

NICHOLAS v. THE COMMONWEALTH OF AUSTRALIA AND ANOR
(S183/2010)

Writ of Summons: issued 19 August 2010

Special Case: filed 30 November 2010

From 1 January 2004 until 25 August 2008 the Plaintiff was a commissioned officer in the Australian Army holding the rank of Captain. On or about 1 October 2007 the Australian Military Court ("the AMC") was established pursuant to the *Defence Force Discipline Act 1982 (Cth)* ("the DFD Act").

Between 18 and 25 August 2008 the Plaintiff was tried before the AMC in respect of eleven charges under the DFD Act. The Plaintiff pleaded not guilty to all eleven charges. On 25 August 2008 the Plaintiff was convicted by the AMC of four offences under the DFD Act.

The AMC purported to impose the following punishments in respect of the four convictions: in respect of the conviction on the first charge of engaging in conduct outside the Jervis Bay Territory that is a Territory offence, namely obtaining financial advantage contrary to s 135.2(1) of the Commonwealth Criminal Code, the Plaintiff was reduced in rank to Lieutenant with seniority in that rank to date from 1 January 2006 and ordered to pay reparation to the Commonwealth; in respect of the conviction on the second charge of engaging in conduct outside the Jervis Bay Territory that is a Territory offence, namely obtaining financial advantage contrary to s 135.2(1) of the Commonwealth Criminal Code, the Plaintiff was sentenced to a severe reprimand and ordered to pay reparation to the Commonwealth; in respect of the conviction on the fourth charge of engaging in conduct outside the Jervis Bay Territory that is a Territory offence, namely conduct tending and intended to pervert the course of justice, the Plaintiff was sentenced to dismissal from the Defence Force effective 19 September 2008; in respect of the conviction on the sixth charge of engaging in conduct outside the Jervis Bay Territory that is a Territory offence, namely attempting to pervert the course of justice contrary to ss 713.1(1) and 44(1) of the *Criminal Code Act 2002 (ACT)*, the Plaintiff was sentenced to dismissal from the Defence Force effective September 2008.

On 25 August 2008 pursuant to the order of the AMC the Plaintiff's rank was reduced to Lieutenant and on 19 September 2008 pursuant to the order of the AMC the Plaintiff was dismissed from the Australian Defence Force.

On 26 August 2009 this Court in *Lane v Morrison* declared the provisions of Division 3 of Part VII of the DFD Act which established the AMC to be invalid. On 22 September 2009 the *Military Justice (Interim Measures) Act (no 2) 2009* ("the Interim Measures Act") commenced operation. Part 2 of Schedule 1 to the Interim Measures Act applies to the punishments purportedly imposed by the AMC prior to the High Court decision date. Pursuant to item 5 of Schedule 1 to the Interim Measures Act the rights and liabilities of the Plaintiff are declared to be, and always to have been, the same as if the punishments purportedly imposed by the AMC had been properly imposed by a general court martial and certain other conditions were satisfied.

The rights and liabilities as declared by item 5 of Schedule 1 to the Interim Measures Act are subject to the outcome of any review provided for by Part 7 of Schedule 1.

On or about 7 October 2009 the Plaintiff was notified of his right to petition a competent reviewing authority for a punishment review pursuant to Part 7 of Schedule 1 to the Interim Measures Act. The Plaintiff did not lodge a petition for punishment review within the time permitted, nor has the Plaintiff sought an extension of the period for lodging a petition for punishment review.

The Special Case states the following question for consideration by the Full Court:

- Is item 5 of Schedule 1 to the Interim Measures Act a valid law of the Commonwealth Parliament?