HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **EGH19**
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

PLAINTIFF'S REPLY SUBMISSIONS

PART I: CERTIFICATION

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

PART II: REPLY

2 The Defendant's submissions (**DS**) at [5] and [67] say that the Court would not entertain the plaintiff's submissions (**PS**) at [37]-[42] that s 504 of the *Migration Act* would be unsupported by a head of power, to the extent that the provision facially authorises the instruments referred to in the questions of law referred in this matter. The submission is surprising. At the hearing in which this Court stated the questions, the Court observed, in dialogue with the Commonwealth, that EGH19 sought to agitate a "wider question of power" beyond one "of punishment",[1] and that the questions as ultimately formulated were "really just a much more precise way of expressing that it is invalid because there is no power in the *Constitution* to make it, and it … permits both parties to make all the arguments that they wish."[2] The Commonwealth agreed, with respect correctly.[3] The Plaintiff's notice pursuant to s 78B of the *Judiciary Act* appropriately took an approach of giving the required notice by giving notice of the questions referred: SCB 36-41. That was to give notice adequate for PS [37]-[42], and DS [5] and [67] would be rejected.

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1 ***RCWV*** *v Commonwealth of Australia;* ***EGH19*** *v Commonwealth of Australia* [2025] HCATrans 43, 7.187 (Edelman J).
2 *RCWV; EGH19* [2025] HCATrans 43, 7.208-211 (Edelman J).
3 *RCWV; EGH19* [2025] HCATrans 43, 7.213 (Solicitor-General: "[t]hat is right, your Honour").

3 DS [3], [30] and [33] are concessions that the curfew and monitoring conditions are prima facie punitive. Those concessions are rightly made, and are of significance. The Commonwealth resists the description of at least the monitoring condition as "punitive by default" (whether rightly or not).[4] The substance of the concession is, therefore, that, upon completion of a first "task of characterisation" having regard to "the meaning and scope of the law", this Court would conclude that cl 070.612A(1), so far as it imposes the conditions, is on its face punitive.[5] While it may be accepted that this conclusion "is not sufficient to establish invalidity",[6] the concession does put on an incline the Commonwealth's chosen path of argument. That path involves the contention that "the … singular purpose" of cl 070.612A(1) (emphasis added), constructed upon ordinary principles, is a purpose of protection (DS [41]), notwithstanding the concession that on the face of the provision, properly characterised, that purpose is punishment: see further [6]-[10] below.

4 DS [24]-[32] give selective descriptions of the detriments imposed by the curfew and monitoring conditions. Yet "[t]he nature and severity of the detriment imposed by the curfew and monitoring conditions … are unchanged since they were considered in *YBFZ*": DS [33]. This Court would have regard to the nature of those detriments as already found by five justices of this Court in *YBZF* (the plurality at [48]-[52], [60]-[62]; Edelman J at [163]-[168]). The essence of what was found is that: the "curfew condition involves a deprivation of liberty" that "is material and relatively long-term" (at [52]); "[t]he detriments the monitoring condition imposes affecting … bodily integrity … are material and relatively long-term" (at [60]) ;and "[t]he monitoring condition … effects an involuntary restraint on the liberty of the person …" (at [61]). Those detriments are such as to cause the "constitutional value … at stake" (as bears on the characterisation of the law's purpose)[7] to be liberty, which is "the substratum"[8] and "the great fundamental principle"[9] of our law. In all, the detriments are very weighty for the purposes of the constitutional analysis.

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4 Cf *YBFZ* (2024) 99 ALJR 1, [244] (Beech-Jones J).
5 *YBFZ* (2024) 99 ALJR 1, [16] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
6 *YBFZ* (2024) 99 ALJR 1, [64] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
7 *Alexander (by his litigation guardian Alexander) v Minister for Home Affairs* (2022) 276 CLR 336, [104]–[105].
8 *Lyons v Smart* (1908) 6 CLR 143, 177 (Higgins J).
9 *Master Retailers' Association of NSW v Shop Assistants Union of NSW* (1904) 2 CLR 94, 107 (Griffith CJ for the Court, emphasis added).

5 Contrary to DS [27], the curfew condition does in fact require the visa holder to remain at a single notified address during curfew hours. In relation to DS [28], although there is a distinction between home detention and detention in custody, it does not follow that a person retains a "significant level of autonomy" when subjected to the former.

6 D [37]-[41] build to a contention (at [41]) that cl 070.612A(1) has a "singular purpose", being "to protect the Australian community, or any part thereof, from serious harm of the kind caused by the commission of a 'serious offence'". But the extrinsic materials say that the clause has other purposes, including quintessentially punitive purposes. That is unsurprising given that cl 070.612A(1) is (as the Commonwealth concedes) on its face punitive. For example, the explanatory materials say that "[t]he purposes of electronic monitoring as a condition is to deter the individual from committing further offences whilst holding the BVR"[10] (see further PS [24(c)]).

7 D [37] and [41] advance these two facially inconsistent propositions.

(a) *First*, that the statements of diverse purposes in the extrinsic materials identified at "PS [24(c)(i), (vi), (vii)]" "do not address the purpose of cl 070.612A(1)" but "address … the expected operation or benefits of the regime": DS [41].

(b) *Second,* "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": DS [37] (emphasis added).

8 The second of these propositions is correct, and it is the first that must give.

9 DS [41] further says that certain statements of purpose in the explanatory materials directed to the imposition of mandatory imprisonment for breach of the monitoring and curfew conditions (being the statements identified at PS [24(c)(ii) and (iii)]) should be discounted because they "address … distinct provisions of the *Migration Act*". But those statements of purpose address closely related provisions of that Act (ss 76DA read with ss 76C-76D), being provisions imposing the consequence for breach of the material conditions as reflects on those conditions' characters.

10 DS [42] identifies "th[e] circumstance" (said to "explain[] the need for an alternative mechanism to address the risk of serious harm those aliens may otherwise pose to the

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[10] Explanatory Statement for the *Migration Amendment (Bridging Visa Conditions) Regulations 2024,* p 11 (emphasis added), and similarly at p 12.

community") as the fact that persons upon which cl 070.612A(1) operates are persons "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". That is not a circumstance that "explains" the need for the special restraint on liberty that cl 070.612A(1) operates to apply, if the purpose of that clause is posited to be the protection of the Australian community from serious offending. The fact that a person cannot be removed from Australia is not a fact bearing on the risk of serious offending that the person poses to the Australian community. These considerations resolve in the conclusion that cl 070.612A(1) would not be attributed, in the present task of characterisation, the protective purpose that the Commonwealth posits for the clause.

11 By DS [43]-[51], it is contended that the purpose that the Commonwealth posits for cl 070.612A(1) is legitimate and non-punitive. That contention is premised on the proposition at DS [44] that "[t]here 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". The proposition does not state a correct principle, because it does not differentiate between the "importance of the 'constitutional value[s]… at stake'" in the detriments caused.[11] Because liberty is the fundamental constitutional value of our system of laws (see [4] above), and because cl 070.612A(1) (in its relevant operation) effects a significant detriment to persons in their enjoyment of liberty, the analysis in DS [43]-[51] falls away.

12 DS [46] says that the operation of cl 070.612A(1) by reference to the concept of a "serious offence" has a result that the clause "specifically articulates the nature, extent and degree of harm to which it is directed", and the "harm addressed … is … well-defined and significant". But the nature of the harms involved in offences coming within the definition of a "serious offence" in cl 070.111 is disparate, because the categories of listed offending are disparate. Further, the extent and degree of the harms are not specifically articulated, because (as the Commonwealth appears to accept: DS [48], [50]) so long as an offence falls within one of the categories in cl 070.111, it will be a "serious offence" within that clause whatever the seriousness of the actual offending, attracting a sentence of whatever severity. In circumstances where the definition of "serious offence" does not identify particular offences, but categories of

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

"conduct constituting" any offence and "involve[ing]" the matters then identified (e.g. "loss of a person's life", etc.), the Court would not accept the Commonwealth's invitation to sever, found at DS [50]. It is an invitation to perform a legislative task.

13 DS [60] says, in answer to PS [24(a)], that "the assessment required by cl 070.612A(1)(b) … may sometimes be difficult" but that this "is beside the point". The point in PS [24(a)] is not that the exercise is difficult, but that it is notoriously difficult and prone to error even when undertaken on the informational basis provided by judicial proceedings, and would be even more difficult and prone to error when done administratively pursuant to cl 070.612A. That consideration is not beside the point.

14 DS [61] seeks to answer a "suggestion" attributed to "the Plaintiff … that the Executive would exercise an 'exclusively judicial power' simply by exercising a statutory power … framed by reference to a constitutional limitation". That is to set up a straw person; the Plaintiff has not made that suggestion: PS [35].

15 DS [63] does not deny that the sequencing required by cl 070.612A(1) would have the arbitrary result identified at PS [31(a) and (b)]. The Court would accept that that sequencing does have that result, as supports a conclusion that the clause is not appropriate and adapted in the way required.

16 DS [64] says that "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" does not support a conclusion that the clause is not calibrated to the constitutional test. But a majority of this Court held that that feature of the clause does support that conclusion.[12]

17 DS [69] would be answered by what was said by Justice Edelman at [150]-[152] of *YBFZ* (2024) 99 ALJR 1.

Dated: 2 October 2025

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