HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

EGH19
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

SUBMISSIONS OF THE DEFENDANT

PART I — CERTIFICATION

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

PART II — CONCISE STATEMENT OF ISSUES

2. The issue in this proceeding is whether, to the extent cl 070.612A(1) of Sch 2 to the *Migration Regulations 1994* (Cth) (**Migration Regulations**) authorises the Minister to impose condition 8620 (**curfew condition**) or condition 8621 (**monitoring condition**) on a Bridging R visa, that clause is invalid because it exceeds the power conferred by s 504 of the *Migration Act 1958* (Cth) (**Migration Act**) when that power is construed subject to Ch III of the Constitution.

10 3. Applying the framework identified by this Court in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*,[1] the Commonwealth submits that cl 070.612A(1) is valid insofar as it authorises the Minister to impose the curfew and monitoring conditions. Although the Commonwealth accepts that the power to impose the curfew and monitoring conditions is *prima facie* punitive, that power is not properly characterised as punitive because:

3.1 it has a legitimate and non-punitive purpose — namely, to protect the Australian community, or any part thereof, from serious harm of the kind caused by the commission of serious offences (as defined); and

3.2 having regard to the significant limitations on the power to impose the conditions,
20 the power is reasonably capable of being seen as necessary for that purpose.

4. In those circumstances, the questions in the Special Case should be answered: (1) no; (2) no; and (3) the Plaintiff.

PART III — SECTION 78B NOTICE

5. Except in the respect noted in paragraph 67 below (purporting to advance a head of power argument), the Plaintiff's notice under s 78B of the *Judiciary Act 1903* (Cth) is adequate.

PART IV — CONTESTED FACTS

6. The facts agreed by the parties are set out in the Special Case (SCB 43-53).

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[1] (2024) 99 ALJR 1 (***YBFZ***).

PART V — ARGUMENT

(a) The impugned provision

7. ***The former provision***. Clause 070.612A of Sch 2 to the Migration Regulations was originally enacted as part of the legislative response to this Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*.[2] That legislative response established a regime by which non-citizens in respect of whom there was no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future could be granted a Bridging R visa subject to a range of conditions.

8. Within that regime, sub-paragraphs (a) and (d) of cl 070.612A(1) respectively required the Minister to impose the monitoring condition and the curfew condition on a Bridging R visa "unless the Minister is satisfied that it is not reasonably necessary to impose that condition for the protection of any part of the Australian community".[3]

9. In *YBFZ*, Gageler CJ, Gordon, Gleeson and Jagot JJ held that sub-paragraphs (a) and (d) of cl 070.612A(1) were *prima facie* punitive[4] and had no legitimate and non-punitive purpose.[5] Their Honours also observed, in *obiter*, that even if the purpose of those sub-paragraphs had been the "protection of the Australian community from the risk of harm arising from future offending", the sub-paragraphs would not have been reasonably capable of being seen as necessary for that purpose.[6]

10. ***The new provision***. Following delivery of judgment in *YBFZ*, cl 070.612A(1) was repealed and substituted with a new provision.[7] It now relevantly provides:

> For each of conditions 8621, 8617, 8618 and 8620, the Minister must impose the condition if:
>
> (a) subclause (3) applies to the visa; and
>
> (b) despite the other conditions imposed on the visa by or under this subclause or another provision of this Division, the Minister is satisfied on the balance of probabilities that the holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence; and

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2 (2023) 280 CLR 137 (***NZYQ***). See *YBFZ* (2024) 99 ALJR 1 at [7] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

3 See cl 070.612A(1) of Sch 2 to the Migration Regulations, as in force on 2 April 2024 (Compilation No 255).

4 *YBFZ* (2024) 99 ALJR 1 at [52], [63] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

5 *YBFZ* (2024) 99 ALJR 1 at [76], [81]-[83] (Gageler CJ, Gordon, Gleeson and Jagot JJ). While Edelman J was also a member of the majority, his Honour's reasoning process was materially different.

6 *YBFZ* (2024) 99 ALJR 1 at [84]-[85] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

7 See cl 2 of Sch 1 to the *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (Cth) (**Amending Regulations**).

(c) the Minister is satisfied on the balance of probabilities that the imposition of the condition (in addition to the other conditions imposed by or under this subclause or another provision of this Division) is:

(i) reasonably necessary; and

(ii) reasonably appropriate and adapted;

for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk.

11. The Amending Regulations also introduced a new definition of "serious offence" in cl 070.111 of Sch 2 to the Migration Regulations.[8] "Serious offence" is defined to mean "an offence against a law of the Commonwealth, a State or a Territory" where the offence is "punishable by imprisonment for life or for a period, or maximum period, of at least 5 years" (sub-paragraph (a)), and "the particular conduct constituting the offence involves or would involve" one of ten categories of serious criminal conduct, including loss of life, serious personal injury, sexual assault, facilitating child sexual abuse or dealing in child abuse material, domestic or family violence, threatening or inciting violence on the ground of an attribute, people smuggling or human trafficking (sub-paragraph (b)).

12. The Explanatory Statement to the Amending Regulations makes clear that, as repealed and substituted, cl 070.612A(1) is intended to address the defects identified by the Court in *YBFZ* by creating a "confined and specific test" directly focused upon "protecting any part of the Australian community from serious harm" of the kind caused "by committing a serious offence" (as defined in new cl 070.111).[9] Consistently with this, there are several significant distinctions between the version of cl 070.612A(1) considered in *YBFZ* and that now in force (cf PS [22]-[23]). In particular:

12.1 clause 070.612A(1) now empowers the Minister to impose the curfew or monitoring conditions only if positively satisfied, on the balance of probabilities, of the matters in sub-paragraphs (b) and (c);

12.2 sub-paragraph (b) now expressly identifies both the nature of the harm that the visa holder must pose to the Australian community ("serious[ ] harm" by the commission of a "serious offence"), and the level of risk of that harm that must

[8] See cl 1 of Sch 1 to the Amending Regulations.
[9] See Explanatory Statement to the Amending Regulations at 1.

exist ("a substantial risk"), before the curfew or monitoring conditions may be imposed;[10] and

12.3 sub-paragraph (c) now expressly identifies the purpose of the power to impose the curfew or monitoring conditions as being to protect any part of the Australian community from serious harm of the kind caused by the commission of a serious offence.

13. As such, cl 070.612A(1) is now carefully delimited to identify, among other things, "the nature, degree, or extent of the harm sought to be protected against" and "the nature, degree, or extent of the required state" of satisfaction by the Minister.[11] The effect of these changes is discussed further in paragraphs 54 to 62 below.

14. ***The balance of the regime***. Several other aspects of the regime are materially unchanged from that considered in *YBFZ*. For example:

14.1 as in *YBFZ*, the Minister must decide whether to impose each of the conditions in cl 070.612A(1) in the order in which they are mentioned;[12]

14.2 the obligations imposed upon persons who hold a Bridging R visa subject to the curfew or monitoring conditions remain identical, and failure to comply with either condition without a reasonable excuse remains an offence;[13] and

14.3 if a condition listed in cl 070.612A(1) is imposed, absent the grant of a new Bridging R visa, the visa will be subject to that condition for 12 months.[14]

15. A condition listed in cl 070.612A(1) can apply for longer than 12 months only if, before the expiry of the 12-month period, the visa holder is granted a new visa that is again subject to the condition (cf PS [11]).

16. The process for inviting representations under s 76E of the Migration Act also remains similar, in that, if one or more of the conditions listed in cl 070.612A(1) is imposed on a Bridging R visa, s 76E(3)(b) of the Migration Act requires the Minister to invite the visa holder to make representations as to why the visa should not be subject to the

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10 See generally Explanatory Statement to the Amending Regulations at 1-2.
11 See *YBFZ* (2024) 99 ALJR 1 at [65] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
12 See cl 070.612A(2) of Sch 2 to the Migration Regulations.
13 See ss 76C and 76D of the Migration Act. The offences are subject to a mandatory minimum sentence of one year: see s 76DA.
14 See reg 2.25AE of the Migration Regulations.

condition(s).[15] However, the obligation imposed on the Minister by s 76E(4) to grant a further visa not subject to the relevant condition(s) in certain circumstances has been reframed so as to cohere with the amended form of cl 070.612A(1).

(b) The *YBFZ* inquiry

17. ***The single question of characterisation***. Chapter III of the Constitution separates the judicial power of the Commonwealth from federal legislative and executive power and exclusively assigns "to that separated judicial power [the] authority to impose punishment".[16] Chapter III therefore invalidates a Commonwealth law that purports to vest any part of that exclusively judicial function in the Executive.[17]

10 18. Where a Commonwealth law confers upon the Executive power to impose a detriment, whether that law infringes the constitutional limit described above is determined by answering a "single question of characterisation" — namely, "whether the power to impose the detriment conferred by the law is properly characterised as punitive and therefore as exclusively judicial" (cf PS [14]).[18]

19. Following *YBFZ*, that single question of characterisation is to be answered by reference to two "subsidiary steps":[19]

19.1 Does the power to impose the relevant detriment have a *prima facie* punitive character, either by default or by a process of characterisation (having regard to "the meaning and scope of the law; the law's practical and legal operation; and
20 the end or object the law is designed to achieve")?[20]

19.2 If so, is there a justification, in the sense that "the power having a *prima facie* punitive character (by default or otherwise) is reasonably capable of being seen to be necessary (in the relevant sense of 'reasonably appropriate and adapted'

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15 See also s 76E(1) of the Migration Act and reg 2.25AD of the Migration Regulations.

16 *YBFZ* (2024) 99 ALJR 1 at [4] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

17 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (***Lim***) at 27 (Brennan, Deane and Dawson JJ; Mason CJ agreeing); *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1 (***Benbrika [No 2]***) at [33] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [56], [60] (Gordon J).

18 *YBFZ* (2024) 99 ALJR 1 at [16] (Gageler CJ, Gordon, Gleeson and Jagot JJ), referring to *Jones v Commonwealth* (2023) 280 CLR 62 (***Jones***) at [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ). See also *NZYQ* (2023) 280 CLR 137 at [44] (the Court); *Benbrika [No 2]* (2023) 280 CLR 1 at [35]-[36] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

19 *YBFZ* (2024) 99 ALJR 1 at [16], [18] (Gageler CJ, Gordon, Gleeson and Jagot JJ); see also at [239] (Beech-Jones J).

20 *YBFZ* (2024) 99 ALJR 1 at [16] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

rather than essential or indispensable) for a legitimate and non-punitive purpose"?[21]

20. If the power to impose the relevant detriment is *prima facie* punitive, but the power is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose, then the power's constitutional character will be non-punitive.[22]

21. In answering the single question of characterisation outlined above, it must be recalled that the relevant constitutional limit is the separation of powers effected by Ch III. As explained by the plurality in *YBFZ*, Ch III "does not embody any conception of free-standing rights".[23] Nor does it "create a constitutional limit applying to every law that imposes a detriment on a person".[24] Indeed, "[t]here are many interferences with bodily integrity and liberty authorised by the legislature, both significant and insignificant, which are non-punitive and therefore do not infringe on exclusively judicial power".[25]

22. ***Testing the validity of a regulation***. The question for determination in this case is whether, to the extent it authorises the imposition of the curfew or monitoring condition on a Bridging R visa, cl 070.612A(1) is invalid because it exceeds the regulation-making power conferred by s 504 of the Migration Act (SCB 54 [60]; PS [13]). That question can be approached by asking whether, if cl 070.612A(1) were enacted as a law, it would infringe Ch III. That approach is appropriate because the power conferred by s 504 of the Migration Act "could not and does not extend to the making of a regulation which would transgress a constitutional limit on the legislative power of the Commonwealth Parliament".[26] For that reason, if cl 070.612A(1) could not be enacted as a law without infringing Ch III, it would follow that the clause cannot be supported by s 504 and is invalid.

(c) The nature and severity of the detriment

23. Before turning to the steps identified in paragraph 19 above, we briefly address the nature and severity of the detriment imposed by the curfew and monitoring conditions.

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21 *YBFZ* (2024) 99 ALJR 1 at [18] (Gageler CJ, Gordon, Gleeson and Jagot JJ), referring to *Jones* (2023) 280 CLR 62 at [42] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

22 *YBFZ* (2024) 99 ALJR 1 at [18] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

23 *YBFZ* (2024) 99 ALJR 1 at [6] (Gageler CJ, Gordon, Gleeson and Jagot JJ); see also at [15].

24 *YBFZ* (2024) 99 ALJR 1 at [6] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

25 *YBFZ* (2024) 99 ALJR 1 at [15] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

26 *YBFZ* (2024) 99 ALJR 1 at [19] (Gageler CJ, Gordon, Gleeson and Jagot JJ), referring to *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [104] (Gummow J); *Palmer v Western Australia* (2021) 272 CLR 505 (***Palmer***) at [119]-[120] (Gageler J), [231] (Edelman J).

The nature and severity of the detriment is relevant at each step in the process of characterising the power to impose the detriment: it is relevant to determining whether the power to impose the detriment is *prima facie* punitive;[27] as explained in paragraphs 44 and 49 below, it is relevant in identifying the purposes for which the power to impose the detriment can legitimately be conferred; and, as explained in paragraph 52 below, it is relevant in identifying whether the power to impose the detriment is reasonably capable of being seen as necessary for an identified legitimate purpose.

24. ***Detriment imposed by the curfew condition***. A visa holder subject to the curfew condition is required to remain at a notified address for up to eight hours each day (being between 10pm on one day and 6am on the next day, or between such other times, not more than eight hours apart, as are specified in writing by the Minister).[28] The notified address may be any of: the visa holder's residential address; an address at which the visa holder stays regularly because of a close personal relationship; or another address notified by the visa holder at least one day in advance.[29]

25. While the curfew condition involves a "deprivation of liberty" that is "material and relatively long-term",[30] for the following reasons the detriment caused by that condition is markedly less severe than that associated with full-time detention in custody.[31]

26. *First*, as contemplated by condition 8620(1)-(2), the Minister may mitigate the harshness of the curfew condition by varying the curfew hours applicable to individual visa holders upon their request (SCB 53 [54]). This mechanism has frequently been used in practice: between 7 November 2024 (when the Amended Regulations commenced operation) and 18 July 2025, 42 individual Bridging R visa holders requested that their curfew hours be varied on 202 occasions, and each request was granted (SCB 53 [54(a)]).

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27 See *YBFZ* (2024) 99 ALJR 1 at [16], [46]-[63] (Gageler CJ, Gordon, Gleeson and Jagot JJ). See also *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 (***Alexander***) at [73]-[74], [77], [95] (Kiefel CJ, Keane and Gleeson JJ), [159], [166], [172] (Gordon J), [238], [244], [248] (Edelman J); *Benbrika [No 2]* (2023) 97 ALJR 899 at [21]-[22] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [63] (Gordon J), [101], [109]-[110] (Edelman J); *Jones* (2023) 97 ALJR 936 at [76] (Gordon J), [155] (Edelman J).

28 See item 8620 of Sch 8 to the Migration Regulations. See also SCB 53 [56]. Compare *YBFZ* (2024) 99 ALJR 1 at [48]-[51] (Gageler CJ, Gordon, Gleeson and Jagot JJ), which speak of the condition applying, for example, "from 10 pm on one day until 6 am the next day" (at [48]), "for eight hours every night" (at [49]) and "[f]or one-third of every day" (at [51]).

29 See item 8620(3) of Sch 8 to the Migration Regulations, read with item 8513.

30 *YBFZ* (2024) 99 ALJR 1 at [52] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

31 See, generally, *YBFZ* (2024) 99 ALJR 1 at [216]-[217] (Steward J), [317] (Beech-Jones J). As to the existence of the distinction, see *Vella v Commissioner of Police* (2019) 269 CLR 219 (***Vella***) at [53] (Bell, Keane, Nettle and Edelman JJ).

27. *Secondly*, as is apparent from paragraph 24 above, the curfew condition does not require the visa holder to remain at a single notified address during curfew hours. Rather, provided the relevant address has been notified by the visa holder in accordance with condition 8620(3), the place at which they spend the curfew hours "may change from day to day … enabling the person, for example, to stay with whomever the person chooses (in Australia) and wherever the person chooses (in Australia)".[32]

28. *Thirdly*, the curfew condition imposes no restriction on who can live with, visit or communicate with the visa holder during curfew hours, or on what the visa holder can do during those hours, allowing the visa holder to retain a significant level of autonomy during curfew hours.[33]

29. *Fourthly*, the ordinary curfew hours of 10pm to 6am encompass a period during which most people are within their overnight accommodation, quite independently of any curfew.[34] That is relevant to the extent of the detriment arising from the curfew.

30. These matters together have the consequence that, while the power to impose the curfew condition is *prima facie* punitive (but not "punitive by default": cf PS [21]), the detriment the condition imposes is markedly less severe than that arising from some other forms of interference with liberty. Accordingly, as developed below, the purposes for which power to impose the curfew condition can legitimately be conferred are wider than those that can justify detention in custody, and the interference with liberty caused by the curfew condition is more readily justified than is the case where detention in custody is imposed in order to advance a non-punitive purpose.

31. ***Detriment imposed by the monitoring condition***. A visa holder subject to the monitoring condition is required to: wear a monitoring device at all times; allow an authorised officer to fit, install, repair or remove that device and any related monitoring equipment; and take any steps specified in writing by the Minister, and any other reasonable steps, to ensure that the device and any related monitoring equipment remain in good working order.[35] The particular monitoring device and equipment used for

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32 *YBFZ* (2024) 99 ALJR 1 at [48] (Gageler CJ, Gordon, Gleeson and Jagot JJ); see also [316] (Beech-Jones J).
33 See *YBFZ* (2024) 99 ALJR 1 at [216] (Steward J), [316] (Beech-Jones J).
34 See *YBFZ* (2024) 99 ALJR 1 at [216] (Steward J), [316] (Beech-Jones J).
35 See item 8621 of Sch 8 to the Migration Regulations. See also SCB 49 [43].

those purposes is described in Section D of the Special Case and relevantly comprises a "smart tag" (or "anklet") and an "on-body charger" (**OBC**) (SCB 50 [45]).

32. The monitoring condition affects the bodily integrity of a person whose visa is subject to that condition.[36] It is not disputed that the detriment caused by requiring a visa holder to wear the smart tag continuously, keep it charged (requiring the attachment of the OBC: SCB 50 [45], 52 [51]), and facilitate its installation, repair and removal is "material and relatively long-term".[37] Nevertheless, the physical burden of wearing the smart tag is not excessive: the smart tag weighs only 135g (SCB 50 [46(b)]), and is "not a cause of pain or physical discomfort".[38] The dimensions of the smart tag are such that it is capable of being concealed by ordinary clothing, including by slim-fitting tracksuit and suit pants (SCB 50 [47], 462, 464; cf PS [19]).[39] Taken together, these matters mean that while the detriment imposed by the monitoring condition is material, it is markedly less severe than other forms of interference with bodily integrity that have historically been imposed as forms of punishment, and for that reason is more readily justified than those more severe forms of interference.[40]

(d) Step 1: The power to impose the conditions is *prima facie* punitive

33. The nature and severity of the detriment imposed by the curfew and monitoring conditions, and the historical incidence of the imposition of detriments of that kind, are unchanged since they were considered in *YBFZ*. Accordingly, having regard to the holding of the plurality in *YBFZ*,[41] the Commonwealth accepts that the power conferred by cl 070.612A(1) to impose each of the curfew and monitoring conditions is to be characterised as *prima facie* punitive.

34. In those circumstances, there is no need for the Court to consider the submissions in PS [16]-[21], because those submissions are directed to a point that is not in dispute. To avoid doubt, however, the Commonwealth disputes much of what appears in those paragraphs, which in many cases address matters of little or no relevance to whether a

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36 *YBFZ* (2024) 99 ALJR 1 at [60] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
37 *YBFZ* (2024) 99 ALJR 1 at [60] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
38 *YBFZ* (2024) 99 ALJR 1 at [58] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
39 Cf *YBFZ* (2024) 99 ALJR 1 at [58], [62] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
40 *YBFZ* (2024) 99 ALJR 1 at [239] (Beech-Jones J); see more generally at [219] (Steward J), [303] (Beech-Jones J).
41 *YBFZ* (2024) 99 ALJR 1 at [52], [63] (Gageler CJ, Gordon, Gleeson and Jagot JJ); cf at [215] (Steward J), [239], [310] (Beech-Jones J).

power to impose a detriment is *prima facie* punitive.[42]

(e) Step 2(a): The power has a legitimate and non-punitive purpose

35. As the power to impose each of the conditions is *prima facie* punitive, it is necessary to consider whether the power is reasonably capable of being seen as necessary for a legitimate and non-punitive purpose.[43]

36. The first aspect of that consideration is whether the power to impose each of the conditions has a legitimate and non-punitive purpose. For the reasons that follow, the Commonwealth submits that it does.

37. ***The purpose of cl 070.612A(1)***. The purpose of a provision is "the public interest sought to be protected and enhanced' by the provision or what the provision is designed to achieve in fact".[44] Identifying the purpose of a law is similar to identifying the mischief that the law is designed to address; "[t]he object or purpose will sometimes be stated in the text of the law and will sometimes emerge from the context".[45]

38. The purpose of cl 070.612A(1) is to protect the Australian community, or any part thereof, from serious harm of the kind caused by the commission of a "serious offence".

39. That purpose is evident from the text: specifically, the combined effect of subparagraphs (b) and (c) is that the curfew and monitoring conditions can be imposed on a Bridging R visa if, and only if, the Minister is satisfied, on the balance of probabilities, both that: the visa holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence; and the imposition of each condition is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk.

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42 For example, PS [17]-[18], in suggesting that comparison with Div 395 of the Criminal Code reveals that cl 070.612A has a "punitive purpose", conflates different parts of the requisite analysis.

43 See *YBFZ* (2024) 99 ALJR 1 at [18] (Gageler CJ, Gordon, Gleeson and Jagot JJ). See also *Jones* (2023) 280 CLR 62 at [39] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [63] (Gordon J); *NZYQ* (2023) 280 CLR 137 at [39] (the Court).

44 *Babet v Commonwealth* (2025) 99 ALJR 883 at [32] (Gageler CJ and Jagot J). See also *YBFZ* (2024) 99 ALJR 1 at [245] (Beech-Jones J); *Ravbar v Commonwealth* (2025) 99 ALJR 1000 at [41] (Gageler CJ).

45 *McCloy v New South Wales* (2015) 257 CLR 178 (***McCloy***) at [132] (Gageler J). See also *Brown v Tasmania* (2017) 261 CLR 328 (***Brown***) at [101] (Kiefel CJ, Bell and Keane JJ), [208]-[209] (Gageler J), [321] (Gordon J); *Unions NSW v New South Wales* (2019) 264 CLR 595 at [171] (Edelman J); *Palmer* (2021) 272 CLR 505 at [191] (Gordon J); *Alexander* (2022) 276 CLR 336 at [102] (Gageler J); *YBFZ* (2024) 99 ALJR 1 at [245] (Beech-Jones J).

40. As is apparent, the central focus and criterion of operation of cl 070.612A(1) is the protection of the Australian community, or any part thereof, from future harm of a specific gravity, being serious harm of a kind caused by the commission of specific classes of serious offences.[46]

41. The Plaintiff seeks to cast doubt on this articulation of the purpose of cl 070.612A(1) by referring to the "diversity in purposes of cl 070.612A" (PS [24(c)], [25]). But there is no such diversity of purposes. The Plaintiff's submission to the contrary is based entirely on statements in the extrinsic material but, even then, the part of the Explanatory Statement that is actually directed to cl 070.612A reveals the same singular purpose as is apparent from its text.[47] When read in context, the quotes that the Plaintiff has selectively isolated do not address the purpose of cl 070.612A(1) at all, but rather the purpose of distinct provisions of the Migration Act (PS [24(c)(ii) and (iii)]), the structure of the regulatory regime (PS [24(c)(v)]), and the expected operation or benefits of the regime (PS [24(c)(i), (vi), (vii)]). Nor do the extrinsic materials indicate any intention to "surmount" the decision in *YBFZ* (cf PS [24(c)(iv)]). To the contrary, they make clear that the Amending Regulations were intended to bring cl 070.612A(1) into compliance with that decision.[48]

42. The Plaintiff's attempt to call into question the purpose of cl 070.612A(1) by reason of its selective application to aliens is likewise misconceived (PS [28]). As is now well accepted in other branches of constitutional analysis, it is not "unreasonable", nor "indicative of an ulterior purpose", for a legislative scheme to "address the problems that confront it".[49] Having regard to the context in which cl 070.612A(1) was introduced (see paragraph 7 above), it is readily understandable why it applies only to aliens. Specifically, it applies to a subset of aliens who cannot be removed from Australia — being a subset in respect of whom the normal regime of visa cancellation for breach of visa conditions or on character grounds, and then removal from Australia, is not effective. It is that circumstance that explains the need for an alternative mechanism to address the risk of serious harm those aliens may otherwise pose to the community.

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46 See generally Explanatory Statement to the Amending Regulations at 1-2.
47 Explanatory Statement to the Amending Regulations at 19.
48 See Explanatory Statement to the Amending Regulations at 1, 5, 19.
49 *Brown* (2017) 261 CLR 328 at [276] (Nettle J); see also at [422] (Gordon J). See also *McCloy* (2015) 257 CLR 178 at [197] (Gageler J).

43. ***That purpose is legitimate and non-punitive***. The purpose of protecting the Australian community, or any part thereof, from serious harm of the kind caused by the commission of a serious offence, is a legitimate and non-punitive purpose of the power to impose the curfew and monitoring conditions.

44. There is an inverse relationship between the nature and severity of a detriment and the range of purposes for which that detriment can legitimately be imposed.[50] The more severe the detriment, and the more closely associated that detriment is with punishment, the narrower the range of legitimate purposes will be. Thus, in the context of a law authorising full-time detention in custody, the Court has said that "the legitimate purposes of detention — those purposes which are capable of displacing the default characterisation of detention as punitive — must be regarded as exceptional".[51] Conversely, the less severe the detriment, and the less closely associated it is with punishment, the wider the range of legitimate purposes. That is appropriate because, in our constitutionally prescribed system of government, the imposition of detriments less severe than full-time detention in custody by the Parliament and the Executive is not — and is not required to be[52] — "exceptional". Indeed, no justification analysis will be required (and there would therefore be no warrant for a constitutional inquiry as to legitimate purposes, exceptional or otherwise) with respect to any forms of interference with liberty or bodily integrity that are not *prima facie* punitive (including, for example, minor or transient forms of interference).[53]

45. A majority of the Court has accepted that the protection of the Australian community from harm arising from the commission of particular, specifically identified, criminal offences is a legitimate and non-punitive purpose even for laws authorising detention in custody.[54] Having regard to the lesser nature and severity of the detriment imposed by the curfew and monitoring conditions, and the specific and serious nature of the harm from which the power to impose those conditions seeks to protect the Australian

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50 See *YBFZ* (2024) 99 ALJR 1 at [239] (Beech-Jones J).

51 *NZYQ* (2023) 280 CLR 137 at [40] (the Court), citing *Lim* (1992) 176 CLR 1 at 27-28 (Brennan, Deane and Dawson JJ; Mason CJ agreeing).

52 *YBFZ* (2024) 99 ALJR 1 at [6] (Gageler CJ, Gordon, Gleeson and Jagot JJ), [177] (Steward J), [240] (Beech-Jones J).

53 See, eg, *YBFZ* (2024) 99 ALJR 1 at [213] (Steward J), [303] (Beech-Jones J).

54 See *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 (***Benbrika [No 1]***) at [32], [36], [41] (Kiefel CJ, Bell, Keane and Steward JJ) and [79], [86] (Gageler J); *Garlett v Western Australia* (2022) 277 CLR 1 (***Garlett***) at [46] (Kiefel CJ, Keane and Steward JJ), [313] (Gleeson J).

community, the Commonwealth submits that it must follow that the purpose of cl 070.612A(1) is both legitimate and non-punitive.

46. The power conferred by cl 070.612A(1) is enlivened only if the Minister is satisfied that there is a "substantial risk" of serious harm arising from the commission of a "serious offence". As such, the clause specifically articulates the nature, extent and degree of harm to which it is directed (cf PS [23]).[55] In particular, the requirement that the prospective serious harm must flow from the commission of a "serious offence", as defined in cl 070.111 (see paragraph 11 above), means that the harm addressed by the provision is both well-defined and significant.[56] To describe the "required state of satisfaction" as calling for no more than "a prediction as to a person's dangerousness" (PS [24(a)]) is to ignore the much stricter and more specific criteria that the provision sets out,[57] being criteria that specify the very matters identified in *YBFZ* as absent from the previous iteration of cl 070.612A(1).[58]

47. ***Serious offence***. Contrary to PS [30], the categories of offences included in the definition of "serious offence" do not detract from this conclusion. The definition of "serious offence" in cl 070.111 does not encapsulate "relatively minor" offending. Each category of offence identified in sub-paragraph (b) is of a kind capable of giving rise to harm to a part of the Australian community that is properly described as serious. And the requirement in sub-paragraph (a) that the offence must be "punishable by imprisonment for life or for a period, or maximum period, of at least 5 years" ought to remove any doubt that the offending the intended subject of cl 070.111 could ever be properly characterised as minor.[59]

48. The Plaintiff submits that the defined meaning of "serious offence" in cl 070.111 "stretches far beyond the ordinary connotation", apparently on the premise that "threatening or inciting violence towards a person or group of persons on the ground of an attribute of the person or … group"[60] is "relatively minor", "notwithstanding a

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55 See, in particular, *YBFZ* (2024) 99 ALJR 1 at [82] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

56 See generally Explanatory Statement to the Amending Regulations at 6.

57 PS [24(a)] also criticises the "[r]eliance upon the adjective 'serious' to give precision to predictions of risk". In fact, however, cl 070.612A(1) does not use the adjective "serious" in that way.

58 *YBFZ* (2024) 99 ALJR 1 at [65] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

59 Categorising the seriousness of offences is substantially a matter for Parliament: see, eg, *Garlett* (2022) 277 CLR 1 at [80] (Kiefel CJ, Keane and Steward JJ).

60 See, eg, ss 80.2A and 80.2B of the Criminal Code. The *Criminal Code Amendment (Hate Crimes) Act 2025* (Cth) added further offences in ss 80.2BA and 80.2BB; see also Revised Explanatory Memorandum for the Criminal Code Amendment (Hate Crimes) Bill 2024 (Cth) at [2]-[3]; Australian Law Reform

maximum possible penalty of 5 or more years' imprisonment" (cf PS [30]). That submission should be rejected. The category of "serious offences" upon which the Plaintiff focuses includes threatening or inciting antisemitic, homophobic or Islamophobic violence.[61] That some specific crimes within that (or any other) category of offences may, if committed, attract a sentence well below the maximum does not demonstrate that the categories themselves do not identify offences the commission of which may seriously harm parts of the Australian community.

49. Further, contrary to PS [26], even if (which is not conceded) the definition of "serious offence" is wider than would justify a protective law that authorises detention in custody,[62] it would not follow that it is too wide to identify harm of sufficient seriousness to justify protective measures that are less severe than detention in custody.

50. Finally, even if the Court were to find that the definition of "serious offence" encompasses harms that are insufficiently serious to justify cl 070.612A(1), the relevant sub-paragraph(s) of that definition could be severed.[63]

51. Having regard to the foregoing, the purpose of cl 070.612A(1) is far removed from the substantially more general, elastic purposes of "protection of any part of the Australian community"[64] or "protection of every part of the Australian community from any harm at all" that were held by a majority of the Court in *YBFZ* not to be legitimate non-punitive purposes (contra PS [26]-[27]).[65]

(f) Step 2(b): The power to impose the conditions is reasonably capable of being seen as necessary for the legitimate and non-punitive purpose

52. As the power to impose each of the conditions has a legitimate and non-punitive purpose, the next issue is whether the power is reasonably capable of being seen as

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Commission, *Fighting Words* (Report No 104, 2006) at [10.86]-[10.88]; *O'Connell v Western Australia* [2012] WASCA 96 at [191]-[201] (Mazza JA; Martin CJ and Buss JA agreeing).

61 See generally *Hansard*, House of Representatives, 12 September 2024 at 6649-6651 (Attorney-General).

62 That being the context in which the plurality gave the example of "specific harm, such as the harm caused to the community by terrorism": *YBFZ* (2024) 99 ALJR 1 at [82].

63 See, in a closely analogous context, *Benbrika [No 1]* (2021) 272 CLR 68 at [101] (Gageler J). Such severance would be required by s 13(2) of the *Legislation Act 2003* (Cth), which mirrors s 15A of the *Acts Interpretation Act 1901* (Cth). Each sub-paragraph of the definition would satisfy the two conditions for severance identified by the plurality in *Spence v Queensland* (2019) 268 CLR 355 (***Spence***) at [86]-[87] (Kiefel CJ, Bell, Gageler and Keane JJ), referring to *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) and *Pidoto v Victoria* (1943) 68 CLR 87 at 108 (Latham CJ).

64 *YBFZ* (2024) 99 ALJR 1 at [76] (Gageler CJ, Gordon, Gleeson and Jagot JJ), referring to a risk of harm of a kind that is "designedly unparticularised and indeterminate".

65 *YBFZ* (2024) 99 ALJR 1 at [81], see also at [82]-[83] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

necessary for that purpose.[66] In this context, "necessary" means "'reasonably appropriate and adapted', rather than essential or indispensable".[67] At this step, the Court is to assess the relationship between the power to impose a detriment (that is, the "means") and the legitimate and non-punitive purpose (that is, the "ends").[68] A power to impose a less severe detriment will more readily be shown to be reasonably capable of being seen as necessary for a legitimate and non-punitive purpose than a power to impose a more severe detriment.[69]

53. For the reasons explained below, the power to impose the curfew and monitoring conditions is reasonably capable of being seen as necessary for the legitimate purpose articulated above.

54. ***Limitations on the power to impose conditions***. There are significant limitations on the power to impose each of the curfew and monitoring conditions. In contrast to the provision considered in *YBFZ*, each time a Bridging R visa is granted, cl 070.612A(1) now requires the Minister to form a positive state of satisfaction about three positive stipulations, being the matters referred to in cl 070.612A(1)(b), (c)(i) and (c)(ii), before either condition may be imposed (cf PS [19], [24](a)). It is no longer the case that "the default position is that the Minister imposes the condition", or that "the provision resolves all doubt and uncertainty in favour of the imposition of the conditions".[70]

55. Each of the three stipulations referred to above requires the Minister to be satisfied of different matters. In forming the requisite state of satisfaction about those matters, the Minister must, of course, act reasonably,[71] having regard to the scope and purpose of the statute.[72]

56. *First*, the Minister must be satisfied on the balance of probabilities that the visa holder poses a substantial risk of seriously harming any part of the Australian community by

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66 *YBFZ* (2024) 99 ALJR 1 at [18] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

67 *YBFZ* (2024) 99 ALJR 1 at [18] (Gageler CJ, Gordon, Gleeson and Jagot JJ), [251] (Beech-Jones J); see also *Jones* (2023) 280 CLR 62 at [42] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

68 *NZYQ* (2023) 280 CLR 137 at [44] (the Court). See also *YBFZ* (2024) 99 ALJR 1 at [238], [251] (Beech-Jones J).

69 See *YBFZ* (2024) 99 ALJR 1 at [239], [321] (Beech-Jones J).

70 *YBFZ* (2024) 99 ALJR 1 at [85] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

71 See, eg, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [24] (French CJ), [63] (Hayne, Kiefel and Bell JJ), [88]-[89] (Gageler J); *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 (***SZVFW***) at [53] (Gageler J), [89] (Nettle and Gordon JJ), [131] (Edelman J).

72 See, eg, *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J); *SZVFW* (2018) 264 CLR 541 at [53] (Gageler J).

committing a serious offence (cl 070.612A(1)(b)). If the Minister is not positively satisfied that the risk posed by the visa holder is a "substantial risk", or that the relevant harm would be "serious harm" arising from the commission of a "serious offence", then neither the curfew condition nor the monitoring condition can be imposed.

57. *Secondly*, the Minister must be satisfied on the balance of probabilities, and having regard to any other conditions already imposed, that it is reasonably necessary to impose the condition for the purpose of protecting any part of the Australian community from serious harm "by addressing the substantial risk" identified by the Minister in considering cl 070.612A(1)(b) (cl 070.612A(1)(c)(i)). In considering that matter, the Minister must have regard to: the likelihood of that serious harm eventuating if the condition is not imposed; and the extent to which the condition, if imposed, is likely to protect the relevant part of the Australian community from that serious harm.[73]

58. *Thirdly*, the Minister must be satisfied on the balance of probabilities, and having regard to any other conditions already imposed, that it is reasonably appropriate and adapted to impose the condition for the purpose of protecting any part of the Australian community from serious harm by addressing the substantial risk identified by the Minister in considering cl 070.612A(1)(b) (cl 070.612A(1)(c)(ii)). In considering that matter, the Minister must have regard to: the effect that the imposition of the condition will have on the visa holder; and whether there are less restrictive measures by which the relevant part of the Australian community could be adequately protected from the relevant serious harm.[74]

59. If, having regard to the matters identified in paragraphs 57 and 58 above, the Minister is not positively satisfied that a condition is "reasonably necessary" and "reasonably appropriate and adapted" for the purpose of protecting any part of the Australian community from serious harm by addressing the particular substantial risk identified by the Minister in considering cl 070.612A(1)(b), then that condition cannot be imposed. To give two examples, this will mean that the curfew condition and/or the monitoring condition cannot be imposed where:

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73 See the analogous analysis in *Vella* (2019) 269 CLR 219 at [47] (Bell, Keane, Nettle and Edelman JJ); see also at [20] (Kiefel CJ), [128] (Gageler J).

74 See the analogous analysis in *Vella* (2019) 269 CLR 219 at [51]-[52] (Bell, Keane, Nettle and Edelman JJ); see also at [20] (Kiefel CJ), [129] (Gageler J). See further *Thomas v Mowbray* (2007) 233 CLR 307 at [21]-[22] (Gleeson CJ), [102]-[103] (Gummow and Crennan JJ), [651] (Heydon J).

59.1 the conditions would do little or nothing to address the specific substantial risk of serious harm identified by the Minister in considering cl 070.612A(1)(b); or

59.2 the substantial risk identified by the Minister in considering cl 070.612A(1)(b) is already adequately addressed by other conditions to which the visa is subject, or by other legal requirements to which the visa holder is subject (such as parole conditions, or restrictions imposed by a court order).

60. The mere fact that the assessment required by cl 070.612A(1)(b) is evaluative, and may sometimes be difficult, is beside the point (cf PS [24](a)). Assessments of this kind are made by the Executive in the absence of "judicial procedures of fact-finding".[75] Their use does not indicate that cl 070.612A is not reasonably capable of being seen as necessary for the legitimate and non-punitive purpose identified above. Specifically, there is nothing inherently problematic about requiring the Minister to reach a state of satisfaction about whether the imposition of a condition is "reasonably necessary" or "reasonably appropriate and adapted" for the achievement of a particular purpose (cf PS [34]-[35]). The matters identified in paragraphs 57 and 58 above are matters addressed in other forms of decision-making by the Executive.[76]

61. Further, consideration of those matters does not require the Minister directly to address the scope of any constitutional limitation (cf PS [35]). Rather, each of those matters concerns the relationship between the substantial risk identified by the Minister in considering cl 070.612A(1)(b), and the condition to be imposed on the visa. And, even if cl 070.612A did require the Minister to consider the extent of a constitutional limitation, that would not be a "recipe for invalidity" or result in the conferral of a "quasi-judicial function" (whatever the constitutional significance of that term is thought to be): cf PS [35]. To the contrary, a legislative provision that is framed in accordance with a constitutional limit will, by definition, not infringe that limit.[77] If a purported exercise of power under such a provision would infringe that limit then that exercise of power would, if challenged before a court, be held to be invalid in the conventional exercise of judicial power on the ground that it was *ultra vires* the statute.

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75 See, eg, ss 5C(1)(d), 116(1)(e), 500A(1)(c), 501(6)(d) of the Migration Act; ss 196A(5), 443(1) of the *Biosecurity Act 2015* (Cth).

76 See, eg, s 199C(2) of the Migration Act; ss 51(5), 196A(5), 443(1) of the *Biosecurity Act 2015* (Cth); s 63C(4) of the *Online Safety Act 2021* (Cth).

77 See J Stellios, "*Marbury v Madison*: Constitutional Limitations and Statutory Discretions" (2016) 42 *Australian Bar Review* 324 at 335-337 (discussing Stellios' "category 3").

There is no substance to the Plaintiff's suggestion that the Executive would exercise an "exclusively judicial power" simply by exercising a statutory power that is framed by reference to a constitutional limitation.[78]

62. Each of the positive stipulations outlined above makes cl 070.612A(1) considerably more confined than the version of that provision considered in *YBFZ*, which did not require the Minister to be satisfied that harm of any particular nature or degree would result before the curfew or monitoring conditions could be imposed.[79]

63. As was the case with the former provision, the Minister must decide whether to impose each of the conditions in cl 070.612A(1) in the order in which they are mentioned in that subclause,[80] and, in respect of the inquiries in cl 070.612A(1)(c)(i) and (ii), having regard to the other conditions to which the visa holder will be subject.[81] There is nothing "arbitrary" or "inappropriate" about the provision adopting that sequencing (cf PS [24(b)], [31]-[32]). To the contrary, it is logical that the Minister is required to assess the risk posed by the visa holder in an absolute sense (cl 070.612A(1)(b)), and then to consider what conditions may be reasonably necessary and reasonably appropriate and adapted to address that risk having regard to the other conditions already imposed (cl 070.612A(1)(c)). Given the potential detriment in issue, it is appropriate that, if the monitoring condition has been imposed, the Minister would consider the necessity and proportionality of the curfew condition having regard to that fact (cf PS [31(b)]).

64. Nor does the fact that a visa holder is only afforded an opportunity to make representations about the imposition of the conditions after those conditions have been imposed have the consequence that cl 070.612A(1) is not reasonably capable of being seen as necessary for the legitimate and non-punitive purpose identified above (cf PS [33]). To the contrary, given the nature of the positive state of satisfaction that the Minister must form before deciding to impose the conditions (which requires, among other things, satisfaction that the visa holder poses a substantial risk of serious harm to any part of the Australian community arising from the commission of a "serious

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78 Broad discretionary statutory powers are commonly construed as subject to constitutional limits, without the exercise of those powers involving a purported exercise of judicial power: see, eg, *Wotton v Queensland* (2012) 246 CLR 1; *Comcare v Banerji* (2019) 267 CLR 373.

79 See *YBFZ* (2024) 99 ALJR 1 at [82] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

80 See cl 070.612A(2) of Sch 2 to the Migration Regulations.

81 See cl 070.612A(1)(c) of Sch 2 to the Migration Regulations.

offence"), it is readily understandable why s 76E of the Migration Act would provide for an opportunity to make representations after the conditions have been imposed. Notably, where the Minister makes a decision under s 76E after receiving representations from a visa holder, s 76E(5) requires that reasons be given for that decision.

65. In the circumstances above, the power conferred on the Minister by cl 070.612A(1) should be understood as one which is subject to significant limitations. Those limitations are to be considered in light of the nature and extent of the detriment imposed by the curfew and monitoring conditions. As explained above, while the detriments imposed by those conditions are material, they are distinct from more severe forms of interference with either liberty or bodily integrity. Having regard to those matters, the power to impose the conditions is reasonably capable of being seen as necessary for the purpose of protecting the Australian community, or any part thereof, from serious harm caused by the commission of a "serious offence".

66. ***Practical operation of the provision***. The practical operation of cl 070.612A(1) confirms its narrow tailoring to its protective purpose.[82] As at 30 June 2025, only a quarter of Bridging R visa holders were subject to one or both conditions (88 of 346 visa holders) (SCB 49 [42]). Of that number, 46 visa holders were subject to both conditions, 41 visa holders were subject to the monitoring condition only, and one was subject to the curfew condition only (SCB 49 [42]).

(e) The Plaintiff's purported head of power challenge

67. The Court should refuse to entertain the Plaintiff's purported head of power challenge (PS [37]-[42]). That challenge is outside the scope of the questions of law referred to the Full Court under r 27.08.1 of the *High Court Rules 2004* (Cth), which refer expressly to Ch III (SCB 54 [60]; cf PS [37]). It is also outside his Application for a Constitutional Writ (paragraphs 1.2, 4) (SCB 6-7). Further, the s 78B notice issued by the Plaintiff did not give notice of a head of power challenge (SCB 37-40).

68. If the Court does entertain that challenge, it should reject it. The Plaintiff submits that a proportionality assessment is relevant to whether s 504 of the Migration Act is supported by s 51(xix) of the Constitution (to the extent necessary to support cl 070.612A(1) and the imposition of conditions 8620 and 8621) because: (i) it has

[82] See, eg, *YBFZ* (2024) 99 ALJR 1 at [201] (Steward J).

some freestanding significance in assessing whether a provision is supported by a head of power (PS [39]); (ii) the aliens power is a purposive power (PS [40], [42]); or (iii) insofar as it provides for the making of cl 070.612A(1), s 504 is "a law incidental to the subject matter of 'aliens'" (PS [41]). None of those submissions should be accepted.

69. Insofar as s 504 of the Migration Act provides for the making of cl 070.612A(1), it falls squarely within the core of the aliens power. Contrary to PS [40], that power is not accurately or completely described as (although it does include) a "power to deal with the liberty of aliens for the purposes of controlling their entry to the territory of the Commonwealth, or effecting their removal from that territory". Section 51(xix) is not a purposive power. Like s 51(xx), it is a "person" power:[83] a power that extends to imposing upon persons having the status of alien "burdens, obligations and disqualifications which the Parliament could not impose upon other persons".[84] Clause 070.612A(1) falls within the core of that power because it operates directly to authorise the imposition of particular obligations on aliens.[85] For laws within the core of s 51(xix), proportionality has no role in the characterisation analysis.[86]

PART VI — ESTIMATE OF TIME

70. The Defendant estimates that it will require up to 1.5 hours for oral submissions.

Dated: 25 September 2025

.....	.....	.....
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83 James Stellios, *Zines and Stellios's the High Court and the Constitution* (7th ed, 2022) at 70.

84 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at [2] (Gleeson CJ, Gummow and Hayne JJ; Heydon J agreeing at [190]). To the extent that the Plaintiff attempts to rely on *YBFZ* (2024) 99 ALJR 1 at [9]-[10] (Gageler CJ, Gordon, Gleeson and Jagot JJ), that passage describes the nature of the limitation imposed by Ch III, rather than the scope of s 51(xix) of the Constitution.

85 *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 (***Plaintiff S156/2013***) at [24] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *New South Wales v Commonwealth* (2006) 229 CLR 1 at [178], [266]-[267] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). A law may be within the core of s 51(xix) even if it does not grant rights to, or impose obligations on, aliens: see *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 295 (Mason CJ), 317-318 (Brennan J), 334 (Deane J), 358-359 (Dawson J), 374-375 (Toohey J), 387 (Gaudron J) and 394 (McHugh J).

86 See *Plaintiff S156/2013* (2014) 254 CLR 28 at [24]-[27] and [36] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Spence* (2019) 268 CLR 355 at [58] (Kiefel CJ, Bell, Gageler and Keane JJ).

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

EGH19
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

ANNEXURE TO THE SUBMISSIONS OF THE DEFENDANT

Pursuant to *Practice Direction No 1 of 2024*, the Defendant sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in its submissions.

No.	Description	Version	Provision(s)	Reasons	Applicable date(s)
Principal legislation					
1.	*Commonwealth Constitution*	Compilation No 6 (29 July 1997 to present)	ss 51(xix), 51(xx); Ch III	Currently in force	N/A
2.	*Migration Act 1958* (Cth)	Compilation No 166 (6 September 2025 to present)	ss 5C(1)(d), 76C, 76D, 76DA, 76E, 116(1)(e), 199C(2), 500A(1)(c), 501(6)(d), 504	Currently in force	N/A
3.	*Migration Regulations 1994* (Cth)	Compilation No 275 (22 March 2025 to 30 April 2025)	regs 2.25AD, 2.25AE; Sch 2, cll 070.111, 070.612A; Sch 8, items 8513, 8620, 8621	In force on date of decision to grant the Plaintiff's BVR.	1 April 2025 (date of BVR decision)
4.	*Migration Regulations 1994* (Cth)	Compilation No 255 (29 March 2024 to 2 April 2024)	Sch 2, cl 070.612A	Version considered in *YBFZ*	2 April 2024 (date of grant of impugned

No.	Description	Version	Provision(s)	Reasons	Applicable date(s)
					visa in *YBFZ*)
5.	*Migration Amendment (Bridging Visa Conditions) Regulations 2024* (Cth)	F2024L01410 (7 November 2024 to 25 March 2025)	Sch 1, cll 1-2	Amending Regulations	7 November 2025 (date of amendment)
Other legislation					
6.	*Acts Interpretation Act 1901* (Cth)	Compilation No 38 (11 December 2024 to present)	s 15A	Currently in force, governs interpretation of legislation	N/A
7.	*Biosecurity Act 2015* (Cth)	Compilation No 19 (1 January 2025 to present)	ss 51(5), 196A(5), 443(1)	Currently in force	N/A
8.	*Criminal Code Act 1995* (Cth)	Compilation No 167 (8 February 2025 to present)	Schedule (The Criminal Code), Div 395; ss 80.2A, 80.2B, 80.2BA, 80.2BB	Currently in force	N/A
9.	*Criminal Code (Hate Crimes) Amendment Act 2025* (Cth)	C2025A00001 (7 February 2025 to present)	Entire Act	Amending Act	7 February 2025 (date of amendment)
10.	*High Court Rules 2004* (Cth)	Compilation No 29 (1 March 2025 to present)	r 27.08.1	Currently in force, governs the conduct of these proceedings	N/A
11.	*Legislation Act 2003* (Cth)	Compilation No 39 (24	s 13(2)	Currently in force,	N/A

No.	Description	Version	Provision(s)	Reasons	Applicable date(s)
		February 2019 to present)		governs interpretation of regulations	
12.	*Online Safety Act 2021* (Cth)	Compilation No 3 (11 December 2024 to present)	s 63C(4)	Currently in force	N/A