HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY

BETWEEN: KINGSTON TAPIKI

Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Respondent

APPELLANT'S REPLY

Part I: Certification

1. This reply is in a form suitable for publication on the internet.

Part II: Argument

A. Usurpation or interference with Ch III judicial power

2. The respondents and interveners draw analogies to "pending litigation" cases, but 6 Justices in *AEU* expressly rejected that approach,[1] and 3 Justices emphasised the importance of attention to *how* retrospective legislation intersects with past, pending or future litigation.[2]
3. Western Australia sets up a straw person in arguing that the institutional integrity of a Ch III court is not impugned,[3] and points inaptly to similar formulae as used in the *Aggregate Sentences Act* being upheld in "pending litigation" cases as determinative.
4. Queensland does not appear to recognise any distinction between "pending litigation" cases and a case in which retrospective legislation validates a decision the subject of *certiorari*.[4]
5. The *Aggregate Sentences Act* would expressly validate the very decision quashed by the Full Court. Judicial power is exercised to deny validity to the Tribunal's decision. Legislative power is retrospectively exercised to restore validity. There is a direct conflict.
6. *AEU* is distinguishable. In *AEU*, the Full Court granted *certiorari* quashing a decision of the Commission dismissing an appeal; and also quashing "the registration" of an entity whose name had been entered on to the register without a valid "grant" by the Commission.[5] The Full Court found the registrant's membership rules disqualified it from registration.
7. The *factum* for retrospective operation of that legislation was the entry on the register. It "attached to the act of purported registration ... all the legal consequence of a valid registration".[6] That legislation did not purport to retrospectively restore validity to the *decision* of the Commission's grant directly; it did not, in effect, say "a decision of the Commission to grant registration that was held to be invalid by a court is to be taken to be valid"; it "did **not** restore the registration that had been quashed".[7] What it did do was supply the legal consequences of validity to the "historical fact" of registration.[8]

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[1] *AEU* (2012) 246 CLR 117, [20] (French CJ, Crennan & Kiefel JJ), [76] (Gummow, Hayne & Bell JJ).
[2] *AEU* (2012) 246 CLR 117, [85] (Gummow, Hayne & Bell JJ).
[3] Consolidated Submissions on Behalf of the Attorney-General for Western Australia (Intervening) [18].
[4] Submissions for the Attorney-General for the State of Queensland (Intervening) [8], [13]-[15], [20].
[5] *AEU* (2012) 246 CLR 117, [10] (French CJ, Crennan & Kiefel JJ).
[6] *AEU* (2012) 246 CLR 117, [36] (French CJ, Crennan & Kiefel JJ).
[7] *AEU* (2012) 246 CLR 117, [52] (French CJ, Crennan & Kiefel JJ), implicitly accepting the Commonwealth's submission.
[8] *AEU* (2012) 246 CLR 117, [46] (French CJ, Crennan & Kiefel JJ).

8. Item 4 is different. It operates *directly* on a decision of the Tribunal – and in respect of 2 identifiable people – so as to validate *that decision*. It does nothing else (in respect of those 2 decisions). The Tribunal's decision is simultaneously quashed (by the Full Court judgment), and retrospectively validated. If the *Aggregate Sentences Act* retrospectively validated the Tribunal's decision, *mandamus* will not now go to compel a review; nor will the appellant get the lawful review contemplated by the *Migration Act*.

9. If the appellant's arguments to distinguish *AEU* are rejected, then *AEU* is in direct conflict with *Humby* and *Re Macks*. The respondents seek to avoid that conclusion by submitting that all the legislation in *AEU* did was direct that "invalid acts were declared to have the same effect as if they were valid, and they were not directly validated" (RS [20], emphasis in original). Three observations follow from that submission.

10. *First*, the submission accepts the premise of the appellant's argument, namely, that while it is constitutionally permissible to attach the attributes of validity to a decision that is left invalid, it is not within legislative power to take the further step of validating a decision that has been quashed or declared invalid by a Ch III court (see AS [43]). That distinction is drawn directly from the majority in *Humby* (AS [53]–[53]) and *Re Macks* (AS [54]).[9]

11. *Secondly*, in accepting the premise of the appellant's argument, the respondents give away much, because they become unable to defend the legislation in *AEU* according to its terms. There, the legislation referred to a registration that "would, but for this section, have been invalid" and required that that registration be "taken, for all purposes, to be valid and to have always been valid".[10] The words "but for this section" reveal that the effect of the legislation in *AEU* was to validate decisions which would otherwise have been invalid or, in the words of the majority in *Humby*, to "confer validity upon them".[11] Insofar as the Court in *AEU* held that the legislation could permissibly achieve that end,[12] that was a conclusion inconsistent with the reasoning in *Humby* and *Re Macks*, neither of which were engaged with in any detail in *AEU*.

12. *Thirdly*, just as the respondents find themselves unable to defend the legislation in *AEU* according to its terms, so too must their interpretation of the *Aggregate Sentences Act* fail. The text of the *Aggregate Sentences Act* makes clear that it is intended to validate things

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[9] See also *Knight v Victoria* (2014) 221 FCR 561, [64] (Mortimer J).
[10] Quoted at *AEU* (2012) 246 CLR 117, [2] (French CJ, Crennan & Kiefel JJ, emphasis added).
[11] *Humby* (1973) 129 CLR 231, 243 (Stephen J, Menzies & Gibbs JJ agreeing).
[12] *AEU* (2012) 246 CLR 117, [5] (French CJ, Crennan & Kiefel JJ): "Section 26A, on its proper construction, validated the purported registration of the APF".

that would otherwise be invalid, even if they have been declared invalid by a Ch III court and quashed. So much is clear in the text of the statute, for example: (1) heading to Part 2 of Sch 1 and the heading of item 4 ("Validation of things done"); (2) later references to "validated decision[s]";[13] (3) definition "***validated decision*** means a decision (however described) that would have been invalid except for item 4";[14] and (4) wording of item 4 (similar to the legislation in *AEU* emphasised above) that applies to things done that "would, apart from this item, be wholly or partly invalid". The context of the *Aggregate Sentences Act* also makes clear that it is directed to "validate past decisions that have been rendered invalid".[15] The *Aggregate Sentences Act* does not leave these decisions invalid.

13. The most compelling argument for re-opening *AEU* is thus the apparent conflict between that decision and *Humby* and *Re Macks*. The respondents fail to grapple with that.

14. The submission as to legislative reliance (RS [37(c)]) relies on the enactment of general remedial provisions without identifying any instance after *AEU* where it can be inferred that Parliament intended to validate a decision the subject of a Ch III order, intending that validation to have effect as between the parties to the past Ch III controversy (*cf* AS [62]).

15. Finally, the respondents' acceptance that *AEU* conflicts with the Irish jurisprudence (RS [35]) is another reason in favour of re-opening, to allow this Court to consider the conflict.

B. Acquisition of property other than on "just terms"

16. The Court should reject the respondents' two asserted reasons that this issue is not "ripe".

17. *First*, the respondents doubt that the appellant had a valuable chose in action for false imprisonment because, it is suggested, the officer detaining him from 22–23 December 2023 might reasonably have suspected that he was an unlawful non-citizen (RS [46]–[47]). But the detaining officer must have known or suspected the appellant was not an unlawful non-citizen, because he was in fact released the day after *Pearson* and a letter of 1 March 2023 stated that "the Department took the view that, because of *Pearson*, the earlier cancellation of your visa was ineffective" (AS [16]; ABFM 48).

18. The criticism cannot be accepted at the factual level; at the conceptual level the respondents' argument would deny a constitutional protection wherever the Commonwealth acquires a chose in action, because it could only be answered by a trial that could never occur.

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[13] *Aggregate Sentences Act*, Sch 1, item 5(1)(a).
[14] *Aggregate Sentences Act*, Sch 1, item 5(4).
[15] Commonwealth, House of Representatives, *Parliamentary Debates*, 13 February 2023, p 43 (Giles). See also Explanatory Memorandum to the Migration Amendment (Aggregate Sentences) Bill 2023 p 2, see also p 14: "The Bill will also validate (make lawful) past decisions and actions where they may have been deemed invalid as a consequence of the *Pearson* decision".

19. The respondents also contend that the appellant's chose in action is a mere assertion because it is not "properly pleaded" whether the detaining officer did not "actually" suspect or did not "reasonably" have the suspicion required by s 189(1). But that misstates the law for the last least 250 years or so.[16] The appellant's obligation is to allege unlawful imprisonment, which he has done, in orthodox form:[17] (RBFM 11 [10]). It is for the respondents to plead and prove lawful justification by showing "that the applicant is an unlawful non-citizen; that the applicant is in the migration zone; and that an officer knows or reasonably suspects, those matters."[18] The respondents conflate the elements of the cause of action with defences that might be raised (but have not arisen).[19]

10 20. Whatever the state of mind of the detaining officer (whether or not they knew of the decision in *Pearson*), the requirement that it be "reasonable" in s 189(1) cannot be met where the Minister to whom the detaining officer is responsible is in possession of information that falsifies the state of mind. A Minister who knows that a person is not an unlawful non-citizen cannot be permitted to keep their officers in the dark about that information to allow them to maintain a state of mind necessary to detain that person.

21. Otherwise, the Minister could, by withholding information, effectuate the lawful detention of anyone she or he wishes. The statutory concept of reasonableness in s 189(1) requires that knowledge of the Minister be attributed to their officers.

22. *Secondly*, the respondents submit for the first time that even if the appellant had a chose in

20 action the *Aggregate Sentences Act* might have left it intact (RS [48]–[49]). That submission is contrary to the plain intention of the *Aggregate Sentences Act* to validate all "things done" under the *Migration Act*, including so as to affect accrued rights. As Edelman J has explained, detention of a person under s 189(1) involves "doing … any … thing".[20] That is the thing the *Aggregate Sentences Act* purports to validate, in the sense of "make lawful".[21] The respondents confect ambiguity and it should be rejected.

23. The respondents next argue that no property has been acquired (RS [51]), but that is a repackaging of the earlier submissions and is answered above.

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[16] *AKW22 v Commonwealth of Australia* [2024] FCAFC 22, [15] (the Court).
[17] Lord Brennan KC et al, *Bullen & Leake's Precedents of Pleadings* (19th Ed. 2022).
[18] *AKW22 v Commonwealth of Australia* [2024] FCAFC 22, [18] (the Court).
[19] Lord Brennan KC et al, *Bullen & Leake's Precedents of Pleadings* (19th Ed. 2022).
[20] *Mokhlis v Minister for Home Affairs* (2020) 94 ALJR 843, [12] (Edelman J). See also *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602, [14] (Allsop CJ); *Abdel-Hady v Minister for Home Affairs & Anor* [2021] HCATrans 178, line 80 (Gageler J) referring to "the decision to take the plaintiff into, and keep him in, immigration detention under s 189(1) of the Act".
[21] Explanatory Memorandum to the Migration Amendment (Aggregate Sentences) Bill 2023 p 14.

24. Finally, the respondents rely on s 3B of the *Migration Act*. Their primary submission (RS [53]), turns on its head the statutory directive in s 11B(1) of the *Acts Interpretation Act* 1901 (Cth). Instead of reading the *Aggregate Sentences Act* as part of the *Migration Act* (which the appellant submits is not permitted for the reasons given at AS [79]–[80]), they understand s 11B(1) also to authorise the reverse, that is reading s 3B of the *Migration Act* as part of the *Aggregate Sentences Act*. To read s 11B(1) in that bi-directional way requires reading in the words: "Every Act amending another Act must be construed with the other Act as part of the other Act, and the other Act must be construed with the Amending Act and as part of the Amending Act." That is not what s 11B(1) says.

10 25. The respondents at RS [54] pay no regard to s 11B(2) and the distinction drawn between amending and non-amending provisions. A similar appeal to generalities, and a lack of due regard for the text of s 11B(2), is made at RS [55] where the respondents ask the Court to read the *Aggregate Sentences Act* "as a whole" as amending the *Migration Act* and thus avoid the inconvenient distinction between amending and non-amending provisions.

26. The respondents fail to grapple with the fact that item 4 of Sch 1 is a free-standing and non-amending provision. It did not amend the *Migration Act* as other validating provisions sometimes do.[22] Rather, it was a distinct legislative act of validation that had the result of acquiring the appellant's property. It cannot legitimately be said that it was the *Migration Act* that "result[ed] in an acquisition of property" so as to engage s 3B(1).

20 27. Finally, *Bainbridge* did not address the appellant's arguments, and considered a statutory predecessor to s 11B (then s 15) that contained no equivalent of sub-s (2). The case for a contrary intention is much stronger here because of the *Aggregate Sentences Act*'s operation on statutes other than the *Migration Act* (AS [80]); in *Bainbridge*, the provision only validated things done under the *Migration Act*. The re-enactment presumption (RS [57]) is at nought given the changes to s 15 when re-enacted as s 11B, and the absence of any "tolerably clear"[23] indication that Parliament intended to endorse *Bainbridge*.

DATED: 17 June 2024

DAVID HOOKE
P: (02) 9233 7711
E: hooke@jackshand.com.au

MATTHEW CROWLEY
P: (08) 9220 0414
E: mcrowley@francisburt.com.au

JULIAN MURPHY
P: (03) 9225 7777
E: julian.murphy@vicbar.com.au

[22] See, eg, *Independent Commission Against Corruption Act* 1990 (NSW), Sch 4, Part 13.
[23] *DPP Reference No 1 of 2019* (2021) 274 CLR 177, [12] (Kiefel CJ, Keane & Gleeson JJ).