HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY **No P10 of 2024**

BETWEEN: **KINGSTON TAPIKI**
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Respondent

SUBMISSIONS OF THE 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) 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?

   (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 appellant seeks, and the Commonwealth respondents oppose, the re-opening of the decision in *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 (***AEU***).

PART III NOTICES UNDER SECTION 78B OF THE JUDICIARY ACT

4. The appellant filed a notice under s 78B of the *Judiciary Act 1901* (Cth) on 20 March 2024 (**CAB 41**).

PART IV FACTS

5. On 30 September 2020, the appellant was convicted and sentenced in the Local Court of New South Wales to an aggregate sentence of 12 months' imprisonment for offences of affray and assault on two separate occasions (**CAB 13 [4]**).

6. The Commonwealth respondents otherwise accept the facts set out in **AS [8]-[26]**.

PART V ARGUMENT

Ground 1: Usurpation of judicial power

7. The appellant contends on Ground 1 that the Aggregate Sentences Act is invalid as a usurpation of judicial power, namely by purporting to "*reverse the earlier judicial orders*" made in *Tapiki (No 1)*[1] (**AS [28]**).

8. The Full Court below correctly held that this Court's decision in *AEU*[2] provides a complete answer to that contention (**CAB 21 [35]**). The relevant part of item 4(3) of the Aggregate Sentences Act is identically worded to the validation provision which was upheld in *AEU*, namely s 26A of the *Fair Work (Registered Organisations) Act 2009* (Cth). That section 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*".

9. Among other things, s 26A had the effect of validating the past registration of a particular body that had been declared invalid in *Australian Education Union v* ***Lawler***.[3] As in the present case, the Explanatory Memorandum for the relevant bill indicated that s 26A was intended to address *Lawler*, and in particular the "*uncertainty regarding the registration of certain associations*" in light of that decision.[4]

10. The High Court held that s 26A did not impermissibly interfere with the exercise of federal judicial power. Chief Justice French, Crennan and Kiefel JJ accepted that a

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1 *Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 408 ALR 503 (***Tapiki (No 1)***).

2 *AEU* (2012) 246 CLR 117.

3 (2008) 169 FCR 327.

4 *AEU* (2012) 246 CLR 117 at [15] (French CJ, Crennan and Kiefel JJ).

Commonwealth law would be invalid if it "*were to purport to set aside the decision of a court exercising federal jurisdiction*".[5] However, as their Honours explained:[6]

> 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*. We agree with Gummow, Hayne and Bell JJ that s 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. The challenge to the constitutional validity of s 26A fails.

11. Justices Gummow, Hayne and Bell likewise 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*.[7] *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.[8] Their Honours considered that "*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*".[9] In particular, s 26A did not "*purport to declare what the law was at the time of the decision of the Full Court*", but rather "*assume[d] that the* Lawler *matter was correctly decided*."[10] Although s 26A deprived AEU of whatever advantage it gained from the judgment in *Lawler*, that did not make it an impermissible interference with judicial power.[11]

12. Justice Heydon reasoned similarly that s 26A "*does not seek, expressly or by implication, to overrule the reasoning or to set aside that order*" but that it "*create[s] a new legal regime by reference to a particular group of acts – the steps that effected the 'purported registration'*".[12]

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

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

7 *AEU* (2012) 246 CLR 117 at [90] (Gummow, Hayne and Bell JJ).

8 *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).

9 *AEU* (2012) 246 CLR 117 at [90] (Gummow, Hayne and Bell JJ).

10 *AEU* (2012) 246 CLR 117 at [96] (Gummow, Hayne and Bell JJ). That statement was endorsed by French CJ, Crennan and Kiefel JJ at [53], and Heydon J reasoned to similar effect at [116].

11 *AEU* (2012) 246 CLR 117 at [96]-[97] (Gummow, Hayne and Bell JJ).

12 *AEU* (2012) 246 CLR 117 at [116] (Heydon J).

13. In ***Duncan*** *v Independent Commission Against Corruption*,[13] the High Court unanimously upheld legislation which validated previous acts of the Independent Commission Against Corruption (**ICAC**), which, following the decision in *Independent Commission Against Corruption v Cunneen*,[14] were beyond its jurisdiction. The validating provision was again expressed in very similar terms to *AEU*: namely that "*anything done or purporting to have been done … is taken to have been, and always to have been, validly done*".[15] Chief Justice French, Kiefel, Bell and Keane JJ held that the provision was indistinguishable from s 26A of the Act considered in *AEU*, because "*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*".[16] Their Honours also concluded that, if the legislation had been enacted by the Commonwealth Parliament, it would not be inconsistent with Ch III of the Constitution.[17]

14. Justice Gageler likewise reasoned that what the validation provision was doing was simply conferring on ICAC authority to conduct historical acts that it had in fact done; which contravened no constitutional principle.[18] To similar effect, Nettle and Gordon JJ considered that the validation provisions "*create a new or different legal regime*" which expanded ICAC's jurisdiction, and then "*validate[d] acts done during that time according to the new or different legal regime*".[19]

15. In the present case, the Full Court correctly recognised that the Aggregate Sentences Act is "*in these respects … no different from the provision that was upheld in AEU*" (**CAB 19 [27]**). As a result, their Honours held, "*[t]he clear authority of* AEU *stands in the way of acceptance of the applicant's argument*" (**CAB 21 [35]**).

16. Their Honours were correct to so hold. Like the legislation in *AEU* and *Duncan*, item 4 of the Aggregate Sentences Act simply attaches new legal consequences to historical acts, namely certain "things done" or "purportedly done" under the laws and provisions listed in item 4(2). In doing so, item 4 does not interfere with the orders made in *Tapiki (No 1)*: to the contrary, it necessarily assumes that *Tapiki (No 1)* was

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13 (2015) 256 CLR 83.

14 (2015) 256 CLR 1.

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

16 *Duncan* (2015) 256 CLR 83 at [25] (French CJ, Kiefel, Bell and Keane JJ).

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

18 *Duncan* (2015) 256 CLR 83 at [41]-[42] (Gageler J).

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

correctly decided and alters the substantive law with retrospective effect. In form and in substance, item 4 is relevantly identical to s 26A of the Act considered in *AEU*, and the validating legislation considered in *Duncan*.

17. The appellant submits there are "*three ways*" in which the Aggregate Sentences Act "*purports to reverse*" the orders in *Tapiki (No 1)* (**AS [39]**). It may be accepted that, in each of the three ways set out in **AS [40]** to **AS [42]**, the Aggregate Sentences Act retrospectively changes the law so that the legal position is different to that which was declared by the Full Court as at 14 February 2023. But it does not follow that the Aggregate Sentences Act thereby "*purports to reverse*" the Full Court's orders, any more than the legislation in *AEU* "*purported to reverse*" the orders made by the Full Court in *Lawler*. On the contrary, the Aggregate Sentences Act accepts the holding in *Tapiki (No 1)* but changes the law by providing that the legal position is to be determined as if the acts were valid: the "*things done*" are "*taken for all purposes to be valid and to have always been valid*". In this regard, as has been noted above, the Aggregate Sentences Act uses precisely the same validating language as was upheld in *AEU* and *Duncan* on the basis that it did not reverse or dissolve the court orders.[20]

AEU cannot be distinguished

18. The appellant seeks to distinguish *AEU* because, he says, 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'*" (**AS [33]**). However, there is no relevant distinction between the decisions (and other "things done") validated by the Aggregate Sentences Act, and the purported registration considered in *AEU*. Both were purported administrative acts which had been the subject of orders for certiorari,[21] which had had their legal effect quashed but remained in existence as a matter of "historical fact".[22] The appellant also suggests that the legislation in *AEU* attached the attributes of a valid decision to a decision that remained ineffective,

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20 Parliament "*can effectively reverse the outcome of particular litigation by enacting retrospective general legislation which effectively renders the decision irrelevant by altering the legal rights and obligations upon which it was based*": G Winterton, "The Separation of Judicial Power as an Implied Bill of Rights" in G J Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 192 at 195 (citations omitted). See also P Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process* (2009) at 194, 211, 213 and 315 agreeing that Parliament may make a judgment "redundant", "irrelevant" or "otiose" but it must do this "*without expressly overruling the actual decision it thereby renders redundant*" (our emphasis).

21 In *AEU*, the Court in *Lawler* had made orders quashing the Commission's decision to grant the application for registration and orders quashing the purported registration itself: at [4].

22 *AEU* (2012) 246 CLR 117 at [38], [46], [48] (French CJ, Crennan, Kiefel JJ), [113]-[117] (Heydon J). See also *New South Wales v Kable* (2013) 252 CLR 118 at [52] (Gageler J).

whereas the Aggregate Sentences Act goes "the further step of *validating* decisions" (**AS [43]**). That submission should also be rejected, since in both cases the legislation adopts the mechanism of attaching new legal consequences to the historical facts.[23]

19. That mechanism is far from unusual. As Gageler J observed in *Duncan*,[24] there is "*no novelty*" in the (entirely permissible) "*legislative selection of the historical fact of a previously unauthorised administrative act as the trigger for the retrospective conferral of legislative authority on the administrator concerned to have done that act: a legal consequence fairly described as validation*". Examples of validating legislation upheld by this Court of that kind are legion. The legislation upheld in ***Nelungaloo*** *Pty Ltd v Commonwealth*[25] operated on an "*order made by the Minister of State for Commerce*" under a specific regulation. Similarly, the legislation upheld in *R v* ***Humby****; Ex parte Rooney* operated upon a "purported decree" made by an officer of the Supreme Court of a State.[26] Further examples of decisions as the "factum" on which validation legislation operates include "ineffective judgments" of the Federal Court,[27] military punishments and orders,[28] and administrative acts done by ICAC in the course of an investigation.[29] In none of those cases was the existence or otherwise of some "physical thing" (such as an entry on a physical register) regarded as relevant, much less critical to the outcome. It was accepted, in each case, that the legislation operated on the historical fact of the executive or judicial decision having been made.

20. The appellant's argument that *AEU* is distinguishable must otherwise turn on very fine distinctions in the <u>form</u> of the validating provisions. In *AEU*, the validating provision used the expression "*taken, for all purposes, to be valid and to have always been valid*", whereas in *Humby* and *Re Macks*, precisely the same result was achieved by declaring the invalid acts and decrees "*to have the same force and effect … as they*

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23 *AEU* (2012) 246 CLR 117 at [38], [46], [48] (French CJ, Crennan and Kiefel JJ), [113]-[117] (Heydon J). See also *Federal Commissioner of Taxation v* ***Munro*** (1926) 38 CLR 153 at 173 (Isaacs J); ***Re Macks****; Ex parte Saint* (2000) 204 CLR 158 at [110]-[113] (McHugh J), [353] (Hayne and Callinan JJ); *Duncan* (2015) 256 CLR 83 at [14] (French CJ, Kiefel, Bell and Keane JJ), [40]-[41] (Gageler J).

24 (2015) 256 CLR 83 at [42].

25 (1947) 75 CLR 495 at 501.

26 *R v* ***Humby****; Ex parte Rooney* (1973) 129 CLR 231 at 242 (Stephen J), see also at 238 (McTiernan J).

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

28 *Haskins v Commonwealth* (2011) 244 CLR 22.

29 *Duncan* (2015) 256 CLR 83.

would have had" had the order been made by a Supreme Court judge. But that is simply a different way of expressing the same legal operation: the invalid acts were declared to have the same effect as if they were valid. They were not directly validated.

Historical support

21. The appellant also relies on some historical writings, including an excerpt from Quick and Garran, and obiter comments of Barton J and Higgins J in the *Second Engine-Drivers Case*[30] which queried whether Parliament had the power to reverse a final judgment (**AS S[48]-[50]**). Six Justices in *AEU* stated that the excerpt from Quick and Garran did not state a simple test for the validity of legislation affecting pending or completed litigation.[31] More generally, as Professor Gerangelos has observed,[32] these early writings and comments were "*lacking an awareness of the considerable subtleties which may arise, even though these had already begun to emerge in the United States in the nineteenth century*".

22. Judicial exegesis over the century since those comments revealed that, because Parliament can validly legislate to alter the substantive law with prospective and retrospective effect, it is within Parliament's power to pass a law 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*".[33]

23. The roots of that recognition began as early as Isaac J's judgment in *Federal Commissioner of Taxation v* ***Munro***[34] in relation to the validation of decisions of Boards of Appeal which had been declared invalid by the High Court. Justice Isaacs observed that it was not a usurpation to identify invalid decisions (referred to as "*de facto* decisions") and provide that they should be "*as valid and effective as if given by the new Board of Review*".[35]

24. This was developed further in *Nelungaloo*, where the validating legislation deemed an executive order made under a regulation "*to be, and at all times to have been, fully*

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30 *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1913) 16 CLR 245 at 270 (Barton J), 282 (Higgins J) (***Second Engine-Drivers Case***).

31 *AEU* (2012) 246 CLR 117 at [50] (French CJ, Crennan and Kiefel JJ), [77] (Gummow, Hayne and Bell JJ).

32 Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process* (2009) at 210.

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

34 (1926) 38 CLR 153.

35 (1926) 38 CLR 153 at 173-174 (Isaacs J).

authorised by that regulation" and to have and to have had "*full force and effect according to its tenor*…".[36] In upholding the legislation, Dixon J said:[37]

> The theory [of the plaintiffs' argument] is that it undertakes the decision of a question of validity or an issue in the present litigation as to the description and source of the plaintiffs' rights or as to the legal basis or consequence of the Commonwealth's administrative acts. This action was pending when the statute was passed.
>
> In my opinion that is an erroneous complexion to place upon the enactment. It 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. … I can see no objection to its validity.

25. In *Humby*,[38] the High Court considered validating legislation which was enacted in response to the High Court's earlier decisions in *Kotsis v Kotsis*[39] and *Knight v Knight*,[40] which held that decrees given by certain non-judicial officers of State Supreme Courts were invalid. Section 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.[41] Section 5(4) then provided that:[42]

> all proceedings, matters, decrees, acts and things taken, made or done, or purporting to have been taken, made or done, under the *Matrimonial Causes* Act or any other law … are, by force of this Act, declared to have the same force and effect after the commencement of this Act, and to have had the same force and effect before the commencement of this Act, as they would have, or would have had, if the purported decree had been made as mentioned in the last proceeding section.

26. Justice Stephen, with whom Menzies and Gibbs JJ agreed, observed that sub-s (3) "*does not deem those decrees to have been made by a judge nor does it confer validity on them*", but rather:[43]

> They retain the character of having been made without jurisdiction, as was decided in *Knight v. Knight*; as attempts at the exercise of judicial power they remain ineffective. Instead, the sub-section operates by attaching to them, as

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36 (1947) 75 CLR 495 at 502.
37 (1947) 75 CLR 495 at 579.
38 (1973) 129 CLR 231.
39 (1970) 122 CLR 69.
40 (1971) 122 CLR 114.
41 *Humby* (1973) 129 CLR 231 at 242 (Stephen J).
42 *Humby* (1973) 129 CLR 231 at 242 (Stephen J).
43 *Humby* (1973) 129 CLR 231 at 243 (Stephen J).

> acts in the law, consequences which it declares them to have always had and it describes those consequences by reference to the consequences flowing from the making of decrees by a single judge of the Supreme Court of the relevant State.
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> Sub-section (4) deals similarly with all proceedings, matters, decrees, acts and things affecting a party to proceedings in which a purported decree was made. It does not validate them but instead attaches to them, retrospectively, the same force and effect as would have ensued had the purported decree been made by a judge of a Supreme Court.

27. Justice McTiernan agreed that the legislation operated "*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*".[44] Justice Mason also observed 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*".[45] His Honour concluded that:[46]

> Here by legislative action the rights of parties in issue in proceedings which resulted in invalid determinations were declared. The rights so declared in form and in substance were the same as those declared by the invalid determinations. But the legislation does not involve an interference with the judicial process of the kind which took place in *Liyanage*".

28. In *Re Macks*,[47] validating legislation similar in form to that in *Humby* was introduced after the High Court invalidated cross-vesting legislation in *Re Wakim*.[48] The majority Justices in *Re Macks* each recognised that the legislation declared the rights and liabilities of persons to be the same as if the "*ineffective judgments*" were judgments of a State court, rather than directly validating the effect of the orders.[49]

29. These decisions lay the foundations for the decisions in *AEU* and *Duncan*, which reaffirmed that it was within Commonwealth legislative power to attach new legal consequences to a thing done in the purported but invalid exercise of a power conferred by law (including an invalid administrative act).[50] That conclusion is entirely consistent with the reasoning and the result in *Humby* and *Re Macks*: contra **AS [57]**.

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44 *Humby* (1973) 129 CLR 231 at 239 (McTiernan J).

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

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

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

48 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

49 *Re Macks* (2000) 204 CLR 158 at [25], [31] (Gleeson CJ), [77]-82] (Gaudron J), [110]-[111] (McHugh J), [212] (Gummow J), [353]-[355] (Hayne and Callinan JJ).

50 *Duncan* (2015) 256 CLR 83 at [25] (French CJ, Kiefel, Bell and Keane JJ).

Overseas analogies

30. Finding no purchase for his argument in the Australian authorities, the appellant turns to United States and Irish authority. There is no relevant comparison with ***Plaut*** *v Spendthrift Farm Inc* 514 US 211 (1995) (cf **AS [44]**). The law in *Plaut* was expressly directed to the reinstatement of proceedings which had been dismissed by a court, and thereby directly interfered with the processes of the court. It was described by Scalia J, for the majority, as "*retroactively commanding the federal courts to reopen final judgments*", which was a violation of the principle that judicial power renders dispositive judgments.[51] The legislation thereby sought to "*depriv[e] judicial judgments of the conclusive effect that they had when they were announced*".[52]

31. *Plaut* was distinguished in *AEU* on that basis. Chief Justice French, Crennan and Kiefel JJ noted that the "*legislation was directed at judicial proceedings*" and that it was "*directed to the reinstatement of proceedings which had been dismissed*" but "*did not enunciate a more general rule that any legislation affecting the underlying foundation of a judicial decision is invalid*".[53] The Aggregate Sentences Act is distinguishable from the legislation considered in *Plaut* for precisely the same reasons.

32. The appellant submits that the case is analogous to *Plaut* because the "*Aggregate Sentences Act is directed to the 'very case' of the Appellant and Ms Pearson*" and that it is "*bespoke legislation tailored to these two cases, and these two litigants*" (**AS [46]**). This submission appears to be based on the asserted fact that item 4(5)(b)(i) (which confirms, to avoid doubt,[54] that the validation provision in item 4(3) applies in relation to concluded civil and criminal proceedings) might apply only to the present appellant and Ms Pearson.

33. At a factual level, it is not at all clear that the provision only applies to those two people. For example, there may well be other concluded civil and criminal proceedings which are affected in any number of ways by the validation of things done

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51 *Plaut* 514 US 211 (1995) at 219.

52 *Plaut* 514 US 211 (1995) at 228 (Scalia J).

53 *AEU* (2012) 246 CLR 117 at [51] (French CJ, Crennan and Kiefel JJ). See also at [83], [96] (Gummow, Hayne and Bell JJ), [117] (Heydon J).

54 The doubt might otherwise arise because of the principle of statutory construction that where an enactment is open to two constructions, one of which involves and the other averts the alteration of rights already judicially defined, the court will prefer the latter interpretation: *Second Engine-Drivers Case* (1913) 16 CLR 245 at 259, 270-271 referring to *Lemm v Mitchell* [1912] AC 400. See also KR Handley, *Res Judicata* (5th ed, 2019) at [17.25].

under the various provisions identified in item 4(2) in Sch 1 to the Aggregate Sentences Act.

34. However, even if that subparagraph does apply only to two people, it does not follow that the Aggregate Sentences Act is "*bespoke legislation tailored to these two cases*" (Contra **AS [46]**). The Aggregate Sentences Act changed the law for all cases: both prospectively by way of new s 5AB of the *Migration Act 1958* (Cth) (**Migration Act**), and retrospectively by (inter alia) item 4. The evident intention was that the Migration Act should be administered, in all cases, on the basis that the expression "term of imprisonment" in s 501(7)(c) should be taken to include an aggregate term of imprisonment. As is clear from the Aggregate Sentences Act as a whole, it constitutes a legislative response designed to alter the law, in all cases, in response to the Full Court's construction of s 501(7)(c) of the Migration Act in *Pearson v Minister for Home Affairs* (2022) 295 FCR 177 (***Pearson (No 1)***) (the note to which the appellant refers at **AS [46]** goes no further than that, with respect obvious, point[55]). Item 4 simply applies the consequences of that change in the substantive law to previous "things done" which, on that new construction of s 501(7)(c), ought no longer be invalid.

35. The appellant also relies on the first instance decision of the High Court of Ireland in *Howard v Commissioners for Public Works (No. 3)* [1994] 3 IR 394 (***Howard***), which concerned a validating provision which relevantly provided that a State authority "*shall have, and be deemed always to have had, power … to carry out, or procure the carrying out of, development*" (**AS [47]**). The Court upheld that part of the statute which provided the authority "shall have" the power, despite the development previously having been declared beyond power.[56] It is true that the Court construed the balance of the statute ("*deemed always to have had*") as actually "*altering or reversing*" the declaration and injunction made in the previous case.[57] To that extent, the decision is inconsistent with the settled line of authority in Australia discussed

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55 The note is not itself a marker of invalidity, noting that the legislation in *Duncan* expressly referred to the High Court's decision in *Cunneen*: see *Duncan* (2015) 256 CLR 83 at [8] (French CJ, Kiefel, Bell and Keane JJ), and the explanatory materials in *AEU* referred to the "uncertainty regarding the registration of certain associations … in light of [*Lawler*]": *AEU* (2012) 246 CLR 117 at [51] (French CJ, Crennan and Kiefel JJ).

56 *Howard* [1994] 3 IR 394 at 407.

57 *Howard* [1994] 3 IR 394 at 407.

above, including *Nelungaloo*,[58] *Humby*,[59] *AEU*[60] and *Duncan*,[61] where similar forms of "deeming provisions" were construed as attaching new legal consequences to invalid acts, rather than as directly validating the invalid acts. But nothing said in *Howard* provides a compelling reason to depart from the settled Australian position.

Application to re-open *AEU*

36. In the alternative to his argument that *AEU* can be distinguished, the appellant also seeks to have *AEU* re-opened to resolve what he says is a "direct conflict" between *AEU* on one hand, and *Humby* and *Re Macks* on the other (**AS [57], [60]**).

37. While the Court has power to depart from its previous decisions, that course is not lightly undertaken.[62] When considering this issue, the Court often refers to the factors in *John*.[63] The evaluation of those factors is "informed by a strongly conservative cautionary principle".[64] In this case, each of the four factors points strongly against a grant of leave to re-open:

(a) as explained above, *AEU* rests on a principle carefully worked out in a significant succession of cases, including in this Court in *Munro*, *Nelungaloo*, *Humby* and *Re Macks*. It is entirely consistent with those authorities, and is not "in direct conflict" with them (cf **AS [60]**). In all three cases, the High Court accepted the proposition (which has roots as early as *Munro*[65]) that while Parliament cannot legislate to set aside a judgment, it can attach new legal consequences to the historical fact of an invalid act or exercise of power. In each case, the Court also accepted that that was what the validation provision in issue was doing.[66] *AEU* was determined after "a very full examination of the

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58 (1947) 75 CLR 495 at 579 (Dixon J).

59 (1973) 129 CLR 231 at 242-243 (Stephen J, with whom Menzies and Gibbs JJ agreed), 249-250 (Mason J).

60 (2012) 246 CLR 117 at [53] (French CJ, Crennan and Kiefel JJ), [89]-[90] (Gummow, Hayne and Bell JJ).

61 (2015) 256 CLR 83 at [25] (French CJ, Kiefel, Bell and Keane JJ), [41]-[42] (Gageler J), [45]-[46] (Nettle and Gordon JJ).

62 ***John*** *v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ). See also *Plaintiff M76* (2013) 251 CLR 322 at [192] (Kiefel and Keane JJ); ***Wurridjal*** *v Commonwealth* (2009) 237 CLR 309 at [70] (French CJ).

63 *John* (1989) 166 CLR 417, 438–9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

64 *Wurridjal* (2009) 237 CLR 309 at [70] (French CJ), cited with approval in *Plaintiff M76* (2013) 251 CLR 322 at [148] (Crennan, Bell and Gageler JJ), [192] (Kiefel and Keane JJ); *Plaintiff M47/2012* (2012) 251 CLR 1 at [527] (Bell J).

65 (1926) 38 CLR 153 at 173-174 (Isaacs J).

66 *Humby* (1973) 129 CLR 231, 242–243 (Stephen J, Menzies and Gibbs JJ agreeing), 249 (Mason J); *Re Macks* (2000) 204 CLR 158 at [15], [25] (Gleeson CJ), [110] (McHugh J), [210] (Gummow J);

question" and no compelling consideration or important authority was overlooked.[67]

(b) the appellant has not identified any differences as between the majority justices in *AEU* which would justify re-opening. On the contrary, the reasoning is highly consistent. For example, six Justices expressly agreed that s 26A of the Act assumed that *Lawler* was correctly decided and proceeded to change the rule generally and for the particular case.[68]

(c) it can be inferred that the decision in *AEU,* which has now stood for 12 years, has been relied upon by legislatures in drafting validation provisions, not only in enacting the Aggregate Sentences Act and the legislation considered in *Duncan* (noting the precise correlation between the words used in *AEU* and those provisions) but also in enacting a wide range of similarly worded provisions.[69]

(d) the appellant submits that *AEU* has the inconvenient and unjust result that it allows Parliament to "snatch from litigants" the "fruits" of their victory in concluded litigation (**AS [63]**). However, this *John* factor is not directed to the perceived merits or harshness of the results arising from the Court's reasoning in a general or policy sense. It is directed to whether there are unacceptable difficulties or uncertainties about the content or application of that reasoning.[70] The Court's reasoning in *AEU* is clear and gives rise to no difficulties or uncertainties. By contrast, if the appellant's argument succeeds, it has the inconvenient result of providing a form of "constitutional immunity" to the

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AEU (2012) 246 CLR 117 at [53] (French CJ, Crennan and Kiefel JJ), [89]-[90] (Gummow, Hayne and Bell JJ).

67 *Attorney-General (NSW) v Perpetual Trustee Company Ltd* (1952) 85 CLR 237 at 243-244 (Dixon J). See also *Wurridjal* (2009) 237 CLR 309 at [65]-[71] (French CJ)..

68 *AEU* (2012) 246 CLR 117 at [53] (French CJ, Crennan and Kiefel JJ), [96] (Gummow, Hayne and Bell JJ).

69 See, e.g. the *Autonomous Sanctions Amendment Act 2024* (Cth) sch 1; *Social Services Legislation Amendment (Child Support and Family Assistance Technical Amendments Act 2024* (Cth) sch 1, pt 2; *Australian Securities and Investments Commission Act 2001* (Cth) s 249(1), inserted by the *Treasury Laws Amendment (2017 Measures No. 3) Act 2017* (Cth); *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Act 2015* (Cth) sch 5, item 2; *Defence Act 1903* (Cth) s 121A, inserted by the *Defence Legislation Amendment (Woomera Prohibited Area) Act 2014* (Cth). Note also the use of the language "is valid, and is taken always to have been valid" in the past act provisions of the *Native Title Act 1993* (Cth), s 14(1).

70 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [114] (Gaudron, McHugh and Gummow JJ).

appellant and Ms Pearson, but no others, from the cancellation of their visas on account of their aggregate sentences.

Conclusion on Ground 1

38. The Full Court below was correct that the decision in *AEU* provides a complete answer to the appellant's submissions on Ground 1. *AEU* should not be re-opened, and if it is it should be affirmed as correct. It follows that Ground 1 should be dismissed.

Ground 2: Just terms

39. The appellant contends on Ground 2 that the Aggregate Sentences Act is invalid on the basis that it contravenes s 51(xxxi) of the Constitution by acquiring his "*valuable chose in action … for false imprisonment*", other than on just terms (**AS [64]**).

40. As the appellant notes, in the Court below the respondent advanced various arguments as to why the Aggregate Sentences Act did not effectuate an acquisition of property. The Full Court did not need to determine those arguments, concluding that, even if item 4 of the Aggregate Sentences Act does acquire property (which their Honours doubted but were prepared to assume) (**CAB 24 [45]**), just terms are provided by s 3B of the Migration Act (**CAB 29 [64]**).

41. Contrary to the suggestion at **AS [64]**, it is not necessary for the respondent to file a notice of contention in order to submit before this Court that the Aggregate Sentences Act does not effectuate an acquisition of property. It is a necessary premise of the appellant's argument that the Act has that effect, and the Court could not uphold Ground 2 without deciding that issue. However, on the respondent's case, it will not be necessary for the Court to determine that issue because: *first*, the prudential approach to determining constitutional questions means that the Court should decline to decide Ground 2; and, *secondly*, and in any event, just terms are provided by s 3B.

Prudential approach

42. It is well established that the Court should not decide constitutional questions unless there exists a state of facts which makes it necessary to do so in order to do justice in a given case and to determine the rights of the parties.[71]

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[71] *Farm Transparency International Ltd v New South Wales* (2022) 96 ALJR 655 at [20]-[21] (Kiefel CJ and Keane J), [117] (Gordon J); ***Mineralogy*** (2021) 274 CLR 219 at [57]-[59] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), [99] (Edelman J); ***Knight*** *v Victoria* (2017) 261 CLR 306 at [32].

43. That prudential approach may accommodate the Court determining a constitutional question that does not arise on the facts if, in the event that item 4 of Sch 1 does contravene s 51(xxxi) in *some* of its applications, it could not be severed or read down.[72] But that is not this case. If item 4 did contravene s 51(xxxi) in some of its applications, item 4(4) could be severed, and the balance of item 4 could then be read down so as not to affect accrued rights.[73] The provision, as severed and read down, would then validly apply to the appellant so as to provide a legal basis for his current detention, but not to deprive him of any accrued right to sue for false imprisonment. The provision, as severed and read down, could not effect an acquisition of property.

44. That being so, it would be inappropriate for this Court to be drawn into a consideration of whether the provisions would have an invalid operation in relation to any claim for damages.[74] That is so even where the validity of the provision is challenged by a party sufficiently affected to have standing.[75]

45. Applying that well settled prudential approach avoids the "*risk of premature interpretation of statutes on the basis of inadequate appreciation of their practical operation*",[76] which is a very apt descriptor of the limited factual foundation on which the appellant invites the Court now to proceed. Ground 2 is not ripe for this Court's consideration, at least for the following reasons.

46. *First,* the appellant's submissions rise no higher than an assertion that he had a valuable chose in action for false imprisonment. This is based on the single day he was in detention following the handing down of judgment in *Pearson (No 1)* (**AS [65], [68]**): judgment was delivered on 22 December 2022, and he was released the next day. However, the appellant's detention was authorised and required by ss 189(1) and 196(1) of the Migration Act for so long as an officer reasonably suspected that he was an unlawful non-citizen, even if that suspicion was legally incorrect.[77] It is not clear

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72 *Knight* (2017) 261 CLR 306 at [32]-[37].

73 See *Clissold v Perry* (1904) 1 CLR 363 at 373 (Griffith CJ); *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at [43] (McHugh J). Alternatively, item 4 could be partially disapplied pursuant to s 15A of the Interpretation Act.

74 *Knight* (2017) 261 CLR 306 at [33]; *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1 at [90] (Kiefel CJ, Keane and Gleeson JJ); *Mineralogy* (2021) 274 CLR 219 at [57]-[59] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

75 *Knight* (2017) 261 CLR 306 at [33]. Cf *Tapiki* (2023) 300 FCR 354 at [48].

76 *Zhang v Commissioner of the Australian Federal Police* (2021) 273 CLR 216 at [22] (the Court), citing *Tajjour v New South Wales* (2014) 254 CLR 508 at [174] (Gageler J); *Mineralogy* (2021) 274 CLR 219 at [57] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

77 *Thoms v Commonwealth* (2022) 96 ALJR 635 at [40]-[43] (Kiefel CJ, Keane and Gleeson JJ), [49]-[51], [54]-[58] (Gordon and Edelman JJ). See **CAB 24 [46]**.

whether the appellant's asserted cause of action arises because he says that the relevant officer no longer actually suspected the appellant was an unlawful non-citizen (e.g. for any brief period after the officer actually became aware of *Pearson (No 1)* before the appellant was released), or (ii) that such a suspicion was not reasonable (e.g. because the officer should have been aware of *Pearson (No 1)* or its implications earlier).

47. Even if the appellant were to clarify his case in this respect, there is no evidence before the Court as to the existence of the detaining officers' belief at the relevant time, or the basis of it. There is no basis on which Court could infer that the detaining officers' suspicion during this time was absent or unreasonable, particularly given the time needed to assess whether the ratio in *Pearson (No 1)* applied to the appellant.[78] In this regard, it is not enough for the appellant to "*point to a speculative, and contentious, possibility*" of a cause of action.[79]

48. *Second,* the appellant asserts that the Aggregate Sentences Act, on its commencement "*purportedly extinguished the [a]ppellant's chose in action against the Commonwealth*" (**AS [69]**). But he does not explain how it did so, even assuming such a cause of action existed in the first place. If the cause of action is based on the absence of an officer's actual suspicion that the appellant was an unlawful non-citizen, it is not clear whether item 4 would extinguish that cause of action, as item 4 does not appear to affect whether an officer held that suspicion in fact. If, on the other hand, the cause of action is based on an assertion that the suspicion was not reasonable, then item 4 may possibly affect the existence of the cause of action, as the cancellation decision is to be "*taken for all purposes … to have always been valid*", including arguably for the purposes of assessing the reasonableness of the officer's belief. However, that issue would need to be determined in a case where the issue arose squarely on the facts.

49. While the appellant has commenced proceedings in the Federal Court seeking damages for false imprisonment (which are paused pending this appeal) (**AS [25]**), the Amended Statement of Claim does not address the above matters. It merely alleges that between 22 and 23 December an officer of the respondent "*wrongly detained the plaintiff*" and that item 4 "*effectuated an acquisition…of the plaintiff's accrued right to sue and*

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78 See, to a similar effect, the Full Court below at **CAB 24 [46]**.

79 *Bainbridge* (2010) 181 FCR 569 at [42] (Buchanan J, dissenting on other grounds). See similarly, referring to "mere assertion", *Sportodds Systems Pty Ltd v New South Wales* (2003) 133 FCR 63 at [43] (the Court).

recover damages for wrongful detention in that the Aggregate Sentences Act retrospectively validated the applicant's detention".[80]

50. As is apparent, before this Court the appellant seeks a declaration of constitutional invalidity in circumstances where the impact of the Aggregate Sentences Act on any cause of action he may have is very uncertain. The appellant could, of course, properly plead out his cause of action in the false imprisonment proceedings. The Commonwealth would then be required to plead a defence, and the relevant effect of the Aggregate Sentences Act on any cause of action asserted by the appellant may be crystallised. But before that occurs, and in circumstances where item 4 can be severed, read down and/or partially disapplied if necessary, this Court should apply the prudential approach and decline to answer Ground 2 in the present proceedings.

No acquisition of property

51. If the Court proceeds to determine Ground 2, the respondent submits that the appellant cannot succeed in establishing a breach of s 51(xxxi) unless he can demonstrate an identifiable property right that has been acquired.[81] The Court could not be satisfied that any property of the appellant has been acquired so as to support a conclusion that the Aggregate Sentences Act is invalid in its application to him by reason of s 51(xxxi),[82] or that he is entitled to any relief in that regard.[83] The appellant has thus far failed to identify either a property right, or an acquisition of that property right, sufficient to justify the relief that he seeks.

Section 3B of the Migration Act

52. Section 3B(1) provides that, if "this Act" would result in an acquisition of property and any provision of "this Act" would not be valid because a particular person has not been compensated, then the Commonwealth must pay the person a reasonable amount

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80 Respondent's Book of Further Materials at 13 [22A].

81 *Haskins v Commonwealth* (2011) 244 CLR 22 at [42] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Bainbridge* (2010) 181 FCR 569 at [41]-[42] (Buchanan J, dissenting on other grounds).

82 Cf *Betfair v Racing New South Wales* (2012) 249 CLR 217 at [55], [56] (French CJ, Gummow, Hayne Crennan and Bell JJ); [70]-[76] (Heydon J), [127] (Kiefel J); *Cross v Barnes Towing and Salvage (Qld) Pty Ltd* (2005) 65 NSWLR 331 at [97], [103]-[104], [106] (Handley JA) (see also [54] per Spigelman CJ).

83 Cf *Sportodds Systems Pty Ltd v New South Wales* (2003) 133 FCR 63 at [43]-[44], [50] (the Court).

of compensation. A provision of this sort meets the requirement of "just terms" imposed by s 51(xxxi).[84]

53. The appellant contends that the Full Court erred because item 4 is not part of the Migration Act, and therefore s 3B is said not to apply to it (**AS [72]**). However, s 11B(1) of the *Acts* ***Interpretation Act*** *1901* (Cth) provides that, subject to a contrary intention, "*[e]very Act amending another Act must be construed with the other Act as part of the other Act*". The appellant submits that "*s 11B is directed to the construction of the 'amending Act', not the principal Act*" (**AS [78]**). However, that overlooks the words "as part of the other Act". By dint of s 11B, the Aggregate Sentences Act must be construed as "part of" the Migration Act, such that the words "this Act" in s 3B of the Migration Act must include the Aggregate Sentences Act.[85]

54. The appellant also submits that item 4 is a "*non-amending provision*" (**AS [79]**). While item 4 does not amend the text of the Migration Act, it alters its legal operation. It is well settled that an Act which alters the legal operation of another statute "*amends*" it, even if it does not make a textual amendment.[86] Therefore, pursuant to s 11B(1) of the Interpretation Act, item 4 also forms part of the Migration Act for the purposes of s 3B.

55. In the alternative, the same conclusion can be reached on the basis that the Aggregate Sentences Act as a whole amends the Migration Act, including by making textual amendments (s 3 and Pt 1 of Sch 1). Section 11B of the Interpretation Act therefore has the effect that the whole of the Aggregate Sentences Act (i.e. including item 4) is to be construed as part of the Migration Act.

56. The Full Court reasoned along those lines, and expressly followed the decision in *Bainbridge* (2010) 181 FCR 569 (**CAB 26-28 [53]-[61]**). *Bainbridge* considered legislation[87] that amended the Migration Act to reverse the effect of an earlier decision in ***Sales*** *v Minister for Immigration and Citizenship*.[88] *Sales* had held that the Minister's power to cancel a visa on character grounds applied only to visas "which

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84 ***Bainbridge*** *v Minister for Immigration and Citizenship* (2010) 181 FCR 569 at [14] (Moore and Perram JJ); *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [108] (French CJ), [195]-[197] (Gummow and Hayne JJ).

85 Interpretation Act s 11B(1); *Bainbridge* (2010) 181 FCR 569 at [12] (Moore and Perram JJ), [44]-[45] (Buchanan J, dissenting on other grounds), applying Interpretation Act s 15 (a predecessor to s 11B(1)).

86 *Duncan* (2015) 256 CLR 83 at [12] (French CJ, Kiefel, Bell and Keane JJ), cf [46] (Nettle and Gordon JJ); *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [67] (Brennan CJ and McHugh J).

87 *Migration Legislation Amendment Act (No 1) 2008* (Cth).

88 (2008) 171 FCR 56.

had been granted", rather than deemed visas. Item 7 of Sch 4 of the legislation in *Bainbridge*, like item 4 in the present case, was a separate validating provision which provided that certain decisions to cancel visas were "*as valid, and … taken always to have been as valid, as [they] would have been*" if the cancelled visas were visas that "*had been granted*".[89] The Full Court in *Bainbridge* unanimously held that, because s 15 of the Interpretation Act made item 7 part of the Migration Act, s 3B provided just terms.[90]

57. The Full Court in the present case followed *Bainbridge*, and was fortified in doing so by the fact that Parliament had repealed s 15 of the Interpretation Act after *Bainbridge*, and re-enacted it in materially identical form in s 11B. The Full Court reasoned that the legislature should be presumed to be content with the operation given to the former provision in *Bainbridge* (**CAB 28 [61]**).[91] Indeed, s 11B reflects a long-standing rule that has been embodied in interpretation legislation since before federation.[92]

58. The appellant also relies on s 11B(2) as revealing an intention that s 11B(1) does not apply to "*non-amending provisions*" like item 4 (**AS [79]**). There are several answers to that argument. First, as submitted above, item 4 *does* "amend" the Migration Act by altering its legal effect. As such, it does not fall into the category of "non-amending provisions" to which s 11B(2) is addressed. Second, s 11B(3) expressly specifies that s 11B(2) "does not limit" s 11B(1). As such, and even if item 4 is a "non-amending provision", s 11B(2) can be seen to have been included for the avoidance of doubt and does not provide any firm textual basis for the plaintiff's argument. Third, to the contrary, s 11B(2) in fact supports the respondent's construction. As the Full Court recognised, s 11B(2) recognises that an Act which "amends another Act" can include particular provisions that do not amend that Act (but which relate to the amendments), and expressly extends definitions in the principal Act to those "non-amending provisions". This tends to confirm that the whole of the Aggregate Sentences Act is to be characterised as "an Act amending" the Migration Act for the purposes of s

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89 *Migration Legislation Amendment Act (No 1) 2008* (Cth), sch 4, item 7 (set out in *Bainbridge* (2010) 181 FCR 569 at [6]).

90 *Bainbridge* (2010) 181 FCR 569 at [14] (Moore and Perram JJ), [44]-[45] (Buchanan J, dissenting on other grounds).

91 Citing *Thompson v Judge Byrne* (1999) 196 CLR 141 at [40] (Gleeson CJ, Gummow, Kirby and Callinan JJ); *Brisbane City Council v Amos* (2019) 266 CLR 593 at [24] (Kiefel CJ and Edelman J), [45] (Gageler J), [48]-[49] (Keane J), [55]-[56] (Nettle J).

92 See *Sweeney v Fitzhardinge* (1906) 4 CLR 716 at 735 (Isaacs J).

11B(1), and is not "not divided into provisions that amend the Act and provisions that do not" (**CAB 28 [63]**).

59. The appellant finally submits that s 11B is subject to a contrary intention, because item 4(2) defines the scope of validation to include things done under statutes other than the Migration Act (**AS [80]**). The appellant submits it is unlikely the legislature intended s 3B of the Migration Act to apply to things done under environmental and fisheries legislation. However, the provisions mentioned in items 4(2)(c)-(d) are those which prohibit disclosure of certain identifying information, except where it is a "permitted disclosure" (defined to include disclosure of information about a person who has been in detention, for the purposes of immigration detention or removal). Items 4(2)(c)-(d) were presumably designed to ensure that disclosure of such information would not be an offence. It is difficult to see how the application of item 4 to such disclosures could ever amount to an acquisition of property, and so the occasion for the application of s 3B would not arise. In any event the reference to those minor ancillary purposes, which have a clear connection back to the Migration Act, does not provide a contrary intention for the purposes of s 11B.

60. Once it is accepted that s 3B of the Migration Act applies to item 4, it follows that s 3B provides just terms for any acquisition of property, and there is no possible contravention of s 51(xxxi). It is not necessary (and in any event, not possible on the material currently before the Court) to consider whether the appellant of has a right of property which has been acquired by the Aggregate Sentences Act.

PART VII ESTIMATE

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

Dated 22 May 2024

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IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY **No P10 of 2024**

BETWEEN: **KINGSTON TAPIKI**
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Respondent

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

Pursuant to Practice Direction No. 1 of 2019, the First and Second Defendants 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 11B
3	*Australian Securities and Investments Commission Act 2001* (Cth)	Current (Compilation 97, 28 November 2023 – present)	s 249
4	*Autonomous Sanctions Amendment Act 2024* (Cth)	As enacted	Sch 1

5	*Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Act 2015* (Cth)	As enacted	sch 5, item 2
6	*Defence Act 1903* (Cth)	Current (Compilation 79, 6 May 2024 – present)	s 121A
7	*Migration Amendment (Aggregate Sentences) Act 2023* (Cth)	As enacted	Whole Act
8	*Migration Act 1958* (Cth)	Compilation 149 (15 October 2020 to 21 March 2021)	ss 189, 196, 501, 501CA
9	*Migration Act 1958* (Cth)	Current (Compilation 160, 29 March 2024 – present)	ss 3B, 5AB
10	*Native Title Act 1993* (Cth)	Current (Compilation 49, 18 October 2023 – present)	s 14
11	*Social Services Legislation Amendment (Child Support and Family Assistance Technical Amendments Act 2024* (Cth)	As enacted	Sch 1, pt 2