



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 15 Oct 2025 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: S55/2025
File Title: EGH19 v. Commonwealth of Australia
Registry: Sydney
Document filed: Defendant's outline of oral argument
Filing party: Defendant
Date filed: 15 Oct 2025

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

BETWEEN:

EGH19
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE DEFENDANT

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

2. The sole issue is whether, by reason of the amendments made to cl 070.612A(1) of Sch 2 to the *Migration Regulations 1994* (Cth) (**Vol 1, Tab 6**) following *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 (**Vol 10, Tab 45**), that case is distinguishable.

The construction of cl 070.612A(1) (DS [7]-[13])

3. The current version of cl 070.612A(1) has three significant differences from the previous version. Clause 070.612A(1) now:
 - (a) empowers the Minister to impose the curfew and monitoring conditions only if positively satisfied, on the balance of probabilities, of the matters in sub-paragraphs (b) and (c): cf *YBFZ* at [85];
 - (b) expressly identifies the purpose of the power to impose those conditions, being to protect any part of the Australian community from serious harm of the kind caused by commission of a serious offence: cf *YBFZ* at [66]-[76], [81], [83]; and
 - (c) expressly identifies both the requisite level of risk of harm that the Minister must be satisfied exists, and the nature and degree of the harm that the Minister must be satisfied the visa holder poses: cf *YBFZ* at [65].
4. In light of those differences, cl 070.612A(1) does not “retain[] those essential vices that in *YBFZ* were found to render the clause incapable of constitutional justification”: cf PS [22]; SCB 49 [41]-[42]. Instead, by reason of cl 070.612A(1)(b) and (c), the clause is narrowly tailored to the legitimate and non-punitive purpose identified in [3(b)] above.
5. The better construction of cl 070.612A(1)(b) is that, if the Minister is satisfied on the balance of probabilities that there is a substantial risk of the visa holder committing a serious offence (as defined), then it follows that there is a substantial risk of the visa holder seriously harming any part of the Australian community: *Garlett v Western Australia* (2022) 277 CLR 1 at [82] (**Vol 5, Tab 18**). But, if it were necessary to preserve its validity, it would be open to construe cl 070.612A(1)(b) as requiring the Minister to be satisfied both that: (a) there is a substantial risk of the visa holder committing a serious offence (as defined); and (b) the harm arising from the commission of that offence is properly characterised as serious.

Clause 070.612A(1) is not properly characterised as punitive (DS [17]-[66])

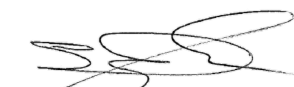
6. In assessing the validity of cl 070.612A(1) against Ch III, it is necessary to ask a single question of characterisation (whether the power to impose the detriment conferred by the law is properly characterised as punitive), which is to be answered by reference to two subsidiary steps: *YBFZ* at [15], [16], [18], see also [239]. **Step 1** asks whether the power has a *prima facie* punitive character. If it does, **Step 2** asks whether the power is reasonably capable of being seen as necessary for a legitimate and non-punitive purpose.
7. **Step 1.** In circumstances where the effect on the visa holder of the curfew and monitoring conditions remains as it was in *YBFZ*, the Commonwealth accepts that the power to impose those conditions is to be characterised as *prima facie* punitive.
8. Nevertheless, while “material and relatively long-term” (*YBFZ* at [52]), the detriment occasioned by the curfew condition is markedly less severe than that of full-time detention in custody, and the detriment occasioned by the monitoring condition is markedly less severe than other forms of interference with bodily integrity traditionally associated with punishment: *YBFZ* at [216], [316]; SCB 462, 464; DS [23]-[32]; cf Reply [4]-[5], [11]. That is relevant to the analysis at step 2.
9. **Step 2(a): Legitimate and non-punitive purpose.** The purpose of cl 070.612A(1) is to protect any part of the Australian community from serious harm of the kind caused by commission of a serious offence: DS [38].
10. The Plaintiff’s attempts to cast doubt on that characterisation of purpose should be rejected. *First*, the aspects of the Explanatory Statement to the Amending Regulations (**Vol 11, Tab 48**) dealing with cl 070.612A(1) describe its purpose consistently with the above: at pp 1, 5, 8, 18-19; cf PS [24]-[25], Reply [6]-[9]. *Second*, the selective operation of the provision to aliens is readily explained, and provides no reason to doubt that purpose: cf PS [28], Reply [10].
11. On either the majority or minority approach in *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 (**Vol 6, Tab 28**) and *Garlett*, it appears that the above purpose would be a legitimate and non-punitive purpose even for a law authorising detention in custody: *Benbrika* at [32], [36], [41] (Kiefel CJ, Bell, Keane and Steward JJ), [79], [86], [90], [92]-[93], [97], [100]-[101] (Gageler J), [163], [169], [177] (Gordon J); *Garlett* at [46] (Kiefel CJ, Keane and Steward JJ), [145], [148] (Gageler J), [190] (Gordon J), [313] (Gleeson J). However, whether or not that purpose is capable of justifying detention in custody, it is capable of justifying the less severe detriments occasioned by the curfew and monitoring conditions (given the requisite relationship between means and ends).

12. The commission of offences in each category in paragraph (b) of the definition of “serious offence” in cl 070.111 is properly described as causing “serious harm”: *Garlett* at [79]-[81] (Kiefel CJ, Keane and Steward JJ); cf PS [30], Reply [12]. However, if that is not true of a particular category of “serious offence”, that category must be partially disapplied to ensure that cl 070.612A(1) does not authorise the imposition of the curfew or monitoring conditions except to the extent necessary to protect any part of the Australian community from serious harm caused by the commission of a serious offence: *Benbrika* at [100]-[101] (Gageler J); *Legislation Act 2003* (Cth), s 13(2); SCB 134-137.
13. **Step 2(b): Reasonably capable of being seen as necessary for the purpose.** Having regard to the significant limitations on the power to impose the curfew and monitoring conditions, and the nature of the detriment occasioned by those conditions, cl 070.612A(1) is reasonably capable of being seen as necessary for the purpose of protecting any part of the Australian community from serious harm of the kind caused by the commission of a serious offence. Among other limitations imposed by the clause, the Minister must form a positive state of satisfaction about three positive stipulations before either condition can be imposed: cf *YBFZ* at [85]. None of the Plaintiff’s complaints about the framing of the scheme withstand scrutiny: PS [31]-[35], Reply [13]-[16].

The Plaintiff’s head of power challenge should be rejected (DS [67]-[69])

14. The Plaintiff’s head of power argument is not properly before the Court, and the Court should decline to entertain it on that basis: SCB 6, 7, 9, 37-40, 54; cf PS [37], Reply [2].
15. If the Court decides to hear the argument, it should be rejected. The argument (PS [38]-[42], Reply [17]) involves two fundamental errors. *First*, it reflects a limited conception of the scope of the aliens power that is contrary to settled authority: *Shaw* (2003) 218 CLR 28 (**Vol 7, Tab 38**) at [2]; *Plaintiff S156/2013* (2014) 254 CLR 28 (**Vol 7, Tab 33**) at [24]. *Second*, it wrongly treats proportionality as relevant to the characterisation analysis even when a law concerns the core of the aliens power: *Plaintiff S156/2013* at [25]-[27], [35]-[36]; *Spence* (2019) 268 CLR 355 (**Vol 8, Tab 39**) at [58].

Dated: 15 October 2025


 Stephen Donaghue

Mark Hosking

Sarah Zeleznikow

Attachment – Defendant’s aide memoire: Side-by-side comparison of the previous and current versions of cl 070.612A(1)

As in force when considered by the High Court in <i>YBFZ</i> (Vol 1, Tab 7)	As in force at time of grant of Plaintiff’s visa (Vol 1, Tab 6)
(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): (a) 8621; (b) 8617; (c) 8618; (d) 8620. Note: See regulation 2.25AE for the period for which the visa is subject to these conditions (if imposed).	(1) 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 (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. Note: See regulation 2.25AE for the period for which the visa is subject to these conditions (if imposed).