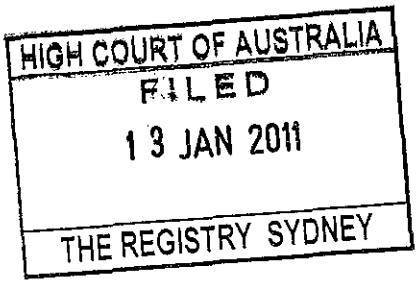
IN THE HIGH COURT OF AUSTRALIA No. S 183 of 2010
SYDNEY REGISTRY

BETWEEN:

PAUL NICHOLAS
Plaintiff



And

THE COMMONWEALTH OF AUSTRALIA
First Defendant

And

CHIEF OF THE DEFENCE FORCE
Second Defendant

PLAINTIFF'S SUBMISSIONS

Part I:

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

Part II:

The following question is stated for the opinion of the Full Court:

1. Is item 5 Schedule I to the ***Military Justice (Interim Measures) Act (No 2) 2009 (Cth)*** a valid law of the Commonwealth Parliament?

Part III:

I certify that the plaintiff has considered whether any notice should be given in compliance with section 78B of the Judiciary Act 1903 and that such a Notice was filed on 19th August 2010 and shortly thereafter served on each of the Attorneys General of the Commonwealth, States, and Territories

Part IV:

As this matter is before this Honourable Court in its original jurisdiction there is no judgment below to cite

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Part V:

Narrative Statement of Relevant Facts

Taken from Paragraphs 1-15 inclusive of the Special Case found at pages 15-17 of the Special Case Book

1. From 1 January 2004 until 25 August 2008 the Plaintiff was a commissioned officer in the Australian Army holding the rank of Captain.

2. On or about 1 October 2007 the Australian Military Court (AMC) was established pursuant to the *Defence Force Discipline Act 1982* (Cth) (DFD Act).

3. Between 18 and 25 August 2008 the Plaintiff was tried before the AMC in respect of eleven charges under the DFD Act.

4. The Plaintiff pleaded not guilty to all eleven charges.

5. On 25 August 2008 the Plaintiff was convicted by the AMC of four offences under the DFD Act.

6. The AMC purported to impose the following punishments in respect of the four convictions:

   6.1. 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 of $1851.43.

   6.2. 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 of $58.80.

   6.3. 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.

   6.4. 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 19 September 2008.

7. On 25 August 2008, pursuant to and by force of the purported orders of the AMC, the Plaintiff's rank was reduced to Lieutenant.

8. On 19 September 2008, pursuant to and by force of the purported orders of the AMC, the Plaintiff was dismissed from the Australian Defence Force.

9. On 26 August 2009 (the High Court decision date) the High Court in *Lane v Morrison* (2009) 239 CLR 230 declared the provisions of Division 3 of Part VII of the DFD Act, which established the AMC, to be invalid.

10. On 22 September 2009 the *Military Justice (Interim measures) Act (No. 2) 2009* (Cth) (the Interim Measures Act) commenced operation.

11. Part 2 of Schedule 1 to the Interim Measures Act applies to the punishments purportedly imposed by the AMC on the Plaintiff, those being punishments purportedly imposed by the AMC prior to the High Court decision date.

12. Pursuant to item 5 of Schedule1 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.

13. 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.

14. 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.

15. The Plaintiff did not lodge a petition for a punishment review with the competent reviewing authority within the time permitted under Part 7 of Schedule 1.

16. The Plaintiff has not sought under Part 7 of Schedule 1 an extension of the period for lodging a petition for punishment review.

Part VI: PLAINTIFF'S ARGUMENT

Background

1. The primary defence power is contained in section 51(vi) of the ***Australian Constitution***, and vests in the Commonwealth power in respect of *"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"*.

2. Pursuant to such power, the Commonwealth Parliament enacted the ***Defence Force Discipline Act 1982 ("the DFDA").*** This created service offences, some of which were peculiarly of a service nature, others of which mirrored civilian offences. The courts martial procedures which had until then been the separate and exclusive province of each of the three services were unified into a tri-service regime that provided for trial by a range of service tribunals, including Defence Force Magistrates, Restricted Courts

Martial (each comprising a board of three officers) and General Courts Martial (each comprising a board of five officers);

3. There were a number of challenges to the ***DFDA*** regime. In ***Re Tracey; Ex Parte Ryan***[1] a challenge was brought which was partially successful insofar as this court struck down a provision which purported to make convictions of Service Tribunals binding so that they could be pleaded in bar to subsequent attempts to try substantially the same charges before civilian courts. There were also unsuccessful challenges to the regime in ***Re Nolan; Ex Parte Young***[2]***, Re Tyler; Ex Parte Foley***[3]***, Re Colonel Aird***[4]***,*** and ***White v Director of Military Prosecutions***[5]***.***

4. Meanwhile, there were significant developments overseas in the field of military justice. The respective United Kingdom and Canadian systems of courts martial were in most respects substantially similar to the ***DFDA*** regime (this is understandable given that, historically, all three had their roots in the United Kingdom military justice system). In ***Findlay v United Kingdom***[6] the applicant, a service member, brought a successful case before the European Court of Human Rights complaining inter alia of a breach of his rights to trial by *"fair and impartial tribunal"* as mandated by Article 6 of the European Convention on Human Rights. Similarly the Canadian Supreme Court in ***R v Genereux***[7] applied the requirement in section 11(d) of the ***Canadian Charter of Rights and Freedoms*** for trial by an "*independent and impartial tribunal"* to strike down the Canadian Court Martial system. It should be noted that Australia was not a signatory to the European Convention on Human Rights and neither does this country have a Bill or Charter of Rights. The pre 2006 court martial system had been substantially upheld by the High Court on a number of occasions, and did not appear to be in imminent danger of a successful challenge.

5. However, in this political climate, the Australian Parliament in 2006 enacted amendments to the ***DFDA*** which abolished trial by Defence Force Magistrate and Courts Martial, and in their stead created the Australian Military Court ("AMC").

6. The AMC was in turn challenged in ***Lane v Morrison***[8]***.*** In that case the High Court on 26 August 2009 made a declaration *"that the provisions of Division 3 Part VII of the* ***Defence Force Discipline Act 1982 (Cth)****are invalid"*, and went on to grant an order in the nature of prohibition prohibiting the first defendant in those proceedings (a judge of the AMC) from proceeding further with charges against the plaintiff in those proceedings.

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[1] ***Re Tracey; Ex Parte Ryan*** (1989) 166 CLR 518
[2] ***Re Nolan; Ex Parte Young*** (1991) 172 CLR 460
[3] ***Re Tyler; Ex Parte Foley*** (1994) 181 CLR 18
[4] ***Re Colonel Aird*** (2004) 220 CLR 308
[5] ***White v Director of Military Prosecutions*** (2007) 235 ALR 455
[6] ***Findlay v United Kingdom*** (1997) 24 EHRR 221
[7] ***R v Genereux*** [1992] 1 S.C.R. 259
[8] ***Lane v Morrison*** (2009) 239 CLR 230

7. On 22 September 2009 the ***Military Justice (Interim Measures) Act (No2) (Cth)*** ("the legislation") came into operation, purporting to have application to the punishments imposed by the AMC (including the punishments imposed on the plaintiff).

The Retrospectivity Aspect of the Legislation

8. The legislation, by its very terms, purports to have a retrospective effect. The general rule in Australia has long been that while courts, so far as they are able, attempt to interpret laws so as to not have a retrospective effect[9]. The position is well expressed by Wright J. in ***Re Athlumney, ex parte Wilson***[10]*"perhaps no rule of construction is more deeply established than this – that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment."*

9. However, where Parliament clearly intends to legislate retrospectively, authority seems on balance to favour the courts upholding the validity of the legislation creating the offense. In ***R v Kidman***[11] the High Court had to consider the validity of certain provisions of the *Crimes Act 1915* which created a crime of "conspiring to defraud the Commonwealth" and purported to give such provision retrospective effect. Griffith CJ held[12] that *"in the case of a Legislature plenary power, such as that of the United Kingdom, no question of the validity of such a law can arise".* His Honour went on to argue that whilst the plenary nature of the Commonwealth Parliament was not unfettered, it did have the power to create retrospective criminal law. Similarly, Isaacs J[13] held *"there is no provision in the* ***Australian Constitution*** *against passing any ex post facto laws".* Powers J made similar comments[14].

10. The decision in ***Kidman*** has been affirmed in a number of subsequent decisions. In ***Polyukhovich***[15] Mason CJ held[16] *"the decision in* ***Kidman*** *was plainly correct".* Two of the three other Judges who together with Mason CJ formed the majority, namely Dawson J[17] and McHugh J[18] agreed with him. Toohey J, also in the majority, found it unnecessary to consider whether or not ***Kidman*** was correctly decided[19]. Gaudron and Deane JJ, in the minority, thought that ***Kidman*** should be overruled. Subsequently, the

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[9] see ***Polyukovich v The Commonwealth*** (1991) 172 CLR 50 per Deane J at para 20
[10] ***Re Athlumney, ex parte Wilson*** [1898] 2QB 547
[11] ***R v Kidman*** (1915) 20 CLR 425
[12] Supra page 432
[13] At pp442-3
[14] At page 462
[15] (1991) 172 CLR 501
[16] At page 539
[17] At page 645
[18] At page 719
[19] At page 690

High Court ***Baker v The Queen***[20] upheld the ***Kidman*** position and held that the Commonwealth can enact retrospective laws.

Bills of Attainder, Pains and Penalty

11. It is submitted that one constraint on the Commonwealth's ability to enact retrospective legislation which comes about by virtue of Chapter III is in respect of Bills of Attainder, Pains and Penalties. It is submitted that the legislation sought to be impugned in this case amounts to such a bill.

12. Put simply, such a bill occurs when Parliament prescribes through legislation that a specific person or defined class of persons has or have committed an offence, and then goes on to prescribe the penalty.

13. ***Halsbury*** notes[21] that the origin of the term "attainder" was to "*declare a person attainted, that is to say, under the stain of a corruption of blood formerly incurred by a criminal condemned for treason or felony*".

14. Historically, bills of attainder resulted in the imposition of the death penalty, whereas bills stipulating lesser penalties were technically known as bills of pains and penalties.

15. Given the unfettered plenary nature of the United Kingdom Parliament, such bills have been historically permissible in that jurisdiction. Indeed, Erskine May's ***Parliamentary Practice***[22] makes specific provision for the manner in which they are undertaken.

16. However, restrictions imposed on our own Commonwealth legislature by virtue of Chapter III do not permit of such a device. Indeed, a number of judges in ***Polyukhovich***[23] specifically excluded bills of attainder from the ability of the Commonwealth Parliament to make retrospective legislation:-

    (a) Mason CJ said in relation to the ***Kidman*** decision said[24] "*the only qualification relevant to the plaintiff's argument that needs to be made is that the separation of powers effected by our Constitution would invalidate a bill of attainder on the ground that it involves a usurpation of judicial power*";

    (b) Toohey J[25] said *"Legislative acts of this character contravene Ch III of the Constitution because they amount to an exercise of judicial power by the legislature. In such a case, membership of a group would be a legislative assessment as to the certainty, or at least likelihood to the criminal standard of proof, of an accused doing certain acts or having certain intentions. Those acts or intentions would not themselves be open to*

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[20] ***Baker v The Queen*** [2004] HCA 45
[21] ***Halsburys Laws of England*** 4th Edition Volume 10 para 736
[22] Erskine May ***Parliamentary Practice*** 18 Ed 63
[23] ***Polyukhovich v The Commonwealth***, Supra
[24] Supra at page 539
[25] Supra at para 99

scrutiny by the court. The vice lies in the intrusion of the legislature into the judicial sphere: Murphy J. in Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation [1982] HCA 31; (1982) 152 CLR 25, at p 107.

(c) Similarly, McHugh J said[26] *"a law which creates a criminal offence but operates retrospectively is not the same as a Bill of Attainder or a Bill of Pains and Penalties. Such Bills are an interference with the exercise of judicial power. Bills of Attainder and Bills of Pains and Penalties constitute a legislative punishment 'of specifically designated persons or groups' .....I think that the enactment of a Bill of Attainder or a Bill of Pains and Penalties infringe the provisions of Ch III of the Constitution".*

17. The legislation in the present case fulfils the definition of a Bill of Pains and Penalty. It relates to a specific class of persons, namely those punishes by the AMC prior to the decision in ***Lane v Morrison***. It does not provide a mechanism whereby the individual members of the group can be adjudged guilty of any military offense; rather it renders them liable to punishment simply by being members of the designated group. Membership of the group seems to have been determined as a result of convictions which are themselves nullities, and which the legislation has not sought to preserve. The legislation provides for punishments which are not consequent on trial or conviction by a body having a proper constitutional basis.

18. That the legislation explicitly seeks to preserve the punishments of the AMC whilst implicitly relying on the AMC trial process which gave rise to them is a nonsense. ***Lane v Morrison*** in effect declared the AMC to be invalid. It is void ab initio. In ***South Australia v The Commonwealth ("First Uniform Tax Case")***[27] Latham CJ phrased the principle thus:-
"Common expressions, such as 'The courts have declared a statute invalid,' sometimes lead to a misunderstanding. A pretended law made in the absence of power is not and never has been a law at all. Anybody in the country is entitled to disregard it. Naturally he will feel safer if he has a decision of a court in his favour- but such a decision is not an element which produces any invalidity in any law. The law is not valid until a court pronounces against it- and is thereafter invalid. If it is beyond power it is invalid ab initio."

19. Parliament cannot simply declare partially valid or indirectly to declare to be partially valid that which the High Court has declared to be invalid. The legislation cannot stand.

R v Humby Distinguished

[26] Supra at page 721
[27] ***South Australia v The Commonwealth ("First Uniform Tax Case")*** (1942) 65 CLR 373 at 408

20. The legislation appears to be based on the reasoning of Stephen J in ***R v Humby; Ex Parte Rooney***[28] by purporting to attach to them, as acts in law, consequences which the legislation declares them always to have had, described by reference to the consequences flowing from an order by a judge.

21. There are, however, a number of differences between the present case and ***R v Humby***:-

(a) In the present case the argument rests on the declaration of invalidity by the High Court in ***Lane v Morrison***;

(b) There is a difference in the nature of the orders. In ***Humby*** it was conceded that Parliament could by legislation dissolve a marriage, whereas Parliament cannot (by reason of the prohibition against Bills of Attainder and Pains and Penalty) convict and punish in respect of what is essentially criminal conduct;

(c) In ***Humby*** a purported court order was not regarded as a nullity. The ***Humby*** principles arguably have no application to the invalid convictions and punishments of the AMC insofar as (given such invalidity) there is no act in law upon which the legislation could operate.

Some Aspects of the *DFDA* Regime

22. Finally, lest it be suggested that the legislation does not amount to a Bill of Pains and Penalties because the sanctions sought to be imposed against the members of the designated class were disciplinary in nature rather than strictly criminal, a number of matters should be born in mind which nonetheless demonstrate that disciplinary proceedings in the military context have more of the flavor of criminal proceedings than of an administrative procedure:-

(a) The ***DFDA*** regime provides for the charging, trial, and (if convicted) consequential punishment of accused persons. Section 66(1) relevantly provides *"Each punishment imposed, and each order made by a service tribunal shall be imposed or made, as the case may be, in respect of a particular conviction and no other conviction."* The requirement of a conviction (and to the criminal standard), it is submitted, places the regime beyond the merely administrative. Indeed, it is apposite to note that in the context of the ***Military Justice (Interim Measures) Act (No 2) of 2009 (Cth)*** there is no conviction upon which to base the punishment, as the conviction is a nullity not sought to be preserved by the legislation.

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[28] *R v Humby; Ex Parte Rooney* (1973) 129 CLR 231 at 243

(b) Section 68 of the ***DFDA*** provides for a scale of punishments in decreasing order of severity. Whilst the ***Military Justice (Interim Measures) Act (No 2) of 2009 (Cth)*** does not seek to preserve the first two (imprisonment for life and imprisonment for a specified period), it does seek to preserve the remainder. The second most severe punishment which it seeks to retain is detention for a period not exceeding two years. A punishment which involves the loss of liberty, it is submitted, is a sanction going beyond the merely administrative (it should be noted that the punishment of dismissal to which the plaintiff has been sentenced ranks as being more severe than detention).

(c) The ***DFDA*** regime maintains military discipline by punishing misconduct. Some of the offences to which punishments attach are inherently military in nature. Others, by the artifice of section 61 of the ***DFDA***, mirror exactly civilian criminal provisions in force in the Jervis Bay Territory. They are to be distinguished both in terms of process and effect from the range of administrative sanctions to which members of the Australian Defence Force are potentially subject and which are underpinned by different legislative provisions. In particular, the punishment of dismissal provided by section 68 of the ***DFDA*** is altogether different in character (and has different consequences, including financial) from other forms of administrative separation from the Australian Defence Force, rooted as are the latter in the provisions of the ***Defence Act 1903 (Cth)*** and the ***Defence (Personnel) Regulations*** made pursuant to that act.

Conclusion

23. In the circumstances of the case it is respectfully submitted that orders should be made as sought by the Plaintiff.

Part VII:

See Annexure A

Part VIII:

The Plaintiff seeks the following orders:-

1. Declaration that Item 5 of Schedule 1 to the ***Military Justice (Interim Measures) Act (No 2) 2009 (Cth)*** is not a valid law of the Commonwealth Parliament;

2. Declaration that the convictions recorded by the Australian Military Court against the Plaintiff are invalid;

3. Declaration that the punishments imposed by the Australian Military Court upon the Plaintiff are invalid;

4. A declaration that the purported dismissal of the Plaintiff by the Second Defendant from the Australian Defence Force was invalid and of no effect;

5. Order that the Defendants pay the Plaintiff's costs as agreed or taxed.

Dated 12th January 2010

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Senior legal practitioner presenting the case in Court

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This and the Following Page is the Annexure Marked "A" to the Plaintiff's Submissions

The applicable constitutional provisions, statutes and regulations as they existed at the relevant time are listed hereunder and are still in force at the date of making these submissions:-

Australian Constitution Section 51:-

"The Parliament shall, subject to the Constitution, have power to make orders 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.

Military Justice (Interim Measures) Act (No 2) 2009 (Cth) Item 5

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.

(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.