HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No S126/2023

BETWEEN:

KATHERINE ANNE VICTORIA PEARSON
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
First Defendant

MINISTER FOR HOME AFFAIRS
Second Defendant

ADMINISTRATIVE APPEALS TRIBUNAL
Third Defendant

PERTH REGISTRY No P10/2024

BETWEEN:

KINGSTON TAPIKI
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Respondent

BRISBANE REGISTRY No B15/2024

BETWEEN:

JZQQ
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

CONSOLIDATED WRITTEN SUBMISSIONS ON BEHALF OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of:

   (a) the First and Second Defendants in S126/2023 ***Pearson*** *v Commonwealth & Ors;*

   (b) the Respondent in P10/2024 ***Tapiki*** *v Minister for Immigration, Citizenship and Multicultural Affairs;* and

   (c) the First Respondent in B15/2024 ***JZQQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs and Anor.*

PART III: REASON WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: ARGUMENT

4. The submissions of the Attorney General for Western Australia in relation to the *Pearson*, *Tapiki* and *JZQQ* matters may be summarised as follows.

   (a) In relation to the arguments advanced by the plaintiff in *Pearson* and the appellant in *Tapiki* that items 4(3), 4(4), and 4(5)(b)(i) of Part 2 of Schedule 1 to the *Migration Amendment (**Aggregate Sentences**) Act 2023* (Cth) are invalid because they are incompatible with Chapter III of the Commonwealth ***Constitution***,[1] it is respectfully submitted that:

      (i) the decision of this Court in *Australian Education Union v General Manager of Fair Work Australia*[2] (**AEU**) is determinative of this issue and should not be re-opened; and

      (ii) further, Chapter III of the *Constitution* does not preclude the Commonwealth Parliament (or a State Parliament) from amending legislation which creates rights, duties, or liabilities by reference to court orders as a factum or trigger.

   (b) In relation to the arguments advanced by the appellant in *JZQQ* that the *Aggregate Sentences Act* is beyond the legislative power of the Commonwealth Parliament because it directs courts as to the conclusions

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1 Plaintiff's submissions in *Pearson* [34]-[36]; appellant's submissions in *Tapiki* [27]-[63].
2 (2012) 246 CLR 117.

they should reach in the exercise of their jurisdiction[3] and has the effect of denying to a court the exercise of jurisdiction derived from s 75(v) of the *Constitution*[4]:

(i) Chapter III contains no prohibition, express or implied, to the effect that rights in issue in pending legal proceedings shall not be the subject of legislative declaration or action. The constitutional distinction is between legislation affecting substantive rights in issue in litigation and legislative interference with the judicial process itself. The former is compatible with Chapter III of the Constitution, the latter is not.

(ii) Further, the *Aggregate Sentences Act* does not contain a clause, privative, limiting or otherwise, that has the effect of undermining the entrenched minimum provisions of judicial review contained within s 75(v) of the *Constitution.* There is no basis for the submission that somehow the legislation impugned here impermissibly curtails or limits the right or ability of applicants to seek relief under s 75(v) of the *Constitution*.[5]

USURPATION OF JUDICIAL POWER

AEU is determinative

5. The plaintiff in *Pearson* and the appellant in *Tapiki* contend that items 4(3), 4(4) and 4(5)(b)(i) of Part 2 of Schedule 1 to the *Aggregate Sentences Act* are invalid because they purport to "reverse the earlier judicial orders" made by the Full Court in *Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs* (***Tapiki (No 1)***)[6]. This is said to be incompatible with Chapter III of the *Constitution* on the basis that this is an usurpation or interference with the exercise of Commonwealth judicial power.

6. This contention should be rejected. The Full Court correctly held in *Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs* (***Tapiki (No 2)***)[7] that the decision of this Court in *AEU* "stands in the way of acceptance of [the appellant's] argument".[8]

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3 Appellant's submissions in *JZQQ* [27]-[56].
4 Appellant's submissions in *JZQQ* [57]-[63].
5 Appellant's submissions in *JZQQ* [62]-[63].
6 (2023) 408 ALR 503.
7 (2023) 300 FCR 354.
8 *Tapiki (No 2)* [35].

7. In *AEU*, this Court upheld the validity of section 26A of the *Fair Work (Registered Organisations) Act 2009* (Cth). Prior to the enactment of section 26A, the Full Court of the Federal Court (hearing the case on remitter from this Court) had held in *Australian Education Union v* ***Lawler***[9] that a particular organisation was not qualified to be registered on the register of organisations maintained pursuant to the *Workplace Relations Act 1996* (Cth) and issued certiorari to quash the registration. The register was annotated to reflect this decision.

8. Following the decision in *Lawler*, the Commonwealth Parliament enacted the *Fair Work (Registered Organisations) Act 2009* (Cth). Section 26A retrospectively declared that the registration of certain organisations was to be taken to be valid, including the organisation which had been the subject of *Lawler*. The legislation achieved this by providing to the effect that the registration of an organisation which would have been invalid for the reasons given by the Full Court in *Lawler* "is taken for all purposes to be valid and to have always been valid". The register was subsequently annotated with a reference to section 26A.

9. The Full Court[10] and this Court rejected the appellant's argument that section 26A had the effect of dissolving or reversing the Full Court's orders in *Lawler*.

10. In *AEU*, French CJ, Crennan and Kiefel JJ said that "as a general rule", the Commonwealth Parliament cannot enact a law purporting to "…'direct [Chapter III] courts as to the manner and outcome of the exercise of their jurisdiction'. It cannot interfere with or intrude into the exercise of the judicial power".[11]

11. That general rule, however, "does not prevent legislation altering the substantive law, including alterations with retrospective effect or affecting rights in issue in pending proceedings".[12] Their Honours in *AEU* went on to say that there is no impermissible interference with judicial power "…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".[13]

12. Gummow, Hayne and Bell JJ said that *Lawler* decided the validity of a particular decision on the basis of the law "as it stood at the time of the Full Court's judgment", which meant that s 26A neither altered that judgment nor dissolved or reversed the

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9 (2008) 169 FCR 327.
10 *Australian Education Union v Lee* (2010) 189 FCR 259.
11 *AEU* [48] (French CJ, Crennan and Kiefel JJ) (citations omitted).
12 *Tapiki (No 2)* [23].
13 *AEU* [53].

orders made by the Full Court.[14] Rather, section 26A assumed that *Lawler* was correctly decided.[15]

13. Any contention that *AEU* is distinguishable should be rejected. The *Aggregate Sentences Act* uses the same validating language as the provisions that were upheld in *AEU* and the subsequent case of ***Duncan*** *v Independent Commission Against Corruption*.[16]

14. The Full Court in *Tapiki (No 2)* was correct to find that the register entries made after *Lawler* and after the enactment of section 26A do not constitute a point of difference between the decision in *AEU* and the matters under current consideration. The register entries cannot be characterised as further exercises of statutory power as a result of the law having changed. Rather, they were notes to assist a reader to understand the legal effect of the registration that had been made.[17]

15. For the above reasons, *AEU* is determinative of issue (a) raised by the appellant in *Tapiki*, and issue (b) raised by the plaintiff in *Pearson*, and their arguments to the contrary are untenable. Like the legislation in *AEU* and *Duncan*, item 4 of the *Aggregate Sentences Act* permissibly attaches new legal consequences to historical acts and the legislation is valid.

Historical support for the exercise of legislative power which affects *existing* court orders

16. The decision in *AEU* is consistent with earlier jurisprudence of this Court which establishes that the Commonwealth Parliament (and a State Parliament) has power to legislate to affect substantive rights by reference to existing court orders.

17. Constitutional considerations concern the function of a court, rather than the law which a court is to apply in the exercise of its function, and the legislative declaration of rights and liabilities does not affect the function of a court.[18] Rather, it specifies the law which the court is to apply in the exercise of its function.

18. The institutional integrity of a court as an independent and impartial tribunal cannot readily be threatened by a mere alteration of substantive legal rights, even if the law leads to what might be regarded as extreme or drastic outcomes. Disproportionately harsh outcomes will not, of themselves, be sufficient to demonstrate constitutional invalidity in order to preserve the integrity of the judicial function.[19]

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14 *AEU* [88]-[89].
15 *AEU* [96].
16 (2015) 256 CLR 83.
17 *Tapiki (No 2)* [33].
18 ***Leeth*** *v The Commonwealth* (1992) 174 CLR 455 at 469-470 (Mason CJ, Dawson and McHugh JJ).
19 ***Mineralogy*** *Pty Ltd v State of Western Australia* (2021) 274 CLR 219 [86] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

19. Where legislation declares rights and liabilities, "new norms of conduct are created by the legislature anterior to the performance of the judicial function".[20] Legislation can declare rights and liabilities to be applied by a court based upon any trigger or factum. As Gageler J (as his Honour then was) said in ***Duncan***[21]: "[t]here is no novelty in the proposition that 'in general, a legislature can select whatever factum it wishes as the "trigger" of a particular legislative consequence'".

20. The Court's decision in *Duncan* did not cast any doubt on the relevant aspects of *AEU*. In that matter, a New South Wales provision retrospectively expanded the jurisdiction of the Independent Commission Against Corruption to address the effect of a decision of this Court.[22] The plurality specifically referred to the judgment of French CJ, Crennan, and Kiefel JJ (as her Honour then was) in *AEU* and said that, had the impugned New South Wales law been a law of the Commonwealth, it would not have been inconsistent with Chapter III.[23]

21. A legislature will not ordinarily exercise or interfere with judicial power by declaring rights and liabilities not to exist. Such a declaration operates prior to any question of whether a breach of those rights and liabilities has occurred. This is what validly occurred in *AEU*,[24] *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth*,[25] ***Nelungaloo*** *Pty Ltd v The Commonwealth*[26] and *R v* ***Humby***; *Ex parte Rooney*.[27]

22. A provision which declares the legal effect of certain matters or things is, in terms of its constitutional character, materially the same as the following legislation which has been upheld as valid:

(a) legislation which declared the legal effect of an executive order and the authorising regulation whatever the true legal position (section 11 of the *Wheat Industry Stabilization Act (No 2) 1946* (Cth) considered in *Nelungaloo*);

(b) legislation which declared the force and effect of a proceeding, matter, decree, act, or thing purportedly made or done under the *Matrimonial Causes*

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20 *Kuczborski v Queensland* (2014) 254 CLR 51 [225] (Crennan, Kiefel, Gageler and Keane JJ). See also *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 184-185 (Mason CJ).
21 *Duncan* [42] (citations omitted).
22 *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1.
23 *AEU* [50], cited with approval in *Duncan* [18]-[26] (French CJ, Kiefel, Bell and Keane JJ).
24 *AEU* [48]-[49] (French CJ, Crennan and Kiefel JJ); [78] (Gummow, Hayne and Bell JJ).
25 (1986) 161 CLR 88 (***Commonwealth BLF Case***) at 96 (the Court).
26 (1947) 75 CLR 495, 579-580 (Dixon J).
27 (1973) 129 CLR 231, 250 (Mason J).

Act 1959 (Cth) which it was accepted was made or done without jurisdiction (section 5 of the *Matrimonial Causes Act 1971* (Cth) considered in *Humby*);

(c) legislation which declared the cancellation of the registration of a particular organisation (section 3 of the *Builders Labourers' Federation (Cancellation of Registration) Act 1986* (Cth) considered in the *Commonwealth BLF Case*);

(d) legislation which declared the zoning of particular land and the effects of such zoning (*Local Government (Morayfield Shopping Centre Zoning) Act 1996* (Qld) considered in ***Bachrach*** *(HA) Pty Ltd v Queensland*);[28]

(e) legislation which declared valid the registration of organisations which had not complied with certain rules (section 26A of the *Fair Work (Registered Organisations) Act 2009* (Cth) considered in *AEU,* discussed above);

(f) legislation which effectively declared certain past conduct to be "corrupt conduct" (sections 34 and 35 of the *Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW) considered in *Duncan*, discussed above); and

(g) legislation which deprived arbitral awards of legal effect (section 10 of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) considered in *Mineralogy*).

23. In two clear ways, the *Aggregate Sentences Act* alters existing rights to a much lesser extent than many of the pieces of amending legislation which this Court has previously upheld as valid. First, the *Aggregate Sentences Act* does not declare rights and liabilities not to exist. Item 4 of the *Aggregate Sentences Act* identifies the factum which "triggers" a particular legislative consequence. The legislation attaches new legal consequences to the historical acts of certain "things done" or "purportedly done" under the laws and provisions set out in item 4(2). The amendments do not directly extinguish choses in action. Instead, they have a consequential effect on rights and liabilities. For example, the amendments have an indirect impact on a suit for unlawful imprisonment by rendering that imprisonment to be lawful. The Act goes no further than to ascribe new legal consequences to past events.

24. Secondly, and contrary to the submission of the plaintiff in *Pearson* and the appellant in *Tapiki* that the *Aggregate Sentences Act* "is bespoke legislation tailored

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28 (1998) 195 CLR 547.

to these two cases, and these two litigants",[29] the Aggregate Sentences Act is not specifically directed to affecting or extinguishing the existing rights, duties, or liabilities of the plaintiff and the appellant in this matter. It changed the law for all cases both prospectively pursuant to the new section 5AB of the ***Migration Act 1958*** (Cth) and retrospectively by, for example, item 4. But even if the plaintiff's and the appellant's characterisation of the legislation is correct, as Edelman J noted in *Mineralogy*, the party-specific nature of legislation is not conclusive that the function is judicial, though it may be a consideration.[30] Legislation which is specific to particular individuals or corporations has been considered and upheld on a number of occasions.[31] For example, in *Mineralogy*, Edelman J held that the ad hominem aspect of the law served only the legislative function of focusing upon the particular rights to be extinguished.[32] The *Aggregate Sentences Act* alters rights, duties and liabilities far less than the legislation considered by this Court in *Mineralogy*.

25. The provisions in the *Aggregate Sentences Act*, particularly item 4, are no more a "direction" to courts than any of the other legislation which has validly amended the law retrospectively. As the Full Court held in *Tapiki (No 2)*, the *Aggregate Sentences Act* is premised on the basis that the Full Court's decision in *Pearson* was correctly decided, and it does not interfere with the orders made in *Pearson* or *Tapiki (No 1)*.[33]

26. In light of the well-established principles summarised above, and the application of *AEU* which is determinative of this particular matter, the impugned provision cannot be characterised as an exercise of judicial power. Contrary to the contentions of the plaintiff in *Pearson* and appellant in *Tapiki,* items 4(3), 4(4) and 4(5)(b)(i) of Part 2 of Schedule 1 to the *Aggregate Sentences Act* are compatible with Chapter III of the *Constitution* and valid.

<u>The decision of this Court in *AEU* should not be re-opened</u>

27. In the alternative to the argument made by the plaintiff in *Pearson* and the appellant in *Tapiki* that *AEU* can be distinguished, both seek to have *AEU* re-opened to

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29 Appellant's submissions in *Tapiki* [46].
30 *Mineralogy* [159].
31 See *Minogue v Victoria* (2019) 93 ALJR 1031 [23] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Knight v Victoria* (2017) 261 CLR 306, [26] (the Court); *Commonwealth BLF Case*; *Bachrach*.
32 See *Mineralogy* [159].
33 *Tapiki (No 2)* [32].

resolve what they say is a "direct conflict" between *AEU* on the one hand and *Humby* and ***Re Macks***; *Ex parte Saint*[34] on the other.[35]

28. This Court's departure from its previous decisions is not lightly undertaken.[36] There is no reason to do so in the case of either *Pearson* or *Tapiki.* There is no "direct conflict" between *AEU* and any of the preceding decisions of this Court.

29. In *Humby* and *Re Macks,* this Court found that Commonwealth and State Parliaments can attach new legal consequences to the historical fact of an invalid act or exercise of power.[37]

30. The subsequent decisions of this Court in *AEU* and *Duncan* are consistent with those decisions. They follow the well-established principle that Commonwealth and State Parliaments may legislate so as to affect and alter rights in issue in pending or completed litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution.

31. In *AEU*, the impugned legislation was not, as is contended by the appellant, found to "validate the invalid… or at least not when a court has declared the thing to be invalid". Nor did this Court hold in *AEU* that "a statute may declare as valid that which a court has held to be invalid".[38]

32. As set out above at [12], this Court held in *AEU* that the impugned provision did not affect an alteration to, let alone a dissolution or reversal of, the judgment in *Lawler*.[39] Rather, the legislation was enacted on the assumption that *Lawler* was correctly decided and changed the rule of law embodied in the statute that was construed by the Full Court as at the time of its decision in *Lawler.*

33. Consistently with *Humby, Re Macks, AEU,* and *Duncan,* the Aggregate Sentences Act does no more than attach new legal consequences to the historical acts of certain "things done" or "purportedly done" under the laws and provisions set out in item 4(2). As discussed above at [23], by changing the definition of what constitutes a term of imprisonment of 12 months or more in the *Migration Act*, the *Aggregate Sentences Act* merely has a consequential effect on rights and liabilities.

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34 (2000) 204 CLR 158.

35 Appellant's submissions in *Tapiki* [57]-[60].

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

37 *Humby* 242–243 (Stephen J, Menzies and Gibbs JJ agreeing), 249 (Mason J); *Re Macks* [15], [25] (Gleeson CJ), [110] (McHugh J), [210] (Gummow J); *AEU* [53] (French CJ, Crennan and Kiefel JJ), [89]-[90] (Gummow, Hayne and Bell JJ).

38 Appellant's submissions in *Tapiki* [60].

39 *AEU* [53] (French CJ, Crennan and Kiefel JJ); [88]-[89], [95]-[96] (Gummow, Hayne and Bell JJ).

34. This Court's decision in *AEU* is clear, based on established principles, and does not give rise to any difficulties or uncertainties about the content or application of its reasoning.[40] The plaintiff in *Pearson* and the appellant in *Tapiki* have not identified a sufficient basis to re-open *AEU*.

THE COMMONWEALTH PARLIAMENT'S POWER TO AFFECT *ANTICIPATED* OR *PENDING* PROCEEDINGS

35. The appellant in *JZQQ* argues that the entirety of the *Aggregate Sentences Act* is invalid as it is beyond the legislative power of the Commonwealth Parliament. The appellant contends that the Act infringes the principle that "the Parliament cannot enact a law purporting to direct the courts as to the manner and outcome of the exercise of their jurisdiction".[41]

36. In *Mineralogy*, Kiefel CJ, Gageler, Keane, Gordon, Steward, and Gleeson JJ said that:[42]

> *"In Duncan v Independent Commission Against Corruption, four members of the Court pointed out by reference to a long line of cases, including H A Bacharach Pty Ltd v Queensland that '[i]t is now well settled that a statute which alters substantive rights does not involve an interference with judicial power contrary to Ch III of the Constitution even if those rights are in issue in pending litigation'."* (Emphasis added.)

37. In the same case Edelman J said that: "[i]t is well settled that any effect of a law causing extinguished or lesser alteration of rights, even on pending litigation, does not invalidate the law".[43]

38. It follows that the appellant's argument in *JZQQ* that the *Aggregate Sentences Act* is invalid because it infringes Chapter III must be rejected. The *Aggregate Sentences Act* does not direct, or purport to direct, the courts as to the manner and outcome of the exercise of their jurisdiction.

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40 See the Respondents' submissions in *Tapiki* [37] which considers the factors in *John* 438–9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).
41 Appellant's submissions in *JZQQ* [27].
42 *Mineralogy* [85].
43 *Mineralogy* [159]. See also *Nelungaloo* 503-504, 579-580; *Humby* 250; *Bachrach* [8]-[9], [18]-[22].

NO INVALID IMPAIRMENT OF SECTION 75(V) OF THE *CONSTITUTION*

39. There is no basis for the appellant's contention in *JZQQ* that the *Aggregate Sentences Act* impermissibly curtails or limits the right or ability of applicants to seek relief under s 75(v) of the *Constitution*.[44]

40. ***Bodruddaza*** *v Minister for Immigration and Multicultural Affairs*[45] and ***Graham*** *v Minister for Immigration*[46] both concerned legislation that, as a matter of substance, impermissibly curtailed or limited the right or ability of applicants to seek relief under s 75(v) of the *Constitution*.

41. The provision in question in *Bodruddaza* was a limitation provision that required that an application to this Court for relief in its original jurisdiction in relation to a migration decision must be made within 28 days of the notification of the decision. The Court could extend that 28-day period by up to 56 days if an application was made within 84 days of the notification of the decision and the Court was satisfied that it was in the interests of the administration of justice to do so. Section 486A(2) otherwise purported to prohibit this Court from making an order allowing, or which had the effect of allowing, an applicant to make an application outside that 28 day period.

42. The constitutional deficiency, from which flowed the invalidity of the section, was that by fixing upon the time of the notice of the decision in question, the section did not allow for the range of vitiating circumstances which may affect administrative decision-making. That is, the time of notification may be very different from the time when a person becomes aware of the circumstances giving rise to a possible challenge to the decision, and fixing upon the time of notification does not allow for supervening events which may physically incapacitate the applicant or otherwise, without any shortcoming on the part of the applicant, lead to a failure to move within the stipulated time limit. Such a time limit subverted the constitutional purpose of the remedy provided by section 75(v) of the *Constitution*.[47]

43. *Graham* concerned a scheme under the *Migration Act* that enabled the Minister to act on "confidential information" provided by "gazetted agencies", which encompassed specific bodies, agencies, or organisations responsible for (or who dealt with) law enforcement, criminal intelligence, criminal investigation, fraud, or

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44 Appellant's submissions in *JZQQ* [57]-[63].
45 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.
46 *Graham v Minister for Immigration* (2017) 263 CLR 1.
47 *Bodruddaza* [53]-[60] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

security intelligence in Australia or in a foreign country. Relevantly, section 503A(2) provided that the Minister could not be required to divulge such information to any person or a court. Such information was relevant to the purported exercise of the power of the Minister that was under review. The constitutional defect in the provision was its inflexibility, which withheld the information from the reviewing court irrespective of the importance of the information to the review. To that extent, it amounted to a substantial curtailment of the capacity of a court exercising jurisdiction under or derived from section 75(v) of the *Constitution* and denied the court evidence upon which the Minister's decision was based,[48] striking at the very heart of the review for which section 75(v) provides.

44. There is no bright line standard which can be applied. It is a question of degree whether a statute so diminishes the opportunity for a superior court to exercise its supervisory jurisdiction that it may constitute an effective removal of the jurisdiction, equivalent to a privative clause.[49]

45. The essence of the appellant's claim in *JZQQ* is that the "practical effect" of the *Aggregate Sentences Act* is to deny the Federal Court (and this Court) its jurisdiction to declare an executive decision to be beyond power.[50] However, when compared to *Bodruddaza* and *Graham*, the limiting effect of the *Aggregate Sentences Act* is not of the same degree and cannot be said to impermissibly deprive the Federal Court (or this Court) of its jurisdiction under s 75(v) of the *Constitution*.

46. Unlike the cases above where the invalidating vices were the inflexible application of a time limit and a statutory instruction not to disclose otherwise relevant material to the court with supervisory jurisdiction, the *Aggregate Sentences Act* does no more than alter the meaning of a legislative provision affecting the court's decision.

47. The *Aggregate Sentences Act* does not prevent an applicant from raising jurisdictional error or a Chapter III court from giving relief in respect of such an error. All an applicant is precluded from by virtue of the *Aggregate Sentences Act* is successfully raising a specific argument about what constitutes a term of imprisonment of 12 months or more under the *Migration Act*. The *Aggregate Sentences Act* does not curtail or limit the Federal Court's (or this Court's) jurisdiction under s 75(v) of the *Constitution*.

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48 *Graham* [64]-[65] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

49 *A v Independent Commission against Corruption* (2014) 88 NSWLR 240 [50] (Basten CJ). See also *Graham* [48].

50 Appellant's submissions in *JZQQ* [57]-[63].

PART V: LENGTH OF ORAL ARGUMENT

48. It is estimated that the oral argument for the Attorney General of Western Australia will take 15 minutes if all three matters are heard concurrently.

Dated: 5 June 2024

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BRISBANE REGISTRY — No B15/2024

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Appellant

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ANNEXURE TO SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

Pursuant to paragraph 3 of Practice Direction No. 1 of 2019, the Attorney General for Western Australia sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions.

	Description	Version	Provision(s)
Constitutional Provisions			
1.	*Commonwealth Constitution*	Current (Compilation No. 6, 29 July 1977 – present)	Chapter III
Commonwealth Statutory Provisions			
2.	*Judiciary Act 1903* (Cth)	Current (Compilation No. 48, 1 September 2021 – present)	s 78B
3.	*Migration Amendment (Aggregate Sentences Act) 2023 (Cth)*	As enacted	Entire Act
4.	*Migration Act 1958* (Cth)	Compilation 149 (15 October 2020 to 21 March 2021)	ss 501, 501CA
5.	*Migration Act 1958* (Cth)	Current (Compilation 160, 29 March 2024 – present)	s 5AB