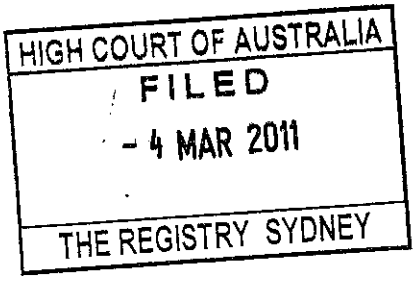
IN THE HIGH COURT OF AUSTRALIA No. S 183 of 2010
SYDNEY REGISTRY

BETWEEN:

PAUL NICHOLAS
Plaintiff

And



THE COMMONWEALTH OF AUSTRALIA
First Defendant

And

CHIEF OF THE DEFENCE FORCE
Second Defendant

PLAINTIFF'S REPLY SUBMISSIONS

Part I:

I certify that the submission is in a form suitable for publication on the internet.

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Part II:

As to the Submissions filed on behalf of the First Defendant, the Plaintiff submits in reply as follows:-

The Purposive Power Argument

1. The First Defendant's Submissions[1] point to the defence power of the Commonwealth contained in section 51 of the ***Constitution*** and argue that the object of the ***Interim Measures Act*** is *"to maintain the continuity of discipline in the Defence Force in the immediate aftermath of* ***Lane****."*

2. One cannot, it is submitted, cloak an unlawful Bill of Pain and Penalty (or Attainder) with constitutional legitimacy simply by reference to a section 51 purposive power. To take an extreme example, the hypothetical imposition by Parliament of an ex post fact penalty on a person by historical reference to that person having been convicted as an enemy combatant by an (arguably) unlawful military commission sitting at Guantanamo Bay would not be any the less a Bill of Attainder or Bill of Pain and Penalty (as the case might be) simply because it could otherwise be attached to the defence or external affairs power. If one took that argument a stage further, would an Act seeking to rely on the finding of guilt by an illegal military commission and seeking to use the punishment purported to be imposed by the commission as a historical reference point be any the less a Bill of Pain and Penalty simply by reference to a purposive power?

The Usurpation of Judicial Power Argument

3. The First Defendant's submissions argue[2] that *"the* ***Interim Measures Act*** *does not purport to convict any person, declare any person's guilt, or otherwise determine any person guilty in respect of any offence".*

4. With respect, this is precisely what the Interim Measures Act attempts to do. The Australian Military Court has been declared in ***Lane v Morrison***[3] to be invalid. It is a nullity. Its findings of guilt in respect of the Plaintiff are nullities, in effect dead and buried. Yet the ***Interim Measures Act*** seeks to breathe new life into them by treating such convictions and findings of guilt as a historic reference point. The "*pith and substance*" of the ***Interim Measures Act*** aptly fits the Privy Council's description in ***Liyanage***[4] as "*a*

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[1] At paragraphs 10-12
[2] At paragraph 26
[3] ***Lane v Morrison*** (2009) 239 CLR 230
[4] ***Liyanage v R*** [1967] 1 AC 259

legislative plan ex post facto to secure the conviction.....of particular individuals".

5. The legislature has, it is submitted, in the ***Interim Measures Act*** in practical terms *"performed an adjudicative function in respect of the person or persons identified in the Act and substituted its judgment for that of a court".*

The Punishment Review Argument

6. As to paragraph 29 of the First Defendant's submissions, the assertion that *"in light of the provision for administrative review, it cannot be said that the legislature has, in the manner of an Act of Pains and penalties, made a judgment of guilt in respect of certain individuals and imposed penalties upon them"* cannot be allowed to pass without challenge.

7. With respect, such assertion misses the point that administrative review under Pt 7 of Sch 1 of the ***Interim Measures Act*** is limited to review of punishment only. Item 24(1) of such part relevantly provides *"For the purpose of this Part, a punishment review is a review of a punishment or a Part IV order that is declared by a provision of Part 2,3,4 or 5 of this Schedule to be a liability of the person".*

8. This stands in stark contrast to the provisions of Part IX of the ***Defence Force Discipline Act 1982*** as it existed immediately prior to the creation of the Australian Military Court[5] which provided a regime of reviews of proceedings of service tribunals extending to both conviction and punishment. As to conviction, the then section 158(1) of the ***Defence Force Discipline Act*** relevantly provided:-

"Subject to subsection (5), where in a review it appears to a reviewing authority:

(a) that the conviction is unreasonable, or cannot be supported, having regard to the evidence;
(b) that, as a result of a wrong decision on a question of law, or of mixed law and fact, the conviction was wrong in law and that a substantial miscarriage of justice has occurred;
(c) That there was a material irregularity in the course of the proceedings and that a substantial miscarriage of justice has occurred; or
(d) That in all the circumstances of the case, the conviction is unsafe or unsatisfactory;

The reviewing authority shall quash the conviction"

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[5] See ADFP Vol 2 AL10

9. It cannot, it is submitted, be said that the opportunity for punishment review afforded by the Interim measures Act relieves such act of the character of a judgment of guilt by the Commonwealth Parliament in respect of certain individuals. To argue otherwise is simply to engage in an exercise of semantics.

Dated 4th March 2011

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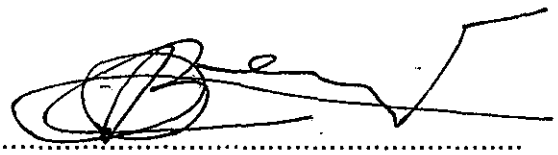

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