

NICHOLAS TAYLOR - BARRISTER

THE HIGH COURT DECISION IN LINCOLN v COMMISSIONER OF POLICE 2013

LEGAL OPINION – 10 SEPTEMBER 2013



My name is Nicholas Taylor. I am a specialist firearms lawyer and have practiced in the field of criminal and civil law relating to firearms in New Zealand for the past sixteen years. Over this time I have appeared before the courts in New Zealand on a daily basis in regards to firearm cases. I regularly advise shooters, collectors and gun dealers nationwide on issues relating to firearms law in New Zealand.

A recent decision by the High Court in the case of Lincoln v Commissioner of Police 2013, NZHC 1813, has altered the interpretation of the law in regards to military-style semi-automatics (MSSA's).

I have been asked by a number of firearms dealers to examine this case in the context of the Arms Act 1983 and to give my opinion on its meaning. They have allowed this opinion to be distributed for the benefit of the wider firearms community.

[What was this case about?](#)

A declaration was sought from the High Court in regards to a number of disputed matters concerning the interpretation of the Arms Act 1983 and for the clarification of other matters in doubt or dispute in regards to police policy.

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In his decision Justice Panckhurst identified 5 questions to be considered:

- 1) Is a permit to procure required for the conversion of a firearm to a MSSA firearm? **Decision: the Judge declared that no permit to procure is required.**
- 2) When the statutory criteria are met, can the police still refuse to issue a permit to procure a MSSA firearm? **Decision: the Judge refused to deal with this issue as it was outside the realm of a declaratory judgment.**
- 3) In considering an application for an endorsement to authorise the possession of a MSSA firearm, may the police a) impose a pre-condition that firearm security must first be in place, and b) adopt a blanket policy to this effect? **Decision: the Judge refused to make a declaratory judgment on this question but commented “... requiring the installation of a safe storage facility as a precondition to granting the E endorsement seems premature”.**
- 4) When considering an application to import a MSSA firearm, may the police a) impose conditions in relation to the permit, and b) if so, may the police impose a condition requiring the surrender of an unserviceable MSSA or part? **Decision: the Judge refused to make a declaration in regards to this question.**
- 5) Is it an offence against the Arms Act 1983 for a non-licenced person to possess a MSSA under the immediate supervision of a licence holder? **Decision: the Judge declined to grant relief, meaning that you could be prosecuted with supplying a MSSA to an unlicenced person, however the judge commented that it appeared to be a drafting error. This may lend itself to a defence against such a charge, such as “mistake at law”, and could promote the argument for parliament to amend a drafting error now identified by the High Court.**

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What does this decision mean?

The case successfully had a declaration made in regards to Point 1 as follows:

THE DECLARATION

“A permit to procure under s 35 of the Arms Act 1983 is not required where a person modifies an existing semi automatic firearm to create a military style semi automatic firearm.” (Lincoln v Commissioner of Police 2013, Paragraph 34, The declaration).

It appears from this judgment that if you are the holder of an ‘E’ endorsement on your firearms license, then you may own and possess a rifle that you have converted into a MSSA configuration. No offence is committed by you as no permit to procure your own firearm is required.

As an example – you hold an ‘E’ endorsement and possess a “sporting configured” AR15 rifle, an ‘A’ category rifle. You decide you would like to convert this to a MSSA rifle by placing a large capacity magazine into the rifle, along with a flash hider and an original, military-style pistol grip. You need to apply for an endorsement for this converted firearm under section 30A of the Arms Act 1983. You need to fill in a form provided by the police. No fee (should be) required and no approval is required. The application can only be refused on the basis of you not being a “fit and proper person” to possess that MSSA (section 30B of the Arms Act 1983), which would be highly unlikely given the fact that you already possess an ‘E’ endorsement attached to your firearms licence.

You must have a MSSA endorsement on your firearms licence and apply for and receive an endorsement for the specific firearm you wish to convert. If you do not, and you convert a firearm to a MSSA configuration, you will be committing an offence against section 50 (1) (c) of the Arms Act 1983.

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It appears from this decision, and from the decision in *Jenner v Attorney General* 2009, BLC514, that there are two types of endorsement. The first is an endorsement that attaches to a standard firearms licence giving a person authority to possess a “special category” of firearm, such as MSSA’s. The second is an endorsement that attaches and refers to a specific firearm. The general rule is that one endorsement equals one firearm.

My understanding is that the police are currently in the process of drafting a new form for this purpose entitled “Request to Add a Firearm to an Endorsement” (a draft copy of this document is attached). Note that this may not be the final form as in my opinion it contains some erroneous material and wording, for example, multiple firearms cannot be attached to a single endorsement. You can contact your local Police Arms Officer for a current version of this form. Section 30A (2) of the Arms Act 1983 states the police must provide the “form” on which an application for an endorsement is to be made.

It is important to note that you can then only sell this converted firearm to another person if they produce a permit to procure that firearm. If not, you will be committing an offence against section 44 (1) of the Arms Act 1983.

Once the firearm in this MSSA configuration is to be sold it will then be subject to the permit process under section 35 of the Arms Act 1983 and must be dealt with in accordance with the Arms Regulations 1992, section 26. This is where the firearm details, including make, model, serial number, your name as the seller and the name of the purchaser, will be recorded in the NIA (National Intelligence Application – the police computer system).

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In my opinion, this decision in Lincoln v Commissioner of Police 2013 means that:

- ⇒ If you are an 'E' endorsed license holder, and
- ⇒ If you have an 'A' category firearm currently in your possession, then
- ⇒ You may convert this firearm to a MSSA configuration.
- ⇒ You must fill in a Police-provided "Request to Add a Firearm to an Endorsement" form (draft example attached) with the firearm details and your details and post it to your Police Arms Officer. No further steps need to be taken. No reasons or purpose need to be given.
- ⇒ This application can only be refused on the basis that you are not a 'fit and proper person'; it does not need police "approval".
- ⇒ You may then possess and use this firearm as a MSSA firearm from this time forward.
- ⇒ It must be stored and secured in the same way as other MSSA firearms in your possession (section 28 of the Arms Regulations 1992).
- ⇒ If you sell this now converted MSSA firearm, the purchaser must obtain a permit to procure it under section 35 of the Arms Act 1983.
- ⇒ You must not supply (give to, hand-over, or lend to hold or use) this MSSA firearm to anyone without a permit to procure, even at a gun range under your immediate supervision.

General waiver

This opinion is a brief description of the decision in Lincoln v Commissioner of Police 2013. It is not a complete review of all the matters raised, discussed or decided upon, and should be read in conjunction with the Arms Act 1983, the

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Arms Amendment Act 2012, the Arms Regulations 1992 and a copy of the full decision of Justice Panckhurst in *Lincoln v Commissioner of Police* 2013 CIV 2012-409-000866 (2013 NZHC 1813).

Please note, categories of firearms licence referred to in this opinion, such as 'A' 'B' 'C' 'D' 'E', are used for convenience only as these categories are not mentioned in the Arms Act 1983 or Arms Regulations 1992.

If you need further information in regards to this opinion please don't hesitate to contact me.



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Nicholas J. B. Taylor

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