HIGH COURT OF AUSTRALIA

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### Details of Filing

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### Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: JZQQ
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

**APPELLANT'S SUBMISSIONS**

## Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

## Part II: Issues

2. The issues in this appeal are:
   a. Did the *Migration Amendment (Aggregate Sentences) Act 2023* (Cth) (**Amending Act**) apply, or purportedly apply, to the Appellant? Specifically, is a decision made by the Tribunal under s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) capable of meeting the Amending Act's description of a decision made 'under' the *Migration Act 1958* (Cth) (**Migration Act**)?
   b. If so, was the Amending Act invalid to the extent that it purportedly applied to the Appellant? Specifically, in its purported application to the Appellant was the Amending Act beyond the legislative power of the Commonwealth Parliament by reason of it: (i) directing the courts as to the conclusions they should reach in the exercise of their jurisdiction; and/or (ii) having the legal or practical operation of denying a court exercising jurisdiction under, or derived from, s 75(v), the ability to enforce the limits which Parliament has expressly or impliedly set on executive power?
   c. If the Amending Act did not apply to the Appellant (either because it was invalid or otherwise), should the Federal Court's decision nevertheless be upheld on the basis that – contrary to ***Pearson*** *v Minister for Home Affairs* (2022) 295 FCR 177 – the Appellant's aggregate sentence of 15 months' imprisonment was a 'term of imprisonment of 12 months or more' within the meaning of s 501(7)(c) of the Migration Act and thus the Tribunal did not err jurisdictionally in not being satisfied that the Appellant passed the character test in s 501(6) of that Act?
3. The final issue is raised by the First Respondent's notice of contention. The Appellant will address this issue in writing after receiving the First Respondent's submissions.

## Part III: Notice of constitutional matter

4. The Appellant has given notice under s 78B of the *Judiciary Act 1903* (Cth).

## Part IV: Reports of the judgments below

5. The judgment of the Full Court of the Federal Court is reported at *JZQQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 413 ALR 620.

## Part V: Facts[1]

6. The Appellant was born in Somalia in 1974. He subsequently fled the civil war in that country to Kenya, and then to New Zealand, where he was granted refugee status. In 2011, the Appellant moved to Australia where, by this time, he had two children of his first marriage and later a daughter born in 2010 of his second marriage (CAB 9).
7. On 1 September 2021, the Appellant was convicted of intentionally causing injury and making threats to kill (the offending occurring in late December 2020) and he was sentenced to an aggregate term of imprisonment of 15 months (**aggregate sentence**) (CAB 7 [3]). The Tribunal later accepted that this offending was a 'once-off' and 'an extreme aberration in' the Appellant's personal history (CAB 31 [114]).
8. The Appellant's visa was subsequently cancelled, purportedly on the basis that he failed the 'character test' in s 501 of the Migration Act because he had been sentenced to a term of imprisonment of 12 months or more. The Appellant unsuccessfully sought revocation of that cancellation decision under s 501CA(4) of the Migration Act. He then applied to the Tribunal for review of the non-revocation decision.
9. On 29 August 2022, the Tribunal affirmed the non-revocation decision (CAB 4). The Tribunal concluded that the Appellant did not pass the character test by reason of the aggregate sentence. The Tribunal was not satisfied that there was 'another reason' to revoke the cancellation decision, despite accepting that the risk of the Appellant engaging in further criminal conduct was 'low' and that the best interests of the Appellant's 11-year-old daughter weighed in favour of revocation, as did his other links to Australia (CAB 21 [74], 27 [100], 36 [136], 48 [195]–[196]).
10. On 26 September 2022, the Appellant (unrepresented) lodged an originating application in the Federal Court seeking judicial review of the Tribunal's decision (ABFM 4).
11. On 22 December 2022, the Full Court of the Federal Court published its reasons in *Pearson*, relevantly holding that an aggregate sentence is not '*a* term of imprisonment' for the purposes of the character test in s 501 of the Migration Act.
12. On 23 December 2022, the Appellant was approached by his case worker in immigration detention. He was told 'I have good news for you. You are a free man' (ABFM 19–20). The Appellant was then released from immigration detention because it was recognised, for the reasons given in *Pearson*, that he passed the character test. In an affidavit later

[1] The facts at [6]–[17] were not disputed on the application for special leave to appeal.

filed in the Federal Court, the Appellant explained that in his time back in the community he reconnected with family and friends, spent time with his children, and performed his first big concert at a Somali New Year's Eve party (ABFM 20). He also secured employment as a halal slaughterman, which he was to commence on 20 February 2023.

13. On 20 January 2023, the Appellant (now represented) lodged an amended originating application, ground 5 of which asserted – relying on *Pearson* – that the Tribunal had erred in concluding that the Appellant failed the character test on account of the aggregate sentence (CAB 51).

14. Ahead of a case management hearing on 14 February 2023, the Respondent foreshadowed seeking an adjournment of the proceeding pending the determination of any special leave application against *Pearson* and/or the anticipated enactment of the Amending Act. The Appellant filed submissions opposing that adjournment (ABFM 10–4). The Respondent ultimately did not press for an adjournment.

15. On 14 February 2023, the Appellant was granted leave to file his amended originating application, relevantly raising the *Pearson* ground (ABFM 15).

16. On 17 February 2023, the Amending Act commenced, having received royal assent the previous day. Australian Border Force officers attended the Appellant's address and told him that he had to come for an interview (ABFM 21). He cooperated, only to find he was being re-detained on the purported authority of the Amending Act.

17. The effect of the above chronology is that, had the proceedings below been heard and determined on 14 February 2023, the Federal Court would have inevitably granted the Appellant the relief he sought, including quashing the Tribunal's decision. It was only the enactment of the Amending Act that changed that otherwise certain outcome and prevented the Court from declaring invalid a decision which was invalid at the time it was made (and at the time that the Appellant commenced proceedings).

18. After the Chief Justice of the Federal Court directed that the Appellant's matter be heard by a Full Court, the Court dismissed his amended application. On ground 5, the Court relevantly held that the Amending Act: applied to the Tribunal's decision under s 43 of the AAT Act (J [96]); and was not invalid as an impermissible direction to the Court as to the manner and outcome of the exercise of its jurisdiction (J [99]–[102]).[2] The Court

[2] The Federal Court did not separately address the Appellant's argument based on the entrenched minimum provision of judicial review. The Court did deal with, and reject, an argument that the Amending Act was invalid by reason of s 51(xxxi) even though the Appellant had not pressed that argument orally.

then went on immediately to conclude that 'Ground 5 must be rejected' (J [108]). It follows that the Court must have concluded that the application of the Amending Act left no room for any of the relief sought by the Appellant, even an order that quashed the decision but allowed the Amending Act to operate on that quashed decision.[3]

## Part VI: Argument

19. The three independent reasons why the Appellant must succeed are addressed below.

### A. Amending Act did not apply because Tribunal's decision was 'under' AAT Act

20. The Amending Act did not apply to the Appellant because it only relevantly applied to decisions made, or other things done, 'under' the Migration Act.[4] The Tribunal's decision in the Appellant's proceeding was made 'under' the AAT Act, *not* the Migration Act. The Federal Court was wrong to conclude otherwise (J [94]–[95]).

*Authority confirms that Tribunal's decision was made 'under' AAT Act*

21. There is a long line of case law supporting the view that Tribunal decisions in merits review proceedings are made 'under' the AAT Act, rather than the enactment under which the original decision was made. That view has its roots in cases as early as *Brian Lawlor Automotive Pty Ltd and Collector of Customs*, where Brennan J said that 'the only decision which takes effect under the enactment' is the primary decision, *not* a Tribunal decision on review to affirm that primary decision.[5] Later, French J observed:

> when the Tribunal affirms a decision in my opinion it exercises a power conferred by s 43(1)(a). It does not exercise afresh the power conferred by the enactment under which the decision reviewed was made. … Relevantly for present purposes therefore the decisions of the Tribunal affirming the decisions of the Minister's delegate were not decisions made under the Migration Act or the regulations relating to visas.[6]

22. French J's observations were subsequently endorsed by a Full Court, which observed: 'the source of the AAT's power is s 43 of the AAT Act. It does not exercise afresh the power conferred by the enactment under which the decision was made'.[7] Those remarks

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[3] Contrast *Re Macks; Ex parte Saint* (2000) 204 CLR 158, [113] (McHugh J). See also *Independent Commission Against Corruption Act 1988* (NSW) sched 4, s 35(5), considered in *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83.
[4] Amending Act sched 1, item 4(2).
[5] *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs* (1978) 1 ALD 167, 175–6 (Brennan J), approved *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, [100] (Hayne and Heydon JJ).
[6] *Powell v The Administrative Appeals Tribunal and Anor* (1998) 89 FCR 1, 12 (French J, emphasis added).
[7] *Madafferi v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 326, [68] (the Court).

are consistent with the way this Court has described Tribunal decisions as being made 'under' s 43 of the AAT Act.[8]

23. To the extent Mortimer J (as her Honour then was) said something different in *Williams v Minister for Immigration and Border Protection*,[9] her Honour's comments turned upon the statutory context in which the word 'under' there appeared in s 499(1) of the Migration Act. The context is very different here. In particular, the question of construction here arises in a validating statute. The orthodox approach to such statutes is that courts will be careful not to extend their validating effect beyond the decisions clearly identified in the statute,[10] which is consistent with the approach to deeming provisions more generally.[11]

*The Full Court's errors in this regard*

24. Contrary to that usual approach to deeming provisions – or, indeed, to any question of statutory construction, which 'must begin with consideration of the text'[12] – the Federal Court apparently approached the question on the basis that the Tribunal's decision would fall within the operation of the Amending Act unless the Appellant could show that it was 'exempt' or 'exclude[d]' (J [95], [96]).

25. However, even on that approach, the Court did not expressly hold that the Tribunal's decision was made 'under' the AAT Act. Instead, it said that it was 'difficult to resist' the conclusion that the Tribunal's jurisdiction is conferred by s 500(1) of the Migration Act and that, by reason of s 43 of the AAT Act, in exercising that jurisdiction the Tribunal may exercise the powers conferred on the original decision-maker (J [94]). That reasoning did not answer the question of whether the Tribunal's decision was made 'under' the AAT Act or the Migration Act.

26. Perhaps that is why the Court went on to suggest that, even if the Tribunal's decision was made 'under' the AAT Act, it 'did something else'[13] under the Migration Act in 'undertaking a review' (J [95]). There are two problems with that suggestion. First, in

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[8] *Minister for Immigration & Border Protection v Makasa* (2021) 270 CLR 430, [50] (the Court).
[9] (2014) 226 FCR 112, [12], [43], [60]–[65] (Mortimer J).
[10] *Martinez v Minister for Immigration & Citizenship & Anor* (2009) 177 FCR 337, [29] (Rares J).
[11] *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693, 696 (Griffith CJ); *Wellington Capital Ltd v Australian Securities and Investments Commission* (2014) 254 CLR 288, [51] (Gageler J). See also *Commissioner of Taxation v Comber* (1986) 10 FCR 88, 96 (Fisher J).
[12] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, [47] (Hayne, Heydon, Crennan and Kiefel JJ, French CJ agreeing).
[13] Referring to paragraph (c) of the definition of 'do a thing' in Amending Act shed 1, item 2.

'undertaking a review' the Tribunal was exercising 'jurisdiction … conferred on the AAT by ss 25 and 43 of the AAT Act'.[14] Second, even if it were accepted that in 'undertaking a review' the Tribunal 'did something' under the Migration Act, the only thing that mattered for the purpose of the proceedings in the Federal Court was the Tribunal's *decision*. If the Amending Act did not apply to that decision, then the Applicant's *Pearson* ground was bound to succeed whether or not the Amending Act might have applied to 'something else' that the Tribunal did in undertaking the review.

**B. Amending Act an invalid direction to the Court in the exercise of its jurisdiction**

27. The Federal Court accepted the **direction principle** that 'the Parliament cannot enact a law purporting to direct the courts as to the manner and outcome of the exercise of their jurisdiction' (J [99], internal quotation marks removed). The Court also accepted:

> In the present case, from the date on which this Court made an order permitting the applicant to rely on an amended application raising the Pearson point (14 February 2023) until 16 February, this Court had jurisdiction and the power to make an order quashing the Tribunal's decision but, as from the day on which the Amending Act commenced, 17 February 2023, was subsequently deprived of that power. (J [100], emphasis added)

28. However, the Court found that the direction principle was not infringed by the Amending Act on the basis that '[t]here is nothing constitutionally offensive about a law which declares or changes the parties' substantive rights, even if they are the subject of pending judicial review proceedings' (J [102]).

29. That is exactly the type of 'all-embracing proposition' about which members of this Court expressed concern in *Australian Education Union v General Manager of Fair Work Australia* (***AEU***).[15] To be accurate, the proposition must be qualified as follows: 'that a statute affects rights in issue in pending litigation does not necessarily involve an invasion of judicial power'.[16] Whether or not such a statute infringes the direction principle requires analysis of 'substance, not merely of form'.[17] When the Amending Act is subjected to that analysis, it should be found to be invalid, albeit only in its application to pending proceedings.

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[14] *Frugniet v Australian Securities and Investments Commission* (2019) 266 CLR 250, [51] (the Court). See also *Miller v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 13, [13] (the Court).
[15] (2012) 246 CLR 117, [87] (Gummow, Hayne and Bell JJ).
[16] *H A* ***Bachrach*** *Pty Ltd v Queensland* (1998) 195 CLR 547, [16] (the Court, emphasis added).
[17] *Bachrach* (1998) 195 CLR 547, [12] (the Court).

*The origins and development of the direction principle*

30. The constitutional risk against which the direction principle protects was recognised during the framing era. Harrison Moore wrote of the 'temptation to which Legislatures are liable … to apply a new rule to past acts or events', which he described as an 'invasion of judicial power'.[18] Moore referred to the seminal American authority of *United States v Klein*,[19] which held that Congress could not pass legislation the effect of which was to direct the outcome of a particular case.[20] Also around the time of the framing, Andrew Inglis Clark wrote against 'an attempted encroachment on the provinces of the judiciary' by 'any exposition of the purport of the language of an existing law, or any declaration of the existence of any rights or liabilities as the result of its enactment'.[21]

31. This Court first[22] considered the issue in ***Nelungaloo*** *Pty Ltd v Commonwealth*,[23] which concerned a provision which provided that a ministerial order previously given under regulations 'shall be deemed to be, and at all times to have been, fully authorised by that regulation, and shall have, and be deemed to have had, full force and effect according to its tenor'.[24] The provision was challenged on the basis that it attempted to 'prescribe the construction to be placed upon an existing law by the court and the determination of the meaning of a statute is of the essence of judicial power'.[25] Williams J dismissed the argument at first instance without considering the operation of the law on pending proceedings.[26] On appeal, Latham CJ held that the ministerial order was valid in the first place (as did Starke J[27]) and that the subsequent legislation removed any doubt about that.[28] McTiernan J held to similar effect.[29] Rich J and Webb J did not consider the issue. Dixon J (as his Honour then was) dealt with the matter briefly, and without a great deal

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[18] WH Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) 322.
[19] 80 US (13 Wall) 128 (1871), referred to at WH Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) 323.
[20] 80 US (13 Wall 128 (!871).
[21] A Inglis Clark, *Studies in Australian Constitutional Law* (1901, reprinted 1997) 39.
[22] See also *Sendall v Federal Commissioner of Land Tax* (1911) 12 CLR 653, 665 where a regulation was passed after reasons were published but before judgment was entered. Griffith CJ described it as 'remarkable that … one of the suitors should endeavour to alter the rights of the parties'. That case was subsequently understood to stand for the proposition that 'the Commonwealth could not by declaratory legislation place an interpretation upon an Act which would affect a pending case since this would be an invasion of the judicial sphere'. G Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (3rd ed, 1962) 167.
[23] (1948) 75 CLR 495.
[24] *Nelungaloo* (1948) 75 CLR 495, 496.
[25] *Nelungaloo* (1948) 75 CLR 495, 503 (Williams J), see also 520 (argument).
[26] *Nelungaloo* (1948) 75 CLR 495, 503–4 (Williams J).
[27] *Nelungaloo* (1948) 75 CLR 495, 545 (Starke J).
[28] *Nelungaloo* (1948) 75 CLR 495, 531 (Latham CJ).
[29] *Nelungaloo* (1948) 75 CLR 495, 584 (McTiernan J).

of elaboration. Importantly, however, his Honour opined that the legislation 'should be treated in the same way as if it said that the rights and duties of the growers and of the Commonwealth should be the same as they would be, if the order was valid'.[30] Thus, his Honour did not understand the legislation to require the Court to declare as valid that which was in fact invalid; rather, the Court was required to honour the legal effects that Parliament had attached to what remained invalid executive acts.

32. In *R v* ***Humby****; Ex parte Rooney*,[31] the Court was concerned with a Commonwealth law enacted in response to the High Court's earlier decision holding that certain decrees given by non-judicial officers of State Supreme Courts were invalid. The remedial legislation provided that '[t]he rights, liabilities, obligations … of all persons are by force of this Act, declared to be, and always to have been, the same as if … the purported decree had been made by the Supreme Court of that State constituted by a single judge'.[32] Stephen J gave the leading judgment, in which Menzies and Gibbs JJ agreed. His Honour explained of the legislation that neither of its operative provisions 'purports to effect a "validation" of the purported decrees' because the legislation 'does not deem those decrees to have been made by a judge nor does it confer validity upon them; it leaves them, so far as their inherent quality is concerned, as they were before the passing of this Act. <u>They retain their character of having been made without jurisdiction</u> … as attempts at the exercise of judicial power they remain ineffective.'[33] This has subsequently been explained to be the distinction at the heart of the judgment.[34] Stephen J explained that the legislation operated 'by attaching to them [the purported decrees], as acts in the law, consequences which it declares them to have always had'.[35] McTiernan J also held that the effect of the legislation was 'to give binding force of a legislative nature to a "purported decree" … It does not aim at establishing a "purported decree" as a judicial decree or order.'[36] Mason J referred without criticism to ***Liyanage*** *v The Queen*[37]

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[30] *Nelungaloo* (1948) 75 CLR 495, 579 (Dixon J).
[31] (1973) 129 CLR 231. See also, around this time, *Clyne v East (No 1)* (1967) 68 SR (NSW) 385. However the legislation in that case 'did not affect any pending litigation': 5 (Asprey JA) See also PH Lane, *Lane's Commentary on the Australian Constitution* (2nd ed, 1997) 484: 'the Act disadvantaged future lessors only, not Clyne himself'.
[32] *Humby* (1973) 129 CLR 231, 238.
[33] *Humby* (1973) 129 CLR 231, 242–243 (Stephen J, emphasis added).
[34] Hon Wayne Martin AC, 'The Third Branch of Government: The Constitutional Position of the Courts of Western Australia' (2012) *University of Western Australia Law Review* 184, 197. See, to similar effect, *University of Wollongong v Metwally* (1984) 158 CLR 447, 478 (Deane J).
[35] *Humby* (1973) 129 CLR 231, 243 (Stephen J).
[36] *Humby* (1973) 129 CLR 231, 239 (McTiernan J).
[37] [1967] 1 AC 259.

(discussed below), but held that 'the sub-section does not attempt to validate the decree' and thus in the instant case 'there is not enough in these circumstances to support the conclusion that there has been a usurpation of judicial power'.[38] It has since been said of *Humby* that '[c]entral to the reasoning of the Court was the conclusion that the legislation did not purport to validate the invalid decrees but, rather, established, as was within legislative competence, rights, liabilities, obligations and status of persons.'[39]

33. In *Australian Building Construction Employees and Builders Labourers' Federation v Commonwealth* (***BLF (Cth)***),[40] an industrial group (**BLF**) had proceedings on foot in this Court seeking to quash a decision of the Conciliation and Arbitration **Commission** made under Commonwealth legislation, which decision had been a precondition to the Minister's statutory power to cancel the BLF's registration. While those proceedings were pending, the Commonwealth Parliament enacted legislation which provided that the BLF's registration 'is, by force of this section, cancelled.'[41] The Court dismissed a challenge to the validity of the legislation, holding that it 'does not deal with any aspect of the judicial process. It simply deregisters the Federation, making redundant the legal proceedings which it commenced in this Court.'[42]

34. In *Building Construction Employees and Builders Labourers' Federation of New South Wales v Minister of Industrial Relations* (***BLF (NSW)***),[43] the BLF had proceedings on foot in State court challenging the cancellation of its registration under State legislation. After those proceedings were dismissed, but while an appeal by BLF was pending, the State Parliament enacted legislation validating ministerial acts in relation to the cancellation to 'remove doubts which had arisen in the argument of the case' at first instance.[44] The legislation provided that BLF's registration 'shall, for all purposes, be taken to have been cancelled'.[45] Street CJ held that the impugned provisions were 'cast in terms that amount to commands to this Court as to the conclusion that it is to reach in the issues about to be argued before it'.[46] His Honour explained the vice as follows: 'Rather than substantively validating the cancellation of the registration and the

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[38] *Humby* (1973) 129 CLR 231, 249, 250 (Mason J).
[39] *Re Macks; Ex parte Saint* (2000) 204 CLR 158, [15], see also [25] (Gleeson CJ).
[40] (1986) 161 CLR 88.
[41] *BLF (Cth)* (1986) 161 CLR 88, 93.
[42] *BLF (Cth)* (1986) 161 CLR 88, 96 (the Court).
[43] (1986) 7 NSWLR 372.
[44] (1986) 7 NSWLR 372, 395 (Kirby P).
[45] *BLF (NSW)* (1986) 7 NSWLR 372, 377.
[46] *BLF (NSW)* (1986) 7 NSWLR 372, 378 (Street CJ).

Ministerial certificate, Parliament chose to achieve its purpose in terms that can be more accurately described as directive rather than substantive.'[47] Accordingly, the legislation would have been invalid had it been enacted by the Commonwealth Parliament because it 'was a legislative interference with the judicial process of this Court by directing the outcome of particular litigation'.[48] Similarly, Kirby P said of the legislation that 'the terms in which it is cast' showed that it was 'more apparently a direct intrusion into the judicial process than was the case with the Federal Acts'.[49]

35. In ***Lim*** *v Minister for Immigration, Local Government and Ethnic Affairs*,[50] the plaintiffs had proceedings pending in the Federal Court relevantly seeking orders that they be released from custody when Parliament amended the Migration Act to include s 54R, which provided: 'A court is not to order the release from custody of a designated person.'[51] It was uncontroversial that the plaintiffs fell within the definition of 'designated person'. The plaintiffs relevantly argued before the High Court that s 54R was invalid on the basis that it was comparable to the provisions considered in *BLF (NSW)* that 'were cast in terms that amounted to commands to the Supreme Court as to the conclusion that it was to reach on the issues about to be argued before it.'[52]

36. The majority commenced their reasoning on this issue with the reminder that:

> Ours is a Constitution 'which deals with the demarcation of powers, leaves to the courts of law the question of whether there has been any excess of power, and requires them to pronounce as void any act which is ultra vires'.[53]

37. The majority went on to hold that s 54R was invalid on two bases, which correspond to those relied upon by the Appellant in these proceedings. For present purposes, the relevant conclusion was that s 54R was 'inconsistent with Ch. III' because it was 'an impermissible intrusion into the judicial power which Ch. III vests exclusively in the courts which it designates.'[54] That conclusion – which Toohey and McHugh JJ would also have reached had they not read down the provision[55] – followed from the fact that s 54R was 'a direction by the Parliament to the courts as to the manner ['and outcome'] in

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[47] *BLF (NSW)* (1986) 7 NSWLR 372, 378 (Street CJ).
[48] *BLF (NSW)* (1986) 7 NSWLR 372, 379 (Street CJ).
[49] *BLF (NSW)* (1986) 7 NSWLR 372, 394 (Kirby P).
[50] (1992) 176 CLR 1.
[51] *Lim* (1992) 176 CLR 1, 10.
[52] *Lim* (1992) 176 CLR 1, 5.
[53] *Lim* (1992) 176 CLR 1, 36 (Brennan, Deane and Dawson JJ, Gaudron J agreeing, citation omitted).
[54] *Lim* (1992) 176 CLR 1, 36–37 (Brennan, Deane and Dawson JJ, Gaudron J agreeing).
[55] *Lim* (1992) 176 CLR 1, 50 (Toohey J), 68 (McHugh J).

which they are to exercise their jurisdiction'.[56] The judgment on this issue was noted to be responsive to the plaintiffs' reliance on *Liyanage* and Street CJ's judgment in *BLF (NSW)*,[57] neither of which were doubted.

38. By 1997, PH Lane explained that the direction principle was infringed where there was '(a) there was legislative interference in *specific* proceedings; (b) the interference affects pending litigation; (c) the interference affects the judicial process itself, that is, the discretion or judgment of the judiciary, or the rights, authority or jurisdiction of the court'.[58]

39. In ***Nicholas*** *v The Queen*,[59] the Court was concerned with a legislative response to an earlier decision[60] of this Court holding that evidence of drug importation obtained by a 'controlled operation' by law enforcement agencies was inadmissible, and the proceedings should be stayed, by reason of the law enforcement agencies acting unlawfully in the controlled operation. The legislation impugned in *Nicholas* required courts to 'disregard' the fact that a law enforcement officer committed an offence in the importation. A five-member majority of the Court held the provision to be valid, albeit only Brennan CJ, Toohey and Hayne JJ squarely addressed the direction principle. The majority judgments have been criticised as a 'retreat' from the position in *Lim* on the basis that they 'downplayed the significance of the direction principle and set a very high threshold for its application'.[61] There are indeed problems with some aspects of the reasoning of Brennan CJ[62] and Toohey J.[63] However the principled basis for the majority's conclusion – which comes through most clearly in Hayne J's reasons, but also in Toohey J's – was that a purely evidentiary provision will ordinarily only *affect*, not *direct*, the exercise of judicial power and thus not infringe the direction principle.[64]

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[56] *Lim* (1992) 176 CLR 1, 36, see also 37 (Brennan, Deane and Dawson JJ, Gaudron J agreeing).
[57] *Lim* (1992) 176 CLR 1, 34 (Brennan, Deane and Dawson JJ, Gaudron J agreeing).
[58] PH Lane, *Lane's Commentary on the Australian Constitution* (2nd ed, 1997) 484 (quotation marks and punctuation removed, emphasis in original), quoted with approval in *Nicholas v The Queen* (1998) 193 CLR 173, [192] (McHugh J). For earlier academic commentary, see G Nettheim, 'Legislative Interference with the Judiciary' (1966) 40 *Australian Law Journal* 221.
[59] (1998) 193 CLR 173.
[60] *Ridgeway v The Queen* (1995) 184 CLR 19.
[61] Peter Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations* (Hart, 2009) 90.
[62] Brennan CJ at [28] misunderstood the direction principle to be limited 'to legislation that can properly be seen to be directed ad hominem.' That limitation cannot be squared with *Lim*.
[63] On one view, Toohey J at [53] misunderstood the direction principle by collapsing it with the broader principle that he had earlier recognised that 'It is only if a law purports to operate in such a way as to require a court to act contrary to accepted notions of judicial power that a contravention of Ch III may be involved.' *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, 689 (Toohey J).
[64] *Nicholas* (1998) 193 CLR 173, [53]–[55] (Toohey J), [238] (Hayne J).

40. In *H A* ***Bachrach*** *Pty Ltd v Queensland*,[65] it was submitted that amendments to Queensland planning legislation constituted 'an interference with the exercise of judicial power' and were 'incompatible with Ch III of the Commonwealth Constitution'.[66] The Court accepted that it was permissible to look to the 'litigious background' to the legislation to discern its character, 'as a matter of substance and not merely of form'.[67] It was significant for the Court, however, that the determination of the planned use of land was not one of the 'matters which appertain exclusively to the judicial power', such as 'determination of criminal guilt and the trial of actions for breach of contract and for civil wrongs'.[68] The Court referred with apparent approval to *BLF (NSW)* but considered the key indicia of invalidity in that case to have been that the legislation 'specifically addressed current litigation, prescribed that for the purposes of determining the issues in that litigation certain facts were to be taken as established, and dealt with the costs of the litigation.'[69] As the Queensland legislation did not share those characteristics, and was not *ad hominem*,[70] the Court held it to be valid.

41. In *Re Macks; Ex parte* ***Saint***,[71] the Court was concerned with State legislation responsive to this Court's decision[72] invalidating cross-vesting legislation, which had had the effect of rendering ineffective certain judgments of the Federal Court. The legislation was challenged relevantly on the basis that it interfered with federal judicial power but the appeal was dismissed by a majority reasoning that the legislation simply declared rights and liabilities to exist by reference to what remained 'ineffective judgments'.[73]

42. In ***Bodruddaza*** *v Minister for Immigration and Multicultural Affairs*,[74] the Court relevantly confirmed that the limit recognised in *Lim* would be infringed by 'a law which purported to direct the manner in which the judicial power of the Commonwealth should be exercised'.[75] Ultimately, however, the Court decided the case on the basis of the entrenched minimum provision of judicial review (discussed below).

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[65] (1998) 195 CLR 547.
[66] *Bachrach* (1998) 195 CLR 547, [2] (the Court).
[67] *Bachrach* (1998) 195 CLR 547, [12] (the Court).
[68] *Bachrach* (1998) 195 CLR 547, [15], [18] (the Court).
[69] *Bachrach* (1998) 195 CLR 547, [21] (the Court).
[70] *Bachrach* (1998) 195 CLR 547, [23] (the Court).
[71] (2000) 204 CLR 158.
[72] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.
[73] *Saint* (2000) 204 CLR 158, [25] (Gleeson CJ), see also [74] (Gaudron J), [110] (McHugh J), [210] (Gummow J), [355] (Hayne and Callinan JJ).
[74] (2007) 228 CLR 651.
[75] *Bodruddaza* (2007) 228 CLR 651, [47]–[48] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

43. In *AEU*, the Court was concerned with legislation that validated an executive decision that had previously been held to be invalid. The Court confirmed that 'the Parliament cannot direct the courts as to the conclusions they should reach in the exercise of their jurisdiction'.[76] However, the Court held that the legislation did not constitute such a direction because it operated upon a concluded exercise of Chapter III judicial power, in particular an order of the Full Court of the Federal Court quashing the registration of an organisation pursuant to a federal statutory scheme.[77] That is why the Court could say of the legislation that it 'attaches new legal consequences to an act or event which the court had held, on the previous state of the law, not to attract such consequences'.[78] Thus, *AEU* has been understood to reiterate the position – first explained by Stephen J in *Humby* – that legislation may permissibly attach new legal consequences to the 'historical fact' of an invalid decision without changing the 'inherent quality' or the 'fact of the invalidity of the decision'.[79]

44. That the Court in *AEU* limited its consideration to the legislation's effect on *concluded* exercises of judicial power is particularly evident in the judgment of Gummow, Hayne and Bell JJ, who noted that the legislation 'did not intersect with any litigation that was pending in the judicial system at the time it came into operation.'[80] Their Honours expressed concern about the breadth of the Federal Court's 'all-embracing proposition' that 'an Act that affects and alters rights in pending litigation does not interfere with the exercise of judicial power'.[81] Their Honours suggested that '[a]t least in cases which are still pending in the judicial system, it will be important to consider whether or to what extent the impugned law amounts to a legislative direction about how specific litigation should be decided.'[82] Ultimately, their Honours left the question for another day because 'no decision is called for in this case about how such a balance should be struck in respect of legislation that affects pending litigation'.[83] From those passages of *AEU*, it is clear that their Honours considered that special concerns might arise when validating legislation purports to apply to pending proceedings.

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[76] *AEU* (2012) 246 CLR 117, [87] (Gummow, Hayne and Bell JJ), see also [48] (French CJ, Crennan and Kiefel JJ).
[77] *AEU* (2012) 246 CLR 117, [4] (French CJ, Crennan and Kiefel JJ).
[78] *AEU* (2012) 246 CLR 117, [53] (French CJ, Crennan and Kiefel JJ, emphasis added).
[79] *Knight v Victoria* (2014) 221 FCR 561, [64] (Mortimer J).
[80] *AEU* (2012) 246 CLR 117, [96] (Gummow, Hayne and Bell JJ, emphasis added).
[81] *AEU* (2012) 246 CLR 117, [76] (Gummow, Hayne and Bell JJ).
[82] *AEU* (2012) 246 CLR 117, [87] (Gummow, Hayne and Bell JJ, emphasis added).
[83] *AEU* (2012) 246 CLR 117, [87] (Gummow, Hayne and Bell JJ, emphasis added).

45. In ***Duncan*** *v Independent Commission Against Corruption*,[84] the Court was concerned with State legislation providing that certain things done by the ICAC before a particular date were 'taken to have been, and always to have been, validly done'. The legislation was enacted while the plaintiff had proceedings on foot in State court. While the legislation did not expressly state that it was to be applied in pending proceedings, it was not disputed that that was its effect (if it was valid). Although the case concerned State legislation, it was accepted that if it would not infringe the direction principle's limit on Commonwealth legislative power then it could validly be enacted by State Parliament. The Court unanimously concluded that the legislation was not a direction.

46. French CJ, Kiefel, Bell and Keane JJ cited approvingly[85] to the reasoning in *Bachrach* that had referred to *Liyanage* and *BLF (NSW)*. Their Honours concluded that the legislation in *Duncan* did not offend against the principles from those cases because it operated *generally* to 'attribute the consequences of legal validity to things done by the respondent'.[86] Put differently, but to similar effect, Nettle and Gordon JJ explained that the legislation operated to 'create a new or different legal regime … for a prescribed period of time … [and to] validate acts done during that time according to the new or different legal regime'.[87] That is why their Honours agreed with the conclusion of the other joint judgment that, while the legislation may have incidentally affected the plaintiff's pending case in State Court, it did 'not purport to give a direction to a court'.[88] Gageler J approached the matter somewhat differently, albeit consistently with the way the plaintiff's argument was presented. The plaintiff suggested – albeit the suggestion was in tension with Stephen J's judgment in *Humby* – that the legislation would be invalid if it 'operates to attach new legal consequences to an invalid act of ICAC while accepting that the act remains invalid'.[89] Gageler J rejected that interpretation of the provision in light of its purpose and to preserve its validity.

47. In ***Mineralogy*** *Pty Ltd v Western Australia*,[90] the Court was concerned with State legislation which affected concluded State litigation. However Edelman J acknowledged

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[84] (2015) 256 CLR 83.
[85] *Duncan* (2015) 256 CLR 83, [26] (French CJ, Kiefel, Bell and Keane JJ).
[86] *Duncan* (2015) 256 CLR 83, [15] (French CJ, Kiefel, Bell and Keane JJ, emphasis added).
[87] *Duncan* (2015) 256 CLR 83, [46] (Nettle and Gordon JJ).
[88] *Duncan* (2015) 256 CLR 83, [27] (French CJ, Kiefel, Bell and Keane JJ, Nettle and Gordon JJ agreeing in the conclusion at [45]).
[89] *Duncan* (2015) 256 CLR 83, [37] (Gageler J).
[90] (2021) 274 CLR 219.

that 'there may have been force' in the plaintiffs' challenge to the declaratory provisions in that case *if* they had affected *pending* litigation.[91]

*Discerning infringement of the direction principle*

48. The point to be taken from the above survey is the distinction between an impermissible direction and a permissible change in law is not a 'hard and fast line'.[92] While no majority of this Court has explained in any detail how to discern when the line is crossed, the approving citations[93] to *Liyanage* suggest the following considerations are relevant:

> 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.[94]

49. The 'particularity' and 'purpose' of the legislation were also central to Kirby J's analysis in *Nicholas*,[95] albeit his Honour dissented in the result. Peter Gerangelos – whose work on the direction principle was cited approvingly in *AEU*[96] – has identified similar considerations: the law appears tailored and/or timed to interfere in a particular case or category of cases (such tailoring sometimes being apparent in *ad hominem* or retrospective legislation), the government is a party to that case or category of cases, the legislative interference is in 'a domain that can traditionally be regarded as a judicial one', and the statutory wording is 'clearly directive'.[97]

*Direction principle infringed in this case*

50. In determining the Amending Act's 'constitutional character', 'as a matter of substance and not merely of form', the 'litigious background' to the legislation should be taken into

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[91] *Mineralogy Pty Ltd* (2021) 274 CLR 219, [159] (Edelman J).
[92] *AEU* (2012) 246 CLR 117, [76] (Gummow, Hayne and Bell JJ). See, earlier, *Liyanage* [1967] 1 AC 259, 289–90 (Privy Council); *Nicholas* (1998) 193 CLR 173, 256 (Kirby J).
[93] *Clyne v East (No 1)* (1967) 68 SR (NSW) 385, 402 (Sugerman JA); *Humby* (1973) 129 CLR 231, 250 (Mason J); *BLF (Cth)* (1986) 161 CLR 88, 96 (the Court); *Leeth v Commonwealth* (1992) 174 CLR 455, 469–70 (Mason CJ, Dawson and McHugh JJ); *Bachrach* (1998) 195 CLR 547, [17] (the Court); *Saint* (2000) 204 CLR 158, [300] (Kirby J); *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, [65]–[68] (Kirby J); *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219, [158] (Edelman J).
[94] *Liyanage v The Queen* [1967] 1 AC 259, 290 (Privy Council). For a summary of other matters the Privy Council considered relevant see Peter Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations* (Hart, 2009) 72–3.
[95] (1998) 193 CLR 173, [201(4)], [202], [203], [205] (Kirby J).
[96] *AEU* (2012) 246 CLR 117, [87] (Gummow, Hayne and Bell JJ).
[97] Peter Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations* (Hart, 2009) 174–5, 178–9, 314.

account.[98] Here, as in *Lim*, the legislation was enacted against the litigious background of a relatively small set of 'known or prospective legal proceedings'.[99] Parliament understood that a 'relatively small group'[100] of approximately 100 people had been released as a result of the decision in *Pearson*.[101] The Amending Act's express reference to pending proceedings[102] confirms that Parliament understood that some of the persons affected by *Pearson* already had proceedings on foot. That understanding is confirmed by the statement in the extrinsic materials that 'provisions to validate past decisions and actions under the Migration Act' were necessary to avoid such decisions and actions being held to be invalid.[103] Thus, unlike the legislation in *Duncan*,[104] the Amending Act can be seen to 'specifically address[] current litigation' and to 'prescribe[] that for the purposes of determining the issues in that litigation certain facts were to be taken as established'.[105] These were two features of the legislation impugned in *BLF (NSW)* that this Court later emphasised in *Bachrach*.

51. *Duncan* is distinguishable. The legislation considered in that case contained no express or implied reference to *pending* proceedings. While the legislation in that case validated 'legal proceedings'[106] themselves, it did not expressly require that within pending legal proceedings things done by the ICAC that were the subject of those proceedings were taken to be valid. While that was ultimately accepted to be the effect of the legislation, the fact that this work was left to a general validation provision rather than an express provision directed to pending proceedings suggests that the legislation's effect on pending proceedings was incidental. In fact, to the extent the legislation in *Duncan* was concerned with legal proceedings at all, the reference in it to declarations that the ICAC's conduct was a 'nullity'[107] suggests that Parliament was most concerned about *completed*, not *pending*, proceedings.

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[98] *Bachrach* (1998) 195 CLR 547, [12] (the Court).
[99] *Lim* (1992) 176 CLR 1, 34 (Brennan, Deane and Dawson JJ, Gaudron J agreeing).
[100] Senate, *Parliamentary Debates*, 8 February 2023, 30 (Watt).
[101] Senate, *Parliamentary Debates*, 8 February 2023, 21, 28 (McKim); House of Representatives, *Parliamentary Debates*, 13 February 2023, 72 (Ware), 73 (Gillespie), 79 (Daniel), 80 (Tink).
[102] Amending Act sched 1 item 4(3) and 4(5)(b)(ii).
[103] Commonwealth Senate, Explanatory Memorandum to the Migration Amendment (Aggregate Sentences) Bill 2023 p 3, 9–10. See also Commonwealth House of Representatives, *Parliamentary Debates*, 13 February 2023, 43 (Giles).
[104] See also *Nicholas v Western Australia* [1972] WAR 168.
[105] *Bachrach* (1998) 195 CLR 547, [21] (the Court). As to the deeming of facts, see also *Nicholas* (1998) 193 CLR 173, 189–190 (Brennan CJ) discussing *Williamson v Ah On* (1926) 39 CLR 95, 108 (Isaacs J).
[106] *Independent Commission Against Corruption Act 1988* (NSW) sched 4, s 35(2).
[107] *Independent Commission Against Corruption Act 1988* (NSW) sched 4, s 35(5).

52. Beyond the text, the statutory context in *Duncan* was also very different. The 'urgent passage' of the legislation was stated to be necessary to 'eradicate corruption',[108] not due to Parliament's awareness that any proceedings were on foot (contrast the legislation considered in *BLF (NSW)*). The extrinsic material made no reference to pending proceedings. Rather, the Second Reading Speech stated that 'information gathered by the ICAC can still be validly used by other investigatory or regulatory bodies, such as the NSW Police Force, and validly used in subsequent proceedings, whether disciplinary, civil or criminal proceedings'.[109]

53. Also relevant to the inquiry into the true character of the Amending Act is 'identification of the nature of the rights, duties, powers and privileges which the statute changes, regulates or abolishes'.[110] At one level, that inquiry requires examination of the *jurisdictional nature* of the proceedings impacted by the impugned legislation. Here, the Amending Act relevantly changes the causes of action[111] available in proceedings seeking to enforce the legality of executive action. Given the centrality of judicial review to the rationale for Chapter III,[112] this subject matter should be understood to be one of the 'matters which appertain exclusively to the judicial power', and thus analogous to 'determination of criminal guilt and the trial of actions for breach of contract and for civil wrongs'.[113] This Court recognised in *Bachrach* that legislation affecting these core judicial responsibilities warrants heightened scrutiny.

54. But the inquiry into the character of the Amending Act must also consider the nature of the *rights* underlying the proceedings. Here, as in *Lim*, the underlying rights impacted by the Amending Act include the right to liberty and the right to remain in Australia (given the duties to detain and remove in ss 189 and 198 of the Migration Act). By contrast, in *Duncan*, the proceedings impacted by the impugned legislation concerned a finding of the ICAC that had no 'legal consequences' even before it was validated.[114]

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[108] New South Wales Legislative Council, *Parliamentary Debates*, 6 May 2015, 158 (Gay).
[109] New South Wales Legislative Council, *Parliamentary Debates*, 6 May 2015, 157 (Gay, emphasis added).
[110] *Bachrach* (1998) 195 CLR 547, [12] (the Court).
[111] *AIO21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 294 FCR 80, [65]–[66] (the Court).
[112] *Lim* (1992) 176 CLR 1, 36 (Brennan, Deane and Dawson JJ, Gaudron J agreeing); *Bodruddaza* (2007) 228 CLR 651, [44]–[46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).
[113] *Bachrach* (1998) 195 CLR 547, [15], see also [18] (the Court).
[114] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 148 (Gleeson CJ): 'determinations of [ICAC], although they may be extremely damaging to the reputations of individuals, do not have legal consequences'.

55. The complaint in the present case is well illustrated by reference to the 'history of the [Appellant's] pursuit of [his] legal rights',[115] and particularly the change to the course of the present proceeding from 14–17 February 2023. At the earlier of those dates, the Federal Court would have been 'obliged'[116] (absent discretionary considerations) to make an order quashing the Tribunal's decision on the strength of *Pearson*. At the later of those dates, the Court was purportedly obliged (at least on the *Pearson* ground) to 'affirm the legality of a decision which had been unlawfully made'.[117] The constitutional concern with such legislation is in part one of appearances, insofar as the effect of the Amending Act was to 'require the Federal Court to make an unqualified order that may create a misleading appearance.'[118]

56. The Amending Act is thus analogous to the legislation considered in *BLF (NSW)*, which 'concerned a legislative edict to treat that which had been found to be invalid, as valid.'[119]

**C. Amending Act an invalid impairment of s 75(v) jurisdiction**

57. Whether or not it constitutes an impermissible direction to the courts, the Amending Act is invalid because it derogates from the constitutionally entrenched jurisdiction of Chapter III courts.[120] Section 75(v) provides the 'implication' that has now been 'discovered' so as to prevent 'Parliament from extinguishing a cause of action against the Commonwealth' in proceedings for constitutional writs.[121]

58. It will be recalled that in *Lim* a provision purporting to prevent the Court from ordering a person's release from custody was held by the majority to be invalid because it purported 'to derogate from that direct vesting of judicial power [by s 75(v)] and to remove ultra vires acts of the Executive from the control of this Court'.[122]

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[115] *Bachrach* (1998) 195 CLR 547, [12] (the Court).
[116] *Saint* (2000) 204 CLR 158, [53] (Gaudron J).
[117] *Abebe v Commonwealth* (1999) 197 CLR 510, [53] (Gleeson CJ and McHugh J), referring to the concerns of Gummow, Gaudron and Hayne JJ in *Abebe, Ex parte Re Minister for Immigration and Multicultural Affairs and Anor* [1998] HCATrans 395. See also *Bainbridge v Minister for Immigration and Citizenship* (2010) 181 FCR 569, [24], [26] (Moore and Perram JJ), [73]–[77], [87] (Buchanan J).
[118] *Abebe v Commonwealth* (1999) 197 CLR 510, [57] (Gleeson CJ and McHugh J).
[119] *Varnhagen v The State of South Australia* (2022) 372 FLR 194, [143] (Hughes J), decision affirmed on appeal in *Varnhagen v State of South Australia (No 2)* (2022) 406 ALR 587.
[120] This Court recognised the independence of these two bases of invalidity: *Lim* (1992) 176 CLR 1, 36–37 (Brennan, Deane and Dawson JJ, Gaudron J agreeing); *Bodruddaza* (2007) 228 CLR 651, [47]–[49] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).
[121] Cf *Werrin v Commonwealth* (1938) 59 CLR 150, 165 (Dixon J), see also 166: 'If sec. 75, a constitutional provision, operates as a source of liability, it is not easy to see how parliamentary legislation could extinguish, qualify, or limit the liablity thence arising'.
[122] *Lim* (1994) 176 CLR 1, 36 (Brennan, Deane and Dawson JJ, Gaudron J agreeing).

59. Subsequently, in ***Plaintiff S157****/2002 v Commonwealth*,[123] the Court was primarily concerned with a privative clause decision. In that context, the plurality explained that s 75(v) 'introduces into the Constitution of the Commonwealth an entrenched minimum provision of judicial review'[124] and 'places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action'.[125] However Callinan J went on to hold invalid another provision that imposed a 35-day time limit on applications to the High Court for judicial review of certain decisions. Callinan J explained that while the provision did not 'extinguish' access to s 75(v) jurisdiction, it 'substantially interfere[d] with or limit[ed] access to constitutional remedies'.[126]

60. Similarly, when another time limiting provision was considered in *Bodruddaza*, the Court explained that the inquiry was one of 'substance of practical effect' into whether the impugned provision 'so curtail[ed] or limit[ed] the right or ability of applicants to seek relief under s 75(v) as to be inconsistent with the place of that provision in the constitutional structure'.[127] The provision was held to be invalid.

61. Finally, in ***Graham*** *v Minister for Immigration and Border Protection*,[128] the Court was concerned with a provision which purported to authorise a Minister not to divulge to a Court in judicial review proceedings material that had been placed before the original decision-maker. While the provision was held to be valid, the limit on legislative power was reiterated to be a matter of substance and 'practical operation'.[129]

62. On the approach commanded by the authorities, the Amending Act is invalid because its practical effect is to deny the Federal Court – which was exercising jurisdiction 'derived from'[130] s 75(v) – the ability to enforce one of the legislated limits on the Tribunal's jurisdiction, namely, the limit recognised in *Pearson*.[131]

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[123] (2003) 211 CLR 476.
[124] *Plaintiff S157* (2003) 211 CLR 476, [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
[125] *Plaintiff S157* (2003) 211 CLR 476, [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ, emphasis added).
[126] *Plaintiff S157* (2003) 211 CLR 476, [165] (Callinan J). See also *Bodruddaza* (2007) 228 CLR 651, [49] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).
[127] *Bodruddaza* (2007) 228 CLR 651, [53]–[54] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).
[128] (2017) 263 CLR 1.
[129] *Graham* (2017) 263 CLR 1, [46] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[130] *Graham* (2017) 263 CLR 1, [46] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[131] See, by analogy, *Bainbridge v Minister for Immigration and Citizenship* (2010) 181 FCR 569, [57]–[61] (Buchanan J).

63. Just as there must be a limit to the way that Parliament can *prospectively* shield executive action from judicial scrutiny by the 'clever drafting'[132] of 'no invalidity' provisions,[133] so too must *retrospective* 'validating' legislation be subject to a corresponding limit. While the Amending Act is not framed as a privative clause, its practical effect is to preclude a Court from declaring, even as a historical fact, an executive decision to have been beyond power. That engages the rationale for, and the limit flowing from, the entrenched minimum provision of judicial review.

**D. Conclusion to argument**

64. For those reasons, the Amending Act either did not apply to the Appellant's pending proceedings in the Federal Court or, if it purportedly applied, it was invalid. It follows that, subject to the notice of contention in this Court, the Appellant's ground 5 ought to have succeeded in the Federal Court and this Court ought to make orders to that effect.

## Part VII: Orders sought

65. The Appellant seeks the following orders:
    a. The appeal be allowed.
    b. The orders of the Federal Court on 19 October 2023 be set aside and in lieu thereof:
        i. The decision of the Administrative Appeals Tribunal be quashed.
        ii. A writ of mandamus issue directed to the Tribunal, requiring it to determine the application according to law.
        iii. The First Respondent pay the Applicant's costs.
    c. The First Respondent pay the Appellant's costs of the application for special leave to appeal, and of the appeal, to the High Court.

## Part VIII: Estimate

66. The Appellant estimates that he will require 2.5 hours for oral argument.

Dated: 24 April 2024

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[132] Will Bateman, 'The "Constitution" and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 3 *Federal Law Review* 463, 502.
[133] *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, [55]–[57] (Gummow, Hayne, Heydon and Crennan JJ). See also *Bodruddaza* (2007) 228 CLR 651, [28] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: JZQQ
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

## ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to Practice Direction No. 1 of 2019, the Appellant sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in his submissions.

| No. | Description | Version | Provisions |
|---|---|---|---|
| 1. | *Administrative Appeals Tribunal Act 1975* (Cth) | Compilation 51 (17 August 2022 to 30 June 2023) | ss 25, 43 |
| 2. | *Commonwealth of Australia Constitution Act* | Compilation 6 (current) | Chapter III |
| 3. | *Migration Act 1958* (Cth) | Compilation 152 (1 September 2021 to 16 February 2023) | ss 189, 198, 499, 500, 501 |
| 4. | *Migration Amendment (Aggregate Sentences) Act 2023* (Cth) | As enacted | Entire Act |