HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	P10/2024
File Title:	Tapiki v. Minister for Immigration, Citizenship and Multicultu
Registry:	Perth
Document filed:	Form 27C - A-G NT Intervener's submissions
Filing party:	Interveners
Date filed:	05 Jun 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

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY OF AUSTRALIA (INTERVENING)

PART I – CERTIFICATION

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

PARTS II AND III – INTERVENTION

2. The Attorney-General for the Northern **Territory** of Australia intervenes in support of the Respondent and the Commonwealth Attorney-General (**Commonwealth Respondents**) pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART IV – ARGUMENT

A. SUMMARY

3. The Territory adopts the submissions of the Commonwealth Respondents and makes only one supplementary submission, that the ground of appeal concerning Ch III of the Constitution (**Ground 1**) must be dismisses by reason of *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 (***AEU***). Leave is sought to re-open *AEU* but leave should be refused or, alternatively, *AEU* confirmed.

4. The Territory does not make any submission in relation to the s 51(xxxi) ground (**Ground 2**), noting that the Appellant accepts that, if s 3B of the ***Migration Act*** *1958* (Cth) applies to any acquisition of property effected by the *Migration Amendment (Aggregate Sentences) Act 2023* (Cth) (**Migration Amendment Act**) as a matter of construction, just terms would be provided for that acquisition: **AS [70]**.

B. *AEU* IS A COMPLETE ANSWER TO GROUND 1

5. The Appellant's primary argument is that the Migration Amendment Act is invalid because it purports to dissolve or reverse the judgment of a Ch III court: **AS[28]-[63]**. The argument is foreclosed by *AEU*, which is not materially distinguishable.

6. The sequence of events in *AEU* may be summarised as follows:

   (a) The Australian Principals Federation (**APF**) applied to be registered as an organisation under the *Workplace Relations Act 1996* (Cth) (**WR Act**). The Industrial Relations **Commission** granted that application and the Industrial **Registrar** entered the particulars of the APF on the **Register** of Organisations kept under the WR Act.[1]

   (b) The Australia Education Union (**AEU**) sought judicial review of the Commission's decision to register, and the Registrar's registration of, the APF on the basis that (relevantly) the APF's rules of association did not confine its membership to employees who were capable of being engaged in an industrial dispute, as required by s 18(1)(b) of Schedule 1B to the WR Act.[2]

   (c) In *Australian Education Union v* ***Lawler***, the Full Court of the Federal Court gave judgment for the AEU, quashing both the decision to register the APF and the registration of the APF, because the decision of the Commission had proceeded on a misconstruction of s 18 of Schedule 1B to the WR Act.[3]

   (d) After the decision in *Lawler*, Parliament passed the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), which transformed Schedule 1B of the WR Act into the *Fair Work (Registered Organisations) Act 2009* (Cth) (**FW(RO) Act**). It also enacted s 26A of the FW(RO) Act, which validated registrations of organisations (including that of the APF) which were invalid by reason of the issue identified in *Lawler*.[4]

   (e) The relevant effect of s 26A was to attribute to the historic facts of registration legal consequences which were different to those declared in *Lawler* on the law as it then stood.

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1 *AEU* (2012) 246 CLR 117, [9]-[10] (French CJ, Crennan, Kiefel JJ), [56] (Gummow, Hayne, Bell JJ).
2 Ibid, [12] (French CJ, Crennan and Kiefel JJ).
3 (2008) 169 FCR 327, [88] and [95] (Lander J), [270] and [316] (Jessup J). See also *AEU* (2012) 246 CLR 117, [4], [12] (French CJ, Crennan and Kiefel JJ), [58], [66] (Gummow, Hayne and Bell JJ).
4 *AEU* (2012) 246 CLR 117, [2]-[3], [14] (French CJ, Crennan and Kiefel JJ), [59] (Gummow, Hayne and Bell JJ).

7. Those facts are not materially distinguishable from those pertaining to this case. In particular:

   (a) The Appellant was taken into detention as a consequence of decisions made by or on behalf of the Respondent: **As [8]-[10]**.

   (b) The Appellant sought judicial review of his detention, including on the ground that the decisions leading to his detention were infected by jurisdictional error by reason of the constructional issue identified in *Pearson v Minister for Home Affairs* (2022) 295 FCR 177 ***(Pearson No. 1***): **AS [11]-[14]**. That decision held that, as a matter of construction, the phrase "sentenced to a term of imprisonment of 12 months or more" in s 501(7)(c) of the Migration Act did not include an aggregate sentence of that duration.[5]

   (c) The Full Court of the Federal Court gave judgment for the Appellant, quashing or declaring to be invalid the decisions which required the Appellant's detention (***Tapiki No.1***): **AS [20]**.[6]

   (d) The Migration Amendment Act was passed after that relief was granted and validated things done (including the impugned decisions) which were invalid by reason of the issue identified in *Pearson No.1*.

   (e) Subject to Ground 2, the relevant effect of the Migration Amendment Act was to attribute to the historic facts of those decisions legal consequences which are different to those declared in *Tapiki No.1* on the law as it then stood.

8. The legislation in both cases is identical, Parliament having plainly relied on *AEU* as a guide to drafting validating provisions.

9. In *AEU*, s 26A of the FW(RO) Act provided (emphasis added):

   > If:
   >
   > (a) an association was purportedly registered as an organisation under this Act before the commencement of this section; and
   >
   > (b) the association's purported registration would, but for this section, have been invalid merely because, at any time, the association's rules did not

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5 *Pearson No. 1* (2022) 295 FCR 177, [40]-[49] (the Court).

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

> have the effect of terminating the membership of, or precluding from membership, persons who were persons of a particular kind or kinds;
>
> that registration *is taken, for all purposes, to be valid and to have always been valid*.

10. Schedule 1 to the Migration Amendment Act is to identical effect. Item 2 defines to "do a thing" to include making a decision, exercising a power, performing a function, complying with an obligation, discharging a duty, or doing anything else. Item 4(1) then provides that Item 4 applies to a thing done which would, apart from validation be wholly or partly invalid by reason of the issue identified in *Pearson No. 1*: Item 4(1). Together, those two provisions perform the same function as sub-paragraphs (a) and (b) of s 26A of the FW(RO) Act.[7] Item 4(2) then provides that the "thing done, or purportedly done, *is taken for all purposes to be valid and to always have been valid*" (emphasis added). That is the same language used in the tailpiece to s 26A.

11. In that relevantly identical factual and statutory context, the Appellant's argument in this case is identical to that made in *AEU*. The Appellant's sole contention is that the Migration Amendment Act is invalid because it "has the effect of reversing [] earlier judicial orders by validating that which had been quashed and declared to be invalid by a Ch III court": **AS [28]**. The applicant's argument in *AEU* was that s 26A was:[8]

> "invalid as an interference with or usurpation of the judicial power of the Commonwealth … because Ch III of the *Constitution* prevents Parliament from reversing or dissolving a final judgment such as in *Lawler's Case* given in the exercise of the judicial power of the Commonwealth; and s 26A would in substance reverse or dissolve the order in *Lawler's Case*".

12. That argument was unanimously rejected. French CJ, Crennan and Kiefel JJ noted the passage in *Mabo v Queensland* where Brennan, Toohey and Gaudron JJ observed that "declaratory Acts are frequently passed in order to override a judicial decision as to *what the law is*. The effect of such a statute is to *change the law* and the courts are thereafter bound to take the law as the statute declares it to be" (emphasis added).[9] Their Honours then said that (emphasis added):[10]

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7 *AEU* (2012) 246 CLR 117, [115] (Heydon J).
8 Ibid, 120 (Hanks QC, *arguendo*), [47] (French CJ, Crennan and Kiefel JJ).
9 Ibid, [35] (French CJ, Crennan and Kiefel JJ), referring to *Mabo v Queensland* (1988) 166 CLR 186, 211-212 (Brennan, Toohey and Gaudron JJ).
10 Ibid, [36] (French CJ, Crennan and Kiefel JJ).

> The text of s 26A attached to the act of purported registration of an association all the legal consequences of a valid registration in those cases in which the purported registration would otherwise have been invalid merely because of the absence of a purging provision in the association's rules. The purported registration was to be taken always to have been valid. That is to say, the legal consequences of a valid registration were attached to a purported registration, validated by s 26A, as though they had always attached to it. *The section changed the law so as to overcome the vitiating consequences, for the registration of associations under the WR Act, of the law as stated in Lawler*.

13. Their Honours concluded that (emphasis added, citations omitted):[11]

> … it would be an impermissible interference with the judicial power of the Commonwealth if the Parliament were to purport to set aside the decision of a court exercising federal jurisdiction. There is no such interference, however, if Parliament enacts legislation which 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. *That was the substantive operation of s 26A. It changed the rule of law embodied in the statute as construed by the Full Federal Court in* Lawler. … [Section] 26A assumes that *Lawler* was correctly decided. To change that rule generally and for the particular case was within the legislative competence of the Commonwealth.

14. Gummow, Hayne and Bell JJ reasoned to like effect. Their Honours said:[12]

> Section 26A did alter the law governing which organisations have the status of a registered organisation under the Act. The section altered the law by providing, in effect, that the organisations with which it dealt were to be treated as having had the status of registered organisation from the time when the organisation in question was first purportedly entered on the register. But neither as a matter of form nor as a matter of substance did s 26A alter the decision the Full Court of the Federal Court had reached in the *Lawler* matter. Section 26A did not alter or in any way affect the *orders* which the Full Court had made. In particular, and contrary to the submission of the AEU, s 26A did not dissolve or reverse those orders. Section 26A did not dissolve or reverse those orders because in no sense was s 26A a legislative adjudication of any right or question of law which had been in issue in the *Lawler* matter.

15. Their Honours also considered it significant that:[13]

> [Section 26A] does not purport to declare what the law *was* at the time of the decision of the Full Court in the *Lawler* matter. On the contrary, s 26A assumes that the *Lawler* matter was correctly decided. And as has already been pointed out, s 26A did not intersect with any litigation that was pending in the judicial system at the time it came into operation.

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11 Ibid, [50] (French CJ, Crennan and Kiefel JJ).
12 Ibid, [90] (Gummow, Hayne and Bell JJ).
13 Ibid, [96] (Gummow, Hayne and Bell JJ).

16. Heydon J reached the same result by similar reasoning. His Honour said that:[14]

> The ground of decision in *Lawler's* case was that the rules of the Australian Principals Federation did not have the effect of terminating the membership of persons who had ceased to be employed as principals or assistant principals. Section 26A proceeds on the basis that both the reasoning that led to order 3 and order 3 itself were correct. Section 26A does not seek, expressly or by implication, to overrule the reasoning or to set aside that order. Section 26A cannot be said to have dissolved or reversed order 3. It left order 3, which reflected the law as it stood when *Lawler's* case was decided, unaffected. Section 26A simply created a new legal regime by reference to a particular group of acts – the steps that effected the "purported registration".

17. The reasoning in those three judgments is not relevantly different and the Act conforms with the principle therein. It is not in terms directed to any relief previously granted by a court and does not purport to dissolve those orders. Rather, it alters the law by providing that things done which were invalid because "a term of imprisonment of 12 months or more" did not historically include an aggregate term of imprisonment of 12 months or more, are to have the status of validity. Further, the Migration Amendment Act expressly does not deny the correctness of the reasoning in *Pearson No. 1* or *Tapiki No. 1* or the relief granted therein. That is because Schedule 1, Item 3 extends beyond "things done" and validates things "*purportedly* done". It proceeds on the basis that those "things" were historically beyond power.[15]

AEU is not distinguishable

18. The Appellant says *AEU* is distinguishable because s 26A validated the *registration* of the APF whereas the Migration Amendment Act effects the validity of certain *decisions* quashed or declared to be invalid: **AS [33]**. There are a number of flaws in that argument.

19. First and foremost, the asserted distinction between *registration* and a *decision* was not material in *AEU*. Gummow, Hayne and Bell JJ queried whether certiorari was the correct remedy to issue in respect of the registration of the APF, but said that those questions "did not need to be examined" because the "critical observation about the orders made in [*Lawler* was] that they gave effect to the Federal Court's conclusion that the decision to grant the APF's application for registration (and the decision to

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14 Ibid, [116] (Heydon J).
15 Ibid, [38] (French CJ, Crennan and Kiefel JJ), [116] (Heydon J).

effect the registration) was not made lawfully and was invalid because affected by jurisdictional error".[16] It was the intersection between s 26A and those orders as a matter of substance – not form – which was decisive.[17]

20. As noted above, the substantive effect of s 26A was to change the law which determined the legal consequences attaching to the purported registration of certain organisations, and that did not impermissibly interfere with a prior judicial determination that those administrative acts had, as the law stood at the time those determinations were made, been made in excess of jurisdiction. The analysis is the same whether those administrative acts are characterised as a *decision* or *conduct*, either of which may be the factum upon which legislation attaches new legal consequences.[18]

21. Secondly, the premise is flawed because, as Gummow, Hayne and Bell JJ said in *AEU*, the orders made in *Lawler* were concerned with "*the decision* to effect the registration" of the APF.[19] Thirdly, certiorari issued in *Lawler* in respect of the decision of the Commission to grant the registration of the APF, which then automatically required the APF's registration.[20] Fourthly, even if the registration of the APF is not characterised as a "decision", there is no relevant difference between the provisions in *AEU* and in the Migration Amendment Act. As noted above, that Act validates certain "things done", which include complying with an obligation and "anything done". That is broad enough to include conduct in discharge of a statutory obligation.

Overseas authority and historical materials

22. *AEU* being indistinguishable, the Appellant's reliance on overseas analogies (**AS [44]-[47]**) and historical matters (**AS [48]-[56]**) cannot produce a different result. However,

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16 Ibid, [68]-[69] (Gummow. Hayne and Bell JJ).

17 *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, [12] (the Court), quoted with approval in *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219, [83]-[84] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). See also *Parklands Darwin Pty Ltd v Minister for Infrastructure, Planning and Logistics* [2021] NTSCFC 4, [35] (the Court), *Question of Law Reserved (No. 1 of 2019)* (2019) 135 SASR 226 (SASCFC), [15]-[16] (Stanley J, Nicholson and Doyle JJ agreeing); *Question of Law Reserved (No. 1 of 2018)* (2018) 275 A Crim R 400 (SASCFC), [106]-[107] (Hinton J, Lovell J agreeing); *The Palace Gallery Pty Ltd v The Liquor and Gambling Commissioner* (2014) 118 SASR 567 (SASCFC), [49] (the Court); *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 (NSWCA), 377B-C (Street CJ).

18 *AEU* (2012) 246 CLR 117, [46] (French CJ, Crennan and Kiefel JJ).

19 Ibid, [69] (Gummow, Hayne and Bell JJ).

20 Ibid, [68] (Gummow, Hayne and Bell JJ).

it must be noted that these arguments in large measure rehearse the submissions made and dismissed in *AEU*. Those questions having been unanimously resolved after full consideration, they should not be reopened without "grave reason".[21] Speaking of the application of the *Kable* doctrine to legislation analogous to that considered in an earlier case, Kirby J has said that "care should be taken to avoid (especially within a very short interval) the re-opening and re-examination of issues that have substantially been decided by earlier decisions in closely analogous circumstances."[22]

23. For example, the passage relied on by the Appellant from Quick and Garran (**AS [49]**) was also relied on by the applicant in *AEU* and did not cause the Court to hold s 26A invalid. French CJ, Crennan and Kiefel JJ said of the main passage emphasised by the Appellant (that legislation cannot "affect the rights of the parties in whose case the judgment was given") was "too broad if understood as stating a simple test for the validity of legislation affecting pending or completed litigation".[23] Gummow, Hayne and Bell JJ noted with evident approval that the applicant had accepted that the passage "had not been considered or adopted in any decision of" the High Court.[24]

24. Similarly, the applicant in *AEU* relied for analogical support on the decision in ***Plaut*** *v Spendthrift Farm Inc*: **AS [44]-[46]**.[25] French CJ, Crennan and Kiefel JJ said that *Plaut* was of "*no assistance*" because it concerned legislation "directed to the reinstatement of proceedings which had been dismissed" and "did not enunciate a more general rule that any legislation affecting the underlying foundation of a judicial decision is invalid".[26] Heydon J distinguished *Plaut* on the same basis.[27] Gummow, Hayne and Bell JJ undertook a more representative survey of American jurisprudence and concluded that s 26A was valid[28], while noting that any attempt to adopt American authority would require a more "comprehensive survey" and an articulation of "how cases of the kind discussed would be decided in Australia".[29] The Appellant has not undertaken either exercise.

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21 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 554 (the Court).
22 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, [246] (Kirby J), referred to with approval in *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, [350] (Heydon J); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, [198] (Kiefel and Keane JJ); and *Vanderstock v Victoria* (2023) 98 ALJR 208, [426] (Edelman J).
23 *AEU* (2012) 246 CLR 117, [50] (French CJ, Crennan and Kiefel JJ).
24 Ibid, [73] (French CJ, Crennan and Kiefel JJ).
25 Ibid, 120 fn 10 (Hanks QC, *arguendo*).
26 Ibid, [51] (French CJ, Crennan and Kiefel JJ).
27 Ibid, [117] (Heydon J).
28 Ibid, [80]-[84] (Gummow, Hayne and Bell JJ).
29 Ibid, [85] (Gummow, Hayne and Bell JJ).

25. Finally, the Appellant's treatment of prior Australian authority begins with *Federated Engine-Drivers and Fireman's Association of Australia v Broken Hill Proprietary Co Ltd*: **AS [50]**.[30] The applicant in *AEU* placed a "deal of reliance" on that case, but Gummow, Hayne and Bell JJ gave it thorough analysis and said that it "did not assist the AEU" because s 26A conformed with the holding in that case.[31]

26. The Appellant relies on three further Australian authorities. The first is *R v* ***Humby****; Ex parte Rooney*: **AS [51]**.[32] In *AEU*, Heydon J said that s 26A "exemplified the type of legislation which was upheld in [*Humby*] and the cases which have followed it."[33] The second authority is ***Re Macks****; Ex parte Saint*[34]: **AS [54].** The legislation in that case was modelled on the legislation in *Humby* and was upheld on the same basis.[35] The Appellant takes comments in those cases out of context. It was significant in those cases that the legislation did not in terms retrospectively validate the subject decrees or judgments, being (purported) decrees or judgments of Ch III courts. Validation of such decrees or judgments may then have involved an exercise of judicial power by deeming those purported decrees or judgments to be judicial acts.[36] The same is not true of the validation in the case of administrative acts, effected by the Migration Amendment Act.

27. That point is confirmed by the third authority, ***Duncan*** *v Independent Commission Against Corruption*: **AS [55]-[56]**.[37] After referring to *Humby* and *Re Macks*, the majority in that case approved legislation which retrospectively validated administrative acts.[38] Further, the majority in *Duncan* referred with evident approval to *AEU* and said that "no relevant distinction" could be drawn between the legislation there in issue and the legislation upheld in *AEU*: "both sets of provisions attach new legal consequences and a new legal status to things done which otherwise would not have had such legal consequences or status."[39]

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30 (1913) 16 CLR 245.
31 *AEU* (2012) 246 CLR 117, [91]-[96] (Gummow, Hayne and Bell JJ).
32 (1973) 129 CLR 231.
33 *AEU* (2012) 246 CLR 117, [117] (Heydon J).
34 (2000) 204 CLR 158.
35 *Re Macks* (2000) 204 CLR 158, [14] (Gleeson CJ).
36 *Humby* (1973) 129 CLR 231, 243 (Stephen J, Menzies and Gibbs JJ agreeing), 239 (McTiernan J) and 250 (Mason J); *Re Macks* (2000) 204 CLR 158, [25], [31] (Gleeson CJ), [77]-[82] (Gaudron J), [110]-[111] (McHugh J), [212] (Gummow J), and [353]-[355] (Hayne and Callinan JJ).
37 (2015) 256 CLR 83.
38 *Duncan* (2015) 256 CLR 83, [14] fn 12, [20] and [31] (French CJ, Kiefel, Bell and Keane JJ). See also [42] fn 36 (Gageler J).
39 Ibid, [21]-[25] (French CJ, Kiefel, Bell and Keane JJ). See similarly, [42] (Gageler J).

AEU should not be re-opened

28. The Territory adopts the submissions of the Commonwealth Respondents against re-opening *AEU*: **RS [36]-[37]**. It supplements those submissions as follows.

29. The Appellant says that *AEU* does not rest upon a principle carefully worked out in a significant succession of cases: **AS [60]**. That is incorrect. As noted above, and as observed by Heydon J in *AEU*, s 26A "exemplified the type of legislation which was upheld in [*Humby*] and the cases which have followed it."[40] The Appellant says *AEU* departs from *Humby* and *Re Macks*, but that rests on the misreading of those cases: see [26] above. Once that is corrected, there can be seen a consistent line of authority which, as the Commonwealth Respondents submit, goes back at least to this Court's decision in *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153: **RS [23]**.

30. The Appellant says that *AEU* is a relatively recent decision and its constitutional holding has not been relied on in subsequent decisions: **AS [61]**. As noted above, the decision's recency and analogous circumstances points strongly *against* it being re-opened: see [22] above. Further, *AEU* was endorsed by five members of the Court in *Duncan*[41] and cited with approval by five members of this Court in *Minogue v Victoria*.[42] Its constitutional holding has also been applied by a large number of intermediate appellate and trial level authorities.[43]

31. The Appellant says that there would be no inconvenience if *AEU* was overturned: **AS [62]**. However, legislatures around the country have relied on the understanding that provisions of the kind upheld in *Humby*, *Re Macks* and *AEU* will not impermissibly interfere with the judicial process. In addition to the Commonwealth legislation in **RS**

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40 *AEU* (2012) 246 CLR 117, [117] (Heydon J), referring to *Humby* (1973) 129 CLR 231.

41 *Duncan* (2015) 256 CLR 83, [21]-[25] (French CJ, Kiefel, Bell and Keane JJ). See similarly, [42] (Gageler J).

42 (2018) 264 CLR 252, [24] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

43 *Varhagen v South Australia* (2022) 406 ALR 587 (SASCFC), [99] (the Court); *Varnhagen v State of South Australia* (2022) 372 FLR 194 (SASC), [104], [128], [131]-[132], [135] (Hughes J); *Parklands Darwin Pty Ltd v Minister for Infrastructure, Planning and Logistics* [2021] NTSCFC 4, [17], [21]-[22] (the Court) (special leave refused where *AEU* relied upon: Parklands *Darwin Pty Ltd v Minister for Infrastructure, Planning and Logistics* [2022] HCATrans 55, lines 320-345); *Question of Law Reserved (No. 1)* (2019) 135 SASR 226 (SASCFC), [28] (Stanley J, Nicholson and Doyle JJ agreeing); *Question of Law Reserves (No.1 of 2018)* (2018) 275 A Crim R 400 (SASCFC), [163]-[167], [175] (Hinton J, Lovell J agreeing); *Lazarus v Independent Commission Against Corruption* (2017) 94 NSWLR 36, [128] (Leeming JA, McColl and Simpson JJA agreeing); *State of Victoria v Intralot Australia Pty Ltd* [2015] VSCA 358, [98] (the Court); *Commissioner of State Revenue v EHL Burgess Properties Pty Ltd* (2015) 209 LGERA 314 (VCA), [78]-[79] (the Court); *Knight v State of Victoria* (2014) 221 FCR 561 (FCA), [64] (Mortimer J); *The Palace Gallery Pty Ltd v The Liquor and Gambling Commissioner* (2014) 118 SASR 567 (SASCFC), [43]-[44] (the Court); *State of Queensland v Together Queensland* [2014] 1 Qd R 257 (QCA), [102] (the Court); *Jones v Commonwealth Services Delivery Agency* [2012] SASC 106, [32]-[40] (Gray J).

fn 69, the Territory has passed a number of statutes concerning matters of public importance relying on this understanding.[44]

32. The Appellant says that *AEU* should be re-opened because the rule it establishes is unfair and deprives some litigants of the benefits of the judgments they secure in litigation: **AS [62]-[63]**. The same argument was made and rejected in *AEU*. French CJ, Crennan and Kiefel JJ said it was "unpersuasive" because it "[did] not offer, and almost certainly could not offer, any comprehensive analysis and weighing of the interests, both public and private" which may have been affected by the legislation and that the Court was not "in a position to make broad judgments, appropriate to the Parliament, about the balance of fairness in relation to the legislative validation of the APF's registration."[45] Similarly, Gummow, Hayne and Bell JJ said that the applicant was "right to observe that, because s 26A altered the law as it did… the effect of the law is to deny the AEU whatever was the advantage it gained" from the litigation, but that did not mean that s 26A should not be given effect in its terms.[46]

33. Further, the Appellant not only accepts but relies upon the decision in *Humby* to support re-opening *AEU*: **AS [58], [60]**.[47] However, *Humby* itself held that Parliament may enact legislation which has the substantive effect of depriving a litigant of a successful result. The legislation in issue in that case was a consequence of the successful challenges in *Kotsis v Kotsis*[48] and *Knight v Knight*[49] and deprived the litigants in those (and many other) cases of the substantive benefit of those judgments.

C. CONCLUSION

34. For those reasons, the principle in *AEU* dictates the answer to Ground 1. Leave to re-open *AEU* should be refused or the decision confirmed. On either basis, the Ground should be dismissed.

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44 E.g. *McArther River Project Agreement Ratification Act 1992* (NT), s 4AB, validating mining authorisations held to be invalid in *Lansen v Minister for Mines and Energy* [2007 NTSC 36, considered in *McArthur River Mining Pty Ltd v Lansen* [2007] NTCA 5. See also *Planning Act 1999* (NT), s 148A, concerning the validity of the refusal of a re-zoning application for land around the Darwin Botanic Gardens, considered in *Parklands Darwin Pty Ltd v Minister for Infrastructure, Planning and Logistics* [2021] NTSCFC 4 (special leave refuse: *Parklands Darwin Pty Ltd v Minister for Infrastructure, Planning and Logistics* [2022] HCATrans 55). See also *Public and Environmental Health Act 2011* (NT), Part 10A, validating directions of the Chief Health Officer given during the COVID-19 pandemic, considered in *Phillips v Chief Health Officer (No. 2)* (2022) 371 FLR 457 (NTSC).

45 *AEU* (2012) 246 CLR 117, [29] and [32] (French CJ, Crennan and Kiefel JJ).

46 Ibid, [97] (Gummow, Hayne and Bell JJ).

47 *Humby* (1973) 129 CLR 231.

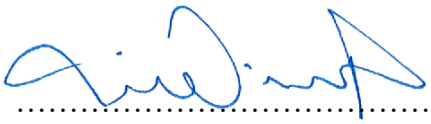
48 (1970) 122 CLR 69.

49 (1971) 122 CLR 114.

PART V – ESTIMATE OF TIME

35. The Territory estimates that no more than 10 minutes will be required for oral submissions.

Dated: 5 June 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 INTERVENER'S SUBMISSIONS (ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY OF AUSTRALIA)

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Attorney-General for the Northern Territory sets out below a list of the constitutional, statutory and statutory instrument provisions referred to in these submissions.

No.	Description	Version	Provisions
1.	*Fair Work (Registered Organisations) Act 2009* (Cth)	In force 1 July 2009 to 4 August 2009	s 26A
2.	*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)	As enacted	Whole Act
3.	*Migration Act 1958* (Cth)	In force 15 October 2020 to 21 March 2021	s 501(7)(c)
4.	*Migration Amendment (Aggregate Sentences) Act 2023* (Cth)	As enacted	Whole Act
5.	*Workplace Relations Act 1996* (Cth)	In force 14 December 2005 – 26 March 2006	Sch 1B, s 18