HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

YBFZ
Plaintiff

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

SUBMISSIONS OF THE DEFENDANTS

PART I: FORM OF SUBMISSIONS

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) (**Regulations**) authorises the Minister to impose condition 8620 (the **curfew condition**) and condition 8621 (the **EM condition**) on a Bridging R visa, that clause purports to authorise the Minister to exercise a power that is properly characterised as punitive and therefore as exclusively judicial.

3. For the reasons given below, the Defendants submit that the questions in the Special Case should be answered: (1) no; (2) no; (3) none; and (4) the Plaintiff.

PART III: SECTION 78B NOTICE

4. The Plaintiff's notice under s 78B of the *Judiciary Act 1903* (Cth) is adequate.

PART IV: CONTESTED FACTS

5. The facts agreed by the parties are set out in the Special Case (SCB 62-95).

PART V: ARGUMENT

(a) Introduction and summary

6. Clause 070.612A of Sch 2 to the Regulations is part of a suite of provisions introduced into the *Migration Act 1958* (Cth) (**Act**) and the Regulations in response to the Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*.[1]

7. As a result of that decision, approximately 150 non-citizens were released from immigration detention on the basis that there was no real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future (SCB 70 [54]) (the ***NZYQ* cohort**). A significant majority of the *NZYQ* cohort had a substantial criminal record (as defined in s 501(7) of the Act) (SCB 70-72 [55], [58]), including 125 who had committed crimes involving violence or sexual assault (SCB 75 [73], 499-508).

8. A non-citizen who has a substantial criminal record and who is considered to pose a risk of harm to the Australian community can be refused a visa, or have their visa cancelled.[2]

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1 (2023) 97 ALJR 1005 (***NZYQ***). See Explanatory Memorandum to the Migration Amendment (Bridging Visa Conditions) Bill 2023 (Cth) at 2; Explanatory Statement to the *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Cth) at 1.

2 See s 501 of the Act. See also ss 5H(2) and 36(1C), (2C) of the Act.

Refusal or cancellation of a visa in those circumstances is not punitive.[3] Ordinarily, its effect is to exclude the non-citizen from Australia, depriving them of any further opportunity to harm members of Australian community.[4] However, where a non-citizen cannot be removed from Australia in the reasonably foreseeable future, the risk of harm cannot be addressed in that way. Such a non-citizen must be released into the community even if they do not hold a visa.

9. The criminal records of many members of the *NZYQ* cohort were such that there was a clear risk of those persons committing criminal offences that would harm the Australian community following their release. The provisions introduced in response to *NZYQ* were directed to that risk. They provided that non-citizens who did not hold a substantive visa, and could not be removed from Australia in the reasonably foreseeable future, could be granted a Bridging R visa[5] subject to a range of conditions.[6] Further, cl 070.612A(1) of Sch 2 to the Regulations empowered the Minister to impose additional protective conditions on such a visa unless satisfied those conditions were not reasonably necessary for the protection of the community.

10. The Defendants submit that the power conferred by cl 070.612A(1) is not properly characterised as punitive, and is not exclusively judicial in nature. That is because: having regard to all the relevant circumstances, the power to impose the curfew and EM conditions is not *prima facie* punitive; further or alternatively, even if it were, the power to impose those conditions is reasonably capable of being seen as necessary for the legitimate and non-punitive purpose of protecting the Australian community from harm.

(b) The impugned provision

11. ***The power and the relevant conditions***. Clause 070.612A(1) of Sch 2 to the Regulations relevantly provides that:

> 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 [the EM condition];
>
> …

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3 See *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 (***Falzon***) at [48] (Kiefel CJ, Bell, Keane and Edelman JJ), [88] (Gageler and Gordon JJ), [92]-[96] (Nettle J).

4 A person who does not have a visa is generally not permitted to enter or remain in Australia: see ss 13, 14, 29, 189 and 198 of the Act.

5 See regs 2.20(18), 2.25AA and 2.25AB of the Regulations.

6 See cll 070.611, 070.612 and 070.612B of Sch 2 to the Regulations. These conditions are not challenged by the Plaintiff.

(d) 8620 [the curfew condition].

12. If a person holds a Bridging R visa that is subject to condition 8620, that person must remain at a notified address between the hours of 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).[7] 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.[8] Failing to comply with the curfew condition without a reasonable excuse is an offence.[9]

13. If a person holds a Bridging R visa that is subject to condition 8621, that person must: 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.[10] Failure to comply with the EM condition without a reasonable excuse is an offence.[11]

14. ***Reasonably necessary for the protection of the Australian community***. Although cast in negative terms, cl 070.612A(1) imposes a positive duty on the Minister. Each time a Bridging R visa is granted, the Minister must consider whether it is reasonably necessary to impose each of the conditions listed in that provision for the protection of any part of the Australian community.[12] If, having considered that question, the Minister is satisfied that the imposition of a condition is not reasonably necessary for the protection of any part of the Australian community, then the Minister must not impose that condition.

15. The Minister must decide whether to impose each of the conditions in cl 070.612A(1) in the order in which they are listed,[13] having regard to the other conditions imposed.

16. It is implicit in the text of cl 070.612A(1) that, in considering whether it is "reasonably necessary to impose [a] condition for the protection of any part of the Australian community", the Minister must consider the nature of the harm that is likely to occur

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7 See item 8620 of Sch 8 to the Regulations. See also SCB 84 [110].
8 See item 8620(3) of Sch 8 to the Regulations, read with item 8513.
9 See s 76C of the Act. The offence is subject to a mandatory minimum sentence of one year: see s 76DA.
10 See item 8621 of Sch 8 to the Regulations. See also SCB 75 [74].
11 See s 76D of the Act. The offence is subject to a mandatory minimum sentence of one year: see s 76DA.
12 That is reflected in the *Community Protection Board: Guidelines for consideration relevant to the imposition of visa conditions* (SCB 73 [66], 520, 527, 528 [(a)-(d)]) (**Guidelines**), which state that the Board's advice to the Minister is to address whether a condition is reasonably necessary for the protection of the community. As to the Community Protection Board, see paragraph 18 below.
13 See cl 070.612A(2) of Sch 2 to the Regulations.

without the condition, and whether the condition is "reasonably necessary" to protect any part of the Australian community from that harm. In order to consider those matters, the Minister must take into account:[14]

16.1 the nature of the harm that the visa holder may cause to any part of the Australian community;

16.2 the likelihood of that harm eventuating;

16.3 the extent to which the condition is likely to protect the relevant part of the Australian community from that harm;

16.4 the effect that the imposition of the condition will have on the visa holder; and

16.5 whether there are less restrictive measures by which the relevant part of the Australian community could be adequately protected from the relevant harm.

17. In considering the above matters for the purpose of forming the state of satisfaction required by cl 070.612A(1), the Minister must act reasonably.[15] Thus, the Minister could not lawfully form the view that a condition was reasonably necessary to protect any part of the Australian community if, for example, the Minister considered that: the visa holder would not cause harm to any part of the Australian community; or, although the visa holder posed a risk of harm, the condition would do little or nothing to reduce that risk.

18. The Minister is assisted in making decisions under cl 070.612A by advice from the Community Protection Board (**Board**) (SCB 73-75, 527-530). The Board comprises members who have a range of experience relating to community safety and are well qualified to examine all the relevant material and to provide advice with respect to the relevant matters identified in paragraph 16 above (SCB 73 [67], 523).

19. If a condition listed in cl 070.612A(1) is imposed on a Bridging R visa, the visa will be subject to that condition for 12 months.[16] Such a condition can apply for longer than 12 months only if, before the expiry of the 12-month period, that person is granted a new visa that is again subject to the condition. If such a new visa is granted, the Minister must again perform the duty identified in paragraph 14 above.

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14 See the analogous analysis in *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 (***Vella***) at [43], [51], [75] (Bell, Keane, Nettle and Edelman JJ), also [20] (Kiefel CJ), [128]-[129] (Gageler J). See also *Thomas v Mowbray* (2007) 233 CLR 307 (***Thomas***) at [21]-[22] (Gleeson CJ), [102]-[103] (Gummow and Crennan JJ), [651] (Heydon J). See further the Guidelines at SCB 527 and 529.

15 See *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 at [53] (Gageler J), [89] (Nettle and Gordon JJ), [131] (Edelman J).

16 See reg 2.25AE of the Regulations.

20. If one or more of the conditions listed in cl 070.612A(1) is imposed on a Bridging R visa, the Minister must invite the visa holder to make representations as to why the visa should not be subject to those conditions.[17] If the visa holder makes representations, the Minister must consider whether, having regard to the representations and any other relevant material, the conditions are reasonably necessary for the protection of any part of the Australian community. If satisfied they are not reasonably necessary for that purpose, the Minister must grant a new visa that is not subject to those conditions.[18]

21. In the practical operation of cl 070.612A, decision-makers have often been satisfied that the imposition of the curfew and EM conditions was not reasonably necessary for the protection of any part of the Australian community. Thus, at the time of filing the Special Case, almost half the members of the *NZYQ* cohort held Bridging R visas that were not subject to either the curfew condition or the EM condition (SCB 74 [71]).

22. Of course, the Plaintiff's visa is subject to both conditions. The delegate's decision to impose those conditions (SCB 245-246, 251) accords with the Board's recommendation, in which the Board demonstrated an exclusive focus on the protection of the community from the "significant risk to the Australian community" that the Plaintiff was assessed to pose in light of his "extensive and continued criminal history" and "severe mental health issues" (SCB 197-199). The reality of that risk is readily apparent, the Plaintiff having been sentenced to terms of imprisonment on 13 occasions, for offences including malicious wounding, assault with a weapon and assaulting an emergency worker.[19]

(c) Relevant principles

23. ***A preliminary matter***. The Plaintiff seeks to challenge the validity of cl 070.612A(1)(a) and (d) of Sch 2 to the Regulations, meaning he challenges delegated legislation. It might be thought that his challenge should have been to ss 41(1) and 504(1) of the Act (to the extent those provisions are said to confer power to make cl 070.612A(1)(a) and (d)),[20] on the basis that if cl 070.612A(1)(a) and (d) are invalid that is because they are *ultra vires* the Act rather than unconstitutional.[21] That said, the regulation-making power so clearly

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17 See s 76E(1) and (3) of the Act, and reg 2.25AD of the Regulations.
18 See s 76E(4) of the Act.
19 See, eg, SCB 64 [12]-[15], 230, 297.
20 Read together, those provisions authorise the Governor-General to make regulations, not inconsistent with the Act, providing that visas, or visas of a specified class, are subject to specified conditions.
21 See *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 613-614 (Brennan J); *Wotton v Queensland* (2012) 246 CLR 1 (***Wotton***) at [21] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 (***APLA***) at [104] (Gummow J); *Palmer v Western Australia* (2021) 272 CLR 505 (***Palmer***) at [122] (Gageler J).

must be read as being subject to the Constitution that the Court may be content to identify the limits of that power by asking the "composite hypothetical question" whether, if cl 070.612A(1)(a) and (d) had been enacted as legislation,[22] they would have infringed Ch III.[23] Even if that approach is adopted, the analysis should focus on the range of potential lawful outcomes of the exercise of the power in cl 070.612A(1)(a) and (d), and not the outcome in any specific case[24] (albeit recognising that the practical operation of the impugned provisions is illuminated by the particular facts pertaining to the Plaintiff). The Defendants submit that cl 070.612A(1)(a) and (d) are valid in all their potential operations.

10 24. ***A single question of characterisation***. Because the adjudgment and punishment of criminal guilt is an exclusively judicial function, Ch III of the Constitution invalidates a Commonwealth law that purports to vest any part of that function in the Executive.[25] The concern of the Constitution is with substance and not form, such that this limitation may be infringed by a law apparently divorced from both the adjudgment and punishment of criminal guilt.[26]

25. Recent decisions of this Court establish that, if a Commonwealth law confers on the Executive a power to impose a detriment, that law will infringe Ch III if "the power to impose the detriment conferred by the law is properly characterised as punitive".[27] Determining that character of the power requires consideration of two issues:

20 25.1 The first issue is whether the power to impose a detriment is *prima facie* punitive. For some kinds of detriment, that question will be answered by a "default characterisation" (**Step 1(a)**). In all other cases, whether the power is *prima facie*

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22 In fact, the original version of cl 070.612A was enacted in primary legislation, but it was amended to take its present form by the *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Cth).

23 See *APLA* (2005) 224 CLR 322 at [104] (Gummow J); *Palmer* (2021) 272 CLR 505 at [122] (Gageler J).

24 See *Wotton* (2012) 246 CLR 1 at [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Comcare v Banerji* (2019) 267 CLR 373 at [44] (Kiefel CJ, Bell, Keane and Nettle JJ), [96] (Gageler J), [209]-[210] (Edelman J); *Palmer* (2021) 272 CLR 505 at [65]-[68] (Kiefel CJ and Keane J), [127]-[128] (Gageler J), [201]-[202] (Gordon J), [224] (Edelman J).

25 *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) 97 ALJR 899 (***Benbrika [No 2]***) at [33] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [56], [60] (Gordon J).

26 *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ; Mason CJ agreeing); *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 (***Alexander***) at [79] (Kiefel CJ, Keane and Gleeson JJ), [158] (Gordon J); *Benbrika [No 2]* (2023) 97 ALJR 899 at [34] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

27 *Benbrika [No 2]* (2023) 97 ALJR 899 at [35]-[36] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *Jones v Commonwealth* (2023) 97 ALJR 936 (***Jones***) at [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *NZYQ* (2023) 97 ALJR 1005 at [44] (the Court); *ASF17 v Commonwealth* [2024] HCA 19 (***ASF17***) at [32] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

punitive must be proved by reference to all the relevant circumstances (**Step 1(b)**).

25.2 If the power to impose a detriment is *prima facie* punitive, the second issue is whether the power is reasonably capable of being seen as necessary for a legitimate and non-punitive purpose. If it is, the power will not be properly characterised as punitive, because its *prima facie* status will have been displaced. This step depends on "an assessment of both means and ends, and the relationship between the two" (**Step 2**).[28]

26. In addressing the above issues, it is important to recall that the relevant constitutional limit is the separation of powers effected by Ch III.[29] Chapter III does not create a free-standing constitutional limit applying to any law that can be described as affecting "liberty",[30] let alone as affecting privacy or bodily integrity in some way. Rather, Ch III takes its place in a Constitution that deliberately does not contain a Bill of Rights,[31] and leaves it to Parliament to determine the limits of and protections for such rights through the democratic process. The inquiry into whether a power to impose a detriment is properly characterised as "punitive" should not be divorced from its constitutional foundations in Ch III, which direct attention to whether the power in question can validly be exercised only by the judiciary as an incident of the adjudgment and punishment of criminal guilt. In considering that issue, it must be borne in mind that many powers (including to impose some forms of detriment[32]) are neither exclusively judicial nor exclusively executive, instead taking their character from the repository of the power.[33]

27. ***Step 1***. The first issue is whether the power to impose a detriment is *prima facie* punitive.

28. ***Step 1(a): default characterisation***. A court may conclude that a power to impose a detriment of a particular kind is *prima facie* punitive by applying a "default

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28 *NZYQ* (2023) 97 ALJR 1005 at [44] (the Court).

29 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Lim* (1992) 176 CLR 1 at 26 (Brennan, Deane and Dawson JJ; Mason CJ agreeing).

30 See *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 (***Benbrika [No 1]***) at [215] (Edelman J).

31 See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 105 at 135-136 (Mason CJ).

32 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at [17] (Gleeson CJ), approved many times: see, eg, *Alexander* (2022) 276 CLR 336 at [160] (Gordon J), [328] (Steward J); *Minogue v Victoria* (2019) 268 CLR 1 at [31] (Gageler J). Far from holding that the power to impose preventive restraints analogous to those in issue here is exclusively judicial, in *Vella* (2019) 269 CLR 219 at [171]-[172], Gageler J (in dissent) held that the power there in issue could not form part of judicial power.

33 See, eg, *R v Quinn; Ex parte Consolidated Foods* (1977) 138 CLR 1 at 6 (Gibbs J), 8-10 (Jacobs J), 18 (Aickin J); *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 628 (Mason J), 631-632 (Murphy J); *Attorney-General (Cth) v Alinta Limited* (2008) 233 CLR 542 at [93] (Hayne J; Gleeson CJ and Gummow J generally agreeing at [1] and [9] respectively).

characterisation". This Court has identified two types of detriment that attract such characterisation: the power to detain a person in custody;[34] and the power to deprive a person of Australian citizenship.[35] The Defendants do not submit that these are the only forms of detriment that could attract such a default characterisation. Capital punishment and some forms of corporal punishment would likely do so, although that need not now be decided. But default characterisation is potentially relevant only to powers to impose detriments of substantial severity[36] and of a kind historically imposed as punishment.[37]

29. ***Step 1(b): not otherwise* prima facie *punitive***. If a power to impose a detriment is not subject to a default characterisation as punitive, the party challenging that power will bear the onus of demonstrating that it is otherwise *prima facie* punitive. Whether that onus can be discharged will depend on all the circumstances, including:

29.1 the nature and severity of the detriment[38] — the less severe the detriment, the less likely it is that a power to impose that detriment will be *prima facie* punitive;

29.2 whether the detriment is of a kind that has historically been imposed as punishment[39] — a power to impose a detriment that has not historically been imposed as punishment will be less likely to be *prima facie* punitive; and

29.3 whether the detriment is of a kind that is commonly imposed otherwise than by courts — a power to impose a detriment commonly imposed otherwise than by courts will be less likely to be *prima facie* punitive.

30. The second and third of those matters are relevant because the inquiry to which the question is directed is whether the power to impose the detriment is exclusively judicial.

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34 *Falzon* (2018) 262 CLR 333 at [24] (Kiefel CJ, Bell, Keane and Edelman JJ); *Benbrika [No 1]* (2021) 272 CLR 68 at [40] (Kiefel CJ, Bell, Keane and Steward JJ), [73] (Gageler J); *Benbrika [No 2]* (2023) 97 ALJR 899 at [35] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *Jones* (2023) 97 ALJR 936 at [39] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *NZYQ* (2023) 97 ALJR 1005 at [40] (the Court); *ASF17* [2024] HCA 19 at [33] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

35 *Benbrika [No 2]* (2023) 97 ALJR 899 at [63], [73] (Gordon J); *Jones* (2023) 97 ALJR 936 at [39] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [76]-[77] (Gordon J).

36 See *Alexander* (2022) 276 CLR 336 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). See also *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569 at [95] (Gageler J).

37 See *Alexander* (2022) 276 CLR 336 at [72], [75] (Kiefel CJ, Keane and Gleeson JJ), [159] (Gordon J), [250] (Edelman J). The close historical association between detention in custody and the adjudgment and punishment of criminal guilt was a large part of the foundation for the reasoning in *Lim*: see (1992) 176 CLR 1 at 27-28 (Brennan, Deane and Dawson JJ; Mason CJ agreeing).

38 See fn 36 above.

39 See fn 37 above.

Matters of these kinds have long been accepted as being relevant to the identification of judicial power.[40] The Plaintiff's submission that the only relevant matter is a law's "punitive effect" (PS [10]) either leaves too much obscure, or pays insufficient regard to matters this Court has accepted to be relevant both to the identification of judicial power and to the characterisation of a power as punitive.

31. Recognition that not all powers to impose a detriment are *prima facie* punitive appropriately reflects that there have long been Commonwealth laws conferring power on the Executive to impose hardship or detriment, or themselves imposing hardship or detriment, which have not been thought to require scrutiny against Ch III. In addition to laws imposing taxation,[41] these include laws authorising a vast array of government activity that interferes with liberty, privacy and/or bodily integrity, such as the arrest and search functions of law enforcement,[42] telecommunications intercepts,[43] tracking and surveillance[44] to detect and investigate offences or security threats, and biosecurity orders compelling a person to submit to medical testing, provide body samples, receive a vaccination, or be subject to a curfew.[45] Indeed, "[f]or better or worse, every day every branch of government exercises power which deprives people of their liberty of action", whether that be the slight deprivation of preventing a person from driving through a red light or the more substantial deprivation of prohibiting a person from leaving their home during a pandemic.[46] Given that practical and historical reality, any framework for analysis to identify whether a power is properly characterised as punitive must recognise that many powers that result in the imposition of some detriment clearly are not exclusively judicial, without any need to analyse their proportionality to their purpose.

32. ***Step 2***. If the power to impose a detriment is *prima facie* punitive, the next issue is whether the power is reasonably capable of being seen as necessary for a legitimate and non-punitive purpose.[47]

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40 See *R v Davison* (1954) 90 CLR 353 at 368-370 (Dixon CJ and McTiernan J); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 373 (Kitto J), 387 (Menzies J), 394 (Windeyer J); *Jones* (2023) 97 ALJR 936 at [45] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

41 See *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at [17] (Gleeson CJ).

42 See, eg, ss 14A, 14B, 14D and 14J of the *Australian Federal Police Act 1979* (Cth); ss 3F, 3G, 3W, 3WA, 3ZC, 3ZE, 3ZF and 3ZH of the *Crimes Act 1914* (Cth) (**Crimes Act**).

43 See, eg, ss 9, 10, 30, 31A and 46 of the *Telecommunications (Interception and Access) Act 1979* (Cth).

44 See, eg, Subdivs D and DA of Div 2 of Pt III of the *Australian Security Intelligence Organisation Act 1979* (Cth); ss 18, 27D, 27KE, 27KP, 37, 38 and 39 of the *Surveillance Devices Act 2004* (Cth).

45 See *Biosecurity Act 2015* (Cth) (**Biosecurity Act**), Ch 2, Pt 3, Div 3, and particularly ss 87, 89 and 90-93.

46 *Benbrika [No 1]* (2021) 272 CLR 68 at [216] (Edelman J).

47 *Jones* (2023) 97 ALJR 936 at [38]-[39] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [63] (Gordon J); *NZYQ* (2023) 97 ALJR 1005 at [39] (the Court).

33. ***Step 2(a): a legitimate and non-punitive purpose***. The purpose of a law is "what the law is designed to achieve in fact".[48] Identifying the purpose of a law is similar to identifying the mischief that the law is designed to address, and must take account of both the text and the relevant context.[49]

34. The purpose of a law will be "legitimate" if it is "compatible with the constitutionally prescribed system of government".[50] In identifying whether the purpose of a power to impose detriment is "legitimate", there is an inverse relationship between the nature and severity of the detriment and the range of purposes for which that detriment can legitimately be imposed. Accordingly, 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 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 detention in custody by the Parliament and the Executive is not — and is not required to be — "exceptional" (see paragraph 31 above).

35. ***Step 2(b): reasonably capable of being seen as necessary***. Once a legitimate and non-punitive purpose for a power to impose a detriment has been identified, it is necessary to ask whether the power is reasonably capable of being seen as necessary for that purpose. In this context, "necessary" means "reasonably appropriate and adapted".[52] This requires an assessment of means and ends, and the relationship between the two.[53] That being so, a power to impose a less severe detriment (the means) must more readily be shown to be reasonably capable of being seen as necessary for a legitimate and non-punitive purpose (the end) than a power to impose a more severe detriment.

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48 See *McCloy v New South Wales* (2015) 257 CLR 178 at [132] (Gageler J); *Brown v Tasmania* (2017) 261 CLR 328 (***Brown***) at [209] (Gageler J); *Palmer* (2021) 272 CLR 505 at [191] (Gordon J).

49 See *Brown* (2017) 261 CLR 328 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).

50 *NZYQ* (2023) 97 ALJR 1005 at [40] (the Court). See also *Jones* (2023) 97 ALJR 936 at [44] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

51 *NZYQ* (2023) 97 ALJR 1005 at [40] (the Court), citing *Lim* (1992) 176 CLR 1 at 27-28 (Brennan, Deane and Dawson JJ; Mason CJ agreeing).

52 *Jones* (2023) 97 ALJR 936 at [42] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

53 *NZYQ* (2023) 97 ALJR 1005 at [44] (the Court).

(d) The power to impose the curfew condition

36. Applying the above approach, the power to impose the curfew condition is not properly characterised as punitive, and therefore is not exclusively judicial.

37. ***Step 1(a): default characterisation***. The Plaintiff contends that the curfew condition imposes "detention in custody" (PS [17]), and must therefore have a purpose that is "exceptional" to escape characterisation as punitive (PS [31]-[32]). That contention should be rejected because it fails to account for the clear differences between a curfew (as imposed under the curfew condition) and detention in custody.[54] Specifically, the requirement to remain at a notified address between the hours of 10pm and 6am each day differs in degree and quality from the full-time detention in custody considered in *Lim* and *NZYQ*. The effects on liberty are not remotely comparable (cf PS [14], [17]). Most relevantly:

37.1 except as imposed by other (unchallenged) visa conditions,[55] there is no restriction on where the visa holder can go and what they can do during the 16 (or more) hours each day outside the curfew hours;

37.2 as long as the relevant address has been notified by the visa holder in accordance with condition 8620(3), the visa holder can determine the address at which they are required to remain during the curfew hours (and can remain at different addresses on different days);

37.3 except as imposed by other (unchallenged) visa conditions,[56] there is no restriction on who can live with, visit or communicate with the visa holder during the curfew hours, or on what the visa holder can do during those hours;

37.4 the ordinary curfew hours of 10pm to 6am encompass a period during which most people are likely to be asleep, or otherwise within their homes; and

37.5 the visa holder can apply for different hours to be specified if they wish to be outside their notified address during ordinary curfew hours (for example, for work, to attend a particular event such as a funeral, or for religious reasons) (SCB 85-86 [111]-[112], 511).

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54 As recognised, for example, in *Vella* (2019) 269 CLR 219 at [53] (Bell, Keane, Nettle and Edelman JJ).
55 See, eg, items 8303, 8551 and 8555 of Sch 8 to the Regulations.
56 See, eg, items 8556 and 8616 of Sch 8 to the Regulations.

38. In several respects, the curfew condition resembles a condition on the interim control order at issue in *Thomas*. There, the statutory regime authorised the making of an interim control order which included a requirement that a person "remain at specified premises between specified times each day, or on specified days".[57] In response to an argument that such a requirement constituted detention in custody and could not be imposed without adjudication of criminal guilt,[58] Gummow and Crennan JJ, with whom Callinan and Heydon JJ relevantly agreed, held that "[d]etention in the custody of the State differs significantly in degree and quality from what may be entailed by observance of an interim control order".[59] Their Honours went on to reject the submission that the power to impose protective measures "falling short of detention in the custody of the State" was repugnant to Ch III,[60] without any analysis of whether the interim control order regime was reasonably necessary for a legitimate (let alone "exceptional") purpose. That judgment is wholly consistent with decisions of the House of Lords that more restrictive curfews than those that can be imposed under cl 070.612A(1)(d) did not amount to a deprivation of liberty for the purposes of Art 5 of the European Convention on Human Rights.[61]

39. Contrary to PS [23], there is no basis to re-open *Thomas*. None of the factors relevant to such a re-opening are satisfied here (in particular, there are no relevant differences in the majority reasoning, and there is clear evidence of legislative replication of the law upheld in *Thomas*).[62] Further, this aspect of *Thomas* has been relied on (or distinguished) in subsequent judgments of this Court, without its correctness being questioned.[63]

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57 See s 104.5(3)(c) of the *Criminal Code* (Cth) (as at 15 November 2006).

58 See *Thomas* (2007) 233 CLR 307 at [114] (Gummow and Crennan JJ).

59 *Thomas* (2007) 233 CLR 307 at [116] (Gummow and Crennan JJ), see also [18] (Gleeson CJ), [121] (Gummow and Crennan J), [600] (Callinan J), [651] (Heydon J). See further *Vella* (2019) 269 CLR 219 at [53] and [60] (Bell, Keane, Nettle and Edelman JJ); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [91] (Bell J).

60 *Thomas* (2007) 233 CLR 307 at [121] (Gummow and Crennan JJ).

61 See *Secretary of State for the Home Department v MB* [2008] 1 AC 440 at [7], [11] (Lord Bingham), [47] (Lord Hoffmann), [56] (Baroness Hale), [78] (Lord Carswell), [89] (Lord Brown) (concerning a 14-hour curfew, together with electronic monitoring and other restrictions); *Secretary of State for the Home Department v E* [2008] 1 AC 499 at [7], [11] (Lord Bingham), [23] (Lord Hoffmann), [25] (Baroness Hale), [31] (Lord Carswell), [36] (Lord Brown) (concerning a 12-hour curfew, together with electronic monitoring and other restrictions). Cf *Secretary of State for the Home Department v JJ* [2008] 1 AC 385 at [20], [24] (Lord Bingham), [60]-[61], [63] (Baroness Hale), [103]-[105], [109] (Lord Brown) (concerning an 18-hour curfew, together with electronic monitoring and substantial restrictions on communications, visitors and movement outside the curfew hours).

62 See, eg, State organised crime control order schemes, such as the *Serious and Organised Crime (Control) Act 2008* (SA) and *Criminal Organisation Act 2009* (Qld) (the validity of which was upheld in *Condon v Pompano Pty Ltd* (2013) 252 CLR 38). See also the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW), the validity of which was upheld in *Vella* (2019) 269 CLR 219.

63 See, eg, *South Australia v Totani* (2010) 242 CLR 1 at [39] (French CJ), [140] (Gummow J), [223]-[224] (Hayne J), [350], [356]-[357] (Heydon J), [421], [429]-[437] (Crennan and Bell JJ), [458], [476]-[478]

40. Faced with the difficulties identified above, the Plaintiff suggests that "detention" in the context of Ch III should be "aligned" with "imprisonment" in the context of the tort of false imprisonment (PS [15]), such that any conduct amounting to "imprisonment" at common law should be treated as "detention" of a kind that can be imposed only by a court as a punishment for criminal guilt (irrespective of its brevity or any other circumstances). But there is no warrant for equating principles that define when conduct can constitute a civil wrong with those that define when a power is exclusively judicial.[64] To illustrate, the detention of a suspected shoplifter by a store security guard while awaiting the police will constitute false imprisonment if it is not authorised by law,[65] but if it is so authorised then it will plainly be lawful despite the fact that the detention will not have been authorised by a court. The attempt to use false imprisonment cases to inform the meaning of "detention" for Ch III purposes ignores the fact that the false imprisonment cases concern detention that is capable of being authorised by any law. To re-purpose those cases as relevant to Ch III would convert findings about conduct for which *authorisation is required* into findings about conduct that *cannot be authorised* other than by a court in adjudging and punishing criminal guilt. Such cherry picking from the law of tort can only serve to mislead.

41. For the reasons identified above, the detriment imposed by the curfew condition is not commensurate with detention in custody. Nor is there a strong historical association between curfews and punishment for criminal offences. The power to impose the curfew condition therefore clearly does not attract a default characterisation as punitive.

42. ***Step 1(b): not otherwise* prima facie *punitive***. Nor is the power to impose the curfew condition otherwise *prima facie* punitive. For the reasons explained in paragraph 37 above, the detriment imposed by the curfew condition is qualitatively different, and markedly less severe, than detention in custody. The fact that it is imposed only at night (unless altered), for a maximum of eight hours, at a location that is readily changed, and without restricting the other people who may be present during the relevant period, means that the ultimate burden it imposes on liberty is comparatively slight. Nothing about the

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(Kiefel J); *Vella* (2019) 269 CLR 219 at [58]-[64], [85] (Bell, Keane, Nettle and Edelman JJ), [163]-[164], [168], [171] (Gageler J), [204] (Gordon J); *Benbrika [No 1]* (2021) 272 CLR 68 at [14] (Kiefel CJ, Bell, Keane and Steward JJ), [59]-[63], [90]-[92] (Gageler J), [132], [147], [151]-[152] (Gordon J), [189] (Edelman J).

64 By analogy, in *Jalloh v Home Secretary* [2021] AC 262 at [32]-[34], the Supreme Court rejected an invitation to align "imprisonment" at common law with deprivation of liberty under Art 5 of the European Convention on Human Rights.

65 See, eg, *Myer Stores Ltd v Soo* [1992] 2 VR 597.

imposition of such a burden bespeaks exclusively judicial power.

43. Further, considerably more onerous curfews are imposed for purposes that obviously are not punitive. For example, curfews were imposed by public health officials in Victoria and certain regions of New South Wales during the COVID-19 pandemic[66] (and, likewise, in regions of the United States and Canada: SCB 90 [136]-[137]). The notion that such curfews were imposed to punish the entire populations to whom they applied is untenable (even on a *prima facie* basis), yet they were more restrictive than the curfew condition.

44. The reality is that curfews are imposed for a range of non-punitive reasons both in Australia and other Western liberal democracies. In Canada, the United Kingdom and the United States, curfews can be imposed by the Executive on persons released from immigration detention or as a condition of discretionary immigration parole (SCB 89 [131]-[135]). A youth curfew was recently imposed in Alice Springs by the relevant Minister to restore public order[67] (curfews on minors also being imposed by the Executive in regions of the United States and Canada: SCB 91-92 [138]-[142]). In several Australian jurisdictions, the police or parole authorities may impose curfews as bail or parole conditions.[68] And in the United States, curfews have also been imposed in response to natural disasters (SCB 92-93 [143]-[144]) and civil unrest (SCB 93-94 [146]-[148]). Given the wide range of reasons why curfews might be used, the power to impose the curfew condition should not be seen as *prima facie* punitive.

45. ***Step 2(a): a legitimate and non-punitive purpose***. If, contrary to the submissions above, the power to impose the curfew condition is held to be *prima facie* punitive, that power

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66 See, eg, *Stay at Home Directions (Restricted Areas) (No 6)* (Vic), made under s 200 of the *Public Health and Wellbeing Act 2008* (Vic); *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) Amendment Order 2021* (NSW) (see Schedule 1, cl 8), amending *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW), made under s 7 of the *Public Health Act 2010* (NSW). Power to impose similar conditions exists in other States and Territories.

67 See Northern Territory Government, *Declaration of Emergency Situation in High Risk Area – Alice Springs Precinct* (27 March 2024) and Northern Territory Government, *Amended Declaration of Emergency Situation in High Risk Area – Alice Springs Precinct* (28 March 2024), made under s 18(2) of the *Emergency Management Act 2013* (NT).

68 As to bail, see, eg, *Bail Act 1977* (Vic) ss 3(c)-(d) ("bail decision maker") and 5AAA(4)(c), (5); *Bail Act 1982* (WA) ss 3 ("authorised officer"), 13 and Sch 1, Pt D, cll 2(1)(b)-(c), (1a)(a); *Bail Act 1980* (Qld) ss 7(1) and 11(2); *Bail Act 1985* (SA) ss 3 ("bail authority", "Chief Executive Officer"), 5(1)(e) and 11(2)(a)(vi); see also *Bail Act 1982* (NT) ss 27(2) and 27A(1)(e). As to parole, see, eg, *Crimes (Administration of Sentences) Act 1999* (NSW) ss 128 and 128E; *Corrections Act 1986* (Vic) s 74(4)(b), read with *Corrections Regulations 2019* (Vic) s 114(1)(g); *Corrective Services Act 2006* (Qld) ss 194(1), 200(3) and 200A(2)(a). Determining whether, and on what conditions, to release a prisoner on parole is an executive function: see, eg, *Minogue v Victoria [No 2]* (2019) 268 CLR 1 at [14]-[17] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), [32]-[33] (Gageler J), [38] (Edelman J).

is nevertheless valid because it is reasonably capable of being seen as necessary for the legitimate and non-punitive purpose of protecting the Australian community from harm. That purpose can be discerned from both the text and practical operation of cl 070.612A(1) and the relevant context.

46. The text expressly discloses that purpose. As is explained in paragraphs 14 to 17 above, before imposing the curfew condition the Minister must consider whether the imposition of that condition is reasonably necessary for the protection of any part of the Australian community, and must not impose the condition if satisfied that doing so would not advance that purpose.

47. The practical operation of cl 070.612A(1)(d) confirms its protective purpose. As at the date of the Special Case, 84 members of the *NZYQ* cohort (or more than half) are not subject to a curfew condition (which closely reflects the advice of the Board) (SCB 74 [70]-[71]). If the purpose of cl 070.612A(1)(d) is punitive, it is necessary to explain why some members of the *NZYQ* cohort are being punished by being subjected to the curfew, while most are not. If, however, the purpose is the protection of the Australian community from harm, then the differentiation within the *NZYQ* cohort is readily explained by the differential risks of harm posed by different members of the cohort (SCB 499-508) and the differing extents to which the condition is capable of reducing that risk. The individualised assessment of the risk of harm posed by particular members of the *NZYQ* cohort, and of whether particular conditions would address that risk, is evident in the recommendations of the Board pertaining to the Plaintiff (see paragraph 22 above). That cl 070.612A(1) requires an individualised assessment of the risk of harm also explains why the provision does not identify one specific type of harm that it is intended to address (cf PS [34]).

48. As to context, as explained in paragraphs 6 to 9 above, cl 070.612A(1) was enacted as part of a suite of provisions introduced in response to the risk that members of the *NZYQ* cohort would cause harm to parts of the Australian community.[69] In respect of other non-citizens, that risk would usually be managed by refusal or cancellation of their visa, leading to their removal from Australia.[70] That mechanism, which is not punitive (see paragraph 8 above), is not available with respect to members of the *NZYQ* cohort. In

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69 Explanatory Memorandum, Migration Amendment (Bridging Visa Conditions) Bill 2023 (Cth) at [133]; Explanatory Statement, *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Cth) at 1, 9.

70 See, eg, *Falzon* (2018) 262 CLR 333 at [49]-[50] (Kiefel CJ, Bell, Keane and Edelman JJ).

providing an alternative mechanism for managing the equivalent risk of harm posed by that cohort, cl 070.612A(1) should be accepted as similarly non-punitive.

49. Contrary to PS [32]-[33], the protection of the Australian community from harm is a legitimate and non-punitive purpose for imposing the (fairly modest) restrictions on liberty that result from the curfew condition. Indeed, a majority of the Court has accepted the protection of the Australian community from harm as a legitimate and non-punitive purpose even for more severe detriment in the nature of detention in custody.[71] The Plaintiff relies on dissenting opinions holding that the protection of the Australian community from harm is a legitimate purpose for detention in custody only if the harm in question is "grave and specific".[72] However, even if that analysis were to be adopted by a majority, it should not be extended to forms of detriment less severe than detention (see paragraph 34 above). That is because the requirement that harm be "grave and specific" is intended to calibrate the circumstances in which detention in custody can be imposed for a protective purpose to the magnitude of the harm against which protection is provided. If protective measures that are markedly less onerous than detention in custody were confined to harms that are "grave and specific", that would deny Parliament's ability to calibrate appropriate protective measures to lesser forms of harm.

50. ***Step 2(b): reasonably capable of being seen as necessary***. Taking into account the nature of the detriment imposed by the curfew condition (see paragraphs 12 and 37 above), and the limits on the power to impose that condition (see paragraphs 14 to 20 above), the power to impose the curfew condition is reasonably capable of being seen as necessary for the purpose of protecting the Australian community from harm. In particular, that power can only be exercised after the Minister has considered whether the condition is reasonably necessary for the protection of any part of the Australian community, taking into account the matters identified in paragraph 16 above. The power cannot be exercised if the Minister is satisfied that the imposition of the condition is not reasonably necessary for that purpose. If imposed, the condition will only operate for 12 months.

51. The Plaintiff's argument to the contrary relies heavily on the fact that cl 070.612A(1) lacks several features commonly found in statutory schemes that authorise detention in

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71 *Benbrika [No 1]* (2021) 272 CLR 68 at [32], [36], [41] (Kiefel CJ, Bell, Keane and Steward JJ). See also *Garlett v Western Australia* (2022) 96 ALJR 888 (***Garlett***) at [46] (Kiefel CJ, Keane and Steward JJ), [313] (Gleeson J).

72 See *Benbrika [No 1]* (2021) 272 CLR 68 at [79] (Gageler J); *Garlett* (2022) 96 ALJR 888 at [145], [148] (Gageler J), [188]-[189] (Gordon J).

custody other than as an incident of the adjudgment and punishment of criminal guilt (PS [38]-[42]). But, again, the Plaintiff fails to account for the fact that the detriment imposed by the curfew condition is markedly less severe than detention in custody. Given the need to assess both means and ends, what is required to demonstrate that a power to impose modest restrictions on liberty is reasonably capable of being seen as necessary for the protection of the Australian community from harm is markedly less than would be required to justify detention in a custodial institution in pursuit of the same purpose. Cases concerning detention in custody are therefore of no real assistance.

(e) The power to impose the EM condition

52. The power to impose the EM condition is likewise not properly characterised as punitive, and therefore similarly is not an exclusively judicial power.

53. ***Step 1(a): default characterisation***. For obvious reasons, the Plaintiff does not contend that the power to impose the EM condition attracts default characterisation as punitive.

54. ***Step 1(b): not otherwise* prima facie *punitive***. Of its nature, electronic monitoring is a surveillance tool used to detect a person's location and movement (see, eg, SCB 77 [84]). As such, it necessarily affects a person's privacy. And, in each context where electronic monitoring is conducted through a device affixed to a person's body (see, eg, SCB 87 [121(f)], 88 [128]), there will be a corresponding effect on that person's bodily integrity. But neither of those matters supports the conclusion that the power to impose the EM condition is *prima facie* punitive (cf PS [45], [47]-[48]).

55. Turning first to privacy, no authority supports the proposition that an interference with privacy by the Executive is capable of offending Ch III because such interference involves an exclusively judicial power. That is unsurprising for at least two reasons. *First*, the privacy rights that the Plaintiff seeks to have protected are far removed from the traditional province of Ch III, principally being interference with liberty in the form of detention in custody (and, more recently, the severe detriment constituted by citizenship stripping). *Second*, the protection of privacy remains fragmentary in Australian law, with particular privacy interests protected through a patchwork of statutory and common law causes of action (such as trespass and breach of confidence).[73]

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[73] See, eg, *Smethurst v Commissioner of Police (Cth)* (2020) 272 CLR 177 at [48], [87]-[90] (Kiefel CJ, Bell and Keane JJ), [129] (Gageler J), [150] (Nettle J), [197] (Gordon J), [205], [244], [262] (Edelman J); *Farm Transparency International Ltd v New South Wales* (2022) 96 ALJR 655 at [5], [30]-[32], [38]-[43], [56] (Kiefel CJ and Keane J), [70], [90] (Gageler J), [232]-[240] (Edelman J).

It is therefore inapposite to speak of "privacy" as though it represents a well-defined category (cf PS [46]). Further, many Commonwealth laws have long empowered the Executive to interfere with personal privacy, and have never been suggested to be either exclusively judicial or punitive on that account. These include the search and arrest, interception, tracking and surveillance laws referred to in paragraph 31 above, as well as laws requiring the provision of identity information.[74] That such powers have never been suggested to be punitive denies the contention that a law will be *prima facie* punitive simply because it authorises an interference with privacy.[75]

56. As to bodily integrity, the Plaintiff again seeks to treat conduct which, if unauthorised, may constitute a civil wrong (here, battery) as informing a constitutional limit that determines whether it is possible for the relevant conduct to be authorised at all (PS [45]). For the reasons explained in paragraph 40 above, that approach must be rejected. While there are plainly some forms of interference with bodily integrity that are so significant as to be *prima facie* punitive,[76] the vast majority of interferences with bodily integrity are not.[77] That is made plain by the range of Commonwealth laws conferring power on the Executive to engage in (often significant) interferences with bodily integrity, which have never been suggested to be either exclusively judicial or punitive. In addition to the examples in paragraph 31 above, these include powers to use force when executing warrants or making arrests,[78] to conduct forced searches,[79] to take finger and other prints and handwriting samples,[80] and to provide compulsory medical treatment.[81]

57. The nature and severity of the interference with bodily integrity that results from the EM condition does not suggest that it is punitive. It is true that a visa holder subject to the

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74 See, eg, ss 5 ("personal identifier"), 5A, 257A and Pt 2, Div 13AA of the Act; Crimes Act, ss 3UC, 3UP and 3V(1); *Defence Act 1903* (Cth) (**Defence Act**) ss 71R(1) and 71T(2); *Customs Act 1901* (Cth) (**Customs Act**) ss 203HA(1) and 213(1).

75 The Plaintiff's position is not improved by recourse to the implied freedom cases holding that the protection of privacy and dignity constitutes a "legitimate end" (PS [47]). Those cases recognise that laws seeking to protect or promote privacy and dignity are compatible with the maintenance of the constitutionally prescribed system of representative and responsible government (see, eg, *Clubb v Edwards* (2019) 267 CLR 161 at [5] (Kiefel CJ, Bell and Keane JJ)). They say nothing to suggest that interference with privacy or dignity is an exclusively judicial function.

76 Such as some forms of corporal punishment: see, eg, *Alexander* (2022) 276 CLR 336 at [72] (Kiefel CJ, Keane and Gleeson JJ), [159], [169] (Gordon J).

77 Indeed, minor interferences with bodily integrity may not even sound in tortious consequences: *Binsaris v Northern Territory* (2020) 270 CLR 549 at [41] (Gageler J) (cf PS [45]).

78 See, eg, Crimes Act, ss 3G(b)-(c), 3ZZKG(2), 3ZZLD(2) and Pt IAA, Div 4, noting s 3ZC.

79 See, eg, ss 252AA-B of the Act; Crimes Act, ss 3F(1)(f), (2), 3UD(1)(b)(i), 3ZE-3ZF, 3ZH; Customs Act, ss 211-211A, 219ZJD, 219ZJG(1); Defence Act, ss 71R(2) and 71T(3).

80 See, eg, Act, ss 5 ("personal identifier"), 5A, 257A and Pt 2, Div 13AA; Crimes Act, s 3ZJ(3)(b)-(c), (4).

81 See, eg, Regulations, reg 5.35; Customs Act, s 219ZG; Biosecurity Act, Ch 2, Pt 3, Div 3.

EM condition is required constantly to wear the smart tag device, and to charge it by affixing an on-body charger for two periods of 90 minutes each day (PS [49]; SCB 75 [74(a)], 78 [86(b)]).[82] However, having regard to the size and weight of the device (SCB 76-77 [83(a)-(c)]), the interference is a modest one. Unlike forms of interference with bodily integrity which may constitute punishment, the EM condition does not inflict any physical harm or pain. At worst, it might produce slight discomfort or embarrassment — although there is no requirement that the device remain visible (cf PS [49]), and it would readily fit under clothing (as is apparent from SCB 538, in which the smart tag itself is the device in the top left photograph; the other device is the on-body charger).

58. As to the nature and severity of interference with privacy (if it is relevant to Ch III at all), data about the visa holder's location and movement is recorded, transmitted (in encrypted form), monitored and stored (again, in encrypted form) by the Australian Border Force (**ABF**) and its contractor, Buddi, in accordance with the arrangements described in the Special Case (see especially SCB 77 [84], 78-9 [90]-[92], 80 [96], 81-82 [99]-[102]). No other information about the visa holder's life is recorded, such as the activities that they engage in, who they associate with or what they say or hear (cf PS [50]). In that respect, the EM condition involves significantly less interference with privacy than occurs as a result of the use of surveillance devices or telephone intercepts in the course of criminal or national security investigations, yet authorising those measures plainly is not an exclusively judicial power. Further, the data collected as a result of the EM condition is, as a matter of practice, accessible only by Buddi staff and ABF staff who have an operational need to access it, and, in limited circumstances, other law enforcement agencies (SCB 81 [99], 84 [108]-[109], see also 82 [102]). It is not "distributed widely" (cf PS [52]).

59. Finally, while the recent development of electronic monitoring technology means that it has no historical counterpart,[83] it is used by executive governments in Australia and in other Western liberal democracies in a variety of different contexts. Of particular note, in Canada, the United Kingdom and the United States, electronic monitoring is used in the immigration context (SCB 24-27 [114]-[129]). In Australian States and Territories, it is imposed by police officers and other members of the Executive in the context of

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82 The visa holder is able to remain fully mobile while the device is being charged: SCB 78 [86(d)].

83 That being a matter of constitutional fact: see, eg, *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

bail[84] and parole,[85] and as part of expanded police powers (cf PS [6]).[86]

60. Having regard to the matters set out above, the power to impose the EM condition should not be characterised as *prima facie* punitive. It does not involve a sufficiently severe interference with bodily integrity to warrant that characterisation. And, while it does involve some interference with privacy, neither authority nor principle suggest that Ch III imposes any restriction on the power of the legislature to authorise executive inferences with privacy (the interference in any event being significantly less severe than that which results from many other established forms of executive power: see paragraph 55 above).

61. ***Step 2***. If, contrary the submissions above, the power to impose the EM condition is held to be *prima facie* punitive, it is reasonably capable of being seen as necessary for the legitimate and non-punitive purpose of protecting the Australian community from harm, for the reasons explained in paragraphs 45 to 51 above. Specifically, cl 070.612A(1) requires an individualised assessment of whether the EM condition is reasonably necessary to protect any part of the Australian community from the harm that a particular visa holder may pose; where there is no such risk, the condition cannot lawfully be imposed (cf PS [55]-[57]). Its practical operation confirms that protective purpose.

PART VI: ESTIMATE OF TIME

62. It is estimated that up to 2.5 hours will be required for the Defendants' oral argument.

Dated: 14 June 2024

.....	.....	.....
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84 See, eg, *Bail Act 1982* (NT) ss 3, 16, 27(2), 27A(1)(iaa) and 27B; *Bail Act 1985* (SA) ss 3, 5 and 11(2), (2aa).

85 See, eg, *Crimes (Administration of Sentences) Act 1999* (NSW) ss 124D(1), 128(1)(c) and 170(2)(d), (3)(b) and *Crimes (Administration of Sentences) Regulation 2014* (NSW) regs 214A(1)(c)(x) and 232B(f)-(h); *Corrections Act 1986* (Vic) s 74(4), (5)(b); *Corrective Services Act 2006* (Qld) ss 200(3), 200A(2)(b)-(c) and 267; *Corrections Act 1997* (Tas) s 72(5), (5A)(a), (d); *Parole Act 1971* (NT) s 5A(3)(b), (4) and *Correctional Services Act 2014* (NT) ss 166(2)(f) and 168-170; *Sentence Administration Act 1913* (WA) ss 20, 27B, 30(c)-(e) and 102; *Correctional Services Act 1982* (SA) s 68(1aaa), (1aa)(b)(ii), (1a)(e).

86 See, eg, *Emergency Management Act 2005* (WA) s 70A; *Police Powers and Responsibilities Act 2000* (Qld) s 348A.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

YBFZ
Plaintiff

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

ANNEXURE TO THE SUBMISSIONS OF THE DEFENDANTS

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, the Defendants set out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in their submissions.

No	Description	Version	Provision(s)
Commonwealth			
1.	*Commonwealth Constitution*	Current	Ch III
2.	*Australian Federal Police Act 1979* (Cth)	Current	ss 14A, 14B, 14D, 14J
3.	*Australian Security Intelligence Organisation Act 1979* (Cth)	Current	Pt III, Div 2, Subdivs D-DA
4.	*Biosecurity Act 2015* (Cth)	Current	Ch 2, Pt 3, Div 3
5.	*Crimes Act 1914* (Cth)	Current	ss 3F, 3G, 3UC, 3UD(1)(b)(i), 3UP, 3V(1), 3W, 3WA, 3ZC, 3ZE, 3ZF, 3ZH, 3ZJ(3)-(4), 3ZZKG(2), 3ZZLD(2)

6.	*Criminal Code* (Cth)	As at 15 November 2006	s 104.5(3)(c)
7.	*Customs Act 1901* (Cth)	Current	ss 203HA(1), 211-211A, 213(1), 219ZG, 219ZJD, 219ZJG(1)
8.	*Defence Act 1903* (Cth)	Current	ss 71R(1)-(2), 71T(2)-(3)
9.	*Migration Act 1958* (Cth)	Current	ss 5, 5A, 5H(2), 13-14, 29, 36(1C), (2C), 41(1), 76, 76C, 76D, 76DA, 76E, 189, 198, 252AA-B, 257A, 501, 504(1)
10.	*Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Cth)	Current	
11.	*Migration Regulations 1994* (Cth)	Current	regs 2.20(18), 2.25AA, 2.25AB, 2.25AD, 2.25AE, 5.35; Sch 2, cll 070.611, 070.612, 070.612A(1)-(2), 070.612B; Sch 8, items 8303, 8513, 8551, 8555, 8556, 8616, 8620, 8621
12.	*Surveillance Devices Act 2004* (Cth)	Current	ss 18, 27D, 27KE, 27KP, 37, 38, 39
13.	*Telecommunications (Interception and Access) Act 1979* (Cth)	Current	ss 9, 10, 30, 31A, 46

State and Territory			
14.	*Amended Declaration of Emergency Situation in High Risk Area – Alice Springs Precinct* (28 March 2024)	As made	
15.	*Bail Act 1977* (Vic)	Current	ss 3(c)-(d), 5AAA(4)(c), (5)
16.	*Bail Act 1980* (Qld)	Current	ss 7(1), 11(2)
17.	*Bail Act 1982* (NT)	Current	ss 3, 16, 27(2), 27A(1)(iaa), (1)(e), (2)(a), 27B
18.	*Bail Act 1982* (WA)	Current	ss 3, 13; Sch 1, Pt D, cll 2(1)(b)-(c), (1a)(a)
19.	*Bail Act 1985* (SA)	Current	ss 3, 5, 11(2), (2aa)
20.	*Correctional Services Act 1982* (SA)	Current	ss 68(1aaa), (1aa)(b)(ii), (1a)(e)
21.	*Correctional Services Act 2014* (NT)	Current	ss 166(2)(f), 168-170
22.	*Corrections Act 1986* (Vic)	Current	s 74(4), (5)(b)
23.	*Corrections Act 1997* (Tas)	Current	s 72(5), (5A)(a), (5A)(d)
24.	*Corrections Regulations 2019* (Vic)	Current	reg 114(1)(g)
25.	*Corrective Services Act 2006* (Qld)	Current	ss 194(1), 200(3), 200A(2), 267
26.	*Crimes (Administration of Sentences) Act 1999* (NSW)	Current	ss 128, 128E 170(2)(d), (3)(b)
27.	*Crimes (Administration of Sentences) Regulation 2014* (NSW)	Current	reg 214A(1A)(b)
28.	*Crimes (Serious Crime Prevention Orders) Act 2016* (NSW)	Current	
29.	*Criminal Organisation Act 2009* (Qld)	Current	

30.	*Declaration of Emergency Situation in High Risk Area – Alice Springs Precinct* (27 March 2024)	As made	
31.	*Emergency Management Act 2005* (WA)	Current	s 70A
32.	*Emergency Management Act 2013* (NT)	Current	s 18(2)
33.	*Parole Act 1971* (NT)	Current	s 5A(3)(b), (4)
34.	*Police Powers and Responsibilities Act 2000* (Qld)	Current	s 348A
35.	*Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) Amendment Order 2021* (NSW)	As enacted	Sch 1, cl 8
36.	*Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW)	As enacted	
37.	*Public Health Act 2010* (NSW)	As at 21 August 2021	s 7
38.	*Public Health and Wellbeing Act 2008* (Vic)	As at 3 August 2020	s 200
39.	*Sentence Administration Act 1913* (WA)	Current	ss 20, 27B, 30(c)-(e), 102
40.	*Serious and Organised Crime (Control) Act 2008* (SA)	Current	
41.	*Stay at Home Directions (Restricted Areas) (No 6)* (Vic)	As enacted	