HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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

10

SUBMISSIONS OF THE PLAINTIFF

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PART I: CERTIFICATION

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

PART II: ISSUES

2 The Minister is empowered under cl 070.612A(1) of Sch 2 of the *Migration Regulations 1994* (Cth) (**Regulations**) to impose, on a Bridging R visa granted to a non-citizen, condition 8620 (**curfew power**) and condition 8621 (**monitoring power**).[1] Are those powers, together or alone, "punitive" and therefore contrary to Ch III of the Constitution?

PART III: SECTION 78B NOTICE

3 The Plaintiff has given notice under s 78B of the *Judiciary Act 1903* (Cth): **SCB 32**.

PART IV: FACTS

4 The Plaintiff is a stateless refugee who arrived in Australia as a child in 2002, as the holder of a permanent refugee visa: **SCB 63 [3], [5]**. In 2017, he was sentenced to an aggregate term of imprisonment of 18 months, and his visa was cancelled: **SCB 64 [15]-[16]**. From 12 April 2018 (when he was released from prison) until 23 November 2023, he was detained under s 189 of the Act: **SCB 64 [17], 66 [29]**. The Plaintiff was then granted four Bridging R (class WR; subclass 070) visas; but they never had legal effect.[2] The Plaintiff has since been granted three such visas, each with the curfew condition and electronic monitoring condition imposed: **SCB 69-70 [46]-[51]**.

5 The last and current visa was granted by a delegate under reg 2.25AB(2) of Regulations on 2 April 2024: **SCB 70 [52]**. The delegate was required to impose twenty conditions on that visa.[3] The delegate was also *required* to impose each of the curfew condition and the monitoring condition, unless she was satisfied that it was *not* "reasonably necessary to impose that condition for the protection of any part of the Australian community".[4] The Plaintiff must comply with the curfew and monitoring conditions for one year from the date the visa was granted.[5] Failure to comply with either condition is an offence, requiring a minimum sentence of one year imprisonment with a maximum of 5 years imprisonment.[6]

PART V: ARGUMENT

A INTRODUCTION

6 Every State and Territory now has a sentencing regime under which a *court* — as part of the adjudgment and punishment of criminal guilt — may impose "curfew" and/or

1 See Regulations, regs 2.05, 2.25AA, 2.25AB, Sch 8 items 8620, 8621.
2 Because the decisions were affected by jurisdictional error: see **SCB 66-69 [32], [36], [39], [44]-[45], [48]**.
3 Regulations, Sch 2, cll 070.611, 070.612(1), 070.612B(2). See Notice of visa grant and conditions: **SCB 479**.
4 Regulations, cl 070.612A(1).
5 Unless granted a further visa that removes, or again includes, those conditions: Regulations, reg 2.25AE.
6 Subject to a reasonable excuse defence: *Migration Act 1958* (Cth) (**Act**), ss 76C, 76D, 76DA.

"electronic monitoring" conditions.[7] The imposition of such conditions in that context is necessarily "punitive" in character. Here, the *executive* may impose such conditions. They are not imposed as part of the adjudgment and punishment of criminal guilt. But their imposition by the Minister is nonetheless "punitive".

7 The curfew power is prima facie punitive, either because it authorises "detention in custody" (**Part C(1)**) or a severe restriction on liberty (**Part C(2)**). The monitoring power is prima facie punitive because it authorises a severe interference with bodily integrity and privacy (**Part D(1)**). The powers do not have a "non-punitive" or "legitimate" purpose (**Parts C(3)-(4); D(2)**). If a legitimate non-punitive purpose can be identified, the powers are not "reasonably capable of being seen as necessary" for such a purpose (**Parts C(5); D(3)**). The powers are properly characterised as "punitive" and therefore infringe Ch III.

8 The contrary conclusion would have far-reaching consequences. For Ch III purposes, the only difference between an alien and a non-alien is that an alien is "vulnerable" to exclusion or deportation. Therefore, an alien may be detained for the purpose of: (1) enabling a visa application to be made and considered; or (2) removal.[8] Chapter III otherwise applies equally to aliens and non-aliens.[9] The powers do not have either of those legitimate non-punitive purposes, noting they can only be exercised with respect to aliens for whom there is no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future.[10] Thus, if the powers are valid, Ch III will not stop the Commonwealth, State and Territory Parliaments[11] from enacting equivalent powers for non-aliens.

B CONSTITUTIONAL PRINCIPLES

9 "The Constitution is structured upon, and incorporates, the doctrine of the separation of judicial from executive and legislative powers".[12] The doctrine ensures the existence of

7 See *Crimes (Sentencing Procedure Act) 1999* (NSW), ss 7, 8, 73A(2)(b)-(c), 89(2)(a); *Sentencing Act 1991* (Vic), ss 37, 47, 48I, 48LA; *Sentencing Act 2017* (SA), ss 81, 82(2)(b); *Sentencing Act 1995* (WA), ss 69, 72, 75, 76A; *Sentencing Act 1997* (Tas), ss 42AN, 42AP(1)(m); *Sentencing Act 1995* (NT) ss 31, 34(1)(c), 45, 48(1)(d), with *Sentencing Regulations 1996* (NT), reg 5; *Crimes (Sentencing) Act 2005* (ACT) s 11, with *Crimes (Sentence Administration) Act 2005* (ACT), ss 41, 56-58. See also *Youth Justice Act 1992* (Qld), ss 175, 193, 203-204, 220-221.

8 See ***NZYQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at [29], [31], [72] (the Court).

9 See *NZYQ* (2023) 97 ALJR 1005 at [27], see also at [71] (the Court); ***Vasiljkovic*** *v Commonwealth* (2006) 227 CLR 614 at [83]-[84] (Gummow and Hayne JJ).

10 See Regulations, regs 2.20(18), 2.25AA(1), 2.25AB(1), Sch 2 item 070.612A(4); **SCB 65-66 [22]-[23], [31]**. Moreover, there are other conditions concerned, in a general way, with matters relevant to the person's location in the event there becomes a prospect of removal: see Sch 8 items 8513, 8541, 8542, 8543, 8561, 8614, 8625.

11 As to States and Territories, see *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at [14] (the Court).

12 *Chu Kheng* ***Lim*** *v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 26 (Brennan, Deane and Dawson JJ).

"an independent and impartial judicial branch of government to enforce lawful limits on the exercise of public power".[13] That "checking" role has historically included the determination of the rights of individuals free from the influence of the Parliament and the Executive.[14] The doctrine thereby serves (at least) two constitutional objectives: "the guarantee of liberty and, to that end, the independence of Ch III judges".[15] By that doctrine, the Parliament is prohibited from conferring upon the Executive any part of the "judicial power of the Commonwealth". That power cannot be exhaustively defined. But there are some functions which "have become established as essentially and exclusively judicial", including the "adjudgment and punishment of criminal guilt".[16] A law that vests *any part* of that function in the Executive will be invalid — including any law that confers a power "to impose a measure that is properly characterised as penal or punitive", even if its terms "divorce" the measure from the adjudgment and punishment of criminal guilt.[17] Put simply, Ch III requires "punishment to be imposed by a court if it is to be imposed at all".[18]

10 That directs attention to the question of whether a power conferred upon the Executive is properly characterised as "punitive".[19] Not "all hardship or distress inflicted upon a [person] by the State constitutes a form of punishment" in the relevant sense.[20] There are, however, two potential pathways to reaching the conclusion that a particular form of detriment is, on its face, punitive in character. ***First***, because the "involuntary deprivation of liberty … ordinarily constitutes punishment",[21] the "default characterisation" of a power to impose "detention in custody" is punitive.[22] ***Second***, a power may be characterised as punitive having regard to the "nature and severity of the consequences" of an exercise of the power.[23] The inquiry can be understood as directed to whether the exercise of the power

[13] *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [104] (Hayne, Crennan, Kiefel and Bell JJ)

[14] ***Vella*** *v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [140], see also [151] (Gageler J); *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899 (***Benbrika [No 2]***) at [36]-[38] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [52], [67]-[68] (Gordon J).

[15] ***Wilson*** *v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11-12 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

[16] *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).

[17] See *Benbrika [No 2]* (2023) 97 ALJR 899 at [34]-[35], see also [36] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

[18] *Benbrika [No 2]* (2023) 97 ALJR 899 at [45] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

[19] ***Jones*** *v Commonwealth* (2023) 97 ALJR 936 at [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

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

[21] ***NZYQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at [28] (the Court). See also ***Garlett*** *v Western Australia* (2022) 96 ALJR 888 at [124]-[135] (Gageler J), [176] (Gordon J).

[22] *NZYQ* (2023) 97 ALJR 1005 at [40] (the Court).

[23] *Benbrika [No 2]* (2023) 97 ALJR 899 at [21] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), see also at [109], [112] (Edelman J), [141], [144] (Steward J); ***Alexander*** *v Minister for Home Affairs* (2022) 276 CLR 336 at [166] (Gordon J); *Jones* (2023) 97 ALJR 936 at [76] (Gordon J), [149] (Edelman J).

will have a punitive *effect*. The imposition of a detriment with a punitive effect permits an initial "inference to be drawn that, for some reason, the legislature wishes to punish the person".[24] It is by this second pathway that the Court has held that a power to "strip a person of Australian citizenship" is prima facie punitive.[25]

11 There are, however, circumstances in which a power will "escape characterisation as punishment" notwithstanding its apparent punitive character.[26] To do so, three conditions must be satisfied: ***first***, the purpose of the power must be identified as "non-punitive"; ***second***, the identified non-punitive purpose must be "legitimate"; and ***third***, the power must be "reasonably capable of being seen as necessary" for that purpose.[27] If those
10 conditions are met, the detriment imposed by an exercise of the power will be "justified".[28]

C VALIDITY OF THE CURFEW POWER

12 At the outset, it must be emphasised that while we have used the term "curfew", that is a label is for convenience only. Here, it is requirement that, between 10pm and 6am (or between such other times, not exceeding an 8-hour period specified in writing by the Minister) every day, an identified person remain at an address notified to the Minister.[29] The requirement is an *individualised* form of *confinement* to a single location for a period of time. That is distinct from restrictions that apply to the population *generally* (or a subset thereof), and those that *exclude* persons from specified geographic areas.[30]

(1) The curfew power is prima facie punitive

20 ***What is "detention in custody"?***

13 As formulated in *Lim*, "the detention of a citizen in custody by the State is penal or punitive in character".[31] The reference to "the State" in that formulation serves to identify that the detention involves the "exercise of governmental power".[32] However, the role of the words "in custody" in the *Lim* formulation is less clear. It may be that they are redundant, and that

[24] See *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [24] (Kiefel CJ, Bell, Keane and Edelman JJ). See also *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 471-472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

[25] See *Jones* (2023) 97 ALJR 936 at [39] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [76] (Gordon J), [155] (Edelman J).

[26] *Jones* (2023) 97 ALJR 936 at [49] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

[27] *NZYQ* (2023) 97 ALJR 1005 at [40]-[41] (the Court). See also *Jones* (2023) 97 ALJR 936 at [38]-[39] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [63] (Gordon J), [148]-[149] (Edelman J), [188] (Steward J).

[28] See *Jones* (2023) 97 ALJR 936 at [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [78] (Gordon J), [153] (Edelman J); *NZYQ* (2023) 97 ALJR 1005 at [39] (the Court).

[29] Regulations, Sch 8, condition 8620.

[30] Compare **SCB 90-94 [137], [139], [141], [142], [144], [145], [147], [148].**

[31] *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).

[32] ***Plaintiff M68****/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [30] (French CJ, Kiefel and Nettle JJ), see also [239] (Keane J); *Garlett* (2022) 96 ALJR 888 at [294] (Gleeson J).

the formulation could instead have referred to "detention by the State". Consistent with that possibility, it has been suggested that to focus too much on the words "in custody" may "distract attention" from the "fundamental point to which *Lim* is directed", namely the power to "deprive" a person of their liberty.[33] There is considerable force in that suggestion, given it is the deprivation of liberty that ordinarily constitutes punishment.[34]

14 To the extent that the words "in custody" have utility, the words can be understood as conveying "the notion of dominance and control of the liberty of the person, and the state of being guarded and watched to prevent escape".[35] So understood, they serve to emphasise that Ch III is concerned not only with "detention" in prison (which is the classic example of a deprivation of liberty), but with any factual situation in which the State exercises control over a person's liberty to a sufficient degree to amount to a deprivation of liberty.[36] Whether that degree of control exists is a question that will depend on all of the circumstances, which must be approached as a matter of substance and not mere form.[37]

15 That approach accords with the reliance in *Lim* on Blackstone's explanation that "[t]he confinement of the person, *in any wise*, is an imprisonment" (our emphasis) and "[s]o that the keeping [of] a man against his will … is an imprisonment".[38] In that way, "detention" for the purpose of Ch III can be understood to align with the common law principles that ground a claim for false "imprisonment". The alignment recognises that both the tort and Ch III are directed to protecting the right to liberty, including from the Executive.[39]

16 The essence of a claim in false imprisonment is the "compelling of a person to stay at a particular place against his or her will".[40] There must be a "total restraint" on the person's liberty.[41] But that does not mean "a restriction short of lock and key may not be actionable".[42] There will be an "imprisonment" whether the restraint of liberty be "*in a man's owne house*, as well as in the common gaole … *so long as he hath not his liberty freely to goe at all times to all places* whither he will without baile or main, prise or

[33] *Plaintiff M68* (2016) 257 CLR 42 at [356] (Gordon J).
[34] *NZYQ* (2023) 97 ALJR 1005 at [28] (the Court).
[35] *Eatts v Dawson* (1990) 21 FCR 166 at 179 (Morling and Gummow JJ), see also at 190 (Beaumont J); *R v Montgomery* [2007] EWCA Crim 2157 at [9], [12], [14] ("custody" involves "direct control of another").
[36] See *Vasiljkovic* (2006) 227 CLR 614 at [35] (Gleeson CJ).
[37] *NZYQ* (2023) 97 ALJR 1005 at [28] (the Court).
[38] *Lim* (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ).
[39] See *Ruddock v Taylor* (2005) 222 CLR 612 at [138]-[139] (Kirby J); ***Lewis*** *v Australian Capital Territory* (2020) 271 CLR 192 at [24]-[25] (Gageler J), [45] (Gordon J); *R* ***(Jalloh)*** *v Secretary of State for the Home Department* [2021] AC 262 at [33] (Lady Hale for the Court).
[40] ***McFadzean*** *v Construction, Forestry, Mining and Energy Union* (2007) 20 VR 250 at [41] (the Court).
[41] ***Darcy*** *v NSW* [2011] NSWCA 413 at [145] (Whealy JA); *McFadzean* (2007) 20 VR 250 at [31] (the Court).
[42] *McFadzean* (2007) 20 VR 250 at [42] (the Court). See also *Darcy* [2011] NSWCA 413 at [145] (Whealy JA).

otherwise".[43] Importantly, the requirement for "total restraint" does not imply the "the use of physical force"; it is "sufficient that there be submission to the control of another where the person is given to understand that he must submit or else will be compelled".[44] Consistently with Ch III's focus on substance over form, it is always a "question of fact as to whether a restriction is so severe as to be characterised as false imprisonment".[45]

The curfew condition imposes "detention in custody"

17 For the 8-hour period during which the curfew condition is in effect, the Commonwealth exercises total control over the Plaintiff's liberty, so as to amount to "detention in custody". For those 8 hours — the selection of which are either dictated by the Regulations or otherwise at the open-ended discretion of the Executive — the circumstances are: (a) he must reside at the location; (b) because of the monitoring condition, the exit from that location is permanently monitored by private security;[46] (c) it is an offence to leave the location (punishable by up to 5 years imprisonment, with a mandatory minimum of one year imprisonment); (d) if the person leaves the location, an automatic alert is generated that will result in notification to the ABF; and (e) the AFP can arrest the person for the commission of the breach.

18 In substance, those circumstances are indistinguishable from those considered in *Plaintiff M68*.[47] There, the Court held that the plaintiff was in "detention" where: (a) she was required to reside at the regional processing centre; (b) the exit from centre was permanently monitored by private security staff; (b) private security staff could *not* physically restrain the plaintiff from leaving the centre; (c) however, it was an offence to leave, or attempt to leave, the centre without prior approval (punishable by up to six months imprisonment); and (d) the relevant legislation specifically provided that a police officer could arrest a person for that offence.[48]

19 The conclusion also accords with recent jurisprudence in the United Kingdom. In *Jalloh*,

[43] *Meering v Grahame-White Aviation Co Ltd* (1919) 122 LT 44 at 51 (Duke LJ). See also *Myer Stores Ltd v Soo* [1991] 2 VR 597 at 599 (Murphy J); *The Public Advocate v C, B* (2019) 133 SASR 353 at [67] (Kourakis CJ).

[44] *McFadzean v Construction, Forestry, Mining and Energy Union* [2004] VSC 289 at [89] (Ashley J), approved in *McFadzean* (2007) 20 VR 250 at [31] (the Court). A restraint of this kind will found the issue of a writ of habeas corpus (although restraints short of "imprisonment" may also suffice): see *Ruddock v Vadarlis* (2001) 110 FCR 491 at [69] (Black CJ), [208]-[210] (French J); *Antunovic v Dawson* (2010) 30 VR 355 at [113] (Bell J); *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602 at [54] (Allsop CJ).

[45] *McFadzean* (2007) 20 VR 250 at [42] (the Court).

[46] **SCB 76 [77], [80], 80 [95(f)], 82 [100], 83 [104], [105]**.

[47] (2016) 257 CLR 42.

[48] See *Plaintiff M68* (2016) 257 CLR 42 at [8], [32]-[33] (French CJ, Kiefel and Nettle JJ), [168]-[170] (Gageler J), [310], [318]-[320], [354]-[356] (Gordon J).

the Supreme Court accepted that a curfew imposed by the Secretary upon a person for 8-hours a day amounted to imprisonment at common law. As the Court explained:[49]

> The essence of imprisonment is being made to stay in a particular place by another person. The methods which might be used to keep a person there are many and various. They could be physical barriers, such as locks and bars. They could be physical people, such as guards who would physically prevent the person leaving if he tried to do so. They could also be threats, whether of force or of legal process.

20 As it happened, the person in that case was also subject to a monitoring condition.[50] But as the above passage makes clear, "threats" of "legal process" — such as prosecution of an
10 offence — can be sufficient to confine a person to a particular place.[51] Thus, the Plaintiff would be in a form of detention sufficient to engage Ch III even in the absence of the monitoring condition:[52] the threat of punishment for an offence with a mandatory period of imprisonment (and subsequent arrest by the Executive) would be sufficient. Moreover, a person could reasonably expect that, in the absence of electronic monitoring, other compliance activities (including physical "curfew checks"[53]) would be conducted.

The curfew in Thomas v Mowbray

21 It is necessary to say something about ***Thomas*** *v Mowbray*.[54] The case concerned the validity of Div 104 of the *Criminal Code* (Cth), which relevantly empowered a court to make an "interim control order" in connection with the prevention of terrorist acts. Among
20 other things, such an order could include "a requirement that the person remain at specified premises between specified times each day, or on specified days".[55] Mr Thomas was subject to such a requirement, requiring him to remain at his place of residence between midnight and 5:00am.[56] Mr Thomas challenged the validity of the scheme, including on the basis that it infringed Ch III because "the restriction on liberty involved in the power to make a control order is penal or punitive in character" and exists "only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt".[57] In rejecting

[49] *Jalloh* [2021] AC 262 at [24].
[50] *Jalloh* [2021] AC 262 at [6]-[7].
[51] See *R v Rumble* [2003] EWCA Crim 770, cited in *Jalloh* [2021] AC 262 at [24].
[52] This issue is raised by the terms of the questions in the Special Case, and it may be appropriate for the Court to resolve it. It "cannot be said that the question may never arise", but rather the "liklihood of the question arising is obvious": see ***Clubb*** *v Edwards* (2019) 267 CLR 171 at [36] (Kiefel CJ, Bell and Keane JJ). It can be inferred from the repeated impositions of both conditions on the Plaintiff that, if one condition were invalid, the other condition would still be imposed (noting also that the curfew has been imposed alone on other individuals: **SCB 74 [71(b)]**).
[53] **SCB 85 [113]**.
[54] (2007) 233 CLR 307.
[55] See *Criminal Code* (Cth), s 104.5(3)(c) (compilation prepared 15 November 2006).
[56] See *Thomas* (2007) 233 CLR 307 at [2] (Gleeson CJ), [554] (Callinan J).
[57] *Thomas* (2007) 233 CLR 307 at [18] (Gleeson CJ), see also at [115] (Gummow and Crennan JJ).

that argument, a majority of the Court drew a distinction between the restraints on liberty that might be imposed under a control order and "detention in custody".[58]

22 That reasoning cannot be taken too far. Read literally, "a requirement that the person remain at specified premises between specified times each day" could extend to a requirement that the person remain at a specified premises at all times each day. Given Ch III's focus on substance, it is difficult to comprehend why such a deprivation of liberty — which might be labelled "home detention"[59] — should be distinguished from "detention in custody". It must also be recalled that the Court in *Thomas* approached the question at a high-level: their Honours gave no specific consideration to Mr Thomas's particular "curfew" requirement, nor to any of the matters discussed at paragraphs 13 to 16 above.

23 Nonetheless, to the extent that *Thomas* stands for the proposition that a "curfew" restraint is not "detention in custody" (such that either the *Lim* principle does not apply at all or applies in some attenuated form), it should be re-opened:[60] *first*, it did not rest on a principle carefully worked out in a significant succession of cases; indeed, at the time, the *Lim* principle was less well understood than it is now;[61] *second*, there were two sets of substantive reasons (Gleeson CJ, and Gummow and Crennan JJ) which differ in emphasis and contain only very brief reasoning; *third*, in so far as the reasoning erects an artificial distinction between imprisonment and other substantial restraints on liberty based on form, rather than substance, it has "achieved no useful result" but has the potential to lead to "considerable inconvenience"; and, *fourth*, although it remains to be seen whether the Commonwealth can identify any specific legislative or administrative reliance that militates against reconsideration,[62] it is not apparent to the Plaintiff that this aspect of *Thomas* has been independently acted upon in that way. Even if it has, then overruling it would cause no disruption: *Benbrika [No 1]* reveals that the scheme would not infringe Ch III even if the distinction was not drawn. That final point means that the result in *Thomas* need not be overruled.[63]

(2) Curfew is otherwise punitive

24 If the restriction on liberty authorised by the curfew power is not properly described as

[58] *Thomas* (2007) 233 CLR 307 at [18] (Gleeson CJ), [116] (Gummow and Crennan JJ). Callinan J and Heydon J relevantly agreed with Gummow and Crennan J; Heydon J also relevantly agreed with Gleeson CJ.
[59] *Vella* (2019) 269 CLR 219 at [53] (Bell, Keane, Nettle and Edelman JJ).
[60] See *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [65]-[71] (French CJ).
[61] In *NZYQ* (2023) 97 ALJR 1005 at [34], the Court noted that since 2004 the principle had been "repeatedly acknowledged and frequently applied", but only one example predated 2013: *Woolley* (2004) 225 CLR 1.
[62] Cf *NZYQ* (2023) 97 ALJR 1005 at [19]-[22], [36] (the Court).
[63] See *Vunilagi v The Queen* (2023) 97 ALJR 627 at [165] (Edelman J).

"detention in custody" (because of *Thomas* or otherwise), it nonetheless ought to be concluded that power is prima facie punitive because of the "*nature* and *severity* of the consequences" of its exercise (see paragraph 10 above). That is a question of "fact and degree" that requires an evaluative judgment.[64] Again, the judgment must focus on matters of substance, having regard to the legal and practical operation of the law.

25 The *nature* of the detriment imposed by a curfew power involves an infringement of the right to liberty, properly described as the most "elementary and important" right.[65] Accordingly, infringement of that right is of a "different order" to the loss of a statutory licence (for example).[66] As to *severity*, on any view, the infringement of that right is "substantial".[67] For a third of every day, the person is confined to a particular address. Further, the threat of prosecution and mandatory imprisonment[68] — even for a minor breach such as arriving home a few minutes late — hangs over the person like the sword of Damocles.[69] There is no reason why that degree of deprivation of liberty should not, at this stage of the analysis, be treated as prima facie punitive and therefore as requiring further justification.

(3) Is the purpose of the curfew power non-punitive?

26 The purpose of the curfew power must be "identified at an appropriate level of generality".[70] In this area of constitutional discourse, the purpose is that which the law is "designed to achieve in fact".[71] There is no express statement of purpose in the Act or the Regulations.[72] The purpose must therefore be identified by reference to other textual and contextual considerations.[73] Having regard to the criterion that governs the exercise of the power, its purpose can be identified as the "protection of the community" (or part thereof). There is nothing in the text or context of the Act or Regulations to permit the identified

64 See *Cole v Whitfield* (1988) 165 CLR 360 at 407-408 (the Court); *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [48] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

65 *Trobridge v Hardy* (1955) 94 CLR 147 at 153 (Fullagar J).

66 See *Alexander* (2022) 276 CLR 336 at [74], [77] (Kiefel CJ, Keane and Gleeson JJ); *Benbrika [No 2]* (2023) 97 ALJR 899 at [22] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [63] (Gordon J). Compare *Duncan v NSW* (2015) 255 CLR 388 at [41] (the Court).

67 See *Antunovic v Dawson* (2010) 30 VR 355 at [99], [173] (Bell J).

68 Act, ss 76C, 76DA. If a person is charged with breaches over different days (see, eg, **SCB 68 [42]**), the mandatory one year imprisonment may apply for *each day*: see *Crimes Act 1914* (Cth) s 4K.

69 See *Jones* (2023) 97 ALJR 936 at [203] (Steward J).

70 *NZYQ* (2023) 97 ALJR 1005 at [40] (the Court).

71 *NZYQ* (2023) 97 ALJR 1005 at [40] (the Court), see also at [53] (Edelman J).

72 Cf *Thomas* (2007) 233 CLR 307 at [43] (Gummow and Crennan JJ); *Minister for Home Affairs v Benbrika* (***Benbrika [No 1]***) (2021) 272 CLR 68 at [7] (Kiefel CJ, Bell, Keane and Steward JJ); *Alexander* (2022) 276 CLR 336 at [120] (Gageler J); *Garlett* (2022) 96 ALJR 888 at [15] (Kiefel CJ, Keane and Steward JJ).

73 See *Alexander* (2022) 276 CLR 336 at [114]. See also *Brown* (2017) 261 CLR 328 at [208]-[209] (Gageler J); *Clubb* (2019) 267 CLR 171 at [186] (Gageler J).

purpose to be recast at any more specific level.[74] The legislative history and extrinsic materials do little (if anything) to assist. At best, that material repeats what is evident from the criterion itself, referring to abstract notions such as "risk … to the Australian community" and the "legitimate objective of community safety".[75]

27 One difficulty with that identification of purpose is that it is stated at a level of generality that makes it difficult (if not impossible) to describe the purpose as "non-punitive". The distinction between a "punitive" and a "protective" purpose is "elusive".[76] The problem that causes for a purpose articulated in very broad terms is illustrated by *Alexander*. The purpose of the law was said to be "to protect the Australian community from an Australian citizen found to have contravened a statutory norm".[77] Gageler J explained that to say that the law has that purpose is to "say nothing to indicate that the law has a purpose that is 'protective' in a sense meaningfully distinct from a purpose that is 'penal or punitive'".[78] His Honour continued:[79]

> That is because protection of the community from a citizen found to have contravened a statutory norm is a concept of such elasticity that it is not necessarily inconsistent with the imposition on that citizen of a criminal punishment following an adjudication of criminal guilt — a function which lies in the heartland of judicial power.

28 Here, in terms, the provisions do not even operate by reference to whether the person has contravened any statutory norm. There is merely a free-floating concept of "protection". That is an even more elastic concept than the purpose in *Alexander*, and gives rise to the same problem there identified by Gageler J.

29 There is some suggestion in the extrinsic material that the curfew condition is directed to preventing "future offending" because of a person's "background and past conduct, including criminal offending".[80] If those ideas can sensibly be incorporated into the identification of the purpose of the curfew power (which the Plaintiff denies), then again the problem identified by Gageler J arises. Indeed, the problem is compounded because any link between the power and past offending is so abstract and ill-defined that, if anything, it tends to suggest that, in truth, the person is being punished again for offences

74 Cf *Benbrika [No 1]* (2021) 272 CLR 68 at [87] (Gageler J).
75 See, eg, Explanatory Statement, Migration Amendment (Bridging Visa Conditions) Regulations 2023, at 1, 11.
76 *Rich v ASIC* (2004) 220 CLR 129 at [32] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). See also *Alexander* (2022) 276 CLR 336 at [75] (Kiefel CJ, Keane and Gleeson JJ), [107]-[113] (Gageler J); *Jones* (2023) 97 ALJR 936 at [94] (Gordon J); *Benbrika [No 1]* (2021) 272 CLR 68 at [183] (Edelman J).
77 *Alexander* (2022) 276 CLR 336 at [111], see also at [99] (Gageler J).
78 *Alexander* (2022) 276 CLR 336 at [111] (Gageler J).
79 *Alexander* (2022) 276 CLR 336 at [111] (Gageler J).
80 *Parliamentary Debates*, House of Representatives (16 November 2023) at 8318, see also 8317.

that they have previously committed.[81] It is further compounded because the power is exercisable only in relation to a small (unpopular) minority of people, defined by a status bearing no rational connection to the asserted protective purpose.[82]

30 The difficulty in identifying any meaningful non-punitive purpose should lead to the conclusion that the Court cannot be satisfied that the curfew power has such a purpose. In that event, no further analysis will be required: if the law is prima facie punitive, and there is no identified non-punitive purpose, it will infringe Ch III. Alternatively, if it is accepted that it is "plausible" that purpose of the law is the "protection of the community", then that can be tested at the later stage of asking whether the law is reasonably capable of being seen as necessary to advance that purpose.[83]

(4) Is the purpose of the curfew power "legitimate"?

31 For a purpose to be "legitimate", it must be "compatible with the constitutionally prescribed system of government".[84] That directs attention to the "values to be protected" by the underlying constitutional principle, including the judicial protection of liberty.[85] The function of this step, accepted by all members of this Court in *NZYQ*, is to ensure that "exceptional" cases continue to be regarded as "exceptional".[86] It recognises that, under our system of government, "the permissible means of inflicting State-sanctioned punishment" are limited.[87] And it "serves to emphasise that a legislative objective sought to be pursued by means of involuntary detention is not automatically to be accepted as compatible with the constitutionally prescribed system of government merely because that objective can be characterised as non-punitive".[88]

32 The "protection of the community", without more, is not a "legitimate" object for the purposes of Ch III. If an object stated at that level of generality could be described as "legitimate", it would undermine the very point of the "legitimacy" requirement. It would permit the legislature so much latitude that the exceptions would become the rule. [89]

81 See *Alexander* (2022) 276 CLR 336 at [165] (Gordon J), [239]-[249] (Edelman J).
82 See ***Fardon*** *v Attorney-General (Qld)* (2004) 223 CLR 575 at [126], [135], [143] (Kirby J).
83 See ***Brown*** *v Tasmania* (2017) 261 CLR 328 at [216] (Gageler J).
84 *NZYQ* (2023) 97 ALJR 1005 at [40] (the Court). See also *Garlett* (2022) 96 ALJR 888 at [144] (Gageler J).
85 See *Benbrika [No 1]* (2021) 272 CLR 68 at [78] (Gageler J); *Benbrika [No 2]* (2023) 97 ALJR 899 at [51] (Gordon J); and paragraph 9 above.
86 *NZYQ* (2023) 97 ALJR 1005 at [40] (the Court). See also *Garlett* (2022) 96 ALJR 888 at [134], [140] (Gageler J), [174], [179], [198]-[200] (Gordon J).
87 See *Benbrika [No 1]* (2021) 272 CLR 68 at [84] (Gageler J).
88 *Garlett* (2022) 96 ALJR 888 at [144] (Gageler J), see also at [174], [199] (Gordon J); *Benbrika [No 2]* (2023) 97 ALJR 899 at [97] (Edelman J).
89 *Garlett* (2022) 96 ALJR 888 at [148] (Gageler J).

33 *Thomas* and *Benbrika [No 1]* do not hold otherwise. Both were decided before the significance of the "legitimacy" step in the analysis was fully appreciated.[90] Both involved laws that were, at one level, directed to the "protection of the community". However, identified at the appropriate level of specificity for Ch III analysis and in light of the "legitimacy" requirement, the purpose of those laws is properly understood as being to protect the community from the type of *harm* that might be caused by a person engaging in terrorist acts (*Thomas*)[91] or by a person committing particular terrorism offences (*Benbrika [No 1]*).[92] Put another way, the purpose of those laws was to prevent specifically identified conduct from occurring so as to ensure "the safety and protection of the community from the risk of harm posed by the threat of terrorism", recognising that "[t]errorism poses a singular threat to society".[93]

34 That type of analysis cannot be applied to the curfew power. The question that immediately arises is: from what is the community to be protected? There is nothing in the Act or Regulations that answers that question. There is no identification of any act or criminal offence that is sought to be prevented by the imposition of a curfew. It therefore cannot be said that the purpose of the curfew power is to protect the community from any particular kind of harm. In the absence of being able to articulate such a purpose, it cannot be said that the purpose is "legitimate".

35 In any event, the better understanding of the purpose of the laws in *Thomas* and *Benbrika* cases is that they are directed to the prevention of harm — arising from the commission of specific acts or specific offences — that can be characterised as "grave and specific".[94] If that understanding of what constitutes a "legitimate" object is correct, *Thomas* and *Benbrika [No 1]* are even further removed from the present case.

(5) Reasonably capable of being seen as necessary?

36 Even if the purpose of the curfew power is non-punitive *and* legitimate, the power is not "reasonably capable of being seen as necessary" for that purpose. The analysis "requires an assessment of both means and ends, and the relationship between the two".[95] There are

[90] Although both were concerned with laws conferring judicial power, for present purposes, we assume that the "legitimacy" requirement applies similalry.

[91] See *Benbrika [No 1]* (2021) 272 CLR 68 at [91] (Gageler J).

[92] See *Garlett* (2022) 96 ALJR 888 at [46], [48] (Kiefel CJ, Keane and Steward JJ), [313] (Gleeson J).

[93] See *Garlett* (2022) 96 ALJR 888 at [152] (Gageler J).

[94] *Garlett* (2022) 96 ALJR 888 at [139], [148]-[152], [154] (Gageler J), [189]-[190] (Gordon J); see also at [46] (Kiefel CJ, Keane and Steward JJ), [207], [263]-[266], [270], [282]-[283] (Edelman J), [310]-[313] (Gleeson J).

[95] *NZYQ* (2023) 97 ALJR 1005 at [44].

no fixed techniques for conducting that analysis.[96] It is evident, however, that the concern is with a degree of "proportionality" between means and ends.[97] As such, techniques and "tools of analysis" that have been utilised in other constitutional contexts (domestic and foreign) *may* assist,[98] so long as they are applied in a manner that is appropriate for this constitutional context.[99] The analysis is "ultimately directed to a single question of characterisation (whether the power is properly characterised as punitive)".[100]

37 Utilising a familiar tool, it can be accepted that the curfew power has a "rational connection" to the purpose of protecting the community. The "means for which it provides are capable of realising that purpose"[101] because "[r]estraining any person's liberty will always lessen that person's opportunity" to commit an act that may harm the community.[102] However, the following four matters demonstrate the curfew power is not reasonably capable of being seen as necessary for the purpose of protecting the community.

38 *First*, in some cases, a "reasonably necessary" criterion might assist in ensuring a statutory power conforms with a constitutional limit that is bounded by a proportionality requirement.[103] This is not such a case. The curfew power is not "calibrated to the constitutional test"[104] because the curfew condition *must* be imposed, subject only to the Minister's positive satisfaction of a negative (ie. the condition is *not* reasonably necessary to protect the community). If the Minister lacks information or if the predictive evaluative task is inconclusive, he or she must impose the curfew condition regardless of whether the community requires protection from the person. The Minister makes no "decisive evaluation" in those circumstances.[105] Rather, the default position set by the Regulations — that the curfew condition will be imposed — will prevail. That can be contrasted with existing "preventive justice" schemes that require the government party to discharge a burden of proof in order to have a condition imposed.[106] Moreover, here the Minister

[96] *Jones* (2023) 97 ALJR 936 at [44] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).
[97] See *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at [57]-[62] (French CJ).
[98] See *Jones* (2023) 97 ALJR 936 at [151]-[152] (Edelman J).
[99] *Jones* (2023) 97 ALJR 936 at [44] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).
[100] *NZYQ* (2023) 97 ALJR 1005 at [44] (the Court).
[101] *Comcare v Banerji* (2019) 267 CLR 373 at [33] (Kiefel CJ, Bell, Keane and Nettle JJ). See also ***McCloy*** *v NSW* (2015) 257 CLR 178 at [132]-[133] (Gageler J); *Brown* (2017) 261 CLR 328 at [323] (Gordon J).
[102] See *Vella* (2019) 269 CLR 219 at [186] (Gordon J).
[103] See, eg, *Wotton v Queensland* (2012) 246 CLR 1 at [32] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
[104] Cf Stellios, "*Marbury v Madison:* Constitutional limitations and statutory discretions" (2016) 42 *Australian Bar Review* 324 at 335.
[105] Cf *Garlett* (2022) 96 ALJR 888 at [55], [72] (Kiefel CJ, Keane and Steward JJ).
[106] See *Thomas* (2007) 233 CLR 307 at [30] (Gleeson CJ); *Benbrika [No 1]* (2021) 272 CLR 68 at [10]-[11], [40] (Kiefel CJ, Bell, Keane and Steward JJ); *Fardon* (2004) 223 CLR 575 at [95]-[97] (Gummow J), [225] (Callinan and Heydon JJ); *Garlett* (2022) 96 ALJR 888 at [17] (Kiefel CJ, Keane and Steward JJ).

retains no residual discretion to *not* impose the condition.

39 *Second*, the lack of residual discretion may be of little moment where the decision-maker is able to undertake a meaningful balancing process.[107] That is not the case here. A "reasonably necessary" criterion might ordinarily import a "balancing" process. But there are no relevant parameters by which the Minister may evaluate the likelihood that the curfew will protect the community from particular conduct or harm or the seriousness of the harm that might be caused by that conduct.[108] No mandatory relevant considerations are specified.[109] There is no requirement that the person has engaged in particular conduct or offending in the past.[110] Nor is there any identification of what degree of *risk* the curfew power is designed to protect against.[111] The "reasonably necessary" criterion may allow for consideration of the severity of the interference with the individual's rights, but there are no firm matters against which to weigh that interference. The balancing process is left adrift. That sets the curfew power apart from the rigorous evaluative exercises that are required under existing schemes that have been upheld by the Court in the past.[112]

40 *Third*, the period for which the curfew condition is imposed is set at one year. While the Minister may choose to grant a further visa without the condition sooner, the Minister may equally grant another visa with the curfew condition, resetting the one year period.[113] With the deficiencies at paragraphs 38-39 besetting those subsequent decisions, a person may be subject to the curfew condition indefinitely, without meaningful periodic review.[114]

41 *Finally*, there is no requirement to afford procedural fairness before the power is

[107] See *Garlett* (2022) 96 ALJR 888 at [70]-[73] (Kiefel CJ, Keane and Steward JJ), [269], [280] (Edelman J).

[108] Cf *Benbrika [No 1]* (2021) 272 CLR 68 at [46] (Kiefel CJ, Bell, Keane and Steward JJ); *Vella* (2019) 269 CLR 219 at [51] (Bell, Keane, Nettle and Edelman JJ);.

[109] Cf *Benbrika [No 1]* (2021) 272 CLR 68 at [10] (Kiefel CJ, Bell, Keane and Steward JJ); *Fardon* (2004) 223 CLR 575 at [19] (Gleeson CJ), [97]-[98] (Gummow J), [224] (Callinan and Heydon JJ); *Garlett* (2022) 96 ALJR 888 at [17] (Kiefel CJ, Keane and Steward JJ).

[110] Cf *Benbrika [No 1]* (2021) 272 CLR 68 at [8] (Kiefel CJ, Bell, Keane and Steward JJ); *Garlett* (2022) 96 ALJR 888 at [14] (Kiefel CJ, Keane and Steward JJ), [221]-[222] (Edelman J).

[111] Cf *Benbrika [No 1]* (2021) 272 CLR 68 at [46] (Kiefel CJ, Bell, Keane and Steward JJ); *Vella* (2019) 269 CLR 219 at [43], [47]-[48], [51] (Bell, Keane, Nettle and Edelman JJ); *Garlett* (2022) 96 ALJR 888 at [55], [73] (Kiefel CJ, Keane and Steward JJ), [220] (Edelman J).

[112] See also the "community safety order" scheme in Part 9.10 of the *Criminal Code* (Cth), which commenced in parallel to the curfew power (**SCB 67 [35]**) and requires such an exercise: ss 395.1, 395.13.

[113] See Regulations, regs 2.25AE(1), 2.25AE(3).

[114] In contrast to rigorous procedures of periodic curial review in which the government party again bears the onus, and procedures allowing for a person to seek review within the period if there are new facts: *Benbrika [No 1]* (2021) 272 CLR 68 at [12], [40], [55]-[56] (Kiefel CJ, Bell, Keane and Steward JJ); *Fardon* (2004) 223 CLR 575 at [109]-[114] (Gummow J), [231] (Callinan and Heydon JJ); *Garlett* (2022) 96 ALJR 888 [31]-[32] (Kiefel CJ, Keane and Steward JJ); *Criminal Code* (Cth) ss 395.14(5)(d), 395.19-395.20.

exercised.[115] Thus, the power may be exercised on the basis of limited information about a person, without that person having opportunity to comment on adverse material. That increases the likelihood that the Minister will not have information about the anticipated impacts of the condition on the person, which would be relevant if a meaningful balancing exercise could be undertaken.[116] Procedural fairness is required only if a person then makes representations within a time limit specified at the Minister's discretion[117] and, even then, because there is no reasons requirement[118] a person is likely to be unable to provide a meaningful response. Moreover, that procedure may be interrupted by the grant of a new visa at any time.[119] The lack of procedural protections further distinguishes the curfew power from existing "preventive justice" schemes, which generally require compliance with the rules of evidence, the provision of expert evidence about the individual (which must be considered by the court), procedural fairness, and the provision of reasons.[120]

42 The contrast with existing schemes — and with the parallel community safety order scheme — is stark. Instead of troubling himself with the rigour of the judicial process, the Minister may simply impose the curfew condition by an executive decision with none of the same safeguards. The restraints that ensure a deprivation of liberty is justified, are absent.

D VALIDITY OF THE MONITORING POWER

(1) Electronic monitoring is punitive

43 The monitoring power should be characterised as prima facie "punitive" having regard to the degree of interference that it authorises with two fundamental rights of the individual.

Nature of the consequences

44 *First*, it interferes with an individual's common law right to "personal inviolability" or "bodily integrity".[121] The holder "must allow an authorised officer to fit, install, repair or

[115] Act, s 76E(2). See *Alexander* (2022) 276 CLR 336 at [87] (Kiefel CJ, Keane and Gleeson JJ); *Benbrika [No 2]* (2023) 97 ALJR 899 at [67] (Gordon J).

[116] See, by way of illustration, the Fifth Visa decision, which was made with extremely limited information about the Plaintiff's psychiatric condition, impaired capacity and the impact of the conditions on him (**SCB 178**, cf **SCB 281**), and where the delegate considered alleged "incidents" in immigration detention (**SCB 178**) which the Plaintiff's representatives later clarified included incidents where the Plaintiff was the *victim* of assaults (**SCB 281 [14]**, cf **SCB 316**).

[117] Act, s 76F(3), (4)(a).

[118] None were provided in the Plaintiff's case: **SCB 479**.

[119] As occurred repeatedly in the Plaintiff's case: **SCB 68 [43], 69 [47], 70 [52]**.

[120] See *Fardon* (2004) 223 CLR 575 at [19] (Gleeson CJ), [94]-[99] (Gummow J), [221]-[222], [229]-[230] (Callinan and Heydon JJ); *Thomas* (2007) 233 CLR 307 at [30], [112]-[113], [122] (Gummow and Crennan JJ); *Vella* (2019) 269 CLR 219 at [83] (Bell, Keane, Nettle and Edelman JJ), [113] (Gageler J); *Benbrika [No 1]* (2021) 272 CLR 68 at [11], [40] (Kiefel CJ, Bell, Keane and Steward JJ); *Garlett* (2022) 96 ALJR 888 at [56], [97]-[99] (Kiefel CJ, Keane and Steward JJ); *Criminal Code* (Cth) ss 395.5, 395.8-395.15, 395.27-395.36.

[121] See *Marion's Case* (1992) 175 CLR 218 at 233-234, 242, 253 (Mason CJ, Dawson, Toohey and Gaudron JJ), 265-266 (Brennan J), 309-311 (McHugh J); *Kassam v Hazzard* (2021) 106 NSWLR 520 at [95] (Bell P).

remove … the holder's monitoring device" and the "holder must wear a monitoring device at all times".[122] Authorised officers[123] have the power to "do all things necessary or convenient to be done" for the purpose of "installing, fitting, or removing the person's monitoring device", which power may be exercised despite any other provision of the Act or Regulations or "any other law of the Commonwealth, a State or a Territory (whether written or unwritten)".[124] It is an offence under s 76D(2) of the Act to refuse to allow the authorised officer to fit, install, repair or remove the device.

45 The exercise of the power thus authorises what would otherwise be a trespass to the person (specifically, battery). The common law has long recognised the importance of liberty and bodily integrity as "basic legal value[s]"[125] in that context. It is a person's common law right to bodily integrity that is "protected by the tort of battery".[126] The fundamental nature of that right is reflected by the degree of protection afforded to it.[127] The "slightest intentional non-consensual interference with the physical integrity of a person can, of course, constitute a battery"[128] and the tort is "actionable without proof that the victim has suffered anything other than the infringement of his right to bodily integrity".[129]

46 *Second*, electronic monitoring interferes with a person's privacy, which is equally long recognised by the common law as a fundamental right or interest.[130] It is a broad concept that can be understood as having a number of overlapping aspects[131] — including, most relevantly, "the right to be left alone"[132] and the control of personal information.[133]

[122] Regulations, Sch 8, Conditions 8621(1) and (2).

[123] For s 76F(1) (powers relating to fitting, maintaining, operating or use of monitoring devices), "authorised officers" include officers of the ABF, members of the AFP or a State or Territory police force, and employees of State or Territory corrective services departments or agencies: see Act, s 76F(6); *Migration (Monitoring Devices and Related Equipment – Authorised Officers) Authorisation 2023*: **SCB 532**.

[124] Act, s 76F(1)(a), (3). Cf *Binsaris* (2020) 270 CLR 549 at [18]-[20] (Kiefel CJ and Keane J), [30] (Gageler J), [100] (Gordon and Edelman JJ).

[125] See *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at [155] (Hayne and Bell JJ).

[126] *Binsaris* (2020) 270 CLR 549 at [25] (Gageler J).

[127] See *Trobridge* (1955) 94 CLR 147 at 153 (Fullagar J).

[128] *Binsaris* (2020) 270 CLR 549 at [41] (Gageler J).

[129] *Lewis* (2020) 271 CLR 192 at [116] (Gordon J).

[130] See, eg, *Bunning v Cross* (1978) 141 CLR 54 at 75 (Stephen and Aickin JJ); *Morris v Beardmore* [1981] AC 446 at 465 (Lord Scarman); *George v Rockett* (1990) 170 CLR 104 at 110 (the Court); *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 at [52] (Spigelman CJ); *NSW v Ibbett* (2006) 229 CLR 638 at [30] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ).

[131] See Australian Law Reform Commission, *Privacy For Your Information: Australian Privacy Law and Practice* (Report 108, May 2008) at [1.31]-[1.79].

[132] *Katz v United States*, 389 US 347, 350 (Stewart J for the Court) (1967); *Hunter v Southam Inc* [1984] 2 SCR 145 at [24] (Dickson J).

[133] See *Campbell v MGN Ltd* [2004] 2 AC 457 at [11]-[12]; *R v Tessling*, [2004] 3 SCR 432 at [20], [23]; *R v Spencer* [2014] 2 SCR 212 at [27], [35]; ***Carpenter*** *v United States*, 138 S Ct 2206 (2018) at 2213-2214.

47 The importance afforded to privacy by the common law reflects its close connection to fundamental values of autonomy and human dignity.[134] And the protection of the privacy and dignity of individuals has been recognised as being consistent with the values and principles that underlie our system of government under the Constitution.[135] Consistent with that recognition, there is "a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state".[136] And those values are reflected in Lord Camden's judgment in *Entick v Carrington*, which is "widely seen as prefiguring the right to privacy in the common law world".[137] Of that judgment, it has been said:[138]

> The principles laid down in [it] affect the very essence of constitutional liberty and security. They … apply to *all invasions on the part of the government and its [officers] of the sanctity of a man's home and the privacies of life*. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; *but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence*, — it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.

48 That explanation recognises that, historically, interferences with a person's rights to personal security and personal liberty — including the "privacies of life" — are ordinarily only permissibly infringed by the government where they have been "forfeited" by *conviction* for an offence. That is, the explanation recognises that the forfeit of those rights was historically associated with the adjudgment and punishment of criminal guilt.[139]

Severity of the consequences

49 The monitoring power authorises a substantial interference with bodily integrity and privacy. The device must be affixed to the person's body 24 hours a day, 7 days a week. The device is attached to the person for every moment of their life, including while sleeping and bathing. In addition, for three hours of every day at specified times, the person must

[134] *Clubb* (2019) 267 CLR 171 at [49]-[50] (Kiefel CJ, Bell and Keane JJ); *ABC v* ***Lenah Game Meats*** *Pty Ltd* (2001) 208 CLR 199 at [43] (Gleeson CJ), [125], [132] (Gummow and Hayne JJ); ***Farm Transparency*** *International Ltd v NSW* (2022) 96 ALJR 655 at [159], [169]-[170] (Gordon J).

[135] See *Clubb* (2019) 267 CLR 171 at [51], [60], [82], [85], [99], [101] (Kiefel CJ, Bell and Keane JJ), [197] (Gageler J), [258]-[259] (Nettle J), [497] (Edelman J); *Farm Transparency* (2022) 96 ALJR 655 at [264] (Edelman J); *Lenah Game Meats* (2001) 208 CLR 199 at [200] (Kirby J).

[136] *R v. Plant* [1993] 3 SCR 281 at 292; see also *R v. Ahmad*, 2020 SCC 11 at [38].

[137] (1765) 19 St Tr 1029; Richardson, *The Right to Privacy: Origins and Influence of a Nineteenth-Century Idea* (2017) at 2.

[138] *Boyd v United States* (1886) 116 US 616 at 630, quoted in *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at [125] (Gageler J); see also at [239] (Edelman J); *Farm Transparency* (2022) 96 ALJR 655 at [56] (Kiefel CJ and Keane J), [263]-[264] (Edelman J).

[139] See *Alexander* (2022) 276 CLR 336 at [72] (Kiefel CJ, Keane and Gleeson JJ), [167] (Gordon J), [250] (Edelman J); *Benbrika [No 2]* (2023) 97 ALJR 899 at [22], [44] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

attach the "on-body charger" to the device,[140] which flashes green while charging: **SCB 76-77 [83], 78 [86], 189-190, 538**. The device will vibrate when running low on charge: **SCB 78 [86(c)]**. This trespass is to continue for 1 year, unless the device is removed early. During that period, the device is a constant physical reminder to the monitored person that they lack the "right to determine what shall be done with [their] own body".[141] The device also publicly marks the wearer as an "offender", carrying with it stigma and indignity.[142]

50 For that period, the person is subject to the continuous surveillance of their location and movements. That has a number of dimensions: the data is *collected* by a private company incorporated in the United Kingdom (**Buddi** Ltd) and the Commonwealth; that data is *accessible* and able to be *used* by both Buddi and the Commonwealth; and finally, that data is *stored* by both Buddi (for the period of the contract) and the Commonwealth (for at least 15 years).[143] The data obtained is "detailed, encyclopedic, and effortlessly compiled",[144] and identifies the person's current and historical locations to a high degree of precision.[145] Such data "provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'"[146]

51 The collected data is transmitted to a server operated by Buddi: **SCB 76 [77], 79 [91]-[92]**. The device will immediately transmit an alert in certain circumstances, including when the device is low on battery, has remained static for 8 hours, or indicates the person is outside the curfew location during curfew hours: **SCB 80 [95]**. Buddi staff monitor these alerts, and refer the alerts to the ABF: **SCB 82 [100]**. Buddi's access to and use of the data, however, is not limited to monitoring alerts: **SCB 81 [98(i)]**. The ABF may access the data to investigate alerts, to obtain evidence of breach of visa conditions, to respond to a request from law enforcement agencies, or for any other reason: **SCB 82-83 [102]-[103]**.

52 Further, an authorised officer "may do all things necessary or convenient to be done" for

[140] Failure to do so is a criminal offence with a maximum penalty of five years imprisonment, and mandatory minimum sentence of one year imprisonment: ss 76D, 76DA; **SCB 69 [49], 188-190**.

[141] *Marion's Case* (1992) 175 CLR 218 at 234 (Mason CJ, Dawson, Toohey and Gaudron JJ).

[142] "When a judge orders GPS tracking, a "modern-day 'scarlet letter'" is physically tethered to the individual, reminding the public that the person has been charged with or convicted of a crime": *Commonwealth v Norman*, 142 NE 3d 1, 9 (Mass. 2020). See also *Director of Public Prosecutions v King* [2020] TASCCA 8 at [32] (the Court); Weisburd, "The Carceral Home" (2023) 103 *Boston University Law Review* 1879 at 1917-1918.

[143] **SCB 76 [78]-[79], 80 [96]-[97]**.

[144] *Carpenter*, 138 S Ct 2206 (2018) at 2216.

[145] **SCB 77 [84], 78 [90].** This data is recorded at a frequency that is effectively continuous: **SCB 78 [90]**.

[146] *Carpenter*, 138 S. Ct. 2206 (2018) at 2217, see also 2218 ("when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user").

the purpose of "determining or monitoring the location of" the person.[147] An officer may exercise that power for the purpose of locating the person simpliciter — the determination of the person's location does not itself need to serve some further purpose (such as monitoring compliance with a condition). Further, an officer "may collect, use, or disclose to any other person, information (including personal information)" for a range of purposes including "protecting the community in relation to persons who are subject to monitoring".[148] That is a power of extraordinary breadth: an authorised officer (who may be a private contractor) may disclose the personal information harvested from a monitored individual to *any other person* in pursuit of the purpose of "protecting the community".

10 Thus, a person lives in a state of knowing that, at all times, they are being (or might be being) watched and that information may be distributed widely without their knowledge.[149] Moreover, the person must *facilitate* that surveillance by taking "any steps specified in writing by the Minister, and any other reasonable steps, to ensure" that the device remains in good working order, under threat of prosecution and imprisonment.[150]

(2) No legitimate non-punitive purpose

53 Taking all of the above matters together, "[t]he punitive effect of electronic monitoring is self-evident".[151] It is not possible to identify a legitimate non-punitive purpose of the monitoring power for the same reasons outlined in relation to the curfew power at **Part C(3)-(4)** above. That is sufficient to conclude the monitoring power is also invalid.

20 **(3) Electronic monitoring not reasonably capable of being seen as necessary**

54 The analysis undertaken at paragraphs 38 to 42 applies equally here.

55 In addition, as we have said above, one familiar tool applied at this stage of the analysis is to consider whether there is a "rational connection" between the legal operation of the law and its asserted purpose. However, unlike the curfew condition, there is no such connection between the criterion of legal operation of the monitoring condition and any such purpose. There are two possibilities. Both must be rejected.

56 The first possibility is that the monitoring condition assists in the protection of the

[147] Act, s 76(1).

[148] Act, s 76F(2). For s 76F(2) (powers relating to collection, use an disclosure of information), "authorised officers" additionally include persons in a position "in the part of Buddi Ltd that is providing electronic monitoring and reporting services to the Department": see fn 123 above.

[149] This model of privacy intrusion is classically associated with punishment, evoking Bentham's Panopticon – the conception of the perfect prison design where the inmates believe they may be watched at any moment but cannot be sure if that is so: see Foucault, *Discipline and Punish: The Birth of the Prison* (1975) at 173.

[150] Act, s 76D(3). See also *R v Ndhlovu*, 2022 SCC 38 at [45], [53], [57].

[151] *Boulton v The Queen* (2014) 46 VR 308 at [98] (the Court).

community because it assists in enforcing other location-specific conditions that might be imposed on a person's visa.[152] Based on the material in the Special Case, that appears to be how the monitoring condition is used in practice.[153] However, that does not answer the *legal* question. The monitoring condition may be imposed *regardless* of whether another location-specific condition is imposed,[154] and so the criterion of legal operation by reference to which the constraint is imposed is not connected with any such asserted end.[155] Further, in relation to the curfew condition, the Minister must determine whether to impose the monitoring condition *before* the Minister decides whether to also impose the curfew condition.[156] Thus, at the time the monitoring power falls to be exercised, there is no known connection to any purpose of protecting the community by the enforcement of the curfew. That leaves the second possibility: that electronic monitoring, in itself, serves to protect the community. It is not apparent that electronic monitoring is capable of realising that purpose. There is no material in the Special Case that supports that proposition.[157] If the Commonwealth pursues this possibility further, it will be addressed in reply.

57 The lack of any rational connection is a further (and sufficient) reason to conclude that the power is not reasonably capable of being seen as necessary for the protection of the community.

PART VI: ORDERS SOUGHT

58 The questions in the Special Case should be answered: (1) yes, alone; (2) yes, alone; (3) the declaration at paragraph (2) of the Statement of Claim; (4) the Defendants.

PART VII: ESTIMATE OF TIME

59 It is estimated that up to 2.5 hours will be required for the Plaintiff's oral argument.

Dated: 27 May 2024

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[152] As occurs in Victoria under its sentencing regime: see *Boulton* (2014) 46 VR 308 at [98] (the Court).
[153] See, eg, **SCB 76 [81], 79 [93], [95], 83 [105], 157-158**.
[154] Condition 8623 ("If the holder has been convicted of an offence that involves a minor or any other vulnerable person, the holder must not go within 200 metres of a school, childcare centre or day care centre"); condition 8624 ("If the holder has been convicted of an offence involving violence or sexual assault, the holder must not contact, or attempt to contact, the victim of the offence or a member of the victim's family").
[155] *McCloy* (2015) 257 CLR 178 at [132]-[133] (Gageler J).
[156] Regulations, Sch 2 cl 070.612A(1)-(2) sets up a cascading set of inquiries.
[157] Because the "reasonably capable of being seen as necessary" question is relevant to whether the monitoring power is "justified", the Commonwealth bears a persuasive onus on this issue: see *Jones* (2023) 97 ALJR 936 at [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *Unions NSW v New South Wales* (2023) 296 ALJR 150 at [31] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

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 PLAINTIFF

Pursuant to Practice Direction No 1 of 2019, the Plaintiff sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
	Constitutional provisions		
1.	*Commonwealth Constitution*	Current	Ch III
	Statutory provisions		
2.	*Crimes Act 1914* (Cth)	Current	ss 3ZZUHB, 4K
3.	*Crimes (Sentence Administration) Act 2005* (ACT)	Current	ss 41, 56-58
4.	*Crimes (Sentencing) Act 2005* (ACT)	Current	s 11
5.	*Crimes (Sentencing Procedure) Act 1999* (NSW)	Current	ss 7, 8, 73A(2)(b)-(c), 89(2)(a)
6.	*Criminal Code Act 1995* (Cth)	Current	Sch, s 395.1, 395.5, 395.8-395.14, 395.27-395.36
7.	*Criminal Code Act 1995* (Cth)	15 November 2006	Sch, Div 104
8.	*Migration Act 1958* (Cth)	Current	ss 76C, 76D,

			76DA, 76E, 76F, 189, 501(3A)
9.	*Migration Regulations 1994* (Cth)	Current	regs 2.05, 2.20(18), 2.25AA, 2.25AB, 2.25AE Sch 2 – cl 070.611, 070.612(1), 070.612A(1), (4), 070.612B(2) Sch 8
10.	*Sentencing Act 1991* (Vic)	Current	ss 37, 47, 48I, 48LA
11.	*Sentencing Act 1995* (WA)	Current	ss 69, 72, 75, 76A
12.	*Sentencing Act 1995* (NT)	Current	ss 31, 34(1)(c), 45, 48(1)(d)
13.	*Sentencing Act 1997* (Tas)	Current	ss 42AN, 42AP(1)(m)
14.	*Sentencing Act 2017* (SA)	Current	ss 81, 82(2)(b)
15.	*Sentencing Regulations 1996* (NT)	Current	reg 5
16.	*Youth Justice Act 1992* (Qld)	Current	ss 175, 193, 203-204, 220-221