IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

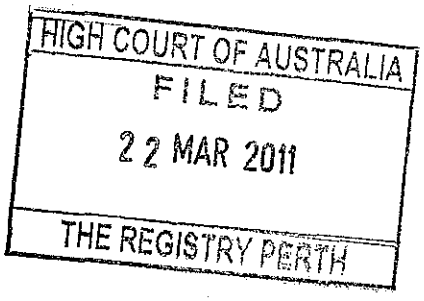
No. S8 of 2011

BETWEEN:

ABLE SEAMAN JOSEPH ANTHONY PETER HASKINS
Plaintiff

and

THE COMMONWEALTH OF AUSTRALIA
Defendant



WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

Date of Document 22 March 2011

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PART I: SUITABILITY FOR PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. Western Australia intervenes pursuant to s 78A(1) *Judiciary Act* 1903 (Cth).

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: APPLICABLE LEGISLATION

4. The legislation applicable to the determination of this matter is set out in the submissions of the Plaintiff and the Defendant.

PART V: CONTENTIONS

5. Western Australia adopts the Defendant's submissions and makes the following supplementary submissions.

6. A law of the Commonwealth or a State based on the *Humby*[1] model is valid subject to:

   (a) in the case of the Commonwealth, there being a relevant head of power under which the law is enacted and the law not offending Ch III or any express or implied prohibition in the Constitution; and

   (b) in the case of a State, the law not offending Ch III or any express or implied prohibition in the Constitution and not being rendered inoperative by reason of s.109.[2]

7. The *Military Justice (Interim Measures) Act (No. 2)* 2009 (Cth) ("Interim Measures Act") does not contravene Ch III. Legislation based on the *Humby* model, such as the Interim Measures Act, does not constitute a bill of pains and

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1 *R v Humby; Ex parte Rooney* (1973) 129 CLR 23.

2 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at [107]-[111], [115]-[116] per McHugh J. See also at [25]-[31] per Gleeson CJ, [79]-[80] per Gaudron J, [208]-[212], [230] per Gummow J, [353]-[355], [366]-[367] per Hayne and Callinan JJ; *R v Humby; Ex parte Rooney* (1973) 129 CLR 23 at 239 per McTiernan J, 240 per Menzies J, 240 per Gibbs J, 243-244 per Stephen J.

penalties. Nor does it involve the legislature in the exercise or usurpation of the judicial power of the Commonwealth.[3]

8. So too, legislation based on the *Humby* model, to remedy an ineffective exercise of judicial power in relation to the criminal process, would not contravene Ch III.

No usurpation or exercise of judicial power of the Commonwealth

Bills of attainder and bills of pains and penalties

9. The Interim Measures Act neither comprises an exercise of, nor an interference with the exercise of, the judicial power of the Commonwealth.

10. At common law, legislation which inflicted punishment upon persons alleged to be guilty of treason or felony "without any conviction in the ordinary course of judicial proceedings" were known as bills of attainder and bills of pains and penalties, the former referring to Acts imposing sentences of death. In the United States, the express constitutional prohibition on bills of attainder has been interpreted as applying to "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict a punishment on them without a judicial trial".[4] An example of an Act held to be a bill of attainder was an Act which purported to prevent persons convicted of offences from challenging those convictions on the ground that they had been prosecuted on an information rather than an indictment.[5] Given the different constitutional context, United States decisions in relation to bills of attainder are not directly applicable in Australia.

11. The adjudication and punishment of criminal guilt is a recognised judicial function which, at the Commonwealth level, is exclusively conferred on Ch III

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3 *R v Humby; Ex parte Rooney* (1973) 129 CLR 23 at 239 per McTiernan J, 243 per Stephen J, 248-250 per Mason J; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at [108] per McHugh J.

4 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 69-70 per McHugh J citing Story, *Commentaries on the Constitution of the United States*, 5th ed. (1891), vol. 2, 216 and *United States v Lovett* (1946) 328 US 303 at 315. For a discussion of the history of bills of attainder see Lehman, *The Bill of Attainder Doctrine: A Survey of the Decisional Law*, 5 Hastings Const LQ 767. See also Maitland, *The Constitutional History of England* (1908) at 215-216, 246 and 319; Holdsworth, *A History of English Law* (1924), Vol IV at 185.

5 See *Putty v United States of America* 220 F 2d 473 (9th Cir, 1955) at 478-479.

courts.[6] Accordingly, Commonwealth legislation characterised as a bill of attainder or a bill of pains and penalties will generally be invalid as an exercise of, or interference with the exercise of, judicial power.[7]

12. In determining whether there has been an interference with judicial power:[8]

> "Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings."

10 13. In this context it is to be noted, first, that it is within the Commonwealth's legislative power to enact legislation with retroactive effect, including by the creation of criminal offences.[9]

14. Secondly, the fact that the Interim Measures Act, as with other legislation based on the *Humby* model, may be capable of application to a defined group of persons does not of itself invalidate it as an interference with the judicial process such as that which occurred in *Liyanage*.[10]

15. Thirdly, the existence of a legislative judgment of guilt or punishment of guilt is central to the determination of whether an Act possesses the characteristics of a

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6 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ citing *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 444 per Griffiths CJ; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 607 per Deane J, 689 per Toohey J, 703-704 per Gaudron J; *Nicholas v The Queen* (1998) 193 CLR 173 at [15]-[16] per Brennan CJ, [112]-[113] per McHugh J, [142] per Gummow J; *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at [16]-[17] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ.

7 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 539 per Mason CJ, 649 per Dawson J, 686 per Toohey J, 721 per McHugh J.

8 *Liyanage v The Queen* [1967] AC 259 at 289.

9 *R v Kidman* (1915) 20 CLR 425 at 432 per Griffith CJ, 442-3 per Isaacs J, 462 per Powers J; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 539 per Mason CJ (Dawson and McHugh JJ concurring at 645 and 719 respectively).

10 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 250 per Mason J; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at [212] per Gummow J. See also *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 50 per Toohey J; *Nicholas v The Queen* (1998) 193 CLR 173 at [27]-[29] per Brennan CJ, [57] per Toohey J, [83]-[84] per Gaudron J, [147]-[148] per Gummow J, [163]-[167] per Kirby J, [246]-[255] per Hayne J; *Baker v The Queen* (2004) 223 CLR 513 at [8] per Gleeson CJ; *Liyanage v The Queen* [1967] AC 259 at 289.

bill of pains and penalties and is invalid as a usurpation of judicial power.[11] The Interim Measures Act lacks those characteristics.

16. As Mason J observed in *Polyukhovic*: [12]

> "The distinctive characteristic of a bill of attainder, marking it out from other *ex post facto* laws, is that it is a legislative enactment adjudging a specific person or persons guilty of an offence constituted by past conduct and imposing punishment in respect of that offence. Other *ex post facto* laws speak generally, leaving it to the courts to try and punish specific individuals.
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> . . .
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> If, for some reason, an *ex post facto* law did not amount to a bill of attainder, yet adjudged persons guilty of a crime or imposed punishment upon them, it could amount to trial by legislature and a usurpation of judicial power. But if the law, though retrospective in operation, leaves it to the courts to determine whether the person charged has engaged in the conduct complained of and whether that conduct is an infringement of the rule prescribed, there is no interference with the exercise of judicial power."

17. To similar effect, Dawson J stated: [13]

> "In designating conduct – whether in the future or the past as criminal, a law does not itself intrude upon the judicial function. It is when the legislature itself, expressly or impliedly, determines the guilt or innocence of an individual that there is an interference with the process of the court. . . Of course, the real question is not whether the Act amounts to a bill of attainder, but whether it exhibits that characteristic of a bill of attainder which is said to represent a legislative intrusion upon the judicial power."

Legislative power to discipline

18. Subject to it being within a head of power, the Commonwealth may legislate to:

(a) confer powers on administrative bodies to regulate disciplinary matters, including in relation to the imposition of liabilities in the nature of disciplinary penalties, without contravening Ch III;[14] and

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11 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 534-535, 537 per Mason CJ (citing with approval *Kariapper v Wijesinha* [1968] AC 717 at 721), 647 per Dawson J, 721 per McHugh J; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 70 per McHugh J; *Nicholas v The Queen* (1998) 193 CLR 173 at [112]-[113] per McHugh J; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [118] per Gummow J(Hayne J concurring at [196]). See also *Phillips v Eyre* (1870) LR 6 QB 1 at 26-27.

12 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 535 per Mason J.

13 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 649-650 per Dawson J.

(b) detain persons for purposes other than punishment for a breach of the criminal law without necessarily infringing Ch III. Established examples include:

- the arrest and detention in custody of persons accused of crimes to ensure that they are available to be dealt with by the courts;[15]
- involuntary detention in cases of mental illness or infectious disease;[16]
- the detention of aliens for the purposes of expulsion or deportation;[17]
- the involuntary detention of indigenous persons for what were at the time perceived as protective purposes;[18]
- the detention during times of war of persons who in the opinion of the executive government are disloyal or a threat to security;[19]
- the detention of persons punished by Parliament for contempt;[20] and
- the detention of members of the armed forces punished by military tribunals for breach of military discipline[21] (see below).

19. The identification of a penal or punitive character of a deprivation of liberty is an essential component of any relevant Ch III limitation on Commonwealth legislative power.[22]

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14 *The Queen v White; ex parte Byrnes* (1963) 109 CLR 665 at 670-671; *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at [90]-[101] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ; *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 at [14] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ, at [28], [46] per Kirby J.

15 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28 per Brennan, Deane and Dawson JJ.

16 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28 per Brennan, Deane and Dawson JJ.

17 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 32 per Brennan, Deane and Dawson JJ; *Al-Kateb v Godwin* (2004) 219 CLR 562.

18 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 84-5 per Toohey J, 110-111 per Gaudron J, 162 per Gummow J. Brennan CJ, Dawson and McHugh JJ found that the limitation arising from Ch III did not apply to territory courts.

19 See *Lloyd v Wallach* (1915) 20 CLR 299 and *Ex parte Walsh* [1942] ALR 359, considered by McHugh J in *Al-Kateb v Godwin* (2004) 219 CLR 562 at [55]-[59].

20 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28 per Brennan, Deane and Dawson JJ.

21 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28 per Brennan, Deane and Dawson JJ.

22 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 32 per Brennan, Deane and Dawson JJ; *Al-Kateb v Godwin* (2004) 219 CLR 562 at [4] per Gleeson CJ, [44] per McHugh J, [657] per Callinan J, cf [128]-[136] per Gummow J.

20. However, as McHugh J observed in *Re Woolley; Ex parte Applicants M276/2003*:[23]

> "The dividing line between a law whose purpose is protective and one whose purpose is punitive is often difficult to draw. This is particularly so where a protective law has acknowledged consequences that, standing alone, would make the law punitive in nature. Protective laws, for example, may also have some deterrent aspect which the legislature intended. However, the law will not be characterised as punitive in nature unless deterrence is one of the principal objects of the law and the detention can be regarded as punishment to deter others. Deterrence that is an intended consequence of an otherwise protective law will not make the law punitive in nature unless the deterrent aspect itself is intended to be punitive."

21. A penalty imposed as a deterrent or a disciplinary measure will not always be regarded as punishment imposable only by a court.[24]

22. The Plaintiff's submission[25], that item 5 of the Interim Measures Act deals with matters which are uniquely susceptible to judicial determination, is inconsistent with his acceptance of the established ability of military tribunals to punish for breach of military discipline (which punishments have traditionally included detention and imprisonment) without exercising the judicial power of the Commonwealth.[26]

23. Whilst dicta exists that, prior to the legislative scheme invalidated in *Lane v Morrison*[27], military tribunals did not exercise "the judicial power of the Commonwealth" identified in s.71 but did exercise "judicial power", this is best understood as a reference to such tribunals acting judicially in their exercise of non-judicial power.[28]

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23 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at [61] per McHugh J. See also *Al-Kateb v Godwin* (2004) 219 CLR 562 at [251]-[267] per Hayne J (Heydon J concurring at [303]).

24 *Al-Kateb v Godwin* (2004) 219 CLR 562 at [291] per Callinan J.

25 Plaintiff's submissions, para 74.

26 Plaintiff's submissions, para 78, citing *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ. See also *White v Director of Military Prosecutions* (2007) 231 CLR 570 at [236] per Callinan J (Heydon J concurring at [246]), [57]-[58] per Gummow, Hayne and Crennan JJ; *The Commonwealth v Tracey* (1989) 166 CLR 518 at 564 per Brennan and Toohey JJ; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501at 626-627 per Deane J.

27 (2009) 239 CLR 230.

28 *Lane v Morrison* (2009) 239 CLR 230 at [47]-[48] per French CJ and Gummow J. See also at [96]-[97] per Hayne, Heydon, Crennan, Kiefel and Bell JJ.

Humby model

24. The Interim Measures Act is in all material respects consistent with the legislative model upheld in *R v Humby; Ex parte Rooney*[29] and found not to usurp or comprise an exercise of judicial power.[30] It does not seek to validate previously invalid acts. Rather it declares rights and liabilities by reference to the rights and liabilities as purportedly determined by an ineffective exercise of judicial power. It adopts the purported orders as the factum, or point of historical reference, by reference to which rights and liabilities are declared.

25. The *Humby* legislation[31] was directed to remedying the consequences of the decision in *Knight v Knight*[32] that the jurisdiction vested in the Supreme Court of South Australia by s.23 of the *Matrimonial Causes Act* 1959 (Cth) could be exercised by judges of that Court but not its Master. A consequence of the *Humby* legislation was that it exposed Humby to a potential penalty of being committed to gaol for up to 12 months for failing to comply with the purported order to pay maintenance made by a Master of the Supreme Court.[33] Another apparent consequence was that if any persons had already been committed to prison for such an alleged breach they would have been required to continue to serve that term of imprisonment. The *Humby* legislation was nevertheless valid and did not contravene Ch III.

26. The *Humby* model has been adopted in other circumstances to remedy the consequences of the invalidity of acts by officers of courts, including those purportedly exercising federal jurisdiction.

27. In 1997 the Full Court of the Family Court of Australia held that Registrars of the Family Court of Western Australia did not have power to make certain orders under delegated powers, no provision having been made for the review of

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29 (1973) 129 CLR 23. A similar model was also upheld in *Re Macks; Ex parte Saint* (2000) 204 CLR 158.

30 *R v Humby; Ex parte Rooney* (1973) 129 CLR 23 at 239 per McTiernan J, 243 per Stephen J, 248-250 per Mason J; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at [108] per McHugh J.

31 *Matrimonial Causes Act* 1971 (Cth).

32 (1971) 122 CLR 114.

33 Humby had been charged by complaint with having failed to comply with the (purported) order that he pay maintenance contrary to s.169 of the *Community Welfare Act* 1972 (SA).

such orders except on appeal.[34] Western Australia and the Commonwealth enacted laws based on the *Humby* model to remedy the effect of the invalid determinations that had been made by the Registrars. The *Family Court (Orders of Registrars) Act* 1997 (WA) and *Family Court of Western Australia (Orders of Registrars) Act* 1997 (Cth), inter alia, declared persons' rights and liabilities by reference to their rights and liabilities as purportedly determined by the ineffective exercise of judicial power by the Registrars.[35]

28. In *Re Wakim; Ex parte McNally*[36] State legislation was held to have invalidly purported to confer jurisdiction on the Federal Court as part of a scheme of cross-vesting. In *Re Macks; Ex parte Saint*[37] it was held that State legislation based on the *Humby* model to remedy the effect of the former decision was valid. The legislative model provided, inter alia, that "the rights and liabilities of all persons are, by force of this Act, declared to be, and always to have been, the same as if . . . each ineffective judgment of . . . the Federal Court of Australia . . . or . . . the Family Court of Australia had been a valid judgment of the Supreme Court" of that State.[38]

29. So too, at least in certain circumstances, it would be within the legislative competence of the Commonwealth or the States to enact legislation based on the *Humby* model to remedy an ineffective exercise of judicial power by a court in relation to the criminal process without contravening Ch III.

30. For example, if State legislation purportedly establishing criminal offences was found to be invalid for inconsistency with Commonwealth laws, it would be open to the Commonwealth to pass remedial legislation.

31. For there to be such an inconsistency the inconsistent Commonwealth laws must necessarily be within the legislative competence of the Commonwealth. It would therefore be open to the Commonwealth to enact legislation based on the *Humby* model under the same head of power. Such legislation could provide for

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34 *Horne v Horne* (1997) 137 FLR 144.

35 Section 4 *Family Court (Orders of Registrars) Act* 1997 (WA); s 5 *Family Court of Western Australia (Orders of Registrars) Act* 1997 (Cth). The Commonwealth legislation was directed to ineffective orders made in purported exercise of the federal jurisdiction of the Family Court of Western Australia.

36 (1999) 198 CLR 511.

37 (2000) 204 CLR 158.

38 Section 6 *Federal Courts (State Jurisdiction) Act* 1999 (Qld); s.6 *Federal Courts (State Jurisdiction) Act 1999* (SA).

the rights and liabilities of all persons to be the same as if each relevant order were an order of a court exercising federal jurisdiction under a law of the Commonwealth in the same terms as the invalid State law.[39] Those rights could be specified to include the right of a person who was a party to the proceeding or purported proceeding in which the ineffective judgment was given or recorded to appeal against that judgment. A similar approach was adopted in the legislation that was held to be valid in *Re Macks; Ex parte Saint.*[40]

32. That the effect of such legislation would be to require persons sentenced to penalties including imprisonment to continue to suffer those penalties, would not necessitate a conclusion that such legislation was a bill of pains and penalties or otherwise usurped or interfered with the exercise of the judicial power of the Commonwealth.

33. If the Commonwealth legislature made its own assessment of whether an accused did certain acts or had certain intentions, without those acts or intentions being "open to scrutiny by the court"[41] or substituted "a legislative judgment of guilt for the judgment of the courts exercising federal judicial power"[42], it would generally contravene Ch III.

34. However, the adoption of the *Humby* model would involve no such contravention. Rather, the legislature would be adopting the earlier purported determinations by courts as a factum for declaring the rights and liabilities of such persons.

35. For the above reasons, the Interim Measures Act does not contravene Ch III.

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39 A relevant order could be an order of conviction or sentence or an ancillary or consequential order made by a court, before the date of the decision which found the State law to be invalid, in relation to an alleged offence against the invalid State law.

40 (2000) 204 CLR 158. See s. 6 of the *Federal Courts (State Jurisdiction) Act* 1999 passed by each State.

41 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 686 per Toohey J.

42 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 70 per McHugh J.

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