HIGH COURT OF AUSTRALIA

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **EGH19**
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

SUBMISSIONS OF THE PLAINTIFF

PART I: CERTIFICATION

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

PART II: ISSUES

2 The first and second questions of law stated for this Court's decision are whether, to the extent clause 070.612A(1) of Sch 2 to the ***Migration Regulations*** *1994* (Cth) purports to authorise the imposition of condition 8620 (**curfew condition**) and/or condition 8621 (**monitoring condition**) on a Bridging R (Subclass 070) visa (**BVR**), that clause is invalid because it exceeds the power conferred by s 504 of the ***Migration Act*** *1958* (Cth) when that power is construed subject to Ch III of the *Constitution*.

PART III: SECTION 78B NOTICE

3 The Plaintiff has given notice under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: FACTS

4 The Plaintiff is a citizen of Papua New Guinea who first arrived in Australia in 2002 as a child and a dependent on his father's temporary visa: **SCB, 44 [2]-[5]**. In November 2006, whilst still a minor, the Plaintiff was convicted of a serious offence and sentenced to a lengthy term of imprisonment: **SCB, 44 [6]**.

5 On 21 December 2017, the Plaintiff applied for a Protection (Subclass 866) visa: **SCB, 44 [11]**. On 7 January 2018, he was released on parole and taken into immigration detention: **SCB, 44 [12]**. Between February 2018 and May 2022, his application for a protection visa was refused on four separate occasions, but each refusal decision was set aside following either merits or judicial review: **SCB, 44-5 [13]-[21]**.

6 On 26 October 2022, a delegate of the Minister for Home Affairs decided to grant the Plaintiff a protection visa, and also made a protection finding for him with respect to Papua New Guinea (within the meaning of s 197C of the *Migration Act*). The Plaintiff was accordingly released from immigration detention: **SCB, 45 [22]**.

10 7 Between 6 and 8 May 2023, the Plaintiff committed offences against his partner and his partner's father: **SCB, 45 [23]**. On 2 April 2024, he appeared before the Local Court of New South Wales in relation to the offence against his partner's father, entered a plea of guilty and was sentenced to three months' imprisonment: **SCB, [30]**.

8 On 20 May 2024, the Plaintiff's protection visa was cancelled by a delegate of the Minister pursuant to s 501(3A) of the *Migration Act*: **SCB, 9 [31]**. On about 30 May 2024, he made written representations to the Minister in support of his request for revocation of the delegate's decision to cancel his protection visa: **SCB, 47 [33]**.

9 On 3 July 2024, the Plaintiff appeared before the Local Court of New South Wales in relation to the offences against his partner, entered pleas of guilty and was sentenced
20 to an aggregate term of 18 months' imprisonment: **SCB, 47 [34]**. On 22 December 2024, the Plaintiff was released on parole and taken into immigration detention: **SCB, 47 [34]**.

10 On 1 April 2025: (a) a delegate of the Minister for Immigration, Citizenship and Multicultural Affairs decided, pursuant to s 501CA of the *Migration Act*, not to revoke the decision to cancel the Plaintiff's protection visa; (b) a delegate of the same Minister decided to grant him a Class WR Bridging (Removal Pending) (Subclass 070) visa (**BVR**), on conditions which included the detention and monitoring conditions; and (c) he was released into the community (where he remains): **SCB, 48 [37]**.

11 The Plaintiff must comply with the detention and monitoring conditions for one year
30 from the date the BVR was granted — failure to do so constitutes an offence, attracting

a mandatory minimum sentence of one year imprisonment with a maximum of five years' imprisonment.[1] The conditions may be renewed.

12 At the time the Plaintiff was granted the BVR, he was: (a) on parole and under the supervision of Corrective Services (NSW) (**SCB, 49 [40]**); and (b) subject to two final apprehended domestic violence orders (**ADVOs**), for the protection of his partner and his partner's father: **SCB, 46-7 [26]-[28], [30]**. The ADVO for the protection of his partner expired on 4 July 2025: **SCB, [28]**. The Plaintiff's sentence for the 2023 offences expired on 22 August 2025: **SCB, 403**. the ADVO in favour of her father will expire on 2 April 2026: **SCB, 83**.

10 PART V: ARGUMENT

13 Section 504(1) of the *Migration Act* confers a general power of delegated-lawmaking upon the Governor-General to make regulations "necessary or convenient to be prescribed for carrying out or giving effect to" the Act. The provision is "so broadly expressed as to require [it] to be read down as a matter of statutory construction to permit only those exercises of discretion that are within constitutional limits".[2] To determine whether a particular exercise of the power is valid, one can proceed by hypothesising whether a particular exercise of statutory power would, were it a statute, directly infringe a constitutional limit. If, on that hypothesis, it would so infringe a constitutional limit, the exercise of a power such as s 504(1) will be invalid — not
20 because it actually directly infringes the constitutional limit, but because it will necessarily exceed the scope of the authorising provision, as must be construed conformably with that limit.[3]

14 The presently salient constitutional limit is that "a law enacted by the Commonwealth Parliament which authorises the detention of a person, other than through the exercise

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1 *Migration Act*, ss 76C, 76D and 76DA.

2 ***Palmer*** *v Western Australia* (2021) 272 CLR 505, [122] (Gageler J). See also ***YBFZ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 419 ALR 457, [19] (Gageler CJ, Gordon, Gleeson and Jagot JJ), [170]-[171] (Edelman J), [327] (Beech-Jones J); *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 613-614 (Brennan J); *Wotton v Queensland* (2012) 246 CLR 1,[10], [21]-[22] (French CJ, Gummow, Hayne, Crennan and Bell JJ); ***Wainohu*** *v NSW* (2011) 243 CLR 181, [113] (Gummow, Hayne, Crennan and Bell JJ).

3 *Palmer* (2021) 272 CLR 505, [119], [122] (Gageler J); *Wainohu* (2011) 243 CLR 181, [113] (Gummow, Hayne, Crennan and Bell JJ); *Tajjour v New South Wales* (2014) 254 CLR 508, [171]-[172] (Gageler J); *Industrial Relations Act Case* (1996) 187 CLR 416, 503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

by a court of the judicial power of the Commonwealth in the performance of the function of adjudging and punishing criminal guilt, will contravene Ch III of the Constitution unless the law is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose" because such detention is "penal or punitive unless justified as otherwise".[4]

15 When s 504(1) of the *Migration Act* is read consistently with that limit, it is incapable of authorising cl 070.612A(1) of Sch 2 to the *Migration Regulations*, to the extent that that clause purports to authorise the imposition of conditions 8620 and 8621. Clause 070.612A(1) is to that extent, and conditions 8620 and 8621 are, therefore *ultra vires* s 504(1) and invalid. That is for the following reasons.

16 *First*, while cl 070.612A(1) has been amended since it was found invalid in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*, its operation to impose conditions 8620 and 8621 remain prima facie punitive. The essential features of cl 070.612A(1) that (before the clause's amendment) gave the provision its punitive character remain intact, and still give the clause a punitive character. In particular:

(a) It was and remains the case that "[t]he effect of the decision in *NZYQ* is that aliens such as the plaintiff are entitled to be released into the Australian community because they presently cannot be detained. The release of the plaintiff and others in that position was not akin to the ordinary grant of a visa upon which conditions might be attached, such as a condition that offences would not be committed".[5]

(b) It was and remains the case that "the purpose of the home detention and monitoring conditions was not, and certainly was not merely, to monitor the movements of this cohort of aliens" and extended to, inter alia, "the deterrence of crime … based on past criminal activity" which is "a punitive purpose".[6] And so the extrinsic materials supporting the amendments to cl 070.612A explain, e.g., that '[t]he purposes of electronic monitoring as a condition is to deter the

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4 ***NZYQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137, [39] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ); *YBFZ* (2024) 419 ALR 457, [8] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

5 *YBFZ* (2024) 419 ALR 457, [164] (Edelman J).

6 *YBFZ* (2024) 419 ALR 457, [165] (Edelman J).

individual from committing further offences whilst holding the BVR',[7] and describes cl 070.612A as having diverse other purposes: [24(c)] below.

(c) It was and remains the case that "the conditions… are not merely forward-looking", and "[t]he forward-looking requirement that the Minister must assess whether there is a real or significant risk to the Australian community arising from the future commission of offences by the visa holder is assessed by reference to the commission of past offences by the visa holder", as gives adverse exercises of the discretion the quality of "protective punishment".[8]

(d) It was and remains the case that "the harshness of the consequence of home detention, sanctioned by mandatory imprisonment for breach of the condition, further supports the conclusion that the home detention condition is not merely administrative regulation of the liberty of a person such as the plaintiff" but is punitive.[9]

17 Likewise, the contrast between cl 070.612A(1) and a community safety order regime as in Div 395 of the Commonwealth *Criminal Code* remains "stark", as throws the punitive purpose into sharp relief.[10] Clause 070.612A(1), as amended, does not, for example, make provision:

(a) for persons the subject of conditions 8620 and 8621 to be treated in a way appropriate to their status as persons not being punished for a criminal offence;[11]

(b) for application to a Court for the imposition of the conditions;[12]

(c) for the Minister to ensure that reasonable inquiries are made to ascertain any facts known to any Commonwealth law enforcement officer that would reasonably be

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7 Explanatory Statement for the *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (**ES to the Amending Regulations**), p 11, and similarly at p 12.

8 *YBFZ* (2024) 419 ALR 457, [166] (Edelman J).

9 *YBFZ* (2024) 419 ALR 457, [166] (Edelman J).

10 *YBFZ* (2024) 419 ALR 457, [72] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

11 Cf *Criminal Code,* s 395.7.

12 Cf *Criminal Code,* s 395.8(1).

regarded as supporting a finding of fact that was favourable to the alien concerned, in the decision to impose conditions;[13]

(d) for a formal procedure for the adducing of probative evidence to the person that makes the decision;[14]

(e) for the appointment of experts to give opinions informing judgments as to future risk;[15]

(f) for the expert's assessment of the alien concerned, to inform judgments as to the future risks the alien may pose,[16] or for privilege to be enjoyed by alien concerned in respect of those assessments.[17]

10 18 Nor does cl 070.612A(1), as now amended:

(a) mandate the decision-maker's consideration of certain factual materials, including expert reports probative of future risk,[18] and of such matters as any treatment and rehabilitation programs the alien has participated in;[19]

(b) provide that the onus of proof of material matters rests on the Commonwealth;[20]

(c) provide for periodic judicial review.[21]

19 Concerning condition 8620 (the curfew condition) in particular, it retains each of those essential features that, in *YBFZ*, were found to give the condition its prima facie punitive character. The condition: involves a deprivation of liberty; and the deprivation is material and relatively long-term.[22] Further, and as now imposed by cl 070.612A(1),
20 the curfew condition will effect this deprivation of liberty in respect of all persons within a class, who "must" be subjected to the condition if (inter alia) the Minister

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13 Cf *Criminal Code,* s 395.8(2).

14 Cf *Criminal Code,* s 395.8(3).

15 Cf *Criminal Code,* s 395.9(1).

16 Cf *Criminal Code,* s 395.9(6).

17 Cf *Criminal Code,* s 395.9(7)

18 Cf *Criminal Code,* s 395.11

19 Cf *Criminal Code,* s 395.11(1)(e), and then further and similarly s 395.11(1)(f)-(m)

20 Cf *Criminal Code,* s 395.11(3);

21 Cf *Criminal Code,* s 395.23-25.

22 *YBFZ* (2024) 419 ALR 457, [52] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

reaches the prescribed state of satisfaction.[23] Concerning condition 8621 (the monitoring condition), it too retains each of the essential features which have been previously found to give the condition its prima facie punitive character. The condition: requires that an authorised officer fit the visa-holder's monitoring device; that fitting necessarily involves what would otherwise be the commission of the tort of trespass to the person (in the forms of assault and battery); and the monitoring device then continues in contact with the wearer thereafter, as a direct and continuing consequence of what would otherwise be the tort of trespass.[24] Further, there is nothing in the Special Case that would negative the plurality's observations in *YBFZ* that the device is "neither small nor discreet" and would "appear[] to be precisely what it is, an ankle cuff that many people would automatically associate with the monitoring of the location of the wearer because they present some kind of risk", and it is not a "slight or modest interference with bodily integrity".[25]

20 The prima facie punitive character of these conditions were held in *YBFZ* to give a prima facie punitive character to cl 070.612A(1)(a).[26] The punitive character of the conditions would equally be held to give the same character to cl 070.612A(1) in that clause's amended form.

21 The consequence is that cl 070.612A(1), to the extent it purportedly authorises the imposition of conditions 8620 and 8621, will be invalid if not reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose.[27] Being "punitive by default" there is no anterior task of characterisation upon which the question of the validity could depend.[28]

22 *Second*, notwithstanding amendments to cl 070.612A(1), that clause (in its presently relevant operation) retains those essential vices that in *YBFZ* were found to render the clause incapable of constitutional justification.

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23 Cf *YBFZ* (2024) 419 ALR 457, [52] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

24 *YBFZ* (2024) 419 ALR 457, [57] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

25 *YBFZ* (2024) 419 ALR 457, [57] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

26 *YBFZ s* (2024) 419 ALR 457, [63] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

27 *YBFZ* (2024) 419 ALR 457, [64] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

28 *YBFZ* (2024) 419 ALR 457, [16] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

23 When examined in *YBFZ*, cl 070.612A(1) was found to pursue purposes "expressed at a high level of generality", including in "not identify[ing] the nature, degree, or extent of the harm sought to be protected against or the nature, degree, or extent of the required state" of opinion to be formed by the Minister.[29] Such findings would again be made in respect of cl 070.612A(1) as amended. Clause 070.612A(1) as amended (with the amendments shown) provides that:

070.612A

(1) ~~If subclause (3) applies to the visa, each of the following conditions must be imposed by the Minister 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 (including because of any other conditions imposed by or under another provision of this Division):~~ For each of conditions 8621, 8617, 8618 and 8620, the Minister must impose the condition if:

(a) ~~8621;~~ subclause (3) applies to the visa; and

(b) ~~8617;~~ 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

(c) ~~8618;~~ 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.

~~(d)~~ ~~8620~~.

24 So amended:

(a) cl 070.612A(1) *still* cannot be said to provide with specificity the nature, degree, or extent of the required state of satisfaction by the Minister, because the state of satisfaction prescribed is a prediction as to a person's dangerousness. Even when supported by judicial procedures of fact-finding (here absent), such predictions

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[29] *YBFZ* (2024) 419 ALR 457, [65] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

are "notoriously difficult" and evaluative.[30] The Executive's decision to condition the state of satisfaction in cl 070.612A(1) on a perception of a "serious risk" does not make the nature of that state of satisfaction materially more precise. Reliance upon the adjective "serious" to give precision to predictions of risk is to "striv[e] for a greater degree of definition than the subject is capable of yielding".[31] It remains true that "cl 070.612A(1) is broad and flexible and authorises uncertain and unpredictable outcomes",[32] and that (albeit by reason of now differently stated criteria) "070.612A(1) therefore casts its net over all members of the class in circumstances where escape from this net depends on the Minister forming an opinion which the Minister is legally entitled not to form in a broad and flexible, as well as uncertain and unpredictable, range of circumstances" capable of informing an assessment of risk;[33]

(b) cl 070.612A(1) *novelly* requires of the Minister a state of satisfaction the attainability of which will depend on the Minister's anterior discretion to impose "the other conditions on the visa" referred to in cl 070.612A(1), including as may be facilitated by s 41(3) of the *Migration Act,* and regulations made for that section from time to time;

(c) cl 070.612A(1) *still* pursues purposes cast at a relatively high level of generality, the only stated purpose being "the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk", being the risk assessed by the evaluative judgment required in cl 070.612A(1)(b),

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30 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 123 (McHugh J); see also *Veen v The Queen* (1979) 143 CLR 458, 464 (Stephen J, "prediction of behaviour … is … most difficult", and describing "[p]redictions as to future violence, even when based upon extensive clinical investigation" as being "prone to very significant degrees of error"); *McGarry v The Queen* (2001) 207 CLR 121, [61] (Kirby J, referring to a "realistic acknowledgment of the limitations experienced by judicial officers … in predicting dangerousness accurately and estimating what people will do in the future"); *In the Marriage of Norbis* (1986) 161 CLR 513, 518 (Mason and Deane JJ); *Minister for Immigration and Border Protection* v *SZVFW* (2018) 264 CLR 541, [44] (Gageler J); *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857, [16] (Kiefel CJ, Gageler and Jagot JJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [12] (Gleeson CJ).

31 *M v M* (1988) 166 CLR 69, 78 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).

32 *YBFZ* (2024) 419 ALR 457, [79] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

33 *YBFZ* (2024) 419 ALR 457, [81] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

with there being these additional, diverse purposes revealed by the extrinsic materials:

i. diffusely, "ensur[ing] compliance with visa conditions in line with community expectations";[34]

ii. to "regulate, in the national interest, the coming into, and presence in, Australia of non-citizens";[35]

iii. to satisfy — through the attachment of mandatory sentence for breach of conditions 8620 and 8621 — "the need to make clear that non-compliance with visa conditions that are aimed at protecting community safety is viewed seriously";

iv. to surmount this Court's decision in *YBFZ*, it being "[a]s a result" of that decision that "the Amendment Regulations introduces a new community protection test to ensure that the Minister can only impose 8621, 8617, 8618 and 8620 conditions using a new confined and specific test… related to protecting any part of the Australian community from serious harm"[36]— the intent being that "[t]he Regulations address legal issues the High Court found";[37]

v. "giv[ing] the Government the ability to effectively manage the operation of Australia's visa program and respond quickly to emerging needs";[38]

vi. "reducing the costs of criminal offending to the community";[39] and

vii. "reducing absconding".[40]

25 This generality and diversity in purposes of cl 070.612A present the same difficulties to justification of the clause, as previously identified by this Court.

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34 ES to the Amending Regulations, p 8.

35 ES to the Amending Regulations, p 10, referring to that purpose as stated in the *Migration Act*, s 4.

36 ES to the Amending Regulations, 1.

37 ES to the Amending Regulations, p 5.

38 ES to the Amending Regulations, p 1.

39 ES to the Amending Regulations, p 12.

40 ES to the Amending Regulations, p 12.

26 *Third*, the amendments to cl 070.612A have not given that clause a legitimate, non-punitive purpose. Rather, those amendments reconstruct the clause with a purpose the legitimacy of which was identified as dubious by the plurality in *YBFZ*. Namely, a general purpose of preventing "harm associated with criminal conduct".[41] As the plurality explained, "where the Court has accepted that protection of the community from the harm of criminal offending is a legitimate non-punitive purpose for a Commonwealth law which authorises imprisonment, the harm to which those laws were directed was a more specific harm, such as the harm caused to the community by terrorism".[42] The expression "serious offence" in cl 070.612A(1), as defined, covers a broad category of offending ranging from relatively serious offending to relatively minor offending: see [30] below. To treat as legitimate a purpose of preventing such a range of offending would entail that "the very point of the legitimacy requirement would be undermined".[43] The plurality, in obiter, and in the subjunctive, said: "even if protection of the Australian community from the risk of harm arising from future offending were accepted to be a legitimate and non-punitive purpose …".[44] Read in light of what preceded this passage, it was to communicate that such a purpose — which is facially the purpose of the present version of cl 070.612A(1) — is not relevantly legitimate.

27 In that connection, it should further be observed that in *YBFZ*, Edelman J construed then cl 070.612A(1) to have the purpose that the clause now pursues in terms. Namely, a "concer[n] with protection from harm arising from the future commission of offences"[45]. His Honour identified that as a punitive purpose.[46]

28 Further, the illegitimacy of the purpose of cl 070.612A in providing for the imposition of conditions 8620 and 8621 is evident in the discriminatory infringements of aliens' liberties effected by the clause. As the plurality said in *YBFZ*, the constitutional limitation enunciated in *NZYQ* expresses the "fundamental and long-established

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41 *YBFZ* (2024) 419 ALR 457, [82] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

42 *YBFZ* (2024) 419 ALR 457, [82] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

43 *YBFZ* (2024) 419 ALR 457, [79] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

44 *YBFZ* (2024) 419 ALR 457, [84] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

45 *YBFZ* (2024) 419 ALR 457, [120] (Edelman J).

46 *YBFZ* (2024) 419 ALR 457, [128], [162], [163] (Edelman J).

principle that no person — alien or non-alien — may be detained by the executive absent statutory authority or judicial mandate", as "an alien who is actually within this country enjoys the protection of our law" and in particular the law's "protections against arbitrary punishment by deprivation of life, bodily integrity and liberty".[47] Clause 070.612A purports to apply to aliens a special regime of Ministerial discretion for the deprivation of those aliens' liberty and affection of bodily integrity. Further, that special regime is not referable to the "relevant difference between a non-alien and an alien for the purposes of Ch III", which "lies in the vulnerability of the alien to exclusion or deportation'".[48] The special regime is applied to aliens for whom there is no prospect of deportation. The special regime in truth pursues a purpose in connection with which there is no constitutionally relevant difference between a non-alien and an alien, being a purpose of preventing certain speculated (in the exercise of a Ministerial discretion) future criminal harms to the Australian community.

29 Further, cl 070.612A(1) has an evident purpose of "restrict[ing]… an offender's liberty due to the past commission of a crime leading to the anticipated *future* commission of a crime".[49] That is a purpose of punishment.[50]

30 *Fourth,* even if cl 070.612A(1), in its relevant operation, were hypothesised to pursue legitimately a purpose of protecting the Australian community from the risk of harm arising from future serious offending, it would not be found to do so in a manner reasonably capable of being seen as necessary for that purpose. Despite the use in cl 070.612A(1) of the expression "serious offence", that expression is defined so as to encompass a range of offending spanning from the very serious, to relatively minor, albeit within the categories of offending identified in cl 070.111. And so, for example, "serious offence" in cl 070.612A(1) would include murder, just as it would include the committing of an offence of "threatening violence" against a group on a discriminatory

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47 *YBFZ* (2024) 419 ALR 457, [9] (Gageler CJ, Gordon, Gleeson and Jagot JJ), quoting *NZYQ* (2023) 280 CLR 137, [27] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ); ***Chu Kheng Lim*** *v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 29 (Brennan, Deane and Dawson JJ, Mason CJ agreeing).

48 *YBFZ* (2024) 419 ALR 457, [10] (Gageler CJ, Gordon, Gleeson and Jagot JJ), quoting *NZYQ v* (2023) 280 CLR 137, [29] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ); *Chu Kheng Lim* (1992) 176 CLR 1, 29 (Brennan, Deane and Dawson JJ, Mason CJ agreeing).

49 *YBFZ* (2024) 419 ALR 457, [91] (Edelman J); *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, [196] (Edelman J) (emphasis in original).

50 *YBFZ* (2024) 419 ALR 457, [91] (Edelman J).

basis where — notwithstanding a maximum possible penalty of 5 or more years' imprisonment — the offence would be judged deserving of one week of imprisonment. The expression "serious offence", as used in cl 070.612A(1), has the defined meaning in cl 070.111 which stretches far beyond the ordinary connotation.

31 Further, cl 070.612A(1) as amended provides for a sequence of consideration having no rational connection to any legitimate purpose that might be ascribed to the clause. The clause relevantly provides: *first*, for the Minister, in deciding to impose conditions "8621, 8617, 8618 and 8620", to reach a state of satisfaction as to the future risk the visa-holder would pose "despite the other conditions imposed on the visa by or under this subclause" (cl 070.612A(1)(b)); *second*, that "[t]he Minister must decide whether or not to impose each of the conditions mentioned in subclause (1) in the order in which those conditions are mentioned in that subclause". That has the arbitrary effect that, for example:

(a) in deciding whether to impose condition 8621 (the monitoring condition), the Minister must not have regard to whether the other conditions that might go on to be imposed would render unnecessary for the clause's purposes the imposition of condition 8621; whereas

(b) in deciding whether to impose condition 8620 (the curfew condition), the Minister would have regard to whether the other conditions by then imposed would render unnecessary for the clause's purposes the imposition of condition 8620.

32 That sequencing of decisions gives cl 070.612A an operation neither appropriate nor adapted for any purpose ascribable to the clause. Further, it has the effect that condition 8621 (the monitoring condition) may be imposed although the Minister may ultimately judge that, in light of other conditions, condition 8621 is not necessary to allay the "substantial risk" referred to in cl 070.612A(1)(b). In passing, that is further suggestive of that condition's true, punitive purpose.

33 Further, and has always been true of cl 070.612A(1), the clause has an effect that the person has no "right to make representations against the conditions being imposed" before they are imposed.[51] And there is no requirement as to the informational basis

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[51] *YBFZ* (2024) 419 ALR 457, [85] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

upon which the Minister is to form his or her opinion pursuant to the clause, or any requirement of a procedure by which that informational basis is to be procured or established.[52]

34 *Fifth*, the framing of cl 070.612A(1)(c) to purport to confer on the Minister a discretion in terms conditioned on satisfaction of the constitutional test of necessity does not save the clause from invalidity. As was said in *Lim*, and repeated by the plurality in *YBFZ*, ""the Constitution's concern is with substance and not mere form" so that it would be "beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt".[53]

35 If anything, the framing of cl 070.612A(1)(c) on lines of the constitutional limitation is a recipe for invalidity. Plainly, cl 070.612A(1)(c) seeks to confer on an executive official, who need not be the Minister answerable to Parliament, a power to deprive persons of liberty upon satisfaction of those matters that would bring the exercise of the power (or strictly, s 504 so far as it might ultimately authorise exercise of the power) within the constitutional limitation enunciated in *NZYQ*. But that is to confer a quasi-judicial function. The conferral of a power to detain pursuant to a function that is quasi-judicial in the sense just described supports that the limitation enunciated in *NZYQ* has been transgressed. That limitation is but an expression of the more basic principle that the legislative and executive powers of the Commonwealth must "not infringe on exclusively judicial power".[54] The purport of the regulatory scheme is to confer on the Executive (the Minister, but extending to any delegate), the decision whether the imposition of conditions would transgress the *NZYQ* limitation.

36 It may lastly be observed that a power such as s 504(1) would not support "attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its end".[55] The punitive purposes of cl 070.612A(1)(c) are not purposes of the Act, and that clause

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52 *YBFZ* (2024) 419 ALR 457, [85] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

53 *YBFZ* (2024) 419 ALR 457, [17]; *Lim* at CLR 27 (Gageler CJ, Gordon, Gleeson and Jagot JJ).

54 *YBFZ* (2024) 419 ALR 457, [15] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

55 *Shanahan v Scott* (1957) 96 CLR 245, 250 (Dixon CJ, Williams, Webb and Fullagar JJ).

may on the principle just identified not fall within the grant of regulatory power construed according to ordinary principles of construction. The purposes properly to be pursued by regulations made under s 504(1) are of providing for the machinery of the Act's administration.[56]

Alternatively, s 504 is unsupported by a head of power — to the extent that it would authorise cl 070.612A(1)(c) in that clause's relevant operation

37 The first and second questions stated for this Court's decision are framed so as to direct attention to the possible operation of Ch III of the *Constitution* upon s 504 of the *Migration Act*. Nonetheless, those questions would have to be answered in the negative if s 504 of the *Migration Act* would not be supported by a head of power, to the extent that that provision has the purported operations described in the questions. In that sense, the questions would accommodate this Court's consideration of whether s 504 in its relevant, purported operation is supported by any head of power, in particular by the Legislature's power in s 51 (xix) of the *Constitution* to legislate with respect to "aliens".

38 In the alternative to the submissions made at [13]-[35] above, the Plaintiff submits that the first and second questions must be answered in the negative, because s 504 of the *Migration Act* would be unsupported by s 51(xix), or any other head of legislative power, to the extent that s 504 provides for the making of cl 070.612A(1) and the imposition of conditions 8620 and 8621.

39 *First*, it is well established that there may be a role, in connection with various heads of Commonwealth power, for a proportionality analysis in assessing whether a statute will be supported by the heads of power.[57]

40 *Second*, "a law that effects a large imposition or constraint, at least upon a person's bodily integrity or liberty, such as a serious violation of their liberty by custodial detention, may not be a law with respect to the relevant head of power to the extent

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56 See further and generally *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1.

57 *YBFZ* (2024) 419 ALR 457, [150] (Edelman J), there referring to: *Australian Boot Trade Employees' Federation v Whybrow & Co* (1910) 11 CLR 311, 338; 16 ALR 513; *R v Sweeney; Ex parte Northwest Exports Pty Ltd* (1981) 147 CLR 259, 275; *Commonwealth v Tasmania* (1983) 158 CLR 1, 259–60, 278;; *Richardson v Forestry Commission* (1988) 164 CLR 261, 289, 303, 311–12, 324, 346; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 29, 93–4, 101; *Leask v Commonwealth* (1996) 187 CLR 579, 616, 638.

that the imposition or constraint is not reasonably capable of being seen as necessary for the purpose of the law".[58] If that were not accepted as a proposition applying generally to the heads of Commonwealth legislative power, it would be accepted as generally applying at least to the power with respect to "aliens" in s 51(xix).[59] That is because that part of the power in s 51(xix) is relevantly 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.[60] Constraints on liberty may be disproportionate to that purpose, as would justify a conclusion that the law is not, properly characterised, with respect to the subject matter of the head of power.[61]

10 That analysis is consistent with the views expressed by Justice Hayne in *Al-Kateb v Godwin*,[62] and with the views of Justice McHugh in *Re Woolley; Ex parte Applicants M276/2003*.[63]

41 Even if the proposition were not held to so generally apply to the power in s 51(xix) to legislate with respect to aliens, it is a proposition accurately defining the extent to which that part of the power may support Commonwealth statutes incidental to the subject matter of "aliens". So much was acknowledged in obiter by Chief Justice Mason CJ in *Cunliffe v Commonwealth*.[64] No larger proposition would be required. That is because cl 070.612A(1), being a law dealing with liberty of aliens for whom there is no prospect of removal and who are required by constitutional principle to be

20 let into the Australian community, is a law incidental to the subject matter of "aliens" described in s 51(xix).

42 *Third*, the Plaintiff has earlier set out the reasons why cl 070.612A(1) in its relevant operation is not reasonably to be considered appropriate and adapted to a non-punitive purpose, as signals inconsistency with Ch III of the *Constitution.* For the same reasons, cl 070.612A(1) in its relevant operation is not reasonably to be considered appropriate

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58 *YBFZ* (2024) 419 ALR 457, [150] (Edelman J).

59 The *Migration Act*, in its current form, not a law with respect to "naturalization" as referred to in s 51(xix).

60 *YBFZ* (2024) 419 ALR 457, [9]- [10] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

61 *YBFZ* (2024) 419 ALR 457, [151] (Edelman J).

62 (2004) 219 CLR 562, [253] (Heydon J agreeing at [303]).

63 (2004) 225 CLR 1, [63]. Further: *YBFZ* (2024) 419 ALR 457, [150]-[151] (Edelman J).

64 (1994) 182 CLR 272, 296.

and adapted to dealing with the liberty of aliens for purposes of controlling their entry in the territory of the Commonwealth, or effecting the removal of aliens from the Commonwealth. For that reason, s 504(1) of the *Migration Act* so far is it purports to authorise cl 070.612A(1) would be found to be unsupported by s 51(xix), and so unsupported by a head of power.

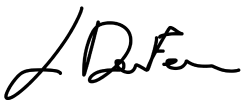
PART VI: ORDERS SOUGHT

43 The questions in the Special Case should be answered: (1) yes; (2) yes; and (3) the Defendant.

PART VII: ESTIMATE OF TIME

10 44 It is estimated that 1.5 hours will be required for the Plaintiff's oral argument.

Dated: 8 September 2025



Lisa De Ferrari 03 9225 8010 lisa.deferrari@vicbar.com.au

Natasha Case 02 9165 1409

Thomas O'Connor 02 9151 2994

Jamie Blaker 03 9225 8558

ANNEXURE TO PLAINTIFF'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	Constitution		s 51(xix), Ch III	In force at all relevant times	
2	*Criminal Code Act 1995* (Cth)	Compilation No. 163	Sch, ss 395.7, 395.8, 395.9, 395.11, 395.23, 395.24, 395.25	Act in force at the time impugned cl 070.612A(1) was made, and now	7 Nov 2024 – present
3	*Migration Act 1958* (Cth)	Compilation No. 162	ss 41(3), 76C, 76D, 76DA, 504(1)	Act as in force at the time impugned cl 070.612A(1) was made	7 Nov 2024 – present
4	*Migration Regulations 1994* (Cth)	Compilation No. 250	Sch 2, cl 070.612A(1)	Regulations in force at the time cl 070.612A(1), as considered by this Court in *YBFZ*, was part of them	8 Dec 2023
5	*Migration Regulations 1994* (Cth)	Compilation No. 266	Sch 2, cll 070.111, 070.612A(1) Sch 8, items 8617, 8618, 8620, 8621	Regulations as in force at the time impugned cl 070.612A(1) was made, pursuant to which conditions 8620 and 8621 were imposed on the Plaintiff's BVR	7 Nov 2024 – present