IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S183 OF 2010**

BETWEEN: **PAUL NICHOLAS**
Plaintiff

AND: **THE COMMONWEALTH OF AUSTRALIA**
First Defendant

THE CHIEF OF THE DEFENCE FORCE
Second Defendant

FIRST DEFENDANT'S SUBMISSIONS

Filed on behalf of First Defendant by:

Australian Government Solicitor
50 Blackall Street
Barton ACT 2600
DX5678 Canberra

Date of this document: 31 January 2011
Contact: Simon Thornton

File ref: 10054142
Telephone: 02 6253 7287
Facsimile: 02 6253 7303
E-mail: simon.thornton@ags.gov.au

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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 question of law stated for the opinion of the Full Court concerns the constitutional validity of item 5 of Schedule 1 to the *Military Justice (Interim Measures) Act (No 2) 2009* (Cth) (***Interim Measures Act***).

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**) 7.

PART IV FACTS

4. The material facts are set out in the special case stated by the parties and filed on 30 November 2010: SCB 15. The facts are reproduced in Pt V of the plaintiff's submissions.

PART V APPLICABLE PROVISIONS

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

6. There is one additional aspect of the factual and legislative context to which attention should be drawn. Item 5 of Sch 1 to the *Interim Measures Act* has the effect of declaring the rights and liabilities of all persons who have been the subject of a purported punishment or order under Pt IV of the *Defence Force Discipline Act 1982* (***DFD Act***) by the Australian Military Court (**AMC**), other than an order of imprisonment, to be (and always to have been) the same as if the punishment or order had been properly imposed by a general court martial and approved or not quashed or revoked by a reviewing authority.

7. The rights and liabilities of persons so declared 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 AMC may lodge a petition for punishment review with a competent reviewing authority. Punishments of detention are subject to automatic review: item 25(4).

8. The plaintiff was advised of his right to seek a punishment review pursuant to Pt 7 of Sch 1: paragraph 14 of the special case (SCB 17) and Annexure B (SCB 23). 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: paragraphs 15 and 16 of the special case (SCB 17).

PART VI ARGUMENT

9. Item 5 of Sch 1 to the *Interim Measures Act* is a law with respect to the defence of the Commonwealth, within the scope of the Commonwealth's legislative power under s 51(vi) of the Constitution. The enactment does not constitute an Act of Pains and Penalties. Nor does it otherwise involve the legislature in the exercise or usurpation of, or interference with, the judicial power of the Commonwealth.

The *Interim Measures Act* is a law within s 51(vi)

10. Section 51(vi) of the Constitution supports laws that are "directed to the defining characteristic of armed forces as disciplined forces organised hierachically" including through the enactment of "measures intended to maintain discipline and morale within the forces": *White v Director of Military Prosecutions* (2007) 231 CLR 570 (***White***) at 596 at 596 per Gummow, Hayne and Crennan J; *Lane v Morrison* (2009) 239 CLR 230 (***Lane***) at 238 per French CJ and Gummow J.

11. As is evident from its structure and the timing of its enactment, and as is spelt out in item 2 of Sch 1, item 5 of Sch 1 has as its main object to maintain the continuity of discipline in the Defence Force in the immediate aftermath of *Lane*. Item 5 applies by reference to purported orders made and punishments imposed by the AMC under the *DFD Act*. The purported orders and punishments in question were made and imposed in respect of charges laid against Defence Force personnel for service offences under the *DFD Act*. Item 5 therefore furthers the objective of maintaining and enforcing service discipline and morale. By maintaining the continuity and integrity of disciplinary measures within the Defence Force the *Interim Measures Act* serves to assist in the object of defence of the Commonwealth: *Australian Communist Party v Commonwealth* (***Communist Party Case***) (1951) 83 CLR 1 at 273 per Kitto J. The enactment bears the character of being a law with respect to defence.

12. The method of administering military discipline and justice effected by item 5 of Sch 1 does not suffer from the defect identified by the Court in *Lane*. Item 5 declares the rights and liabilities of all persons who have been the subject of a purported punishment or Pt IV order by the AMC to be (and always to have been) the same as if the punishment or order had been imposed by a general court martial, pursuant to the *DFD Act* as amended, and approved (or not disturbed) by a reviewing authority within the chain of command. The rights and liabilities of persons as declared by item 5 are also subject to the outcome of any review undertaken pursuant to Pt 7 of Sch 1: item 5(4). The disciplinary measures to which

effect is given by item 5 thus operate within the command hierarchy of the defence forces, consistently with the constitutional foundations of military justice identified in *White*.

13. The primary argument as to invalidity advanced by the plaintiff is that item 5 constitutes an Act of Pains and Penalties[1] and for that reason infringes the separation of judicial and legislative powers for which the Constitution provides. In dealing with this contention, it is necessary to begin by accurately characterising the operation and effect of the impugned enactment. Item 5 operates by reference to past purported decisions of the AMC, in the sense that it takes the purported orders and punishments of that body as an historical point of reference for the identification of the rights and liabilities being declared. In the plaintiff's case, item 5 has the effect of declaring him to be, and to have been since 25 August 2008, subject to a severe reprimand, to have had a reduction in rank to Lieutenant (with effect from 1 January 2006), to be liable to pay reparation to the Commonwealth totalling $1910.23 and to be dismissed from the Defence Force (with effect from 19 September 2008): SCB 16.

14. The *Interim Measures Act* was enacted to deal with invalid decisions of the AMC, following the decision of the Court in *Lane*. Item 5 does not seek to "validate" or otherwise alter the status of the invalid decisions of the AMC. The plaintiff's submission to the contrary (at paragraph 19) should be rejected. The rights and liabilities declared in item 5 operate solely by force of the *Interim Measures Act* and not the previous purported orders and punishments themselves. Contrary to the plaintiff's submissions (in paragraph 21), item 5 of the *Interim Measures Act* follows in all material respects the legislative model upheld in *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 (***Humby***) and *Re Macks; Ex parte Saint* (2000) 204 CLR 158 (***Re Macks***).

15. In *Humby* the Court rejected a challenge to s 5 of the *Matrimonial Causes Act 1971* (Cth), which was enacted in response to the decisions of the Court in *Kotsis v Kotsis* (1970) 122 CLR 69 and *Knight v Knight* (1971) 122 CLR 114 and which was in terms materially equivalent to item 5 of the *Interim Measures Act*. To similar effect, the Court in *Re Macks* upheld the validity of the *Federal Courts (State Jurisdiction) Act 1999 (SA)* (and equivalent Qld legislation), which was enacted in response to the decision of the Court in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511. In *Re Macks* at 200 McHugh J described *Humby* as standing for the principle that:

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1 It has been customary in much of the literature and in previous High Court judgments to refer to "Bills of Attainder" and "Bills of Pains and Penalties", even in the context of legislation which has been enacted, although contrast *Australian Communist Party v Commonwealth* ("*Communist Party case*") (1951) 83 CLR 1 at 172 per Latham CJ and see *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 646 per Dawson J. Acts of Attainder are concerned with the imposition of capital punishments and Acts of Pains and Penalties with lesser penalties (see *Communist Party case* at 172 per Latham CJ; as to the duration and civil consequences of attainder, see *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 602, 605). Given the nature of the liabilities declared by item 5 of the *Interim Measures Act*, these submissions adopt the terminology of "Pains and Penalties".

> Subject to the Constitution, it is within the legislative power of either the Commonwealth or of a State to provide, by legislation, that the rights and liabilities of certain persons will be as declared by reference to the rights and liabilities as purportedly determined by an ineffective exercise of judicial power. "Subject to the Constitution" means, in the case of the Commonwealth, that there must be a relevant head of power under which the law is enacted and that the law must not offend Ch III or any express or implied prohibition in the Constitution. In the case of a State, "subject to the Constitution" means the law must not offend Ch III or any express or implied prohibition in the Constitution and that it must not be rendered inoperative by reason of s109.

The *Interim Measures Act* does not offend Ch III

16. The fact that item 5 operates by reference to the actions of a body which invalidly purported to exercise the judicial power of the Commonwealth does not mean that the enactment itself amounts to an exercise of judicial power, or otherwise interferes with the exercise of judicial power. The Commonwealth may, within the scope of its enumerated heads of power, enact laws declaring the rights and liabilities of persons, including with retroactive effect, by reference to purported orders made by bodies subsequently found to be acting *ultra vires*. Such an Act does not involve the legislature in an exercise of, or interference with, judicial power: *Humby* at 243, 248-249; *Re Macks* at 200.

17. The rights and liabilities declared by item 5 are matters which may properly be the subject of direct legislative regulation. Item 5 does not deal with matters which are uniquely susceptible to judicial determination or "unsusceptible to legislative determination": see *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (***BLF***) (1986) 161 CLR 88 at 95. Any contention that the matters dealt with in item 5 are within the exclusive province of the Ch III courts (as appears to be implicit in the plaintiff's submissions at paragraph 21(b) and 22) must fail in light of the Court's decision in *White,* upholding the validity of a military justice system administered through service tribunals which are not Ch III courts.

18. The types of liabilities which are relevantly declared to apply in respect of the plaintiff (and are taken to have applied since 25 August 2008) – severe reprimand, loss of rank, financial reparations and dismissal – are matters which may properly be the subject of administrative or legislative action, without trespassing into the exclusive domain of the Ch III courts: see *The Queen v White, ex parte Byrnes* (1963) 109 CLR 665 at 670; *Tankey v Adams* (2000) 104 FCR 152 at 162-164; *Health Insurance Commission v Grey* (2002) 120 FCR 470 at 487-489; *Selim v Lele* (2008) 167 FCR 61 at 82.[2] As to the imposition of an obligation to pay money by way of reparations, see *Ex parte Byrnes* at 670 where the Court suggested that a

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2 *Selim v Lele* (2008) 167 FCR 61 was the subject of appeal to the High Court. However, the appellant abandoned the argument that s 106U of the *Health Insurance Act 1953* (Cth) was unconstitutional because it involved a conferral of the judicial power of the Commonwealth on a body other than a Ch III court: *Wong v Commonwealth* (2009) 236 CLR 573 at [88].

"fine" imposed on public servants by an administrative tribunal ought properly be described as "nothing but a mulct".

19. The rights and liabilities for which item 5 provides are of a kind which could, in different circumstances, be the subject of determination in judicial proceedings.[3] However, that is not indicative of any infringement of the separation of powers. Chapter III contains no prohibition, express or implied, that rights that could be in issue in legal proceedings, or are in issue in actual proceedings, shall not be the subject of legislative declaration or action: *Humby* at 248-9 per Mason J; see also *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495 at 503–4 and 579–80 and *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (***Polyukhovich***) at 533. Indeed, the powers of the Commonwealth extend to the enactment of *ad hominem* legislation dealing directly with substantive rights which are the subject of pending proceedings: *BLF* at 95; *HA Bacharach Pty Ltd v Queensland* (1998) 195 CLR 547 at 563-4.

20. As the decisions of the Court in *Humby* and *Re Macks* make clear, the retroactive aspect of item 5 is not indicative of any excess of power or infringement of Ch III. The powers of the Commonwealth with respect to the matters enumerated in s 51 of the *Constitution* extend to the enactment of laws having a retroactive effect: *R v Kidman* (1915) 20 CLR 425 at 451; *Polyukhovich*. Nor is it significant, as a matter of constitutional validity, that item 5 of the *Interim Measures Act* has consequences for a limited group of people. That does not provide any indication of usurpation of, or interference with, the judicial process: see *Re Macks* at 234 per Gummow J; *Nicholas v R* (1998) 193 CLR 173 at 191-193, 203, 211-212, 238-239, 277-278; see also *Liyanage* at 289.

21. The concept of "usurpation of the judicial power" is not susceptible of precise and comprehensive definition: *Humby* at 248-9 per Mason J, citing *Liyanage v R* [1967] 1 AC 259 (***Liyanage***) at 289–90. A usurpation of judicial power may occur where legislation removes from the courts their function "of the adjudgment and punishment of criminal guilt under a law of the Commonwealth" (*Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (***Lim***) at 27) or where the legislature has otherwise exercised judicial power on its own behalf: *Nicholas v R* (1998) 193 CLR 173 (***Nicholas***) at 220 per McHugh J. An Act may also involve a usurpation of judicial power if it "prejudges an issue with respect to a particular individual and requires a court to exercise its function accordingly": *Leeth v Commonwealth* (1992) 174 CLR 455 at 470 per Mason CJ, Dawson and McHugh JJ.

22. In *Liyanage* the Privy Council found that the *Criminal Law (Special Provisions) Act 1962* (Ceylon) and the *Criminal Law Act* 1962 (Ceylon) amounted to an interference with the judicial process and infringed the separation of judicial and legislative powers that was implicit in the Constitution of Ceylon. *Liyanage* was an "extreme"

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3 Although the Full Federal Court considered in *Tankey v Adams* (2000) 104 FCR 152 at 163 that directions for reprimand may be foreign to the exercise of judicial power.

case (see *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at 370 per Kirby J) involving legislation of "an unusual character" (*Humby* at 249 per Mason J). The legislation in *Liyanage* was directed specifically to the conviction and punishment of particular offenders in a pending case: *Liyanage* at 290; *Nicholas* at 192, 193, 203. The Privy Council, at 290, agreed with the description of the "pith and substance of both Acts" as being "a legislative plan ex post facto to secure the conviction and enhance the punishment of ... particular individuals".

23. Like s 5 of the *Matrimonial Causes Act 1971* (see *Humby* at 249), item 5 of the *Interim Measures Act* does not interfere with the exercise of Commonwealth judicial power by a Ch III court in any of the ways referred to in the above authorities. The *Interim Measures Act* does not touch the judicial process at all.

24. As to the usurpation of judicial power, it may be accepted that, as a general proposition, an Act of Pains and Penalties is invalid: *Liyanage* at 289. Such an enactment is contrary to the separation of powers because it involves a legislative exercise of, and therefore usurpation of, judicial power: *Liyanage* at 289; *Polyukhovich* at 539, 649, 686, 721.[4] Yet to ask whether a particular Act fits the description of an Act of Pains and Penalties may be apt to distract. The real question is whether the Act involves a purported exercise of the judicial power of the Commonwealth in a manner contrary to the separation of legislative and judicial powers for which the *Constitution* provides: *Polyukhovich* at 649 per Dawson J. That question is not the same as that which arises in respect of an express and specific prohibition on Acts of Attainder, such as applies under the US Constitution:[5] see *Polyukhovich* at 534 per Mason CJ.

25. An Act of the Commonwealth which itself purported to determine the guilt of a particular individual or particular individuals and impose punishment for such guilt would, at least ordinarily, be invalid because the adjudication and punishment of criminal guilt under a law of the Commonwealth is a function exclusively conferred on Ch III Courts: *Lim* at 27; *Waterside Workers' Federation of Australia v J W Alexander* (1918) 25 CLR 434 at 444; *Nicholas* at 220 and 231.

26. Any consideration of the validity of such a law in the specific context of Defence Force discipline would need to take into account the general principles relating to exclusive judicial power postulated in the above authorities and the special nature of the defence power and service offences as considered in *White, Lane* and earlier authorities: see *Lim* at 28 (where Brennan, Deane and Dawson JJ referred to the

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4 As the constitutional vice of Acts of Attainder and Acts of Pains and Penalty is linked to the separation of powers, there is no equivalent restriction on the legislative power of the United Kingdom Parliament. The history of Acts of Attainder and Acts of Pains and Penalty in the United Kingdom is set out in detail in M P Lehmann "The Bill of Attainder Doctrine: A Survey of the Decisional Law" 5 *Hastings Constitutional Law Quarterly* 767 (1978) at 768-777.

5 Article I, s 9, cl. 3 of the US Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed." Article I, s 10, cl. 1 provides: "No State shall ... pass any Bill of Attainder, [or] ex post facto Law".

power of military tribunals to punish breaches of military discipline as one of the "traditional" powers which may be outside the posited "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"). It is unnecessary to resolve any such questions for the resolution of the present case. The *Interim Measures Act* does not purport to convict any person, declare any person's guilt or otherwise determine any person's guilt in respect of any offence. The Act does not contain or constitute a "legislative judgment of guilt": *Lim* at 70 per McHugh J; see also *Nicholas* at 221 per McHugh J and *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319 at 389 per Heydon J.

27. The *Interim Measures Act* therefore lacks one of the essential elements of an Act of Pains and Penalties: *Kariapper v Wijesinha* [1968] AC 717 at 734-735; *Communist Party Case* at 172; *Polyukhovich* at 535 per Mason CJ, 647 per Dawson J, 721 per McHugh J; *Durham Holdings v New South Wales* (2001) 205 CLR 399 at 430 per Kirby J; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 621 per Gummow J (with whom Hayne J relevantly agreed).[6] A declaration of guilt signifies that the legislature has performed an adjudicative function in respect of the person or persons identified in the Act and substituted its judgment for that of a court: see *Polyukhovich* at 646 per Dawson J. Historically, this characteristic of "trial by legislature" was made starkly apparent by the practice adopted by the Parliament in dealing with Bills of Attainder and Pains of hearing the person with whom the bill dealt: *Communist Party Case* at 172 per Latham CJ. The passage of Bills of Attainder and Bills of Pains and Penalties in England was in this and other respects analogous to a criminal trial (see Holdsworth *A History of English Law* (1924), 185), although no rules of evidence governed the parliamentary inquiry: Story *Commentaries on the Constitution of the United States* (1833) §1338; see also M P Lehmann "The Bill of Attainder Doctrine: A Survey of the Decisional Law" 5 *Hastings Constitutional Law Quarterly* 767 (1978) at 776.

28. Leaving aside the different considerations which may apply in the context of detention, there is no support in the Australian authorities for the proposition that an Act which simply imposes on a person or identifiable group of persons liabilities having a punitive character constitutes an Act of Pains and Penalties or, more importantly, constitutes an exercise of the judicial power of the Commonwealth. The enactment of a law which does no more than impose punitive liabilities does not amount to an exercise of the judicial power of the Commonwealth. This much is apparent from the fact that the Commonwealth may legislate to confer on non-Ch III bodies the power to make disciplinary orders or impose liabilities, including those having a punitive character: see *Queen v White; ex parte Byrnes* (1963) 109 CLR

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6 Note also the position in the United States where an Act may be characterised as an "Act of Attainder" for the purposes of the constitutional prohibition without an express declaration of guilt if the circumstances of the passage of the bill demonstrate that there has been a legislative determination of guilt: *United States v Lovett* 328 US 303 (1946) at 316 (although note the dissenting view on this point of Frankfurter J at 321); *Nixon v Administrator of General Services* 433 US 425 (1977) at 473-474.

665 at 670-671; *Tankey v Adams* (2000) 104 FCR 152 at 163-164; *Health Insurance Commission v Grey* (2002) 120 FCR 470 at 487-489; *Selim v Lele* (2008) 167 FCR 61 at 82; see also *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 and *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350.

29. Even if, contrary to the primary submissions above, the *Interim Measures Act* may be construed as having the character of an Act of Pains and Penalties because it imposes certain penalties that are associated with service offences, the Act lacks the finality which is characteristic of an Act of Pains and Penalties. The orders and punishments imposed by virtue of item 5 are subject to review under Pt 7 of Sch 1. Such a review is carried out within the command hierarchy of the Defence Force. 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.

30. The plaintiff's submissions regarding relief go beyond the scope of the question of law which has been referred to the Full Court. The question of law should be answered "yes".

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Stephen Gageler SC
Solicitor General of the Commonwealth
Telephone: 02 9230 8903
Facsimile: 02 9230 8920
Email: Stephen.Gageler@ag.gov.au

Stephen Free
Telephone: 02 9233 7880
Facsimile: 02 9232 7626
Email: stephenfree@wentworthchambers.com.au

Counsel for the Commonwealth of Australia