HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY **No B15 of 2024**

BETWEEN:

JZQQ
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Respondent

and

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

SUBMISSIONS OF THE FIRST RESPONDENT AND THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

PART I FORM OF SUBMISSIONS

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

PART II ISSUES PRESENTED BY THE APPEAL

2. This appeal raises the following issues:

   (a) should the Full Court of the Federal Court's decision be upheld on the basis that – contrary to *Pearson v Minister for Home Affairs* (2022) 295 FCR 177 (***Pearson (No 1)***) – 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*** *1958* (Cth), and thus the Tribunal did not err in not being satisfied that the appellant passed the character test in s 501(6) of that Act?

   (b) If the Tribunal did err, did the *Migration Amendment (Aggregate Sentences) Act 2023* (Cth) (**Aggregate Sentences Act**) apply to the appellant? Specifically, does a decision made by the Tribunal answer the Aggregate Sentences Act's description of a "thing done" "under" the Migration Act?

   (c) If so, was the Aggregate Sentences Act invalid to the extent that it purportedly applied to the appellant? Specifically, in its purported application to the appellant, was the Act beyond the legislative power of the Commonwealth Parliament by reason of the 'direction principle', or by denying to the Court in exercising its jurisdiction derived from s 75(v) of the Constitution the ability to enforce the limits which Parliament has expressly or impliedly set on executive power?

PART III NOTICES UNDER SECTION 78B OF THE JUDICIARY ACT

3. The appellant filed a notice under s 78B of the *Judiciary Act 1903* (Cth) on 5 April 2024.

PART IV FACTS

4. The Commonwealth respondents accept the factual summary at **AS [6]** to **AS [18]**.

PART V ARGUMENT

A. Notice of Contention

5. Before addressing the appellant's arguments about the application and validity of the Aggregate Sentences Act, this Court should determine the logically anterior question of whether JZQQ's aggregate sentence of 15 months' imprisonment is a "*term of imprisonment of 12 months or more*" within the meaning of s 501(7)(c) of the Migration Act. That question is logically anterior because, if JZQQ's aggregate sentence is a term of imprisonment that engages s 501(7)(c), the Tribunal's decision is not invalid on the grounds alleged in the notice of appeal, and no question arises as to whether the Aggregate Sentences Act operates to validate it.

6. The Full Court did not determine this argument, despite the First Respondent having made a formal protective submission below that the Full Court's decision in *Pearson (No 1)* was wrongly decided.[1] The First Respondent took that course after the refusal of special leave to appeal from *Pearson (No 1)*: see *Minister for Home Affairs v Pearson* (S14/2023). In refusing special leave, Kiefel CJ and Gleeson J said that "*given the enactment of the [Aggregate Sentences Act], the validity of which is not challenged, the only matter which would fall for determination by this Court on an appeal would be the question of costs*".[2] That was not considered a sufficient basis for the grant of special leave.

7. The validity of the Aggregate Sentences Act is now challenged in these proceedings under Ground 2 of the Notice of Appeal. Being constitutional in nature, that question should not be determined unless "*there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties*".[3] If the Notice of Contention is upheld, and the Tribunal did not err, it will follow that there is not a state of facts which makes it necessary to decide it. The Full Court would have been correct to dismiss Ground 5, albeit for a reason other than those the Court gave.

8. The First Respondent recognises that the argument on the notice of contention is contrary to the Full Court's decision in *Pearson (No 1)* that Ms Pearson's aggregate sentence did

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1 First Respondent's Supplementary Outline of Submissions filed 18 August 2023 at [4] (First Respondent's Book of Further Materials at 6).

2 *Minister for Home Affairs v Pearson* [2023] HCATrans 105 at ln 278-285 (Kiefel CJ and Gleeson J).

3 *Lambert v Weichelt* (1954) 28 ALJ 282 at 283, cited in *Knight v Victoria* (2017) 261 CLR 306 at [32] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

not fall within s 501(7)(c). In that case, Ms Pearson had been given an aggregate sentence of 4 years and 3 months in respect of 10 offences. That was done pursuant to s 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which provides that a court may, in sentencing an offender for more than one offence, impose an aggregate sentence with respect to all or any 2 or more of those offences instead of imposing a separate sentence of imprisonment for each.

9. The Full Court held that Ms Pearson's sentence did not fall within s 501(7)(c) for the following reasons:

   (a) the context of s 501(7)(c), namely that it was a basis on which the Minister was required to cancel a visa under s 501(3A), indicated that it was "*reserved for the most serious offences*";[4]

   (b) the inclusive definition of "*sentence*" in s 501(12), that "*sentence includes any form of determination of the punishment for an offence*", indicated that the sentence had to be imposed for a single offence;[5]

   (c) s 23(b) of the *Acts Interpretation Act 1901* (Cth) did not assist in reading the reference to "*an offence*" in s 501(12) as including the plural, because s 501 evinced a contrary intention by elsewhere distinguishing between "*an offence*" or "*one or more offences*";[6] and

   (d) that, had Parliament intended an aggregate sentence to fall within s 501(7)(c), it would have been a straightforward matter to say so, and the absence of clarity could be contrasted with the provision for concurrent sentences in ss 501(7)(d) and 501(7A).[7]

10. None of these reasons, either alone or in combination, compels the conclusion that a person who is sentenced to an aggregate sentence is not "*sentenced to a term of imprisonment*" within the meaning of s 501(7)(c).

11. The task of construction must begin with the text of the provision in question, understood in its context and with regard to its purpose.[8] In the present case, that involves beginning with the words "*sentenced to a term of imprisonment*" in s 501(7)(c). The ordinary

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4 *Pearson (No 1)* (2022) 295 FCR 177 at [41]-[42] (the Court).

5 *Pearson (No 1)* (2022) 295 FCR 177 at [43] (the Court).

6 *Pearson (No 1)* (2022) 295 FCR 177 at [44] (the Court).

7 *Pearson (No 1)* (2022) 295 FCR 177 at [47] (the Court).

8 *SZTAL v Minister for Immigration & Border Protection* (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle and Gordon JJ), [37]-[39] (Gageler J).

meaning of the word "term" in this context is "*a period defined by limits*".[9] In ***Winsor*** *v Boaden*,[10] Dixon CJ explained:

> "... the literal or natural meaning of the words should be adhered to. The word "sentence" connotes a judicial judgment or pronouncement fixing a term of imprisonment. A term of imprisonment is the period fixed by the judgment as the punishment for the offence".

12. The plain meaning of both "*sentence*" and "*term of imprisonment*" as understood in *Winsor* extends to an aggregate sentence. The statutory context, too, supports the inclusion of aggregate sentences within s 501(7)(c). That is so for a number of reasons.

13. ***First***, the scheme of s 501(7) is that s 501(7)(c) applies where there is <u>one</u> term of imprisonment imposed (as here), and s 501(7)(d) applies where there are <u>multiple</u> terms of imprisonment. In the latter case, s 501(7A) provides that, in working out the total of the terms of sentences to be served concurrently, the "*whole of each term*" is to be counted. That provision casts significant doubt on the Full Court's inference in *Pearson (No 1)*, central to its reasoning, that the provision is "*reserved for the most serious offences*".[11] Rather, s 501(7A) indicates that the character test is intended to take account of the cumulative effect of convictions for multiple lesser offences.

14. ***Secondly***, and even more significantly, the construction in *Pearson (No 1)* has the anomalous effect that a person who is sentenced to an aggregate term falls between the two stools of s 501(7)(c) and s 501(7)(d).[12] To take a simple example, a person sentenced to an aggregate term of 25 years for murder and infliction of grievous bodily harm would not fail the character test, while a person sentenced to a single sentence of 20 years for murder, or to two separate sentences of 20 years for murder and 5 years for grievous bodily harm, would. There is no reason why the Parliament would intend those anomalous results.

15. ***Thirdly***, the Full Court's construction results in arbitrary and capricious consequences depending on the State or Territory in which a person is sentenced, given that not all jurisdictions make provision for aggregate sentences. So, for example, a person sentenced to two separate and cumulative terms of imprisonment for murder (25 years) and the infliction of grievous bodily harm (5 years) in Western Australia or Queensland (which

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9 *Jones v Vince* [1954] VLR 88 at 92 (Martin J).

10 (1953) 90 CLR 345 at 347.

11 *Pearson (No 1)* (2022) 295 FCR 177 at [41]-[42] (the Court).

12 As the Full Court held: see *Pearson (No 1)* (2022) 295 FCR 177 at [3] (the Court).

do not not provide for aggregate sentences) would fail the character test, while a person sentenced to an aggregate term of 30 years for the same offences in New South Wales (**NSW**) or Victoria would not. In this respect, there is a significant line of authority in the Federal Court that the federated criminal system is an important contextual consideration in the construction of the Migration Act, including s 501(7) in particular.[13] Consistently with those authorities, Parliament should be taken to have understood that, at the time s 501(7)(c) was introduced, there were four State and Territory jurisdictions that had aggregate sentencing regimes.[14] Again, there is no reason why the Parliament, which is taken to be cognisant of those divergences, would have intended arbitrary results in different jurisdictions.

16. ***Fourthly***, it may be accepted that, as the Full Court reasoned, s 501(12) defines "*sentence*" to "*include[] any form of determination of the punishment for an offence*", using the term "*offence*" in the singular. However, that does not indicate that Parliament intended to exclude aggregate sentences from the scope of the character test. Section 501(12) is an inclusive definition, and accordingly serves to expand and clarify the definition such that it includes "*any form of determination*".[15] That is, its function is to expand the definition so as to include determinations of punishment imposed in foreign courts with different legal systems,[16] as well as military tribunals.[17] Yet the Full Court applied the definition in a limiting way, such that it read the words of s 501(7)(c) as if they said "*sentenced to a term of imprisonment for one offence*".

17. ***Finally,*** the fact that s 501 elsewhere distinguishes between "*an offence*" and "*one or more offences*" does not require the conclusion that s 501(12)'s reference to "*an offence*" is intended to exclude the plural, and thereby provide a contrary intention for s 23(b) of the *Acts Interpretation Act 1901* (Cth). To so conclude, the Court would need to find that Parliament had, in s 501(12) itself, made a distinct choice about the use of the singular instead of the plural. To have made that choice, Parliament would have needed to

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13 *Te v Minister for Immigration and Ethnic Affairs* (1999) 88 FCR 264 at 273 (the Court); *Brown v Minister for Immigration and Citizenship* (2010) 183 FCR 113 at [9] (Rares J, Moore J agreeing); *Ali v Minister for Home Affairs* (2019) 269 FCR 340 at [31] (the Court); *Nuon v Minister for Immigration and Citizenship* (2022) 295 FCR 429 at [46] (the Court).

14 *Statutes Amendment (Sentencing) Act 1992* (SA), introducing s 18A into the *Criminal Law (Sentencing Act) 1988* (SA); *Sentencing Act 1995* (NT), s 52; *Sentencing and Other Acts (Amendment) Act 1997* (Vic) amending s 9 of the *Sentencing Act 1991* (Vic); *Sentencing Act 1988* (Tas), s 11.

15 *Corporate Affairs Commission (SA) v Australian Central Credit Union* (1985) 157 CLR 201 at 206-207 (Mason ACJ, Wilson, Deane and Dawson JJ).

16 See, as to foreign sentences, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Damia-Wilson* (2022) 289 FCR 72.

17 See the definition of "court" in s 501(12).

intentionally exclude aggregate sentences, notwithstanding the capricious consequences of that conclusion, as explained above. Plainly, it did not do so. In this respect, the Second Reading Speech to the Bill that introduced s 501(3A) confirms that the Minister intended the amendments to ensure that any non-citizen "*convicted of a crime or crimes, who receives a sentence totalling twelve months, regardless of how that total is reached*" will fail the character test.[18] That provides a clear indication that Parliament intended to include all sentences totalling twelve months within the scope of the character test.

18. For those reasons, JZQQ was sentenced to a "*term of imprisonment of 12 months or more*" within the meaning of s 501(7)(c) of the Migration Act. It follows that the Tribunal did not err in so concluding. That being so, there is no need, in this case, to consider whether the Aggregate Sentences Act validly operates to cure the error of the Tribunal. The appeal can be dismissed on that anterior basis.

B. Arguments on the appeal

19. If (contrary to the submissions outlined above), the Tribunal did err, then the Full Court below correctly upheld the decision on the basis that the error was validly cured by the Aggregate Sentences Act. The appellant seeks to avoid that result by a construction argument and a validity argument.

B1 Construction argument

20. The appellant at **AS [21]-[23]** makes materially identical submissions to those made by Ms Pearson in S126 of 2023. In order to avoid repetition, the First Respondent relies on the submissions of the First and Second Defendants filed in that proceeding (**Pearson DS**) at **Pearson DS [9]** to **Pearson DS [29]**, and in particular the submissions that:

    (a) The words "thing done" under the Migration Act, as defined in item 2, are very wide and require consideration of whether the relevant thing was required or authorised by the Migration Act: **Pearson DS [12], [21]**;

    (b) The Full Court below correctly identified that s 500(1)(ba) of the Migration Act confers jurisdiction on the Tribunal to conduct the review (or at least operates in tandem with the AAT Act to confer that jurisdiction), and the exercise of that jurisdiction is a "thing done" under the Migration Act: **Pearson DS [14]-[15]. [24]-[25]**;

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18 Commonwealth of Australia, House of Representatives, *Hansard* (24 September 2014) at 10326.

(c) The Full Court below also correctly recognised that particular features of the statutory architecture demonstrate that the review function performed by the Tribunal, and/or the decisions made by the Tribunal, are sufficiently connected to the Migration Act so that they may be aptly described as made "under" that enactment: **Pearson DS [12], [16]-[17]**. That proposition is consistent with the authorities in this Court which consider the nature of the review conducted by the Tribunal: **Pearson DS [16]-[18]**;

(d) Once it is accepted that the Tribunal was exercising jurisdiction conferred and shaped by the Migration Act, it becomes apparent that one of the "things done" by the Tribunal was the performance of a function, namely the exercise of the jurisdiction so conferred. It is that jurisdiction which is, by force of item 4, taken to be valid for all purposes: **Pearson DS [19]**;

(e) *Powell*[19] and *Madafferi*[20] are beside the point, because they consider the source of the Tribunal's power, not the source of the Tribunal's jurisdiction: **Pearson DS [22]-[23].** The appellant's argument sets up a false dichotomy between a decision under the AAT Act and a decision under the Migration Act: **Pearson DS [24]-[25]**;

(f) The appellant's construction produces absurd results. If the Tribunal's decision was not validated, the prospective operation of s 5AB would mean that, on the remittal to the Tribunal, it would conduct a futile exercise of undertaking its review function on precisely the same legal basis as its previous review and therefore affirm the non-revocation decision: **Pearson DS: [24]-[25]**;

(g) The Explanatory Memorandum takes the matter beyond any doubt because it expressly provides that item 4 applies to things done by a Tribunal on a s 500 review: **Pearson DS [26]**.

21. The appellant makes two additional submissions not made in the Pearson proceedings. First, he says that the Tribunal was exercising "*jurisdiction … conferred on the AAT by ss 25 and 43 of the AAT Act*" (**AS [26]**). The appellant relies in this respect on paragraph 51 of this Court's decision in *Frugtniet*.[21] It is true that the Court there described, in passing (and without the issue having been argued), the Tribunal's

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19 *Powell v The Administrative Appeals Tribunal* (1998) 89 FCR 1.

20 *Madafferi v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 326.

21 ***Frugtniet*** *v Australian Securities and Investments Commission* (2019) 266 CLR 250 at [51] (the Court).

jurisdiction as being "conferred" by those provisions. However, the Court was not confronted with the particular question that arises here: namely, whether it is in fact the enabling enactment that (alone or in tandem with the AAT Act) confers jurisdiction on the Tribunal such that the Tribunal was doing something "under" it. The balance of [51] of *Frugtniet* confirms that, on a review of that kind, the Tribunal "*exercises the same power or powers as the primary decision-maker, subject to the same constraints*" and that the "*primary decision, and the statutory question it answers, marks the boundaries of the AAT's review*".[22] Those observations serve to underline the point, recognised by the Full Court below, that "it is the *original decision* to which one must look to understand the jurisdictional foundation" of the AAT's decision (**CAB 87 [91]**). Properly understood, *Frugtniet* supports, rather than detracts, from a construction which takes account of the close connection between the Migration Act and the Tribunal's exercise of jurisdiction.

22. Secondly, the appellant submits that unless the Aggregate Sentences Act validates the "decision" of the Tribunal, it did not cure the error of the Tribunal and is therefore irrelevant to the decision of the Full Court below (**AS [26]**). However, as explained above, the Full Court reasoned that the exercise of jurisdiction by the Tribunal was validated by the Aggregate Sentences Act. On that basis, item 4 provides that the exercise of jurisdiction by the Tribunal is "*taken for all purposes, to be valid and to always have been valid*". That is plainly broad enough to cure an error which the appellant asserts the Tribunal made in the course of exercising that jurisdiction. It follows from that validation that there is, in law, no error in the "decision", even if that is understood narrowly as the exercise of power under s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth).

B2 Validity of the Aggregate Sentences Act

23. The appellant's second ground of appeal is that the Aggregate Sentences Act is invalid as infringing the 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*" (**AS [27]**).

24. The relevant principles are clear. Parliament can validly legislate "*so as to affect and alter rights in issue in pending litigation*",[23] because "*Ch III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative*

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22 *Frugtniet* (2019) 266 CLR 250 at [51] (the Court). See also, to a similar effect, *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at [132]-[134] (Kiefel J).

23 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88 (***BLF (Cth)***) at 96-97 (the Court); *HA* ***Bacharach*** *Pty Ltd v Queensland* (1998) 195 CLR 547 at [19] (the Court).

declaration or action". However, legislation may be invalid where it "*interferes with the judicial process itself, rather than with the substantive rights which are at issue in the proceedings*".[24]

25. It was in this sense that the Full Court below observed that "*there 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*" (our emphasis) (**CAB 90 [102]**). Contrary to **AS [29]**, that is not an overbroad proposition. It is firmly grounded in a long line of authorities in this Court.

26. The Aggregate Sentences Act is plainly directed to altering substantive rights, rather than the judicial process itself. The evident intention is that the Migration Act should apply no differently to aggregate sentences and sentences imposed by a court in respect of a single offence. That intention is brought about in two principal ways:

    (a) prospectively, s 5AB changes the law to declare that the provisions of the Migration Act "apply no differently" in relation to aggregate sentences. The effect, in relation to s 501(7)(c), is that an "aggregate sentence" is now certainly a "term of imprisonment" within the meaning of that provision; and

    (b) retrospectively, the same result is achieved by (*inter alia*):

        (i) targeting "things done" under the Migration Act which are invalid but which would be valid according to the new construction of s 501(7)(c); and

        (ii) deeming those "things done" to have been, and always to have been, valid.

27. Item 4 takes its place in the latter part of that scheme by curing "things done" under the Migration Act which are invalid, but which would have been valid had the new construction of s 501(7)(c) been the law at the time the relevant thing was done.

28. Understood in context, the relevant operation of the Aggregate Sentences Act is simply to change the rule of law as to what constitutes (and constituted) a "term of imprisonment" within the meaning of s 501(7)(c). Item 4 applies the consequences of that change in the law to previous "things done" which, on that new construction of s 501(7)(c), ought no longer be invalid.

29. It follows that the Aggregate Sentences Act in general, and item 4 in particular, are no more a "direction" to courts than any other Act which retrospectively amends the law. Its

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[24] *BLF (Cth)* (1986) 161 CLR 88 at 96-97 (the Court); *Bacharach* (1998) 195 CLR 547 at [19] (the Court).

provisions simply amend the law which courts are required to enforce in determining issues that arise in proceedings.

Analogous cases

30. In *Duncan,* the High Court unanimously upheld legislation which validated previous acts done by ICAC which were the subject of pending judicial review proceedings at the time of the passage of the amending legislation.[25] Although *Duncan* was concerned with a New South Wales Act, French CJ, Kiefel, Bell and Keane JJ expressly reasoned that the legislation would have been valid even if it were a law of the Commonwealth and within federal jurisdiction.[26] Their Honours did so in order to answer an alternative argument by the applicant that the Court of Appeal was exercising federal jurisdiction and that Ch III was directly engaged on that basis.[27]

31. Chief Justice French, Kiefel, Bell and Keane JJ considered that it was "*now well settled that a statute which alters substantive rights does not involve an interference with judicial power contrary to Ch III of the Constitution even if those rights are in issue in pending litigation*" (our emphasis).[28] Their Honours noted that Part 13 of the legislation "*does not operate as an impermissible direction to the judicature: it is not concerned with the functions or jurisdiction of courts; it does not refer to court proceedings either specifically or generally; and it does not direct the courts as to the giving of relief*".[29]

32. Justices Nettle and Gordon reasoned 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*". Their Honours agreed with French CJ, Kiefel, Bell and Keane JJ that the legislation did not "*purport to give a direction to a court*".[30] Justice Gageler likewise upheld the validity of the law, holding that the legislation (validly) retrospectively conferred legislative authority on the Commission to have done the relevant acts.[31]

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25 ***Duncan*** *v* ***I****ndependent* ***C****ommission* ***A****gainst* ***C****orruption (NSW)* (2015) 256 CLR 83 at [1]-[4], [25]-[28] (French CJ, Kiefel, Bell and Keane JJ), [41]-[42] (Gageler J), [45]-[46] (Nettle and Gordon JJ).

26 *Duncan* (2015) 256 CLR 83 at [18]-[25], [31] (French CJ, Kiefel, Bell and Keane JJ) and see also the authorities their Honours there referred to.

27 *Duncan* (2015) 256 CLR 83 at [30] (French CJ, Kiefel, Bell and Keane JJ)

28 *Duncan* (2015) 256 CLR 83 at [26].

29 *Duncan* (2015) 256 CLR 83 at [31] (French CJ, Kiefel, Bell and Keane JJ).

30 *Duncan* (2015) 256 CLR 83 at [46] (Nettle and Gordon JJ).

31 *Duncan* (2015) 256 CLR 83 at [42] (Gageler J).

33. The Aggregate Sentences Act is relevantly indistinguishable from the legislation considered in *Duncan*. Like the Aggregate Sentences Act, the legislation in *Duncan* was enacted at a time when there was a pending judicial review proceeding (to which ICAC was a party) seeking relief in relation to the invalidity of the very thing that the legislation operated to validate (namely, ICAC's findings of corrupt conduct).[32] The terms of the validating legislation are also materially identical. The legislation in *Duncan* provided that a previously unauthorised administrative act was "*taken to have been, and always to have been, validly done*",[33] which is essentially the same as item 4(3) of the Aggregate Sentences Act. It follows that, applying *Duncan*, the Aggregate Sentences Act "*does not operate as an impermissible direction to the judicature*"[34] and is not contrary to Ch III of the Constitution.

34. The appellant seeks to distinguish *Duncan* on the basis that the legislation the Court considered did not expressly refer to pending proceedings, as does item 4(5)(b)(ii) (**AS [51]**). However, the appellant also concedes (correctly) that the High Court in *Duncan* accepted that the effect of the legislation was to validate things done by ICAC for the purposes of pending proceedings (**AS [51]** and see again the extract from the joint reasons at para 31 above). The fact that the drafting of the Aggregate Sentences Act is more precise (and upfront) about this effect does not mean that *Duncan* is distinguishable. In any event, the reference to pending proceedings in item 4(5)(b)(ii) of the Aggregate Sentences Act does not dictate to a court how those pending proceedings should be determined by reference to the pending proceedings. There is a qualitative difference between an avoidance of doubt provision like item 4(5)(b)(ii) – which provides that the substantive rule of law which it changes is applicable even in existing pending proceedings – and a provision which commands a court hearing a particular proceeding how those proceedings are to be resolved.

35. In *AEU,*[35] the High Court upheld the validity of s 26A of the *Fair Work (Registered Organisations) Act 2009* (Cth), which provided that the registration of a body as an industrial organisation was, in specified circumstances, "*taken, for all purposes, to be valid and to have always been valid*". Among other things, s 26A had the effect of

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32 *Duncan* (2015) 256 CLR 83 at [1]-[4], [25]-[28] (French CJ, Kiefel, Bell and Keane JJ), [41]-[42] (Gageler J), [45]-[46] (Nettle and Gordon JJ).

33 *Duncan* (2015) 256 CLR 83 at [8] (French CJ, Kiefel, Bell and Keane JJ).

34 *Duncan* (2015) 256 CLR 83 at [31] (French CJ, Kiefel, Bell and Keane JJ), see also: [46] (Nettle and Gordon JJ).

35 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 (***AEU***).

validating the past registration of a particular body that had been declared invalid in *Australian Education Union v* ***Lawler***.[36] The High Court unanimously held that s 26A was not an impermissible interference with the exercise of federal judicial power:

(a) Chief Justice French, Crennan and Kiefel JJ accepted that a Commonwealth law would be invalid if it purported to set aside a decision of a court in federal jurisdiction. However, there was no such interference if a law (such as s 26A) attached new legal consequences to an act or event which a court had held, on the previous state of the law, not to attract those consequences.[37] Justice Heydon reasoned to a similar effect.[38]

(b) Justices Gummow, Hayne and Bell held that, although s 26A altered the law for registering industrial organisations with retrospective effect, it did not as a matter of form or substance alter the decision in *Lawler*.[39] *Lawler* was about the validity of a particular decision "*as it stood at the time of the Full Court's judgment*", which meant that s 26A did not alter, let alone dissolve or reverse, that judgment.[40]

36. Both s 26A of the Act considered in *AEU,* and item 4 of the Aggregate Sentences Act, attach new legal consequences and a new legal status to things done which, based on the law prior to the commencement of the provision, did not have such consequences or status, which was the basis on which the legislation was upheld by French CJ, Crennan and Kiefel JJ, and Heydon J.[41] It is true that Gummow, Hayne and Bell JJ made clear that they were considering an argument that s 26A usurped or interfered with concluded exercises of Ch III power. But Gummow, Hayne and Bell JJ expressly accepted the proposition from *Humby* that that "*Chapter III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action*".[42] Nothing said in any of the judgments casts doubt upon that orthodox proposition. And any doubt that did exist was later swept away by *Duncan*.

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36 (2008) 169 FCR 327.

37 *AEU* (2012) 246 CLR 117 at [36], [48], [53] (French CJ, Crennan and Kiefel JJ).

38 *AEU* (2012) 246 CLR 117 at [117] (Heydon J).

39 *AEU* (2012) 246 CLR 117 at [90].

40 *AEU* (2012) 246 CLR 117 at [89], see also [69] (Gummow, Hayne and Bell JJ). The Full Court in *Lawler* gave its judgment on the basis of the law at that time: see, eg, *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at [31] (Gageler J).

41 *AEU* (2012) 246 CLR 117 at [36], [48], [53] (French CJ, Crennan and Kiefel JJ), [117] (Heydon J).

42 *AEU* (2012) 246 CLR 117 at [78] (Gummow, Hayne and Bell JJ).

37. *Humby*[43] and *Re Macks*[44] were both cases concerned with legislation which validated judicial decrees or orders following final decisions that had declared them to be beyond power. In *Humby*, s 5(3) of the *Matrimonial Causes Act 1971* (Cth) declared the "*rights, liabilities, obligations and status of all persons … to be, and always to have been, the same as if*" the purported decree had been made by a Judge of the Supreme Court.[45] At **AS [32]** the appellant relies on Stephen J's judgment, and the emphasis on the fact that the legislation did not "deem" the relevant decrees to be "valid" but rather left them as they were, while "attaching to them, as acts in law, the consequences which it declares them always to have had".[46] Similar observations were made in relation to the validating provisions which applied to "ineffective judgments" of the Federal Court in *Re Macks*.[47] However, those observations need to be understood in the context of the argument in those cases, which related to whether it was beyond Commonwealth legislative power to convert impugned decisions into (in effect) decisions of State Supreme Courts. The concern about creating "legislative judgments" in that context is significantly more acute than where an ordinary administrative act is being validated. The comments should not be read as prescribing exhaustive criteria applicable to all cases. What is significant for present purposes is Mason J's recognition, in *Humby*, that "*Chapter III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action*".[48] As noted above, that recognition was cited with approval in *AEU*, and by this Court on many other occasions.[49]

38. In *BLF (Cth)*,[50] the Australian Conciliation and Arbitration Commission had made a declaration, pursuant to an existing legislative provision, that empowered the Minister to order the deregistration of an industrial organisation. The organisation applied to the High Court to quash the declaration. Before that application was heard, the *Builders Labourers' Federation (Cancellation of Registration – Consequential Provisions) Act 1986* (Cth) commenced. That Act legislatively cancelled the registration of that specific organisation and thereby rendered the pending proceedings nugatory. The High

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43 *R v* ***Humby****; ex parte Rooney* (1973) 129 CLR 231.

44 ***Re Macks****; Ex parte Saint* (2000) 204 CLR 158.

45 (1973) 129 CLR 231 at 242 (Stephen J).

46 (1973) 129 CLR 231 at 243 (Stephen J).

47 *Re Macks* (2000) 204 CLR 158 .

48 *Humby* (1973) 129 CLR 231 at 250 (Mason J).

49 *BLF (Cth)* (1986) 161 CLR 88 at 96 (the Court); *Bachrach* (1998) 195 CLR 547 at [17] (the Court); *AEU* (2012) 246 CLR 117 at [49] (French CJ, Crennan and Kiefel JJ), [78] (Gummow, Hayne and Bell JJ); *Duncan* (2015) 256 CLR 83 at [20] (French CJ, Kiefel, Bell, Keane JJ).

50 *BLF (Cth)* (1986) 161 CLR 88 at 96 (the Court).

Court unanimously upheld the cancellation legislation. This Court stated the general principle as follows, citing Mason J's observation in *Humby*:[51]

> It is well established that Parliament may legislate so as to affect and alter rights in issue in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution.
>
> > "Chapter III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action."[52]
>
> . . It is otherwise when the legislation in question interferes with the judicial process itself, rather than with the substantive rights which are at issue in the proceedings.

39. The Court held that the legislation was not invalid on the basis that:[53]

> The Cancellation of Registration Act does not deal with any aspect of the judicial process. It simply deregisters the Federation, thereby making redundant the legal proceedings which it commenced in this Court. It matters not that the motive or purpose of the Minister, the Government and the Parliament in enacting the statute was to circumvent the proceedings and forestall any decision which might be given in those proceedings.
>
> The consequence is that the Cancellation of Registration Act is a valid law of the Commonwealth Parliament.

40. The legislation in *BLF (Cth)* was significantly more targeted than the Aggregate Sentences Act, as it applied to one industrial organisation only. Nonetheless, it was upheld unanimously by this Court. The Aggregate Sentences Act is much broader in scope, as it changed the rule of law as to the meaning of s 501(7)(c) in <u>all</u> cases, past, present and future, as has been explained above. It is even further from an impermissible direction than the legislation upheld as valid in *BLF (Cth)*.

41. In *Bachrach*,[54] the plaintiff had unsuccessfully challenged the validity of a decision of a local authority to approve the re-zoning of land to permit a shopping centre development in an action in the Planning and Environment Court. The plaintiff instituted an appeal in the Queensland Court of Appeal, and on the following day, the Queensland Parliament passed legislation (the **Zoning Act**) which in effect authorised the development by legislation.[55] The legislation was clearly targeted at the land in question: it described the subject land as the "*rezoned Morayfield shopping centre land*" and referred to a specific planning deed made by the Council and the developer. Section 5 provided that the

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51 *BLF (Cth)* (1986) 161 CLR 88 at 96 (the Court).

52 *Humby* (1973) 129 231 at 250 (Mason J).

53 *BLF (Cth)* (1986) 161 CLR 88 at 96-97 (the Court).

54 *Bachrach* (1998) 195 CLR 547.

55 *Bachrach* (1998) 195 CLR 547 at [9] (the Court).

purposes for which the land could be used without the consent of the Council "*are taken to include*" certain identified purposes. Section 5 provided that anything done on the subject land under the planning deed was lawful. The plaintiff challenged the legislation on the ground that it directed the manner and outcome of the exercise of the Court of Appeal's jurisdiction in the context of the plaintiff's litigation.[56]

42. Section 3 of the Zoning Act and item 4 of the Aggregate Sentences Act are relevantly similar in that:

(a) both provisions use the operative formulation "taken" to describe the legal outcome which the legislature intends; and

(b) both provisions have the effect of determining legal questions that arose in pending proceedings. The Zoning Act determined the question of whether the development of the shopping centre was a permissible use of the land, and item 4 determines the legal question of whether the cancellation decision, non-revocation decision, and Tribunal decision are invalid on the ground identified in *Pearson (No 1)*.

43. Although the Zoning Act was a State law, the parties proceeded on the basis that "*if the law in question had been a law of the Commonwealth and it would not have offended [the principles applicable to the exercise of the judicial power of the Commonwealth], then an occasion for the application of Kable does not arise*".[57] On that basis, this Court held that the Zoning Act did not constitute an impermissible interference with judicial power. The Court observed that it is the operation and effect of the law, not the presumed motives of those behind it, which "*defines its constitutional character*".[58] The Court observed, by reference to Mason J's statement in *Humby*, that the fact that the legislation affected "*rights in issue in pending litigation*" did not "*necessarily involve an invasion of judicial power*".[59] The Court applied *BLF (Cth)* to hold that the legislation was valid, as it altered rights in issue in proceedings without interfering with pending litigation.[60]

44. Finally, in ***Nelungaloo*** *v Commonwealth,*[61] s 11 of the *Wheat Industry Stabilization Act (No 2) 1946* (Cth) provided that a particular executive order made under a particular regulation "*shall be deemed to be, and at all times to have been, fully authorized by that*

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56 *Bachrach* (1998) 195 CLR 547 at 550-551 (the Court).
57 *Bachrach* (1998) 195 CLR 547 at [14] (the Court).
58 *Bachrach* (1998) 195 CLR 547 at [12] (the Court).
59 *Bachrach* (1998) 195 CLR 547 at [17] (the Court).
60 *Bachrach* (1998) 195 CLR 547 at [20] (the Court).
61 (1948) 75 CLR 495.

regulation, and shall have, and be deemed to have had, full force and effect according to its tenor". The plaintiff contended that it amounted to a usurpation of judicial power because 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 the judicial power*".[62]. At first instance, Williams J held that s 11 was valid as it, in effect, authorised the order "ab initio".[63] . On appeal, Latham CJ agreed with Williams J's reasons[64] and Dixon J observed that s 11 is "*simply a retrospective validation of an administrative act and 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*".[65]

45. Although s 11 of the Act in *Nelungaloo* is worded slightly differently to item 4, they are materially to the same effect. Section 11 "*deemed*" the executive order "*to be, and at all times to have been fully authorised by that regulation*" and to have, and have had, "*full force and effect*". Item 4's declaration is that "*things done*" are "*taken to be valid and to have always been valid*". Each is simply a retrospective validation of an administrative act, and does not interfere with pending proceedings.

BLF (NSW) is not analogous or is wrong

46. The appellant relies on the NSW case of *Building Construction Employees and Builders Labourers' Federation of NSW v Minister of Industrial Relations*,[66] which considered an equivalent statute of the NSW Parliament which sought to cancel the BLF's registration, but which used different statutory language to the Commonwealth Act considered in *BLF (Cth)* (**AS [34]**). As the High Court noted in *Bachrach*, that legislation was directed to the judicial process itself, as it "*specifically addressed current litigation, prescribed that for the purposes of determining the issues in that litigation certain facts were taken as established, and dealt with the costs of the litigation*".[67] To the extent that the NSW Court of Appeal also expressed concern about the language of the validating statute (that the BLF's registration "*shall, for all purposes, be taken to have been cancelled*") as commanding the Court as to the conclusion it should reach (**AS [34], [56]**), those concerns

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62 *Nelungaloo* (1948) 75 CLR 495 at 503 (Williams J).

63 *Nelungaloo* (1948) 75 CLR 495 at 504 (Williams J).

64 *Nelungaloo* (1948) 75 CLR 495 at 531 (Latham CJ).

65 *Nelungaloo* (1948) 75 CLR 495 at 579 (Dixon J).

66 (1986) 7 NSWLR 372 (***BLF (NSW)***).

67 *Bachrach* (1998) 195 CLR 547 at [21] (the Court).

cannot survive the unanimous approval given to the validating language "*taken to be valid*" in both *AEU* and *Duncan*.

Appellant's remaining arguments

47. The appellant does not seek to make out his argument by way of a direct analogy with any of these decisions. Indeed, he could not do so because, when properly analysed, the authorities provide substantial support for the validity of the Aggregate Sentences Act. Rather, the appellant "cherry picks" isolated statements in the authorities to attempt to identify abstract "*considerations*" that may be relevant to whether legislation impermissibly directs the exercise of jurisdiction (**AS [48]-[49]**).

48. The appellant relies on the fact that Parliament appears to have been aware that some of the persons affected by *Pearson (No 1)* already had proceedings on foot (**AS [50], [52]**). That is not a significant factor weighing in favour of invalidity. In at least both *BLF (Cth)* and *Bachrach* it appears the legislature was aware of the pending proceedings and introduced legislation which changed the law as to live issues in the proceedings. In neither case was the legislation invalid. Similarly, while the "*litigious background*" might be relevant in particular cases,[68] those cases both show that it is not determinative: cf **AS [50]**. It cannot be determinative here, given the clear legislative intention to change the substantive law for a broad class of people both retrospectively and prospectively.

49. The appellant's submission that the Aggregate Sentences Act is particularly sinister because it affects judicial review proceedings (**AS [53]**) takes him nowhere. The legislation in *Duncan* and *AEU* relevantly operated to validate things which, prior to the validating legislation, could have been declared invalid in judicial review proceedings. That impact on the "cause of action" in judicial review proceedings (**AS [53]**) was not treated as relevant by the Court, much less determinative. It would be the case with any legislation that validates administrative decision-making. Moreover, there was an extant judicial review proceeding in *Duncan* at the time of commencement of the validating legislation.[69] The impact on judicial review rights in that proceeding did not invalidate the legislation. It does not do so here.

50. Similarly, the appellant's vague appeal to consider the "*underlying rights … includ[ing] the right to liberty and the right to remain in Australia*" (**AS [54]**) is unsupported by

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68 *Bachrach* (1998) 195 CLR 547 at [12] (the Court).

69 *Duncan* (2015) 256 CLR 83 at [1]-[4], [25]-[28] (French CJ, Kiefel, Bell and Keane JJ), [41]-[42] (Gageler J), [45]-[46] (Nettle and Gordon JJ).

authority, and there is no reason why the nature of the "underlying rights" affects the consideration, required by the authorities discussed above, as to whether the legislature is altering or declaring the substantive law, on one hand, or interfering with the judicial process, on the other.

51. Finally, the fact that the outcome of the appellant's Federal Court proceeding was different as a result of the passage of the Aggregate Sentences Act (**AS [55]**) reflects nothing more than that the legislation had altered the legal rights of the parties by supplying a new rule of law in item 4. It does not reveal any impermissible direction.

Section 75(v)

52. The operation of the Aggregate Sentences Act does not cut across the High Court's "entrenched" jurisdiction under s 75 of the Constitution: cf **AS [57]-[62]**. The equivalent argument, that the legislation intruded upon the entrenched supervisory jurisdiction recognised in ***Kirk*** *v Industrial Court*.[70], was rejected in *Duncan*.[71] This Court held that nothing in *Kirk* denied "the *competence of State legislatures to alter the substantive law to be applied by those agencies and courts*" and that the alteration of the substantive law did not "*withdraw any jurisdiction*" because the Court "*remains seized of the proceedings pending before it*".[72]

53. Those statements are directly applicable here. The fact that the outcome of a challenge to a decision in the exercise of the jurisdiction in s 75 of the *Constitution* may be different following the passage of the Aggregate Sentences Act simply reflects the change to the substantive law to be applied in that jurisdiction. This Court confirmed in *AEU* and *Duncan* that such a change to the substantive law is constitutionally permissible. As the Full Court put it, "*there 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*" (**CAB 90 [102]**).

54. Nothing said in *Plaintiff S157/2002 v Commonwealth*,[73] *Bodruddaza v Minister for Immigration and Multicultural Affairs*[74] or *Graham v Minister for Immigration and Border Protection*[75] cuts across this reasoning. The legal and practical operation of the

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70 (2010) 239 CLR 531.

71 *Duncan* (2015) 256 CLR 83 at [29] (French CJ, Kiefel, Bell and Keane JJ), [35]-[36] (Gageler J).

72 *Duncan* (2015) 256 CLR 83 at [29] (French CJ, Kiefel, Bell and Keane JJ), [35]-[36] (Gageler J).

73 (2003) 211 CLR 476.

74 (2007) 228 CLR 651

75 (2017) 263 CLR 1.

legislation is to change the substantive law, namely by removing an implied limit (the limit identified in *Pearson (No 1)*) which is enforced within the entrenched jurisdiction. Parliament does not alter the existence of the Court's jurisdiction by altering those substantive limits (which then remain to be enforced by the courts, including this Court). Were it otherwise, s 75(v) would have the effect of preventing, in every case, the retrospective validation of decisions made by officers of the Commonwealth because, in each case, Parliament would be "*denying the Federal Court … the ability to enforce one of the legislated limits on … jurisdiction*" (**AS [62]**). That conclusion would be contrary to the long line of authorities outlined above which establish that such a retrospective validation is entirely permissible.

C Relief

55. As noted above, if the First Respondent succeeds on the Notice of Contention, the appeal should be dismissed. On the other hand, if the Appellant succeeds on his construction argument, but not his constitutional argument, there is a question as to the appropriate relief to be granted. There is no dispute that, as a matter of construction, the Aggregate Sentences Act would still apply to the cancellation decision and the non-revocation decision. That being so, even if the construction argument succeeds, this Court should nonetheless decline to issue writs of certiorari and mandamus to the Tribunal on the discretionary ground that they would achieve no useful result.[76] That follows because, if those writs were issued, the Tribunal would be required on re-exercising its function to hold that the appellant's aggregate sentence is a *"term of imprisonment*" under s 501(7)(c) because of the (unchallenged) prospective operation of s 5AB of the Migration Act. It may be accepted that there is a high bar before a court can conclude that a constitutional writ is futile,[77] because, quite often, an error "*permeates [the Tribunal's] reasoning*".[78] However, that is not so here, because the Tribunal would be required by (new) s 5AB of the Migration Act to conduct the review on precisely the same legal basis as the review which it previously conducted (namely, that the appellant's aggregate sentence is a "term

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76 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [55] (Gaudron and Gummow JJ); *SZBYR v Minister for Immigration* (2007) 147 CLR 297 at [28]-[29] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), [87]-[88] (Kirby J), [91] (Hayne J); *Prodduturi v Minister for Immigration and Border Protection* (2015) 144 ALD 243 at [37]-[38] (the Court).

77 *Gill v Minister for Immigration and Border Protection* (2017) 250 FCR 309 at [95]-[100] (Griffiths and Moshinsky JJ, Logan J agreeing in the result); *Shrestha v Minister for Immigration and Border Protection* (2017) 251 FCR 143 at [12] (Bromberg J), [41]-[46] (Bromwich J).

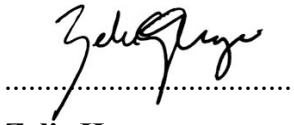
78 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [80] (Gaudron and Gummow JJ).

of imprisonment" within s 501(7)(c)). The result of that exercise has already been seen: the decisions of the Minister's delegate was affirmed: **CAB 4**.

PART VII ESTIMATE

56. The Commonwealth respondents estimate that they will require 4 hours to present oral argument if the matter is heard concurrently with *Pearson* and *Tapiki*.

Dated: 22 May 2024



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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY **No B15 of 2024**

BETWEEN: **JZQQ**
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Respondent

and

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ANNEXURE TO THE SUBMISSIONS OF THE FIRST RESPONDENT AND THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Pursuant to Practice Direction No. 1 of 2019, the Commonwealth respondents set out below a list of constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
Constitutional provisions			
1	*Commonwealth Constitution*	Current (Compilation 6, 29 July 1977 – present)	Ch III
Commonwealth statutory provisions			
2	*Acts Interpretation Act 1901* (Cth)	Current (Compilation 37, 12 August 2023 – present)	s 23
3	*Administrative Appeals Tribunal Act 1975* (Cth)	Compilation 51 (17 August 2022 to 30 June 2023)	ss 25, 43
4	*Migration Amendment (Aggregate Sentences) Act 2023* (Cth)	As enacted	Whole Act

5	*Migration Act 1958* (Cth)	Compilation 152 (1 September 2021 to 16 February 2023)	ss 189, 198, 499, 500, 501, 501CA
6	*Migration Act 1958* (Cth)	Current (Compilation 160, 29 March 2024 – present)	s 5AB
State and Territory statutory provisions			
7	*Crimes (Sentencing Procedure) Act 1999* (NSW)	As at 28 February 2019	s 53A
8	*Criminal Law (Sentencing Act) 1988* (SA)	Current	s 18A
9	*Sentencing Act 1995* (NT)	Current	s 52
10	*Sentencing Act 1991* (Vic)	Current	s 9
11	*Sentencing Act 1988* (Tas)	Current	s 11