HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **YBFZ**
Plaintiff

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

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PLAINTIFF'S REPLY

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PART I: CERTIFICATION

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

PART II: REPLY

2 **A preliminary matter.** The "preliminary matter" raised by the Commonwealth can be put aside: **Cth [23]**. The Commonwealth appears to have overlooked the Plaintiff's pleading that the provisions are invalid because they exceed the regulation-making power in s 504 of the Act: **SCB 26 [65.2], 28 [70.2]**. Further, the Commonwealth agreed to the questions in the Special Case, presumably because it considered they were appropriately framed having regard to the Court's past practice in circumstances where there has been a constitutional challenge to regulations made pursuant to a very broad regulation-making power.[1] The Plaintiff otherwise agrees that the analysis should focus on the range of potential outcomes of the exercise of the powers. The Commonwealth contends that the provisions are valid in *all* of their potential operations: **Cth [23]**. It has not advanced any alternative argument that, if the powers have any invalid operations, the provisions should be read down, severed or partially disapplied. The Court can therefore proceed on the basis that if the provisions have any invalid operations, they are wholly invalid.

3 **Punishment.** The Commonwealth seems to suggest, at least in some places, that the relevant issue is whether imposing a curfew or electronic monitoring is an exclusively judicial function: see **Cth [30], [31], [42], [55]-[56], [58]**. That is to proceed at the wrong "level of generality".[2] The correct approach is to ask whether the particular impugned power may properly be characterised as punitive. That question can only be answered having regard the specifics of the detriments that may be imposed pursuant to that power (including the circumstances and purposes for which they may be imposed). It is therefore wrong for the Commonwealth to suggest that there is some category of generally described powers that are insulated from scrutiny against Ch III: **Cth [31]**. The Commonwealth's own examples prove the point. The notion that non-consensual medical treatment is immune from scrutiny overlooks the significant consequences it has for a person's bodily integrity, and the potential for such powers to be used as punishment.[3] Most tellingly, the

1 See, eg, *Cole* (1988) 165 CLR 360 at 410; *APLA* (2005) 224 CLR 322 at 491-492. There is an additional complicating factor here: the powers operate in conjunction with the terms of conditions 8620 and 8621, which were inserted into Sch 8 of the Regulations by legislation and not by regulation: see **SCB 66-67 [28], [35]**.

2 See, rejecting a similarly pitched argument, *Benbrika [No 2]* (2023) 97 ALJR 899 at [44]-[45] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

3 See, eg, Judge Shaw, *Beautiful Children: Te uiui o te manga Tamariki me te Rangatahi ki Lake Alice* (Abuse in Care Royal Commission, 1 December 2022) at [4], [24], [114], [125], [186]-[189], [223]-[224], 147. In truth, biosecurity measures may be reasonably capable of being seen as necessary for the legitimate non-punitive

Commonwealth places powers of "arrest" in this category, yet it is orthodox that arrest powers must be justified by reference to a legitimate non-punitive purpose.[4]

4 **The analytical framework.** Otherwise, the parties (in substance) largely agree about the steps in the analytical framework. There appear to be two key points of difference. ***First***, the Plaintiff's position is that a power will be characterised as prima facie punitive if it authorises the imposition of a detriment that has a punitive *effect*, assessed by reference to the nature and severity of the detriment (Q1). Where such a detriment is imposed, the natural inference to be drawn is that the power also has a punitive *purpose*: **Plf [10]**.[5] The drawing of that inference is why it is necessary to make a separate inquiry into whether the law has an identifiable non-punitive purpose (Q2). At that stage of the analysis, the natural inference may be rebutted by the identification of a non-punitive purpose.[6] Or it may be confirmed by the identification of a punitive purpose. It is at this stage that history may be of assistance: cf **Cth [29.2]**. Where, for example, other considerations are ambiguous as to the purpose of the law, that a particular form of detriment was historically imposed as punishment may support a conclusion that the law has a punitive purpose.[7] In that way, the character of the law may be "informed" by historical antecedents.[8] But history cannot *control* the inquiry one way or the other.[9]

5 ***Second***, what is "exceptional" is to permit the Executive to inflict a form of detriment that, prima facie, amounts to punishment,[10] regardless of whether the detriment is "detention in custody" or some other form of detriment: cf **Cth [34]**. A law imposing such a detriment requires justification.[11] The purpose of the legitimacy condition (Q3) is to *limit* the non-punitive purposes that are capable of providing the basis for the justification analysis:

purpose of protecting the community from "infectious disease": *Lim* (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ). The other compulsory treatment powers at **Cth [56]** (reg 5.35 of the Regulations and s 219ZG of the *Customs Act 1901* (Cth)) may be exercised where a doctor considers treatment necessary because a person's life is at risk: see *Woolley* (2004) 225 CLR 1 at [61] (McHugh J).

4 See *NAAJA v NT* (2015) 256 CLR 569 at [37]-[38] (French CJ, Kiefel and Bell JJ), [91], [99]-[103] (Gageler J), [236]-[237] (Nettle and Gordon JJ). See also *Donaldson v Broomby* (1982) 60 FLR 124 at 126 (Deane J); *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AZC20* (2022) 290 FCR 149 at [85] (the Court).

5 Referring to *Falzon* (2018) 262 CLR 333 at [24] (Kiefel CJ, Bell, Keane and Edelman JJ).

6 See *Falzon* (2018) 262 CLR 333 at [24] (Kiefel CJ, Bell, Keane and Edelman JJ).

7 The Plaintiff submits that is the better understanding of how historical considerations were used in *Alexander*: see *Alexander* (2022) 276 CLR 336 at [75] (Kiefel CJ, Keane and Gleeson JJ), [167] (Gordon J); cf *Benbrika [No 2]* (2023) 97 ALJR 899 at [22] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

8 See *Alexander* (2022) 276 CLR 336 at [250] (Edelman J).

9 *Palmer v Ayres* (2017) 259 CLR 478 at [37] (Kiefel, Keane, Nettle and Gordon JJ).

10 See *Benbrika [No 2]* (2023) 97 ALJR 899 at [34]-[48] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [70] (Gordon J). See also *Benbrika [No 1]* (2021) 272 CLR 68 at [84] (Gageler J); *Garlett* (2022) 96 ALJR 888 at [132], [134]-[136] (Gageler J).

11 *Jones* (2023) 97 ALJR 936 at [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ),

Plf [31]. That analysis reflects "deeply rooted notions of the relationship of the individual to the state going to the character of the national polity created and sustained by the Constitution".[12] That being so, history may also inform whether an identified non-punitive purpose is "legitimate": cf **Cth [29.3]**.[13]

6 It can be accepted that the (limited) range of permissible legitimate purposes will *vary* depending on the nature of the detriment and the particular context. For example, it is legitimate to impose the detriment of revocation of citizenship for the purpose of protecting the integrity of the naturalisation process.[14] But it would not be legitimate to impose detention in custody for that same purpose. That variability does not mean that the "extraordinary becomes the ordinary"[15] in all cases other than those involving "detention in custody"; nor are those matters aptly expressed by reference to some form of mathematical relationship: cf **Cth [34]**.

7 **Prima facie punitive (curfew).** The Plaintiff's argument is not that "imprisonment at common law" can only be imposed by a court as punishment: cf **Cth [40]**. The "store security guard" example given by the Commonwealth misses the point: any "detention" in that scenario is not authorised or enforced by the Commonwealth Executive and therefore Ch III has nothing to say about it: **Plf [13]**. But where the Commonwealth Executive *is* involved, its ability to authorise or enforce any deprivation of liberty — including imprisonment at common law — necessarily depends on the existence of a *valid* law which "pass[es] muster" under Ch III.[16]

8 In any event, the five matters said by the Commonwealth to make the curfew condition distinguishable from "detention in custody" are at odds with principle. That the Plaintiff is free to leave the curfew location outside of the curfew period says nothing about the deprivation of his liberty *during* that period: **Cth [37.1]**. The balance of the matters concern the *conditions* of the Plaintiff's detention: **Cth [37.2]-[37.5]**.[17] They are irrelevant to the Ch III question because "[w]hatever the conditions of detention, the detention itself

[12] *Garlett* (2022) 96 ALJR 888 at [127] (Gageler J).
[13] The legitimacy of the executive detention of aliens is grounded in the historical vulnerability of aliens to exclusion and deportation by the executive: see *Lim* (1992) 176 CLR 1 at 29-31 (Brennan, Deane and Dawson JJ). See also *Jones* (2023) 97 ALJR 936 at [46]-[47] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).
[14] *Jones* (2023) 97 ALJR 936 at [50] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [63] (Gordon J), [157] (Edelman J), [188] (Steward J).
[15] *Garlett* (2022) 96 ALJR 888 at [148] (Gageler J).
[16] *Plaintiff M68* (2016) 257 CLR 42 at [159], [162]-[163] (Gageler J).
[17] The same applies to the matters at **SA [11]-[18]**. Those features of prison are expressed to relate to the "loss of autonomy and privacy" – making clear that they are *over and above* the loss of the right to be at liberty.

involves involuntary deprivation of liberty".[18] Cases concerning "deprivation of liberty" under the ECHR (**Cth [38]**) are irrelevant for the same reason. That concept requires a "multi-factorial" assessment of a range of factors, including the conditions of detention.[19] That concept is thus "very different" from the protection of liberty afforded for centuries by the common law, which is "at the core of our inherited constitutional tradition".[20]

9 As to *Thomas*, on the Commonwealth's own submission, the relevant propositions underpinning the Plaintiff's case are established only by "[r]ecent decisions" of this Court: **Cth [25]**. All that the Plaintiff seeks to do is place *Thomas* within the analytical framework made plain by those decisions, in a way that respects the outcome in *Thomas* and does not
10 disturb any other line of authority.[21] There is no "plainly wrong" threshold: cf **SA [20]**.

10 **Prima facie punitive (monitoring).** Interferences with privacy and bodily integrity are ordinary incidents of imprisonment and, at least for that reason, have an association with punishment.[22] And there is no basis to limit the interferences with bodily integrity that may be punitive to those that cause "physical harm or pain": cf **Cth [57]**. For example, humiliation is a further aspect of corporal punishments.[23] That accords with the common law understanding that the right to bodily integrity concerns autonomy and dignity.[24]

11 The device is in no sense a "modest" physical imposition, particularly when the OBC is attached: cf **Cth [57], SA [23]**. But, in terms of assessing the punitive effect of monitoring from a bodily integrity perspective, what is most important is the *persistent* interference
20 with the Plaintiff's right to determine what is on his body: **Plf [49]**. That the Plaintiff is forced to wear long clothing if he wishes to avoid public humiliation (see **Cth [57]**) only compounds the degree of interference with that right. From the privacy perspective, it is naïve to suggest that knowing a person's location (at all times) reveals nothing about what activities they engage in or who they associate with: see **Cth [58]**. Indeed, if that were correct, it would make it even harder for the Commonwealth to articulate how electronic monitoring has any rational connection to a protective purpose (which it has failed to do in

[18] *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at [21], see also [10]-[14] (Gleeson CJ), [175]-[176] (Hayne J), [218] (Callinan J); see also *Woolley* (2004) 225 CLR 1 at [29] (Gleeson CJ); *Vasiljkovic* (2006) 227 CLR 614 at [35] (Gleeson CJ).

[19] *Jalloh* [2021] AC 262 at [29] (Lady Hale).

[20] See *Jalloh* [2021] AC 262 at [33] (Lady Hale); *NAAJA* (2015) 256 CLR 569 at [94]-[96] (Gageler J).

[21] The laws identified in **Cth [39] n 62** are all State laws and therefore do not directly intersect with *Thomas*. Nor do the cases cited at **Cth n 63** rely on the proposition that a curfew is distinct from "detention in custody".

[22] See *Bell v Wolfish,* 441 US 520 (1979) at 537, quoted in *Behrooz* (2004) 219 CLR 486 at [13] (Gleeson CJ); **SA [12]-[13], [22]**. See also **Plf [47]-[48]**.

[23] Consider the use of stocks or pillories, public flogging or shackling: see Frevert, *The Politics of Humiliation: A Modern History* (2020) at 8-9, 13, 20-36, 73-74.

[24] *Marion's Case* (1992) 175 CLR 218 at 309 (McHugh J).

any event: cf **PS [55]-[57])**. Otherwise, the Commonwealth's submission on privacy boils down to: "trust the Commonwealth and Buddi because they do certain things as a matter of contract and practice". Those matters do not limit the interference with privacy authorised by the Act and Regulations, and are therefore irrelevant to the Ch III analysis.

12 The various other Commonwealth laws raised do not assist: **Cth [55]-[56], [58]**. That certain trespasses or interferences with privacy may be authorised for legitimate non-punitive purposes does not establish that those detriments may not be prima facie punitive.[25] That is to wrongly import considerations of purpose into Q1: see **Cth [43]-[44], [55]-[56]**. In addition, electronic monitoring interferes with bodily integrity *and* privacy. Many of the Commonwealth's examples do not. Some do not authorise a trespass.[26] None involve interferences that are as constant (all day, every day) or lengthy (1 year).[27]

13 **Legitimacy.** The Plaintiff's primary argument on "legitimacy" is that, for a "protective" purpose to be legitimate in the context of these powers, the law must identify the relevant harm from which the community is to be protected, by reference to particular acts or offences: **Plf [32]-[34]**. There is no decision that has endorsed the legitimacy of a non-punitive purpose divorced from such identified harm: **Plf [33];** cf **Cth [49]**. The Commonwealth does not engage with that argument at all, but instead focuses on the Plaintiff's alternative argument that the identified harm to be prevented must also be "grave and specific": **Plf [35]; Cth [49]**. The Plaintiff maintains the Court should accept that argument, if it is necessary to do so. It is not foreclosed by any authority, for the laws in *Thomas* and *Benbrika [No 1]* satisfy that additional threshold.

14 **Reasonable necessity.** The Commonwealth asserts that there are five "considerations" (not limits) implicit in the bare language of the criterion: **Cth [16]**. The analogy with *Vella* only highlights the problem with that submission; the legislation in that case identified both the particular harm, and the risk threshold that must be reached before imposing conditions.[28]

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[25] The same is true of uses of electronic monitoring in other contexts in Australia or overseas: cf **Cth [59]**. Note, for example, the Canadian framework permitting electronic monitoring to be used only "as an exceptional measure" where proportionate and rationally connected to a purpose of addressing a factor that would otherwise cause the person to be detained, such as being unlikely to appear for removal: **SCB 639, 645, 650-651**.

[26] See Act, s 257A; *Biosecurity Act 2015* (Cth), s 95 (no use of force to require compliance under ss 85-93).

[27] See, eg, *Telecommunications (Interception and Access) Act 1979* (Cth), ss 9B(3A), 10(3), 31A(3), 49(3).

[28] See *Vella* (2019) 269 CLR 219 at [34]-[38], [43] (Bell, Keane, Nettle and Edelman JJ).