to s 188AB, the Chief Military Judge was responsible for, *inter alia*, managing the administrative affairs of the AMC (s 188AB(b)) and "matters conferred on the Chief Military Judge by or under [the] Act" (s 188AB(c)). The creation of an office of Chief Military Judge and the conferral of functions which included (via the designation of "authorized officers" for the purposes of s 170) the issuing of warrants of commitment does not suffer from any of the constitutional defects which led the Court in *Lane* to invalidate Pt VII Div 3.

22. Nor does it follow from *Lane* that an officer, such as Brigadier Westwood, who was a person holding the office of Chief Military Judge, could not validly exercise other powers conferred on him by the *DFD Act* and instruments made under the Act by reference to his status as a person holding that office. It follows that the premise of the plaintiff's attack on the warrant of commitment, as expressed in paragraph 43 of the plaintiff's submissions, is incorrect.

23. If his status as an "authorized officer" was defective because of the invalidity of his position as Chief Military Judge, Brigadier Westwood's acts as a de facto authorized officer pursuant to s 170, including the issuing of the warrant of commitment in respect of the plaintiff, would remain valid. Where an office exists but the title to it of a particular officer is defective the acts of a de facto public officer done in apparent execution of his office cannot be challenged on the ground that he has no title to the office: *Cassell v R* (2000) 201 CLR 189 at 193. Brigadier Westwood, in issuing the warrant of commitment, was acting in apparent execution of the office of "authorized officer" for the purposes of s 170 of the *DFD Act*.

Defence force purposes

24. The plaintiff has also alluded, without elaboration, to an argument that construing the *Interim Measures Act* as conferring a lawful authority which foreclosed any cause of action for false imprisonment would be contrary to the limitation that the provisions of the *Interim Measures Act* have effect for "service purposes only": see paragraph 83 of the plaintiff's submissions. The basis for the argument is item 2(2) of the *Interim Measures Act*, which provides:

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

25. The plaintiff appears to suggest that the words in item 2(2) of Sch 1 mean that even if the plaintiff would otherwise be taken to have been liable to detention in a military detention centre pursuant to the declaration of rights and liabilities in item 5, that would nevertheless not constitute lawful authority to detain the plaintiff for the purposes of a civil claim for false imprisonment based on the period of detention.

26. Item 2(2) does not have that consequence. The relevant question for the purposes of any claim of false imprisonment is whether the Defence Force officers for whom the Commonwealth is vicariously responsible had lawful authority to detain the plaintiff – a serving member of the Defence Force – at DFCE Holsworthy for the purpose of executing a punishment of military detention. Item 5 of the *Interim Measures Act* has the effect of declaring the respective rights and liabilities of all the persons involved in the plaintiff's detention. That is, the declaration of rights and liabilities in item 5 regulates the legal status, by reference to the provisions of the *DFD Act*, of things done by members of the Defence Force in relation to another member of the Defence Force in a DFCE. Such an effect is plainly an effect "for Defence Force service purposes".

27. Item 2(2) cannot plausibly be construed as meaning that certain acts are lawful for some purposes but not others. That would lead to manifestly absurd consequences. For example, if item 5 of the *Interim Measures Act* had the effect of retrospectively declaring a member of the Defence Force liable to an order to make financial reparations to the Commonwealth, it would follow from the plaintiff's argument that the member of the Defence Force may have a claim in restitution, enforceable in the civil courts, in respect of the payment. Likewise, a reprimand which is taken to have been validly imposed by a Defence Force officer by force of item 5 might nevertheless expose that officer to a claim for defamation in a civil court.

28. As these examples indicate, the issue must also be viewed from the perspective of the rights and liabilities of others relating to the plaintiff's detention.[2] On the plaintiff's construction, all of those officers responsible for his detention would be liable for false imprisonment, notwithstanding the apparent conferral of protections which stems from the declaration of rights and liabilities under item 5 of Sch 1 of the *Interim Measures Act*. Officers could also be subject to other tortious consequences if, for the purposes of any civil claim by a detainee, the lawful authority to take certain actions in relation to a detainee was not effective: see, for example, s 178B (which authorises a member of staff of a detention centre to use reasonable force to take fingerprints or photographs of a detainee).

29. The construction of item 2(2) apparently advanced by the plaintiff would not serve any sensible legislative purpose. The general object of the *Interim*

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[2] See also item 3 of Sch 1 to the *Interim Measures Act*.

Measures Act, of maintaining the continuity of discipline in the Defence Force (item 2(1)), would be severely undermined if, notwithstanding the declaration of rights and liabilities in item 5, a person ostensibly liable to have been detained pursuant to the *DFD Act* would nevertheless have a cause of action against his detainers for false imprisonment in respect of that detention.

30. The construction suggested by the plaintiff finds no support in the specific purpose underlying item 2(2). That item, like the analogous provision in the *DFD Act* (s 131B) was intended to address a specific concern about the obligations of present and former Defence Force personnel to disclose, in the context of civilian life, past punishments imposed on them by the Defence Force (and, in the case of s 131B of the *DFD Act*, past convictions).[3]

Validity - Ch III

31. To the extent that the plaintiff adopts and develops the arguments raised in *Nicholas* regarding Acts of Pains and Penalties and the usurpation of judicial power, the Commonwealth relies upon its submissions in *Nicholas* and notes the following additional matters.

32. The plaintiff's reliance on *Commissioner for Motor Transport v Antill Ranger & Co Pty Ltd* (1956) 94 CLR 177 and the reasoning of McHugh J in *Coleman v Power* (2004) 220 CLR 1 at 63 is misplaced: paragraphs 79 to 82 of the plaintiff's submissions. The *Interim Measures Act* does not purport to make lawful that which the *Constitution* makes unlawful. The consequence of *Lane* is that certain exercises of power by a particular body, the AMC, were invalid. The *Interim Measures Act* does not purport to validate the unlawful acts of the AMC. Rather, the *Interim Measures Act* declares particular rights and liabilities of persons, in part by reference to orders and punishments purportedly imposed by the AMC. The Act follows in all material respects the legislative model upheld in *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 and *Re Macks; Ex parte Saint* (2000) 204 CLR 158.

33. The plaintiff contends that item 5 of the *Interim Measures Act*, by declaring rights and liabilities by reference to hypothesised punishments and orders imposed by a general court martial, deals with matters which are "uniquely susceptible to judicial determination". If that were a sound proposition, it must necessarily follow that such punishments and orders could not validly

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[3] The Explanatory Memorandum for the *Interim Measures Act* explains that item 2(2) "means that in circumstances where a person would be required to disclose a conviction for a criminal offence, he or she does not have to disclose the punishment imposed by this Bill." There is an equivalent explanation for s 131B of the *DFD Act* in the Explanatory Memorandum to the *Defence Legislation Amendment Act 2008*, which introduced that provision. The second reading speech for the 2008 Amendment Act is to similar effect and describes the object of the provision in terms of reducing "the possible adverse and disproportionate impact of minor service offences on the civilian lives of persons convicted by an ADF summary authority": Commonwealth, Parliamentary Debates, House of Representatives, 20 February 2008, 841 (Hon Warren Snowdon, Member for Lingiari).

be imposed by a general court martial, given that a general court martial is not a Ch III court. Such a contention finds no support in *Lane* and is inconsistent with earlier authorities including *White v Director of Military Prosecutions* (2007) 231 CLR 570 (***White***).

34. Punishments imposed by military tribunals involving loss of liberty do not intrude into the arena of matters that are uniquely susceptible of determination by a Ch III court. In the context of positing 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" in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (***Lim***) at 28,[4] Brennan, Deane and Dawson JJ expressly excepted the power of military tribunals to punish for breach of military discipline.

35. The authorities considered and affirmed in *White* have upheld the validity of legislation which authorised service tribunals to order the detention of Defence Force personnel, outside Ch III and without the judicial power of the Commonwealth being exercised. The constitutional treatment of detention within the system of military justice takes account of the nature of military discipline under the defence power, the traditional role of military tribunals in enforcing military law and the special character of detention within the context of military justice.

36. A detailed account of the history of military detention under British and Australian law is set out in the schedule to these submissions. That history demonstrates that military detention is, and has at all relevant times including prior to Federation been, an integral part of military discipline and military justice. Detention of military personnel is a unique species of detention. It serves a disciplinary purpose that is at the heart of the defence power. In constitutional terms, such detention has a character that is relevantly distinct from other forms of detention, including incarceration for criminal offences under the civil justice system. The exercise of legislative and/or executive power to detain military personnel under a system of military justice does not infringe the separation of powers under the *Constitution.*

Validity – s 51(xxxi)

37. For the reasons set out above, the *Interim Measures Act*, properly construed, has the effect of conferring retroactive lawful authority for the detention of the plaintiff. It necessarily follows that any claim for false imprisonment by the plaintiff in respect of his detention at the DFCE at Holsworthy must fail.

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[4] Their Honours cited *R. v. Bevan; Ex parte Elias and Gordon* [1942] HCA 12; (1942) 66 CLR 452; *Re Tracey; Ex parte Ryan* [1989] HCA 12; (1989) 166 CLR 518; *Re Nolan; Ex parte Young* [1991] HCA 29; (1991) 172 CLR 460; *Polyukhovich v. The Commonwealth* (1991) 172 CLR, at pp 626-627.

38. The plaintiff's submissions refer to an argument that the *Interim Measures Act*, to the extent it has such an operation, is contrary to s 51(xxxi) of the *Constitution*. Despite having issued a notice to the Attorneys General identifying this as an issue in the case (SCB Vol 1 p 17), the plaintiff has not sought to develop that argument.

39. It may be accepted that the extinguishment of a vested cause of action against the Commonwealth constitutes an "acquisition" of "property": see *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 (***Mutual Pools***) at 176; *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at [16]. However, the *Interim Measures Act* is not a law with respect to the acquisition of property for the purposes of s 51(xxxi). Schedule 1 of the *Interim Measures Act* was enacted for the purpose of maintaining the continuity of discipline in the Defence Force: item 2(1) of Sch 1. It does so principally by declaring certain rights and liabilities of all persons in circumstances where the AMC had purportedly imposed punishments or made Pt IV orders. In relation to the retroactive declaration of rights and liabilities of persons who have been subject to an order of detention, the *Interim Measures Act* serves a number of purposes conducive to the operation of the *DFD Act* and the maintenance of discipline thereunder. For example, the declaration of rights and liabilities regularises the operation of other provisions of the *DFD Act* that operate by reference to detainees (being persons who are undergoing a punishment of detention in a detention centre): see ss 3(16), 54A. It also serves to clarify the position of service personnel for administrative purposes, such as determining periods of service and benefits.

40. The impact on any putative cause of action for false imprisonment which arises by virtue of the effective retroactive conferral of lawful authority under item 5 of Sch 1 is incidental and is not such as to give the *Interim Measures Act* the character of being a law with respect to the acquisition of property. The *Interim Measures Act* is not solely or dominantly concerned with the acquisition of property: *Mutual Pools* at 181 per Brennan J. Nor can it be characterised as being "directed towards the acquisition of property as such": see *Nintendo Co Ltd v Centronic Systems Pty Ltd* (1994) 181 CLR 134 at 161; *Mutual Pools* at 181. The extinguishment of a cause of action arising from the retroactive conferral of lawful authority is "subservient and incidental to or consequential upon the principal purpose and effect sought to be achieved" by the *Interim Measures Act*: *Mutual Pools* at 171 per Mason CJ; see *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 (***Airservices***) at 193, 247. The conferral of lawful authority to detain is a necessary feature of the means which the law selects to achieve its objective of maintaining the continuity of discipline and the means are appropriate and adapted to achieving that objective: see *Mutual Pools* at 179-180 per Brennan J; *Airservices* at 180, 252. Plainly, the maintenance of causes of action by one member of the Defence Force against other members of the Defence Force or the Commonwealth in respect of past periods of detention

would be inconsistent with the object of maintaining the continuity of military discipline.

Conclusion

41. The questions of law should be answered "yes" and "yes".

42. Costs should follow the event. There is no justification for a special costs order of the kind sought by the plaintiff.

Dated: 15 March 2011

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SCHEDULE

THE HISTORY AND CHARACTER OF MILITARY DETENTION

1. The maintenance of discipline in the armed forces is essential to their effective functioning and the public safety. One of the chief instruments for the maintenance of such discipline is the administration of military law and the execution of military justice. The disciplinary function of military law has long been recognised and accepted – in statutes[5], in official military manuals[6], in treatises on military law and the law of war[7], and in the cases.[8]
10 Section 70 of the *DFD Act* provides that a service tribunal, in determining what punishment to impose upon a person convicted of an offence under the Act must have regard not only to the principles of sentencing applied by the civil courts, but also to "the need to maintain discipline in the Defence force". The main object of Schedule 1 of the *Interim Measures Act* is to "maintain the continuity of discipline in the Defence Force".[9]

2. Military law has traditionally provided for offences that have no civilian analogue (such as mutiny, desertion, disobedience and absence without leave) as well as offences for behaviour that would be criminal under the

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5 See e.g. the preamble to the first *Mutiny Act*, enacted in 1688 (12 Anne C.13). Dicey observed that this preamble reappeared with slight alterations in every subsequent Mutiny Act: *Introduction to the Study of the Law of the Constitution* (8th ed 1915) 295.

6 War Office, *The Queen's Regulations and Orders for the Army 1883* (London HM Stationery Office) p.88, s 1; War Office, *Manual of Military Law*, 1st ed (London HM Stationery Office 1884) (**The 1884 Manual**) 59-60, s 79 (SCB vol A, p.439-440); 61, s 85 (SCB vol A, p 61. These passages from the 1884 manual were repeated (with minor alterations) in subsequent editions of the 1884 manual, including the Australian Military Board's *Australian edition of the Manual of Military Law 1941* (Melbourne), 63, s 78 (SCB, vol A, p.476). See also the 19th century sources quoted in Alan Skelley *The Victorian Army at Home* (London Groom Helm 1977) 135.

7 For an early statement, from 1677, see Charles Clode, *The Administration of Justice under Military and Martial Law* (London John Murray 1872) 14-15 citing Lord Orrey's *Treatise on the Art of War* (London, 1677): 'the contempt of authority is of fatal consequence in all human affairs, and most of all in Military, where, though what is commanded might have been indifferent itself, yet it ceases to be so when it is commanded; and if a Soldier of himself may break one Rule of the General's unpunished, he may believe thereby that he may as well break any, nay, all the rest; for the stamp of authority is alike on all, of which when a private person or many private men make themselves the Judges, they bid defiance to all discipline, without which no Society can subsist, and Military ones the least of any'. For similar comments about the purpose of military law in a more modern treatise, see Major PG Clark, *Banning's Military Law* (25th ed) (Aldershot 1954), 1-2. See also Henry Marshall, *Military Miscellany; A history of the army, military punishments, etc* (London John Murray 1846) 155, 117 (***Military Miscellany***).

8 See, for example, *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 596; *Lane* at 238; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 538.

9 Item 2(1) of Sch 1 to the *Interim Measures Act*.

general criminal law.[10] Punishing service personnel for offences of either kind is conducive to the maintenance of military discipline.

3. The function of trying and punishing offences against military law has principally devolved onto military tribunals: most especially, (in late medieval times) the Court of Chivalry, and then (from the 1600s) courts-martial.[11] The seminal statutes for modern military law, in both Britain and Australia, are the *Army Act 1881* (Imp) and the *Naval Discipline Act 1866* (Imp).[12] The role of courts-martial was retained by both of those statutes. After Federation, by virtue of the *Defence Act 1903* (Cth) the institution of courts-martial was retained as an instrument for the maintenance of discipline among the armed forces of the Commonwealth.[13] The *DFD Act*, which came into force in 1985, continued, and continues today, to provide for courts-martial: Part VII, Div 3.

4. Historically, punishments for offences against military law were manifold. They included death, banishment (later, transportation), fines, suspension, discharge, imprisonment and various kinds of physical mutilation or chastisement (e.g. whipping and flogging).[14] Imprisonment is an ancient military punishment, being in evidence in England from at least the late 1500s.[15]

5. The first express statutory provision for imprisonment as a military punishment was in the *Mutiny Act* of 1823 (4 Geo IV c 13). Section 25 thereof provided that imprisonment could be "in any House of Correction, Common Gaol or Public Prison, or in any other Place which such Court [General or other Court Martial] may deem fit and convenient for that purpose".

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10 Shortly after Federation, by s 55 of the *Defence Act 1903* (Cth) (as originally enacted) *the Army Act 1881* (Imp) was, save insofar as it was inconsistent with the *Defence Act*, applied to the military forces of the Commonwealth while on active service. Similarly, by s 56 of the *Defence Act* the *Naval Discipline Act 1866* (Imp) was applied to the Naval Forces of the Commonwealth while on active service. For specifically military offences in the *Army Act 1881* see ss 4-40 and for offences punishable by ordinary law see s 41. For specific military offences in the *Naval Discipline Act 1866* see ss 2-44 and for offences punishable by ordinary law see s 45. For further statutory history see n 21 below. In the present day, the DFDA takes the same approach: Divisions 1-8 of Part III provide for specifically military offences; Division 9 provides for offences punishable by the ordinary criminal law (using the criminal law in force in the Jervis Bay territory as the reference point).

11 The 1884 Manual, 9-12; Clode, *Military and Martial Law* (London 1872), 32-33, 36-37, 53-60, 64-73; see also the first *Mutiny Act 1688* (12 Anne C.13), ss 2-4.

12 Both the *Army Act* (ss 47-56) and the *Naval Discipline Act* (Part IV) used courts-martial as the chief instrument of the trying and sentencing offenders against military law. Note that, by s 2, the *Army Act 1881* (UK) continued in force only for such time as was specified in an annual act, which was (in fact) thereafter passed yearly and called the *Army (Annual) Act*.

13 See *Defence Act 1903* (Cth) (as originally enacted) Part IV; and *Lane v Morrison* (2009) 239 CLR 230, 244-246 [38-45], 256-258 [81-88].

14 *Military miscellany*, 120ff.

15 *Military miscellany*, 124. For other early references to imprisonment as a punishment for military offences see 125, 129, 148, 154.

6. Most barrack cells were suitable for only very short custodial sentences. As a result, from the 1830s offenders against British military law were increasingly confined in civil gaols.[16] The use of civil gaols was considered unsatisfactory for several reasons, in particular overcrowding, and the undesirability of subjecting soldiers (whose offence may have been specifically military and without criminal connotations) to the influences of criminals. Accordingly from around the mid 1800s more suitable cells were constructed at military barracks. Military prisons were also built at major military depots in Britain and other places in the Empire.[17] It appears, however, that no military prison has ever been built in Australia: SCB vol B 515 at [364].

7. The *Army Act 1881* (Imp) retained imprisonment as a punishment. Section 44 set out two scales of punishments, for officers and soldiers respectively. These scales were apparently in descending order of severity. In both scales, imprisonment was third in the scale, behind "death" and "penal servitude", but before dismissal and discharge.

8. The specific punishment of "detention" (as distinct from "imprisonment") dates from the early 1900s and was an innovation of the British Parliament. In 1906 the British Parliament amended the *Army Act 1881* (Imp) to make express provision for courts-martial to inflict, in respect of offences committed by soldiers (but not officers), a punishment of "Detention for a term not exceeding two years". This amendment was expressed to be:

> For the purpose of preventing soldiers convicted against discipline, under the Army Act, and not discharged with ignominy, from being subjected to the stigma attaching to imprisonment...[18]

9. The Act provided that a soldier sentenced to detention "shall undergo the term of his detention either in military custody or in a detention barrack". The punishment was inserted into the scale of punishments for soldiers between "imprisonment" and "discharge with ignominy". [19]

10. In 1909 the *Naval Discipline Act 1866* (Imp) was similarly amended, by the *Naval Discipline Act 1909* (Imp). The amendment made "detention either in naval detention quarters or in a detention barrack" available as a punishment

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16 Peter Burroughs 'Crime and Punishment in the British Army, 1815-1870' (1985) 100 *English Historical Review* 545, 564.

17 Peter Burroughs 'Crime and Punishment in the British Army, 1815-1870' (1985) 100 *English Historical Review* 545, 564-565. For further details, see Sean McConville, *English Local Prisons 1860-1900* (London Routledge 1995) 386-390.

18 *Army (Annual) Act 1906* (Imp), s 4, amending s 44 of the *Army Act 1881* (Imp): s 44 set out the available punishments for offences by persons subject to the Act. As to the provisions which actually authorised courts-martial (which, in the case of the army, were of various kinds) to impose the punishment: s 47(5) of the *Army Act 1881* authorised regimental courts-martial to impose a punishment of detention for a period of up to 42 days, s 48(6) authorised general and district courts-martial to impose the punishment, and s 49(3) authorised a field general court-martial to impose the punishment.

19 *Army (Annual) Act 1906* (Imp), s 4.

that could be imposed by a naval court-martial.[20] The amendment to the *Naval Discipline Act* was expressed to be for the equivalent purpose as the 1906 amendment to the *Army Act*. The detention could not be for a period exceeding two years.

11. In Australia, after Federation and until the commencement of the *DFD Act* on 3 July 1985, the effect of Commonwealth statutes (principally the *Defence Act 1903* (Cth)) was to pick up the relevant British provisions and apply them to the defence force of the Commonwealth. The *Defence Act 1903* (Cth) provided for the convening of courts-martial (s 86) and the application to those courts-martial of the powers and procedures of army and naval courts-martial (respectively) as provided for in the *Army Act 1881* and the *Naval Discipline Act 1866* as "for the time being in force" (s 88). In consequence, under the *Defence Act 1903*, from 1906 detention was an available punishment for military courts-martial and from 1909 was available for naval courts-martial. Subsequent statutory provisions were to the same effect.[21]

12. The punishment of detention for a period not exceeding two years is retained in the *DFD Act*: s 68(1)(d). That provision contains a scale of punishments, expressly stated to be in decreasing order of severity. Detention is fourth in the scale, behind "imprisonment for life", "imprisonment for a specific period"

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20 See in particular s 52 of the *Naval Discipline Act 1866* (Imp), as amended by the 1909 Act: s 52 set out the available punishments for offences by persons subject to the Act. The provision which actually authorised naval courts-martial to impose the punishments described in s 52 was s 56.

21 *Defence Act 1903* (Cth), ss 86 and 88. A new s 88 was substituted by Act No 36 of 1917 (see s 24) but the new s 88 was (for present purposes) not materially different. In the meantime, the *Naval Defence Act 1910* (Cth) had been enacted to make extensive provision for the naval forces of the Commonwealth. The effect of s 5 thereof was (relevantly) to continue the operation of ss 86 and 88 to the naval forces of the Commonwealth. In addition, s 36 of the *Naval Defence Act 1910* explicitly provided that (inter alia) the *Naval Discipline Act 1866* (Imp) as 'for the time being in force shall, subject to this Act and to any modifications and adaptations prescribed by the regulations, apply to the Naval Forces'. As to the air force, it was established by the *Air Force Act 1923* (Cth). Subsection 3(3) provided that the *Defence Act 1903* (ie including ss 86 and 88) 'shall, with such modifications and adaptations as are prescribed by regulations...apply in relation to the Air Force' (s 3). Section 88 of the *Defence Act 1903* was further amended by Act No 74 of 1939 (see the Schedule thereof) to expressly make the same provision in respect of the Commonwealth Air Force that the section had to then made in respect of the Commonwealth military and naval forces. Finally, a new s 88 was substituted by Act No 72 of 1956. The new s 88 provided only for the law governing courts-martial in the military forces (ie not the naval or air forces) and stipulated that such courts martial had the same composition, procedure and powers of courts-martial under the *Army Act 1881* (Imp) as it was on the day Act No 72 of 1956 came into operation. The new s 88 was thereafter not materially amended (for present purposes) until the *DFD Act* came into force. As to the naval forces of the Commonwealth after 1956, the effect of s 36 of the *Naval Defence Act 1910* (Cth) (which continued to remain in force) was to retain courts-martial for offences against naval discipline. This was the case until 1964, when s 36 was repealed and replaced by (a new) s 34, which was to the same effect. Section 34 remained in force until the coming into force of the *DFD Act* (See also RBD Acland 'The Discipline of the Naval Forces of the Dominions' (1918) 18 *Journal of Comparative Legislation and International Law* (NS) 15.) As to the air force, s 5 of the *Air Force Act 1923* (Cth) (as inserted by Act No.74 of 1939) had the effect of applying to the Commonwealth air force the *Air Force Act* (Imp), the latter being a version of the *Army Act* but modified so as to make it applicable to the air force: *Air Force Constitution Act 1917* (Imp) s 12. In essence, that remained the case until the coming into force of the *DFD Act*.

and "dismissal", but ahead of "reduction in rank". In keeping with the traditional position, detention within the statutory scheme is a form of punishment that is appropriate to deal with conduct that is destructive of military discipline but where it is contemplated that the offender will resume ordinary service after punishment.

13. The reforming and disciplinary character of detention is emphasised in the contemporary and historical documents:

13.1. the Manual (issued by command of the Chief of Army) that now governs military detention under the *DFD Act* states that "[t]he primary purpose of detention is to focus on corrective training for offenders to rehabilitate them for further service" (SCB Vol A p 91 [1.8]; see also SCB Vol A p 89 [1.1])). The Manual requires Officers-in-Charge of a detention centre to "exercise their authority with firmness and humanity and ensure that the treatment of detainees is consistent with their rehabilitation for further Defence Force service" (SCB Vol A p 114 [3.4a]);[22]

13.2. The language in the Manual is consistent with the preceding "Orders for Detention Centres" of the late 1980s: SCB Vol A p 318 [9]. The language in those Orders is in turn apparently derived from similar language in paragraph 10 of the official handbook known as the "Red Book": SCB Vol A p 258. The Red Book was a consolidation of Commonwealth regulations and standing orders applicable to detention barracks, which governed military detention of soldiers from 1944 until the mid 1980s: SC [20.1-20.2]);[23]

13.3. in 1968-1969 the Navy, Army and Air Force all expressed to a Committee of Inquiry into the Services' Detention Arrangements the view that the function of detention is correction and rehabilitation. As the representative of the Army put it, "the aim of detention is for the unit to receive back a better soldier": SCB Vol B pp 591-592;

13.4. the 1946 Board of Inquiry expressed the view that "The object of detention, apart from its deterrent aspect is, speaking generally, to inculcate discipline, reform the offender and make him a good soldier, fit to take his place in the Forces": SCB Vol B p 518 [395].

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22 For similar sentiments in other contemporary or near contemporary documents governing military detention see: **[1]** the Defence Instructions (General) on 'Australian Defence Force Detention Centres' (SCB 38 [1]); **[2]** the present ADF Discipline Law Manual (SCB 46 [10.85]); **[3]** earlier editions of the same manual from 1986 (SCB 54 [1121]) and 2007 (SCB 61 [7.93]), the latter being the edition in force during the Plaintiff's detention; and **[4]** the Standing Orders for the detention centre at which the Plaintiff was detained, SCB vol A p 359 [8.1-8.2].

23 The content of the 'Red Book' was drawn principally from *Australian Military (Places of Detention) Regulations* (Statutory Rules No 58 of 1940) and relevant standing orders.

14. Consistently with these imperatives, the execution of punishments of military detention has always placed a heavy emphasis on the reform of errant behaviour, in significant part through military drill and training, with a view to the offender ultimately being received back into service as a better member of the armed services. To this end, persons are detained in military facilities, within the environment of the armed forces and subject to its strictures and culture.

15. The earliest Commonwealth statutory provision dealing with the particulars of detention appears to be the *Military Regulations 1913* (Statutory Rules no 237 of 1913). Regulation 412(2) stipulated a daily routine of work for detainees in detention barracks which routine included "two periods of drill (physical training) of one hour each, and such general fatigue work as may be directed by general or other officers commanding to suit the local circumstances of each station and the season of the year". These regulations were superseded by the *Australian Military Regulations 1927* (Statutory Rules No 149 of 1927), reg 361(1) of which empowered the Military Board to issue orders and instructions in relation to (inter alia) 'military training' in detention centres.[24]

16. In 1940, the 1927 regulations were supplemented by the *Australian Military (Places of Detention) Regulations* (Statutory Rules No 58 of 1940), which regulations (along with associated standing orders) formed the basis for the "Red Book". Paragraph 150 of the Red Book stipulated that suitable educational training will be carried out to the fullest extent possible: SCB Vol A p 269; see also SCB Vol A p 259 [21]). The Red Book's daily timetable for detainees set aside significant parts of the day for "training as per Barrack Syllabus": SCB Vol A p 270. A copy of such a syllabus is extant and is included at SCB Vol B pp 564-573. It illustrates the distinctively military content of the drill and training in question. The stated object of the training (at least in the mid-1940s, when a Board of Inquiry investigated the matter) was to bring the soldier to such a standard that when he was released he could be posted direct to an operational unit: SCB Vol B p 523 [465]. The 'Orders for Detention Centres' that succeeded the Red Book in the 1980s also placed emphasis on training: SCB Vol A p 327 [56-58].

17. The Manual that now governs military detention under the *DFD Act* (and which governed the plaintiff's detention) provides for the training of detainees, including by instruction, inspection parades, drill, and physical training: SCB Vol A p 165. The Standing Orders for DFCE at Holsworthy, where the plaintiff was detained, provided for a daily timetable which, much like the Red Book, set aside a significant amount of time for instruction, drill

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[24] Note also that in 1914 the British War Office issued *Regulations for the Equipment of the Army*, including detention barracks. The equipment prescribed for detention barracks included various kinds of weapons, ammunition and targets for 'musketry instruction' and 'instruction and training of cavalry soldiers'. Likewise there was prescribed 'circular tents for instructional purposes' and related items. (SCB vol A pp 446-450).

and physical training: SCB Vol A p 375. The syllabus applicable during the plaintiff's detention is at SCB Vol A p 414. Its content is predominantly of a military nature.

18. The military and corrective nature of detention are well illustrated by the particulars of the plaintiff's detention:

18.1. the Manual that governed his detention required him, on admission, to be in possession of clothing and equipment of a military nature, including a parade uniform: SCB Vol A p 133;

18.2. upon admission to Holsworthy it was explained to the plaintiff that the instructors and staff there were his superior officers, and he was directed to obey all orders given to him by them. It was also explained to him that he was still subject to military law: SCB Vol A 380-381 [3], [6];

18.3. whilst in detention the plaintiff underwent a daily regime of inspections, parade, drill, instruction, and physical training: SCB Vol A pp 383-387, 389-412;

18.4. his performance was subjected to daily assessments, which indicated that he had responded positively, the final such assessment expressing optimism that the plaintiff 'will be an asset to the RAN Fleet': SCB Vol A pp 389-412.