HIGH COURT OF AUSTRALIA

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### Important Information

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IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY

BETWEEN: KINGSTON TAPIKI

Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

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) whether items 4(3), 4(4) and 4(5)(b)(i) of Part 2 to Schedule 1 of the *Migration Amendment (Aggregate Sentences) Act 2023* (Cth) (**Aggregate Sentences Act**) are invalid in their application to the Appellant because they usurp or interfere with the judicial power of the Commonwealth by having the effect of reversing or dissolving orders made by a Ch III court? Or,
   (b) whether items 4(3), 4(4) and 4(5)(b)(i) of Part 2 to Schedule 1 of the Aggregate Sentences Act are invalid in their application to the Appellant because they effectuate an acquisition of property otherwise than on just terms, contrary to s 51(xxxi) of the Constitution?
3. The first of those issues may, but not necessarily, require this Court to consider whether to re-open the decision in *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 (***AEU***).

## 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 *Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 413 ALR 605 ***(Tapiki No 2)***.

## Part V: Facts

Background and first custodial sentence

6. The Appellant, a 33 year old New Zealand national, has lived in Australia since he was 18 months old. His parents, twin brother and two sisters reside in Australia. He has no remaining family left in New Zealand. In 2016, the Appellant's mother suffered a stroke that left her paralysed. Around this time, the Appellant's mental health spiralled and he was admitted to Goulburn Hospital for four months. He also began to misuse drugs and alcohol (ABFM 16 [18], 20 [39]–[40]).

7. The Appellant's short criminal history followed, with his first conviction on 16 May 2018 for shoplifting, for which he was fined. He received some other non-custodial sentences until he pleaded guilty and was sentence in the Local Court of NSW on 30 September 2020 to an aggregate sentence of 12 months' imprisonment. It was his first (and only) custodial sentence (ABFM 17–19). He was transferred to immigration detention on 19 November 2020.

Visa cancellation and merits review

8. On 29 October 2020, a delegate of the Minister purported to cancel the Appellant's visa under s 501(3A) of the *Migration Act 1958* (Cth) (the **cancellation decision**). The cancellation decision was predicated on the delegate's satisfaction that the Appellant did not pass the character test because his aggregate sentence was "a term of imprisonment of 12 months or more": s 501(7)(c) (ABFM 4–10).
9. The following day, the Appellant requested revocation of the cancellation decision, but on 15 February 2021 a different delegate of the Minister refused to revoke the purported cancellation (ABFM 12 [2]) (the **non-revocation decision**). This delegate's decision was also made on the basis that the Appellant's aggregate sentence meant that he failed the "character test" in s 501(7).
10. On 18 February 2021, the Appellant applied to the Administrative Appeals **Tribunal** for merits review of the non-revocation decision. He was unrepresented at the hearing. On 11 May 2021, the Tribunal affirmed the non-revocation decision, again on the basis that the Appellant failed the character test by reason of his aggregate sentence (ABFM 11) (the **Tribunal decision**).

Judicial review proceedings

11. On 3 June 2021, the Appellant applied to the Federal Court for judicial review of the Tribunal decision. He was again unrepresented. On 14 April 2022, the Federal Court (Bromwich J) dismissed the Appellant's application for review (CAB 14 [7]).
12. On 25 April 2022, now represented, the Appellant lodged a notice of appeal asserting error in Bromwich J's decision, on the single (new) ground that the Appellant's aggregate sentence was not "a term of imprisonment of 12 months or more" within the meaning of s 501(3A) of the *Migration Act*. The Appellant sought various declarations, including that he held a visa at all times on and after 29 October 2020. He also sought an order that he be released from detention forthwith.

13. On 4 May 2022, the Appellant also lodged an application for review in the Federal Circuit and Family Court seeking judicial review of the cancellation decision on the same ground. Those proceedings were transferred by consent to the Federal Court and the Chief Justice of the Federal Court directed that they be heard by a Full Court (the same Full Court as was to hear the appeal) (CAB 14 [8]).

14. On 16 August 2022, the Full Court of the Federal Court (Perry, Derrington and Thawley JJ) heard argument in both proceedings and reserved its decision (ABFM 33).

15. On 25 November 2022, a differently constituted Full Court (Allsop CJ, Rangiah and SC Derrington JJ) heard argument on an identical ground in Ms Pearson's matter. The ground was upheld in reasons given on 22 December 2022 in ***Pearson*** *v Minister for Home Affairs* (2022) 295 FCR 177.

16. On 23 December 2022, the Appellant was released from immigration detention. It was later explained in correspondence to the Appellant on 1 March 2023 that "the Department took the view that, because of *Pearson*, the earlier cancellation of your visa was ineffective" (ABFM 48).

17. On the same day, the Minister wrote to the Court notifying it of this development and seeking until 3 February 2023 to consider the Minister's position in the Appellant's proceedings (ABFM 37 [8]).

18. On 3 February 2023, the Minister wrote to the Court again, seeking two more weeks to consider the position and noting "that the time for filing an application for special leave [against the decision in *Pearson*] does not expire until 21 February 2023" (ABFM 37–8 [8]). The *Migration Amendment (Aggregate Sentences) Bill 2023* (Cth), directed to reversing *Pearson*, was introduced to the Senate on 7 February 2023 and had passed both Houses by 13 February 2023.

19. The Minister did not ever inform the Appellant or the Court that the Bill had been introduced or passed. Instead, on independently learning of the Bill's introduction to the House on 9 February 2023, on 10 February 2023 the Appellant moved for orders in the Full Court finalising the appeal (ABFM 38 [9]).

20. On 14 February 2023, the Full Court gave judgment for the Appellant in both matters (***Tapiki No 1***).[1] Not persuaded that the decision in *Pearson* was plainly wrong (*Tapiki No 1* at [12]), the Full Court granted *certiorari* quashing the Tribunal's decision, declared

[1] *Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 408 ALR 503.

the delegate's cancellation decision to be invalid, and declared that the Appellant "continues to hold a Class TY Subclass 444 Special Category (Temporary) visa".[2]

21. On 5 July 2023, the Minister applied for special leave to appeal against *Tapiki No 1*.[3] The Minister discontinued on 22 August 2023 following refusal of special leave in *Pearson*.[4]

The Aggregate Sentences Act and re-detention of the Appellant

22. On 17 February 2023, the Aggregate Sentences Act commenced (by operation of s 2, having received royal assent on 16 February 2023).

23. On the same day, the Department of Home Affairs wrote to the Appellant informing him that "[t]he effect of the Aggregate Sentences Act is that the original decision to cancel your visa remains valid and you do not hold a valid visa to remain in Australia". No reference was made to the Full Court's orders (ABFM 45).

24. On 8 March 2023, the Appellant was again detained in immigration detention (CAB 16 [16]). He remains there, having now spent some three years in detention.

Second proceedings in the Federal Court, and related false imprisonment proceedings

25. On 21 March 2023, the Appellant commenced the proceedings in the Federal Court for a declaration that provisions of the Aggregate Sentences Act are invalid in their application to him; and an order that he be released from detention forthwith. The Appellant also later commenced proceedings in the Federal Court seeking damages for false imprisonment in relation to his detention between 22 and 23 December 2022 (paused pending this appeal).

26. The Chief Justice directed that the judicial review proceedings be heard by a Full Court. That hearing took place on 24 August 2023 (Katzmann, SC Derrington and Kennett JJ) and, on 19 October 2023, the Court dismissed the application. The Full Court reasoned that *AEU* foreclosed any contention that the Aggregate Sentences Act involved a usurpation of judicial power (CAB 21 [35]), and that any legislative acquisition of a right to claim damages for false imprisonment contrary to s 51(xxxi) was obviated by the compensation mechanism under s 3B of the *Migration Act* (CAB 29 [64]).

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[2] Consistently with the orders proposed in *XJLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 289 FCR 256, [88] (Rares J), [97] (Yates J).
[3] P16/2023.
[4] *Minister for Home Affairs & Anor v Pearson & Anor* [2023] HCATrans 105.

## Part VI: Argument

27. The relevant provisions of the Aggregate Sentences Act are invalid in their application to the Appellant for two independent reasons, deriving from Ch III and s 51(xxxi) of the Constitution respectively.

### A. The Aggregate Sentences Act interferes with, or usurps, Ch III judicial power

28. The Full Court held that *AEU* stood in the way of the argument that the impugned provisions of the Aggregate Sentences Act were invalid by reason of usurping, or interfering with, judicial power under Ch III (CAB 21 [35]). That was wrong. Whereas the legislation considered in *AEU* operated by reference to the historical fact the subject of the judicial decision, and attached new consequences to that fact, the Aggregate Sentences Act has the effect of reversing the earlier judicial orders by validating that which had been quashed and declared to be invalid by a Ch III court.

*AEU* is distinguishable

29. "There is no novelty in the proposition that 'in general, a legislature can select whatever factum it wishes as the "trigger" of a particular legislative consequence'",[5] including attaching consequences to an administrative act previously held by a Ch III court to be invalid.[6] But there is equally no novelty in the proposition that there is impermissible interference with the judicial power where Parliament purports to set aside (*scil.* reverse) a decision of a Ch III court.[7]

30. In *AEU*, this Court did not doubt that a law will be invalid if Parliament "were to purport to set aside the decision of a court exercising federal jurisdiction".[8] The Court held, however, that a law would be valid where it merely "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."[9] *AEU* has been understood to illustrate that Parliament may permissibly attach new legal consequences to the "historical fact" of an invalid

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[5] *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83, [42] (Gageler J).
[6] *AEU* (2012) 246 CLR 117, [53] (French CJ, Crennan and Kiefel JJ).
[7] As to the historical roots to this proposition, see further below and see also Peter Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations* (Hart, 2009) 206–10.
[8] *AEU* (2012) 246 CLR 117, [53] (French CJ, Crennan and Kiefel JJ).
[9] *AEU* (2012) 246 CLR 117, [53] (French CJ, Crennan and Kiefel JJ).

administrative act without changing the "inherent quality" or the "fact of the invalidity of the decision".[10]

31. The core constitutional question in *AEU* was the *effect* of the amending legislation: did Parliament purport to reverse a decision of a Ch III court (thereby adjudicating by legislation)? Or did it simply attach new legal consequences to an act that a court had held not to attract such consequences? This Court held that the legislation did the latter and was valid. *AEU* was thus an orthodox application of the proposition that Parliament can attach new legal consequences to an unauthorised executive act without *necessarily* falsifying, contradicting or reversing orders of a Ch III court.

10 32. *AEU* commands close attention to *how* retrospective legislation intersects with past, pending or future litigation.[11] Six Justices in *AEU* expressly disapproved an approach of simply assimilating legislative alteration of rights in pending litigation with alteration of rights in completed litigation.[12]

33. In *AEU* the *factum* of retrospective operation was not a "decision" but the purported "ent[ry] on the register" or "the steps comprised in the purported registration".[13] By contrast, item 4 of Part 2 of Sch 1 to the Aggregate Sentences Act hinges upon the making of a "decision" and expressly purports to "validate" such a decision even if, as here, it has been the subject of *certiorari* or a declaration of invalidity. That operation is apparent from the text of the statute.

20 34. Item 4(1) of Part 2 to Sch 1 retrospectively applies item 4 to a "thing done, or purportedly done, before commencement under a law, or provision of a law" that "would, apart from this item, be wholly or partly invalid only because a sentence, taken into account in doing, or purporting to do, the thing, was imposed in respect of 2 or more sentences."

35. "[D]o a thing" is defined at item 4(2) to include:

(a) make a decision (however described); and

(b) exercise a power, perform a function, comply with an obligation or discharge a duty; and

(c) do anything else.

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[10] *Knight v Victoria* (2014) 221 FCR 561, [64] (Mortimer J).
[11] *AEU* (2012) 246 CLR 117 [85], (Gummow, Hayne and Bell JJ).
[12] *AEU* (2012) 246 CLR 117, [20] (French CJ, Crennan and Kiefel JJ), [76] (Gummow, Hayne and Bell JJ).
[13] *AEU* (2012) 246 CLR 117, [90] (Gummow, Hayne and Bell JJ), [117] (Heydon J).

36. By item 4(3):

> The thing done, or purportedly done, is taken for all purposes to be valid and to have always been valid.

37. By item 4(4):

> To avoid doubt, anything done or purported to have been done by a person that would have been invalid except for subitem (3) is taken for all purposes to be valid and to have always been valid, despite any effect that may have on the accrued rights of any person.

38. And by item 4(5):

> For the purposes of applying this item in relation to civil or criminal proceedings, this item applies in relation to:
>
> …
>
> (b) civil and criminal proceedings instituted before commencement, being proceedings that are concluded:
>
> (i) before commencement …

39. Against that background, it is now necessary to closely examine three ways in which – by depriving the orders in *Tapiki No 1* of all legal effect, including as between the parties – the Aggregate Sentences Act purports to reverse those orders. That examination must, in this case, proceed on the basis, as the Minister submitted in *Tapiki No 2* and the Full Court accepted in *JZQQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 413 ALR 620,[14] that in "undertaking a review of a decision … not to revoke a decision to cancel a visa pursuant to an application made to it under s 500(1)" the Tribunal was "doing" one or other of the "things" instantiated.

40. *First,* because the Tribunal's "decision" has been quashed, the review required of the Tribunal under s 500 of the *Migration Act* has not been undertaken. The Full Court below held that item 4 of the Aggregate Sentences Act retrospectively made "the Tribunal decision … legally effective" (CAB 19 [26]). But that is to demonstrate a direct collision between the effect of the Aggregate Sentences Act and the orders made in *Tapiki No 1.*

41. *Secondly,* if the effect of the Aggregate Sentences Act is to deem the review as finally concluded, as the Full Court held, the Appellant could not now by *mandamus* compel

[14] *Tapiki No 2* (2023) 413 ALR 605, [15] (the Court); *JZQQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 413 ALR 620, [95] (the Court).

the Tribunal to complete the review. But the legal effect or consequence of *certiorari* is that there *is* no decision of the Tribunal, and the review has not been completed.

42. *Thirdly*, leaving aside the Tribunal's decision and turning to the cancellation decision, the effect of the Aggregate Sentences Act is to declare that decision to have always been valid, despite the express declaration of the Full Court in *Tapiki No 1* that that decision "is invalid".

43. The effect of the Aggregate Sentences Act is thus not, as was the case in *AEU*, to "attach … all the attributes of a valid [decision]" to a decision that remained "ineffective".[15] Rather, the Aggregate Sentences Act goes the further step of *validating* decisions that have been quashed or declared to be invalid. That it cannot do consistently with Ch III.

Overseas analogies

44. No decision of this Court has ever identified an example of legislative adjudication. But the Supreme Court of the United States has supplied a relatively recent example in ***Plaut v Spendthrift Farm, Inc***,[16] which was distinguished but not criticised in *AEU*.[17] In that case, the US Court of Claims had dismissed Plaut's claim as untimely. Retrospective legislation was directed to "dismissed causes of action", requiring them "to be reinstated on motion".[18]

45. Scalia J (for the majority) was careful not to decide the case on the basis of the Due Process Clause of the Fifth Amendment, but solely on separation of powers grounds.[19] The legislation was struck down as intruding upon the judicial power under Article III of the US Constitution:[20]

> Having achieved finality ... a judicial decision becomes the last word of the judicial controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was.

46. The Aggregate Sentences Act is directed to the "very case" of the Appellant and Ms Pearson. *Pearson* is expressly referenced in the "Note[s]" to Item 5(1) and (2) of the Schedule. And item 4 must be taken to be directed also to the Appellant because the Appellant alone had advanced the ground that later prevailed in *Pearson* some months

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[15] *AEU* (2012) 246 CLR 117, [117] (Heydon J).
[16] (1995) 514 US 211.
[17] *AEU* (2012) 246 CLR 117, [51] (French CJ, Crennan and Kiefel JJ), [83] (Gummow, Hayne and Bell JJ).
[18] *Plaut* (1995) 514 US 211, 215.
[19] *Plaut* (1995) 514 US 211, 217.
[20] *Plaut* (1995) 514 US 211, 227 (emphasis in original).

before the ground was introduced in *Pearson*. Thus, with reference to the "litigious background"[21] to the Aggregate Sentences Act, it is apparent that the Appellant and Ms Pearson are the only litigants upon whom item 4(5)(b)(i) could operate. It is bespoke legislation tailored to these two cases, and these two litigants, to set aside final judgments affecting them.[22]

47. Perhaps an even closer analogy is provided by a case based upon the entrenched separation of powers in the Irish Constitution. In ***Howard*** *v Commissioners of Public Works (No 3)*,[23] the High Court had earlier made orders relevantly declaring a particular development to be *ultra vires* due to the absence of a planning permission obtained pursuant to the relevant statute. Six days after the judgment, Parliament enacted a statute stating that the "State authority shall have, and be deemed always to have had, power" to undertake the relevant development (among others). The plaintiffs argued that the statute could not operate upon the site the subject of the earlier proceedings, because if it did it would "be unconstitutionally affected by depriving the plaintiffs of the fruits of the said judgment and order" and "would involve an invasion of the exclusive domain of the courts in the administration of justice".[24] The High Court found that Parliament could not "alter or reverse that finding [of invalidity] or the declaration … To attempt to do so would contravene the constitutional separation of powers … in that the legislature (the Oireachtas) would be trespassing on and into the judicial domain".[25] Accordingly, the statutory provision in question was read "as if the words 'and be deemed always to have had' were omitted therefrom".[26]

Historical support

48. There is nothing new in the proposition that a statute will be invalid if it purports to declare something to be the case contrary to a decision of a Ch III court. In his *Studies in Australian Constitutional Law*, Andrew Inglis Clark wrote:

> … the depository and organ of the legislative power cannot be permitted, as it has been forcibly expressed by an eminent American jurist, "to retroact upon past controversies and to reverse decisions which the courts, in the exercise of their

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[21] *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, [12] (the Court).
[22] See, by analogy with pending proceedings and the direction principle, *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219, [159] (Edelman J), citing *Bank Markazi v Peterson* (2016) 578 US 212.
[23] [1994] 3 IR 394.
[24] *Howard* [1994] 3 IR 394, 402 (Lynch J).
[25] *Howard* [1994] 3 IR 394, 402 (Lynch J).
[26] *Howard* [1994] 3 IR 394, 407 (Lynch J).

> undoubted authority, have made; for this would … be the exercise of it in the most objectionable and offensive form, since the legislature would in effect sit as a court of review to which the parties might appeal when dissatisfied with the rulings of the courts".[27]

49. Quick and Garran thought the matter beyond doubt, writing:

> It cannot be doubted that any attempt by Parliament, under cover of a declaratory law or otherwise, to set aside or reverse the judgment of a court of federal jurisdiction, would be void as an invasion of the judicial power … just as the legislature cannot directly reverse the judgement of the court, so it cannot, by a declaratory law, affect the rights of the parties in whose case the judgment was given … the legislature may overrule a decision, though it may not reverse it; it may declare the rule of law to be different from what the courts have adjudged it to be, and may give a retrospective operation to its declaration, except so far as the rights of parties to a judicial decision are concerned. In other words, the sound rule of legislation, that the fruits of victory ought not to be snatched from a successful litigant, is elevated into a constitutional requirement.[28]

50. This Court touched upon the issue in passing in *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (***Second Engine-Drivers Case***).[29] That case concerned proceedings in which the High Court had earlier answered a case stated to the effect that certain plaints before the Commonwealth Court of Conciliation and Arbitration were invalid. Parliament then enacted legislation to validate those plaints. The case was ultimately decided on a question of statutory interpretation. However, Barton J suggested: "There may be room, indeed, to question whether the Parliament has power to validate a proceeding in an action, void when taken and pronounced to be void by a competent tribunal before the making of the Statute."[30] Higgins J seemed to be of the view that if the High Court had given "final determination" of the case, the amending statute may have been incapable of reversing that.[31] The other Justices did not address the question.

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[27] A Inglis Clark, *Studies in Australian Constitutional Law* (1901, reprinted 1997), 41, quoting from Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the States of the American Union*, 6th edn (Boston MA, Little, Brown & Co, 1890) 112. For colonial case law touching on the topic see *May v Martin* (1886) 12 VLR 115.
[28] J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth* (1901 reprint, Legal Books, 1976) 721–2 (emphasis added).
[29] (1913) 16 CLR 245.
[30] *Second Engine-Drivers Case* (1913) 16 CLR 245, 270 (Barton J, emphasis added).
[31] *Second Engine-Drivers Case* (1913) 16 CLR 245, 282 (Higgins J).

51. The Court returned to the issue in *R v* ***Humby****; Ex parte Rooney*.[32] There, the Court was concerned with a Commonwealth law enacted in response to the High Court's earlier decisions in *Kotsis v Kotsis*[33] and *Knight v Knight*[34] holding that decrees given by non-judicial officers of State Supreme Courts were invalid. Remedial legislation then declared "[t]he rights, liabilities, obligations … of all persons are by force of this Act, ... 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".[35]

52. Stephen J gave the leading judgment, with which Menzies and Gibbs JJ agreed, explaining that the impugned provisions did not "purport[] 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. They retain their character of having been made without jurisdiction … as attempts at the exercise of judicial power they remain ineffective."[36]

53. 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".[37] McTiernan J said 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."[38] Mason J also recognised that "the sub-section does not attempt to validate the decree".[39] Gleeson CJ later said that "[c]entral to the reasoning of the Court [in *Humby*] 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."[40]

54. In ***Re Macks****; Ex parte Saint*,[41] State legislation responded to *Re Wakim; Ex parte McNally*[42] invalidating cross-vesting legislation, rendering ineffective certain judgments of the Federal Court. The legislation was challenged relevantly on the basis that it

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[32] (1973) 129 CLR 231.
[33] (1970) 122 CLR 69.
[34] (1971) 122 CLR 114.
[35] *Humby* (1973) 129 CLR 231, 238.
[36] *Humby* (1973) 129 CLR 231, 242–243 (Stephen J, emphasis added).
[37] *Humby* (1973) 129 CLR 231, 243 (Stephen J).
[38] *Humby* (1973) 129 CLR 231, 239 (McTiernan J).
[39] *Humby* (1973) 129 CLR 231, 249 (Mason J).
[40] *Re Macks; Ex parte Saint* (2000) 204 CLR 158, [15], see also [25] (Gleeson CJ), [110] (McHugh J).
[41] (2000) 204 CLR 158.
[42] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

interfered with federal judicial power. But that appeal was dismissed by a majority reasoning that the legislation did not purport to "validate ineffective judgments" but declared rights and liabilities to exist by reference to them.[43] Here, *contra*, the Aggregate Sentences Act purports in terms to validate the equivalent of ineffective judgments.

55. In ***Duncan*** *v Independent Commission Against Corruption*,[44] State legislation responsive to this Court's decision in *Independent Commission Against Corruption v* ***Cunneen***[45] provided that "things done" by ICAC were "taken to have been, and always to have been, validly done". In an application for leave to appeal pending in the NSW Court of Appeal when the amending legislation commenced, the appellant sought a declaration of invalidity on a new ground, not before the primary judge, that the amending legislation impermissibly directed the exercise of the judicial power.

56. Removed into this Court, that argument was rejected. The Court did not address whether a purported statutory reversal of the Court's orders in *Cunneen* would have infringed not the direction principle, but the different limitation flowing from Ch III which prohibits legislative reversals of concluded exercises of judicial power.

Application to re-open *AEU*, if necessary

57. For the above reasons, *AEU* does not stand in the way of the Appellant's Ch III challenge to the Aggregate Sentences Act. The Full Court was in error to hold that it did (CAB 21 [35]). Rather, *AEU* confirmed that Parliament cannot legislate so as to achieve a setting aside of a decision of a Ch III court. That is what Parliament did in this case, insofar as the Aggregate Sentences Act purported to validate the delegate's and the Tribunal's decisions, which decisions had been respectively declared invalid and quashed in *Tapiki No 1*. However, if that argument is thought foreclosed by *AEU*, the Appellant would respectfully apply to reopen that decision, primarily on the basis that such an understanding of *AEU* would render it inconsistent with *Humby* and *Re Macks*.

58. The principles governing an application to re-open a past decision of this Court are well established.[46] Considerations relevant to re-opening include the time for which a

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[43] *Re Macks* (2000) 204 CLR 158, [25] (Gleeson CJ), see also [76] (Gaudron J), [110] (McHugh J), [210] (Gummow J), [355] (Hayne and Callinan JJ).
[44] (2015) 256 CLR 83. The Full Court below recognised that *Duncan* was not determinative.
[45] (2015) 256 CLR 1.
[46] *Queensland v The Commonwealth* (1977) 139 CLR 585, 630 (Aickin J); ***John*** *v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438–9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ). See also the summary in *Wurridjal v The Commonwealth* (2009) 237 CLR 309, [68]–[69] (French CJ).

decision has stood, the extent to which it has been relied upon, and whether it has produced inconvenience or injustice. Most fundamental, however, is the fact that this Court will more readily re-open a decision as to the meaning and effect of the Constitution than a decision concerning statute or common law.

59. *Constitutional character of the decision*: This Court "may more readily reconsider constitutional issues than it should reconsider questions of statutory construction".[47] That is because "the interpretation of the Constitution is involved and, whilst precedent has a part to play, ultimately it is the Constitution itself, and not authority, which must provide the answer".[48] The rule against legislative adjudications was of fundamental concern to the framers of the Constitution (see above at [48]–[49]) and goes to the core of the separation of powers' protection of the individual. If this Court has any concern that the decision in *AEU* unduly limited the extent of that protection, it ought to re-open it to address that concern. Given the proper weight accorded the passage of time in the re-opening exercise, this case presents the appropriate opportunity for the Court "to set the matter right".[49]

60. *Series of authorities*: It will count against re-opening that a decision "rests upon a principle carefully worked out in a significant succession of cases".[50] *AEU* is not such a case. To the contrary, if *AEU* is to be understood as holding that a statute may declare as valid that which a court has held to be invalid, then it is in direct conflict with *Humby* and *Re Macks*. Both of those cases explain that while Parliament may attach new consequences to acts without affecting the quality of the act as invalid, it may *not* "validate the invalid",[51] or at least not when a Court has declared the thing to be invalid. The judgments in *AEU* did not grapple with this aspect of *Humby* and *Re Macks*.

61. *Time and subsequent judicial reliance*: *AEU* is a relatively recent decision. Its constitutional holding on legislative adjudication has not been relied upon in subsequent

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[47] *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 [128] (Hayne J) citing *Australian Agricultural Co Ltd v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261, 278 (Isaacs J) and *Queensland v The Commonwealth* (1977) 139 CLR 585, 599 (Gibbs J).
[48] ***Street*** *v Queensland Bar Association* (1989) 168 CLR 461, 549 (Dawson J).
[49] *Street* (1989) 168 CLR 461, 489 (Mason CJ).
[50] *John* (1989) 166 CLR 417, 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ), citing *Commonwealth v* ***Hospital Contribution Fund*** *of Australia* (1982) 150 CLR 49, 56 (Gibbs CJ, Stephen and Aicken JJ agreeing).
[51] *Re Macks* (2000) 204 CLR 158, [15], see also [25] (Gleeson CJ), [110] (McHugh J), [210] (Gummow J). See also *Humby* (1973) 129 CLR 231, 242–243 (Stephen J, Menzies and Gibbs JJ agreeing), 249 (Mason J).

decisions of this Court. While it is true that it was discussed in *Duncan*, that case did not concern legislation that sought to reverse the effect of a court's decision in respect of a party to that decision (the position in *AEU*, and in this case). Rather, it concerned a law that sought to alter the substantive law generally. The purported effect of that law on Ms Cuneen was not the subject of comment in *Duncan*, and thus *Duncan* can stand independently of *AEU*. Similarly, the references to *AEU* in lower courts have largely been in the context of the direction principle,[52] rather than in respect of a legislative attempt to reverse the effect of a previous judicial decision as between the very same parties to that decision. Accordingly, *AEU* "stand[s] alone" and overruling it "will not unsettle the law in other respects".[53] Indeed, to overrule it would settle the law, in the sense of resolving the present conflict between *Humby*, *Re Macks* and *AEU*.

62. *Inconvenience and legislative reliance*: It might be said that Parliament has relied on *AEU* in subsequently enacting validating provisions, and that that is exactly what Parliament did in the Aggregate Sentences Act. There are two responses to such an argument. *First*, the general form of validating provisions was known, and well used, long before *AEU*. All that *AEU* did was reveal (wrongly, the Appellant argues) that the general form was capable of operating not just generally but also in respect of the very parties whose rights had been the subject of a previous concluded exercise of Ch III judicial power. That is the very narrow effect of *AEU,* and it seems unlikely that Parliament has had many occasions since that time to rely on it, save perhaps insofar as Parliament hoped that the Aggregate Sentences Act would operate on Ms Pearson and Mr Tapiki. *Secondly*, and in any event, enacting a law on a false assumption does not enact that assumption into law.[54] It is not even clear that Parliament was aware of *AEU*'s technical holding in its hurried enactment of the Aggregate Sentences Act. The better inference is that it was simply casting the validating provisions in similarly general terms as had been used for many years before *AEU*.

63. *Injustice*: Quite apart from inconvenience and legislative reliance, where a previous decision has produced apparently unjust or harsh results, or denied individuals protection

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[52] See, eg, *Varnhagen v The State of South Australia* (2022) 372 FLR 194, [131]–[132] (Hughes J). Many other lower court decisions cite *AEU* on the statutory interpretation principles applying to retrospective legislation.
[53] *Hospital Contribution Fund* (1982) 150 CLR 49, 56 (Gibbs CJ, Stephen and Aicken JJ agreeing).
[54] *Inland Revenue Commissioners v Dowdall, O'Mahoney & Co Ltd* [1952] AC 401, 426 (Lord Radcliffe); *West Midland Baptist Association v Birmingham Corporation* [1970] AC 874, 898 (Lord Reid); *Honeywood v Munnings* (2006) 67 NSWLR 466, [37]–[40] (Handley JA, Giles JA and Hislop J agreeing).

that the law might have been expected to afford them, this Court should (other things being equal) more readily accede to an application to re-open.[55] That is simply another way of saying that the Court will more readily re-open where the effect of a past decision is "injurious to the public interest".[56] *AEU* is such a case insofar as it has the stark effect of allowing Parliament to "snatch[] from a successful litigant" the "fruits"[57] of long, expensive, and often emotionally taxing proceedings to vindicate their rights, and in this case, secure their liberty.

**B. The Aggregate Sentences Act acquired property otherwise than on just terms**

64. Before the Federal Court, the Minister advanced various arguments as to why the Aggregate Sentences Act did not effectuate an acquisition of property otherwise than on just terms. The Full Court determined the matter on what might be called the Minister's ultimate fall-back argument, that is, that s 3B of the *Migration Act* provided just terms for any acquisition of property effectuated by the Aggregate Sentences Act. Given the Minister has not filed a notice of contention in this Court seeking to uphold the Full Court's decision on other grounds, the Appellant's submissions focus on s 3B. However, it is necessary first to explain how it was that the Aggregate Sentences Act effectuated an acquisition of the Appellant's property (as the Full Court was prepared to assume: CAB 24 [46]).

The Aggregate Sentences Act effectuated an acquisition of property

65. Prior to the enactment of the Aggregate Sentences Act, the Appellant had a valuable chose in action against the Commonwealth for false imprisonment for at least the period between 22 and 23 December 2022.

66. That a chose in action for false imprisonment can constitute "property" for the purposes of s 51(xxxi) was accepted by this Court in ***Georgiadis*** *v Australian and Overseas Telecommunications Corporation*[58] and ***Haskins*** *v The Commonwealth*.[59]

67. In *Haskins*, the Australian Military Court (**AMC**) had found Mr Haskins guilty of service offences and sentenced him to detention. After the sentence was imposed, this Court

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[55] Drew C Ensign, 'The Impact of Liberty on Stare Decisis: The Rehnquist Court from *Casey* to *Lawrence'* (2006) 81(3) *New York University Law Review* 1137.
[56] *The Tramways Case (No 1)* (1914) 18 CLR 54, 69 (Dixon J).
[57] J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth* (1901 reprint, Legal Books, 1976) 721–2.
[58] (1994) 179 CLR 297, 303–4 (Mason CJ, Deane and Gaudron JJ), 311–2 (Brennan J).
[59] (2011) 244 CLR 22, [41] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

held that the legislation establishing the AMC was invalid on the ground that it conferred judicial power on a body that was not a Ch III Court.[60] Parliament subsequently passed the *Military Justice (**Interim Measures**) Act (No 2) 2009* (Cth). Rather than validate the sentences imposed by the AMC, the *Interim Measures Act* directly imposed the sanctions that had purportedly been imposed by the AMC. Mr Haskins subsequently challenged in validity of the *Interim Measures Act* on the basis that it acquired his chose in action for false imprisonment otherwise than on just terms. The Court held that if that had been the effect of the impugned previsions, they would have been invalid.[61] However, the Court held that Mr Haskins did not in fact have a cause of action against the Commonwealth because the detaining officer had acted in obedience to a warrant, the validity of which had not been challenged by Mr Haskins.

68. In the present case, unlike *Haskins*, there was no warrant authorising the detention of the Appellant at any time, and particularly not between 22 and 23 December 2022. Rather, during that time the Commonwealth (through agents) was detaining the Appellant in spite of the Full Court's reasons published in *Pearson* on 22 December 2022 (a case, of course, to which the Minister was a party). Thus, from at least the time the reasons in *Pearson* were published, the Appellant was falsely imprisoned. He held a chose in action in respect of that false imprisonment up until the commencement of the Aggregate Sentences Act on 17 February 2023.

69. On that day, the Aggregate Sentences Act purportedly extinguished the Appellant's chose in action against the Commonwealth. That amounts to an acquisition.[62]

Section 3B of the *Migration Act* did not provide just terms for the acquisition of property effectuated by another statute

70. The Federal Court held that s 3B of the *Migration Act* provided just terms for any acquisition of property effectuated by the Aggregate Sentences Act. The Appellant accepts that if s 3B applies to the impugned provisions of the Aggregate Sentences Act then it would provide just terms.[63] But s 3B does not apply to the impugned provisions.

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[60] *Lane v Morrison* (2009) 239 CLR 230.
[61] *Haskins* (2011) 244 CLR 22, [41] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[62] *Georgiadis* (1994) 179 CLR 297, 305 (Mason CJ, Deane and Gaudron JJ). See also *Smith v ANL Ltd* (2000) 204 CLR 493; *Commonwealth v Mewett* (1997) 191 CLR 471.
[63] *Wurridjal v The Commonwealth* (2009) 237 CLR 309, [196] (Gummow and Hayne JJ).

71. Section 3B(1) of the *Migration Act* relevantly provides (with emphasis added):

> **Compensation for acquisition of property**
>
> (1) If:
>
> (a) this Act would result in an acquisition of property; and
>
> (b) any provision of this Act would not be valid, apart from this section, because a particular person has not been compensated;
>
> the Commonwealth must pay that person:
>
> (c) a reasonable amount of compensation agreed on between the person and the Commonwealth; or
>
> (d) failing agreement—a reasonable amount of compensation determined by a court of competent jurisdiction.
>
> …
>
> (3) In this section:
>
> ***acquisition of property*** has the same meaning as in paragraph 51(xxxi) of the Constitution.

72. The field of operation of s 3B(1) is demarcated by the opening words in s 3B(1)(a). It focuses on "this Act" and is engaged when the Act would "result in" an acquisition of property. The broad language of "result in" makes clear that it is not limited to circumstances were a provision of the Act itself effectuates an acquisition of property but also to circumstances where a provision authorises action that effectuates an acquisition of property. But it remains focused on the Act; and action that the Act authorises.

73. In this respect, s 3B(1) is a familiar "historic shipwrecks clause" designed to save from constitutional invalidity provisions of the Act that would otherwise "effect an acquisition otherwise than on just terms".[64] Such clauses are enacted when "the Parliament legislatively … anticipate[s] that a law might be held to constitute an acquisition of property otherwise than on just terms, and to provide in that event for compensation, in order to avoid a legislative vacuum".[65]

74. Perhaps unsurprisingly, such provisions are ordinarily enacted to save the validity of other provisions in the statute in which they appear. That much can be seen from the

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[64] *Cunningham v The Commonwealth* (2016) 259 CLR 536, [29] (French CJ, Kiefel and Bell JJ). See also *Northern Territory v Griffiths* (2019) 269 CLR 1, [49] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
[65] *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151, 167 (Black CJ and Gummow J).

earliest such provision, or at least the most celebrated, s 21 of the *Historic Shipwrecks Act 1976* (Cth). That provision read (with emphasis added):

> (1) If the operation of this Act or the doing of any act by the Minister in pursuance of this Act results in the acquisition of property from a person, being an acquisition of property within the meaning of paragraph 51 (xxxi) of the Constitution, the Commonwealth is liable to pay to that person such compensation as is determined by agreement between the Commonwealth and that person or, in the absence of agreement, by action brought by that person against the Commonwealth in the High Court or the Supreme Court of a State or Territory.

75. Given no provision of the *Migration Act* resulted in the acquisition of the Appellant's property, how could s 3B apply? The Full Court understood s 11B of the *Acts Interpretation Act 1901* (Cth) to extend the reach of s 3B of the *Migration Act* to the impugned provisions of the Aggregate Sentences Act (CAB 26–28 [56]–[63]).

76. Section 11B provides (with emphasis added)

> **Amending Act to be construed with amended Act**
>
> (1) Every Act amending another Act must be construed with the other Act as part of the other Act.
>
> (2) If:
>
> (a) an Act (the amending Act) amends another Act (the principal Act); and
>
> (b) a provision (the non-amending provision) of the amending Act does not amend the principal Act, but relates to an amendment of the principal Act made by another provision of the amending Act; and
>
> (c) a term is used in the non-amending provision that has a particular meaning in the principal Act or in a provision of the principal Act amended or included by the amending Act;
>
> then the term has that meaning in the non-amending provision.
>
> Note: Subsection (2) covers, for example, application, transitional and saving items in a Schedule to an amending Act that relate to amendments of a principal Act made by other items in the Schedule.
>
> (3) Subsection (2) does not limit subsection (1).

77. There are three reasons that s 11B does not have the operation attributed to it by the Full Court.

78. *First*, and most fundamentally, s 11B is directed to the construction of the "amending Act" (here, the Aggregate Sentences Act). It is *not* directed to the construction of the

"principal Act" (here, the *Migration Act*). Accordingly, s 11B could not operate to extend the reach of s 3B beyond its clear terms.

79. *Secondly*, in any event, s 11B should not be understood to extend the reach of s 3B of the *Migration Act* to non-amending provisions like those impugned in this case.[66] Section 11B(2) reveals that s 11B(1) is not, on the face of it, concerned with guiding the construction of non-amending provisions. That is why it was necessary for Parliament in s 11B(2) to specifically alter that natural understanding by clarifying that s 11B(1) *does* apply in a very limited way in the construction of non-amending provisions; namely, by permitting resort to definitions in the principal Act to inform the meaning of non-amending provisions in the amending Act. Even then, however, the extension wrought by s 11B(2) is limited to the construction of non-amending provisions that "relate[] to" amending provisions. In the present case, the impugned provisions are non-amending provisions. Even if it might be said that they relate to amending provisions, the construction the Full Court sought to place on them went well beyond using definitional provisions from the principal Act.

80. *Thirdly*, s 11B only applies in the absence of a "contrary intention".[67] Here, the terms of item 4 make plain that it was not intended that it be read as part of the *Migration Act*; rather, it is to operate a stand-alone act of legislative validation across a number of fields. That is most apparent from item 4(2), which defines the scope of the validation to include things done under statutes other than the *Migration Act*; namely, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), *Fisheries Management Act 1991* (Cth) and *Torres Strait Fisheries Act 1984* (Cth). If the Full Court's reasoning is correct, then its effect is that s 3B of the *Migration Act* provides compensation for the Aggregate Sentences Act's validation of things done under various fisheries statutes. That is a highly unlikely result, and is a strong indicator of a contrary intention to the application of s 11B of the *Acts Interpretation Act*.

**C. Conclusion to argument**

81. For those reasons, the relevant provisions of the Aggregate Sentences Act are invalid, at least in their application to the Appellant. If this Court accepts as much, and makes a

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[66] The Appellant expects it to be uncontroversial that item 4 of Part 2 of Sch 1 of the Aggregate Sentences Act is a non-amending provision. It is concerned with the validation of things done in the past under a whole host of statutes, which include the *Migration Act* but also other Commonwealth statutes.
[67] *Acts Interpretation Act*, s 2(2).

declaration to that effect, at that time it will no longer be open to an officer of the Respondent to reasonably suspect that the Appellant is an unlawful non-citizen (because he will continue to hold a visa by reason of the decision to cancel his visa being quashed by the Full Court of Federal Court in *Tapiki No 1*). Accordingly, this Court should also make an order for the Appellant's immediate release, as the Appellant asked the Court below to do.

## Part VII: Orders sought

82. The Appellant seeks the following orders:

(a) The appeal be allowed.

(b) The orders of the Full Court of the Federal Court be set aside, and in their place:

(i) A declaration that items 4(3), 4(4) and 4(5)(b)(i) of Part 2 of Schedule 1 of the *Migration Amendment (Aggregate Sentences) Act 2023* (Cth), as applied by item 3 therein, is invalid in its application to the applicant.

(ii) A writ of habeas corpus, or an order in the nature thereof.

(iii) The respondent pay the applicant's costs of, and incidental to, the application.

(c) The Respondent pay the Appellant's costs of, and incidental to, the appeal.

## Part VIII: Estimate

83. The Appellant estimates that he will require 2.5 hours for the oral presentation of his argument.

DATED: 24 April 2024

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN: KINGSTON TAPIKI
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
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. | *Acts Interpretation Act 1901* (Cth) | Compilation 36 (20 December 2018 to 11 August 2023) | s 11B |
| 2. | *Commonwealth of Australia Constitution Act* | Compilation 6 (current) | s 51(xxxi), Chapter III |
| 3. | *Historic Shipwrecks Act 1976* (Cth) | As enacted | s 21 |
| 4. | *Migration Act 1958* (Cth) | Compilation 153 (17 February 2023 to 23 June 2023) | ss 3B, 500, 501 |
| 5. | *Migration Amendment (Aggregate Sentences) Act 2023* (Cth) | As enacted | Entire Act |