



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: Plaintiff's Outline of oral argument
Filing party: Plaintiff
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

10

COMMONWEALTH OF AUSTRALIA
Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE PLAINTIFF

20

30

PART I: CERTIFICATION

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

Introduction

2 Key facts are at **PS [4]-[12]**. The Plaintiff is subject to a BVR on conditions which include the curfew (8620) and monitoring conditions (8621).

- Minute (**SCB 123-131**); Record of delegate decision (**SCB 132-137**)
- Act, ss 76B-76D, 76DA-76E and 504 (**JBA Vol 1, 94-97, 100-101, 106-110**)
- Regulations, 2.20(18) (eligible non-citizen), 2.25AB (grant without application),
10 2.25AC to 2.25AE, cl 070.612A, items 8620, 8621 (**JBA Vol 1, 112-116, 118**)

3 Clause 070.612A(1) has been amended since found invalid in *YBFZ* (as then in force, see **JBA Vol 1, 124**): **PS [23]**. But the essential features that (before amendment) gave cl 070.612A(1) its punitive character, remain: **PS [16]-[21]**. Further, it retains the vices which, in *YBFZ*, were found to render it incapable of justification: **PS [22]ff**.

4 Section 504(1) provides for a power to make regulations “not inconsistent with this Act”, prescribing matters which are “permitted” by the Act. Section 41(3), with reg 2.05(2), identifies as (facially) “permitted” all the 8xxx conditions in clauses 070.611, 070.612, and 070.612A. A visa is what renders a non-citizen lawful, thus giving effect to the Act’s object of regulating that person’s presence in Australia (ss 13, 4(1) of the
20 Act). Any regulation must be a proportionate exercise of the regulation-making power (here, s 504) to attain the “ends” (i.e. purpose) of that power, assessed by examination of the legal and practical operation of the regulation: **PS [36]**; *A-G (SA) v Adelaide* at [52]-[59] (French CJ), [117]-[118] (Hayne J), [198]-[202] (Crennan and Kiefel JJ) (**JBA Vol 3, 476-481, 498, 524-525**). Limiting liberty of / inflicting punishment on a non-citizen, who is lawfully in the Australian community, is not such an “end”.

5 By the above route, as well as by the approach of “deeming” the result of the exercise of the power in s 504 (here, the prescribing of cl 070.612A) to be a statute and then considering the implied limitation (**PS [2]**, also **DS [22]**), the analysis leads to the same conclusion. As in fact exercised, the power has been exceeded: **PS [36]**; **PS [3]**.

30 **Clause 070.612A(1) is prima facie punitive**

6 The Commonwealth rightly accepts that the power/duty in cl 070.612A(1) to impose the curfew and monitoring conditions is to be characterised as prima facie punitive:

DS [3], [30], [33]. Nature and severity of the detriments are unchanged: the “curfew condition involves a deprivation of liberty” that “is material and relatively long-term” ([52]); “[t]he detriments the monitoring condition imposes affecting... bodily integrity... are material and relatively long-term” ([60]); “[t]he monitoring condition... effects an involuntary restraint on the liberty of the person” ([61]): **PRS [4]**; cf **DS [24]-[32]**; *YBFZ* at [48]-[52], [60]-[62] (plurality); at [163]-[168] (Edelman J).

Clause 070.612A(1) is not capable of constitutional justification

- 7 Clause 070.612A(1) is still broad and it still authorises uncertain and unpredictable outcomes: *YBFZ* at [79]. The type of assessment required by par (b), involving notions
10 of future dangerousness and “serious risk”, is notoriously difficult and prone to error even when undertaken on the informational basis provided by judicial proceedings; more so when done administratively pursuant to cl 070.612A: **PS [24(a)]**; **PRS [13]**.
- 8 Clause 070.612A(1) still pursues a purpose cast at a relatively high level of generality, (stated as) “protecting any part of the Australian community from serious harm by addressing that substantial risk” – par (b): **PS [24(c)]**. And, it pursues other and diverse purposes: **PS [24(c)]-[25]**; **PRS [6]-[9]**; ES, *Migration Amendment (Bridging Visa Conditions) Regulations 2024*, pp 1, 5, 8, 10-12 (**JBA Vol 11, 3194-3205**); cf **DS [41]**. And, it pursues a purpose of punishment: **PS [29]**. *YBFZ* at [91] (Edelman J); *Benbrika* at [196] (Edelman J) (**JBA Vol 6, 1948**).
- 20 9 As found in the clause itself, the purpose is still a generally stated one of preventing risk of harm associated with (future) criminal conduct. But the concept of a “serious offence” is broad – extending to conduct of varying degrees of seriousness, untethered to offences actually in force at the State, Territory or Cth level: Sch 2, cl 070.111 (**JBA Vol 1, 113**). The nature of the harms, physical or other, that might be associated with such range of conduct are disparate – there is no definition of “serious harm”. To treat as legitimate a purpose of preventing risk from such range of conduct would entail that “the very point of the legitimacy requirement would be undermined”: **PS [26]-[27], [30]**; **PRS [12]**; *YBFZ* at [82].
- 10 Further, the illegitimacy of the purpose of cl 070.612A in providing for the imposition
30 of conditions 8620 and 8621 is evident in the discriminatory infringements of aliens’ liberties effected by the clause: **PS [28]**; **PRS [11]**; *YBFZ* at [9]-[10].
- 11 Even if cl 070.612A(1) were hypothesised to pursue a non-punitive purpose, it would

not be found to do so in a manner reasonably capable of being seen as necessary for that (elusive) purpose. Similarly, a reason being that cl 070.612A(1) is predicated on such a broad range of offending: **PS [30]**. Also, depending on a state of satisfaction by a non-expert on risk of future offending, on the balance of probabilities. Cf Div 395 of the Criminal Code: **PS [17]; (JBA Vol 2, 163-202)**. See also s 76AA (**JBA Vol 1, 90**).

- 12 Clause 070.612A(1) still provides for a sequence of consideration having no rational connection to any legitimate purpose that might be ascribed to it: **PS [30]-[32]**. The Commonwealth does not deny (**DS [63]**) the arbitrariness of imposing the monitoring condition mandatorily without regard to subsequent possible conditions. Contrary to
- 10 **DS [57], [58]**, the clause does not make certain “*Vella*” steps mandatory. It is especially not true that the Minister is mandated to consider whether there are less restrictive measures, including existing parole conditions (cf the assertion at **DS [59]**).
- 13 Clause 070.612A(1) still provides that the person has no right to make representations against the conditions being imposed before they are. There is also still no requirement as to the informational basis upon which the opinion it to be formed, or procedure by which that informational basis is to be procured or established: **PS [33]; YBFZ at [85]**.
- 14 The framing of par (c) to confer a discretion in terms conditioned on satisfaction of the constitutional test, does not save it from invalidity: **PS [34]-[35]; YBFZ at [17]**.

Section 504 not supported by a head of power, to authorise cl 070.612A(1)

- 20 15 Section 504 would be unsupported by s 51(xix) to the extent it provides for the making of cl 070.612A(1) and, by its power/duty, imposition of conditions 8620 and 8621 on a visa. A law that effects a large imposition or constraint may not be a law with respect to the relevant head of power, to the extent imposition or constraint is not reasonably capable of being seen as necessary for the purpose of the law. **PS [37]-[42]; YBFZ at [150]-[161]** (Edelman J). As exercised, s 504 will not be found to be within the core of s 51(xix): the only aliens to whom it is directed are lawfully within the Australian community, and any purpose (or reach of s 51(xix)) of excluding them, by restricting liberty, from that community cannot constitutionally be asserted.

Dated: 15 October 2025

30 
Lisa De Ferrari

Thomas O'Connor


Jamie Blaker