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The Problem with Punitive Powers: A Consideration of the High Court's Decision in *EGH19 v Commonwealth of Australia*

SACHI ELLIOTT*

Abstract

This article examines the High Court's decision in EGH19 v Commonwealth of Australia and the doctrinal problems considered therein. The decision comes in the wake of NZYQ and YBFZ, and marks yet another instance in which the High Court has had to confront the vexed relationship between immigration control and Chapter III of the Constitution. The amended provisions were more carefully drafted than the earlier scheme, yet a majority still found them to be invalid. Nevertheless, the Court was divided on why that was so. The judgments collectively reveal unresolved tensions concerning the relationship between punishment and protection, the relevance of past offending to future risk, the role of judicial safeguards, and the meaning of the 'exceptional cases' as recognised in Lim. It is ultimately argued that in many respects, EGH19 failed to resolve the unresolved.

I Introduction

The relationship between immigration detention and Ch III of the *Constitution* has been the subject of sustained and transformative litigation in recent years.

In *EGH19 v Commonwealth of Australia* ('*EGH19*'),¹ the High Court was yet again faced with a challenge to the validity of monitoring and curfew conditions imposed on holders of certain bridging visas. Broadly speaking, *EGH19* represents a natural sequel to the decision in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*YBFZ*')², wherein the High Court struck down an earlier iteration of the same scheme.

The Commonwealth's second attempt was more carefully drafted, and responded to many of the criticisms raised in *YBFZ*. Nevertheless,

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¹ (2026) 100 ALJR 400 ('*EGH19*').

² (2024) 99 ALJR 1 ('*YBFZ*').

the revised scheme was again held invalid by the majority of the Court. At the same time, the Court's reasoning remains divided in several important respects. This decision, and the decisions preceding it, highlight an emerging disquiet within the High Court about the constitutional parameters of punitive powers, with no sign of a resolution on the horizon.

This article proceeds in five parts. Part II sets out the relevant background and the principles governing punitive laws. Part III identifies the constitutional issue before the Court, the amended form of cl 070.612A(1), and the competing arguments advanced by the parties. Part IV examines the individual judgments, with particular attention given to the different routes by which the majority reached invalidity, and the reasons given in dissent. Finally, Part V outlines the main bones of contention exposed by the decision, including the nature of the characterisation inquiry, the relationship between punishment and protection, and the meaning of punishment itself.

II Background

A *The Constitutionality of Punitive Laws*

In order to place this decision in its proper context, there are a number of steps to be retraced.

The necessary starting point, and a constitutional North Star, is *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers*').³ Several fundamental propositions emerge from this decision, deriving from the 'rootstock doctrine'⁴ of the separation of judicial power embodied in Ch III of the *Constitution*. At a high level of generality, *Boilermakers* posits that: (1) the judicial power of the Commonwealth can only be vested in a Ch III court;⁵ and (2) a Ch III court cannot be vested with anything *other* than the judicial power of the Commonwealth.⁶

Whilst judicial power is an 'elusive concept',⁷ evading any singular definition, it is thought that the adjudgment and punishment of criminal guilt lies at its 'heartland'.⁸ This leads to the next port of call, being the decision in *Chu Kheng Lim and Others v Minister for Immigration*,

³ (1956) 94 CLR 254 ('*Boilermakers*').

⁴ *EGH19* (n 1) [280] (Jagot J).

⁵ *Boilermakers* (n 3) 270.

⁶ *Ibid* 271–2, 289.

⁷ *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, 532 (Mason CJ), discussing *R v Davison* (1954) 90 CLR 353, 366 (Dixon CJ and McTiernan J). See also *EGH19* (n 1) [284] (Jagot J).

⁸ *EGH19* (n 1) [20] (Gageler CJ and Gleeson J), citing *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1, 23 [81], quoting *Alexander v Minister for Home Affairs* (2022) 276 CLR 336, 380 [111].

Local Government and Ethnic Affairs and Another ('*Lim*').⁹ In that case, the plurality of the High Court held that:

the power to order that a citizen be involuntarily confined in custody is, under the doctrine of the separation of judicial from executive and legislative powers enshrined in our Constitution, part of the judicial power of the Commonwealth entrusted exclusively to Ch III courts ...¹⁰

As such, save for 'exceptional cases':

... the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.¹¹

This principle – the '*Lim* doctrine' – is a particularised application of the *Boilermakers* doctrine.¹² Importantly for present purposes, the *Lim* doctrine is not limited to outright detention. It encompasses a 'wider category of detriments', which, by their nature and severity (or 'by default'¹³) are punitive.¹⁴

In *Lim*, it was also observed that the constitutional difference between an alien and a non-alien lies in the susceptibility of the alien to exclusion or deportation.¹⁵ As a result, the executive detention of aliens may be constitutionally valid to the extent that the detention is facilitative of their removal from, or entry to, Australia.¹⁶

In *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*NZYQ*'),¹⁷ the High Court reopened and overruled *Al-Kateb v Godwin*,¹⁸ invalidating provisions of the *Migration Act 1958* (Cth) ('*Migration Act*')¹⁹ insofar as they purported to authorise the executive detention of non-citizens with no real prospect of removal from Australia in the foreseeable future. Applying *Lim*, the majority reasoned that where there is no real prospect of removal, the legitimate,

⁹ (1992) 176 CLR 1 ('*Lim*').

¹⁰ Ibid 28 (Brennan, Deane and Dawson JJ).

¹¹ Ibid 27 (Brennan, Deane and Dawson JJ).

¹² *EGH19* (n 1) [286] (Jagot J).

¹³ See generally Ibid [13]–[14] (Gageler CJ and Gleeson J), recognising detention and deprivation of citizenship as instances of a wider category of detriments attracting prima facie punitive characterisation.

¹⁴ Ibid [13] (Gageler CJ and Gleeson J), discussing *YBFZ* (n 2).

¹⁵ *Lim* (n 9) 29 (Brennan, Deane and Dawson JJ). See also *YBFZ* (n 2) 10 [9]; *CZA19 v The Commonwealth* (2025) 99 ALJR 650, 665–6 [64]; *EGH19* (n 1) [30] (Gageler CJ and Gleeson J), [81] (Gordon J), [187] (Edelman J), [215] (Steward J), [287] (Jagot J), [375] (Beech-Jones J).

¹⁶ Cf *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137, 162 [55] ('*NZYQ*').

¹⁷ Ibid.

¹⁸ (2004) 219 CLR 562.

¹⁹ Specifically, ss 189(1) and 196(1).

non-punitive purpose that might otherwise justify their detention is negated,²⁰ rendering detention constitutionally invalid.

B *The Decision in YBFZ*

In response to NZYQ, the Albanese government enacted the *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth), the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth) and made amendments to the *Migration Regulations 1994* (Cth) ('*Migration Regulations*').

Pursuant to these changes, the Minister could now grant persons affected by the NZYQ decision a Bridging R (Class WR) Subclass 070 (Bridging (Removal Pending)) visa (a 'BVR'), subject to certain conditions prescribed in Pt 070 of Sch 2 to the *Migration Regulations*. Pt 070 of Sch 2 enabled the Minister to, inter alia, require the BVR-holder to wear an electronic monitoring device (the 'monitoring condition'), and to remain at a notified address between 10pm and 6am each day (the 'curfew condition').

Clause 070.612A(1) of Sch 2 of the *Migration Regulations* authorised (and, where enlivened, obligated) the Minister to impose such conditions 'unless the Minister was satisfied that it [was] not reasonably necessary to impose that condition for the protection of any part of the Australian community'.

However, in *YBFZ*, the High Court held by majority that cl 070.612A(1) was invalid to the extent that it authorised and required the Minister to impose the monitoring and curfew conditions. Those conditions were found to be punitive in character, and their imposition by the Executive was thus inconsistent with Ch III.

The test to be applied – the *Lim* doctrine, expressed at an appropriate level of generality – was framed as a single question of characterisation: whether the power to impose the relevant detriment was properly characterised as punitive, and therefore exclusively judicial.²¹ This question involves two subsidiary steps.²² First, the Court is to ask whether the power to impose the detriment is *prima facie* punitive, either by default, or by reference to the purpose and operation of the law.²³ Second, if the power is *prima facie* punitive, the Court is to ask whether it is nevertheless reasonably capable of being seen as necessary for a legitimate and non-punitive purpose.²⁴

This was, of course, the test applied in some shape or form by each member of the High Court in the instant case.

²⁰ *NZYQ* (n 16) 162 [55].

²¹ *YBFZ* (n 2) 12 [16].

²² *Ibid* 12 [16], [18].

²³ *Ibid* 12 [16].

²⁴ *Ibid* 12 [18].

C *The Impugned Amendments*

In response to *YBFZ*, the *Migration Regulations* were further amended.

The revised cl 070.612A(1) authorised (or at least purported to authorise) the Minister to impose the monitoring and curfew conditions if:

...

- (a) ... the Minister [was] satisfied on the balance of probabilities that the holder pose[d] a substantial risk of seriously harming any part of the Australian community by committing a serious offence; and
- (b) the Minister [was] satisfied on the balance of probabilities that the imposition of the condition ... [was]:

- (i) reasonably necessary; and

- (ii) reasonably appropriate and adapted;

for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk.²⁵

Shortly thereafter, these provisions were challenged by the plaintiff.

III The Instant Case

A *The Plaintiff*

The plaintiff's circumstances may be described briefly. EGH19, a citizen of Papua New Guinea, first arrived in Australia as a minor in 2000. In 2006, whilst still a minor, he was convicted of murder and sentenced to prison. After being released on parole in 2018, he was taken into immigration detention, before being granted a protection visa in 2022. After being released into the Australian community, the plaintiff once again returned to prison, having been convicted of a series of domestic violence-related offences. Finally, when released on parole, he was granted a BVR, subject to both the monitoring and curfew conditions.

B *The Constitutional Issue*

The regulation-making power conferred by s 504 of the Migration Act, enabling the Governor-General to make regulations 'necessary or convenient' for carrying out or giving effect to the Migration Act,²⁶ is

²⁵ The *Migration Regulations 1994* (Cth) ('*Migration Regulations*') defined 'serious offence' in cl 070.111 but did not separately define 'serious harm'.

²⁶ *Migration Act 1958* (Cth) s 504(1) ('*Migration Act*').

‘so broadly expressed as to require it to be read down’.²⁷ The power is at least subject to the constitutional limits on parliamentary power; if a regulation would have been invalid had it been enacted by Parliament, it will exceed the scope of s 504, and thus be invalid.²⁸

The issue, therefore, was whether the revised cl 070.612A(1) of Sch 2 to the *Migration Regulations* was inconsistent with Ch III to the extent that it authorised the Minister to impose the monitoring and curfew conditions. More specifically, applying the test expressed in *YBFZ*, the question was whether the provision conferred a power that was punitive in character and therefore exclusively judicial. More simply, the question was whether the Commonwealth’s second attempt would meet the same fate as its first.

C The Arguments

The amended *Migration Regulations* were substantially similar to their invalidated predecessor. They still authorised the Minister to impose the monitoring and curfew conditions on BVR-holders, with the practical effect of those conditions remaining unchanged.

Notwithstanding, the Commonwealth pointed to three substantive differences, each of which designed to cure defects raised in *YBFZ*. First, the amended provision no longer required the Minister to impose the conditions unless satisfied that they were not reasonably necessary.²⁹ Instead, the Minister now had to reach a *positive* state of satisfaction before the conditions could be imposed. Second, the purpose of the provision was no longer expressed at the broad level of ‘protection of any part of the Australian community’, which had been criticised in *YBFZ* as a purpose with considerable elasticity.³⁰ The amended clause instead identified the purpose as protecting the community from serious harm by addressing a substantial risk of such harm. Thirdly, the provision specified both the nature of the relevant harm and the degree of risk required, with the Minister needing to be satisfied that each condition was *reasonably necessary* and *reasonably appropriate and adapted* to address that risk.³¹

The Commonwealth argued that these amendments supplied what the earlier provisions lacked, with the Solicitor-General arguing that the

²⁷ *Palmer v Western Australia* (2021) 272 CLR 505, 547 [122]. See also *YBFZ* (n 2) 12 [19].

²⁸ *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 373 [104]. *Palmer v Western Australia* (2021) 272 CLR 505, 546 [119]–[120], 547 [122].

²⁹ See *YBFZ* (n 2) 23 [85].

³⁰ See *ibid* 23 [81], quoting *Alexander v Minister for Home Affairs* (2022) 276 CLR 336, 380 [111].

³¹ Cf *YBFZ* (n 2) 20 [65]. The majority’s criticism was directed to the former version of cl 070.612A(1), which did not specify the nature or degree of the harm to be addressed, nor the threshold of ministerial satisfaction required before conditions could be imposed. The amendments discussed in the text responded to those deficiencies by defining both the relevant harm and the requisite standard of justification.

result was a ‘radically different, more tailored, narrower regime’, distinguishable from the provisions invalidated in *YBFZ*.

In response, the plaintiff argued that the amendments did not cure the underlying problem. It was accepted that the new provision was narrower than the old one, but the plaintiff argued that its essential character remained punitive. Two unchanged features of the provision were emphasised: (1) the fixed 12-month duration of the conditions, imposed regardless of whether they remained necessary throughout the period; and (2) the fact that the *Migration Regulations* excluded the principles of natural justice,³² lacking the ordinary incidents and protections of the judicial process.

IV The Decision

The Commonwealth had conceded that the monitoring and curfew conditions were *prima facie* punitive,³³ meaning that the remaining question was whether the provision was reasonably capable of being seen as necessary for a legitimate non-punitive purpose. The High Court (divided 5:2) found that they were not. In the majority, Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ found that the regulations were invalid, as they had done in *YBFZ*. Conversely, Steward and Beech-Jones JJ dissented, as they had done in *YBFZ*. Broadly speaking, all members of the Court applied the test expressed in *YBFZ*, with no party seeking to reopen the case (or *NZYQ*, for that matter).

A *Gageler CJ and Gleeson J*

Gageler CJ and Gleeson J were prepared to accept that cl 070.612A(1) had a legitimate and non-punitive purpose. Their Honours described the purpose of this provision as:

the protection of any part of the Australian community from a substantial risk of harm that is inherent in particular conduct that constitutes a ‘serious offence’ as defined for the purposes of Pt 070 of Sch 2 to the *Migration Regulations*.³⁴

They argued that the particularisation of the level of risk of the harm involved in the commission of the captured offences (as in, a ‘substantial’ risk) was itself part of the description of purpose.³⁵ They concluded that the conduct described in the definition of ‘serious offence’ was clearly ‘grave and specific’.³⁶ They also stressed the

³² By virtue of s 76E of the *Migration Act*.

³³ This concession was made against the background of the holding in *YBFZ* that the monitoring and curfew conditions were *prima facie* punitive: *YBFZ* (n 2) 18 [52], 20 [63].

³⁴ *Ibid* 17 [46].

³⁵ *Ibid* 17 [45].

³⁶ *Ibid* 17 [47]; Their Honours confined this conclusion to the conduct described in para (b)(i)–(vi) of the definition of ‘serious offence’.

absence of any constitutional notion of substantive equality before the law, emphasising that the discriminatory nature of the provisions, targeting only certain non-citizens, was not grounds for invalidity.³⁷

The question of whether a law is reasonably capable of being seen to be necessary for the identified purpose, in their Honours' view, comprises both a 'substantive' and 'procedural' element.³⁸ In other words, the inquiry looks not only to what power is being conferred, but how, and by whom, it is to be exercised.³⁹

A distinctive feature of the joint judgment is an emphasis on what their Honours referred to as the 'constitutional paradigm'.⁴⁰ That paradigm posits that a penal or punitive detriment is ordinarily imposed only: (1) by a court (the 'court element'); (2) in the exercise of judicial power (the 'judicial power element'); and (3) in the performance of the exclusively judicial function of adjudging and punishing criminal guilt (the 'exclusively judicial function element').⁴¹ In their Honours' view, this paradigm 'sets the constitutional baseline from which any departure from any one or more of its elements is exceptional'.⁴²

In light of this, their Honours emphasised two key issues.

Firstly, with respect to the 'substantive' dimension of the inquiry, their Honours noted that the conditions were to be imposed for a fixed period of 12 months, irrespective of whether their imposition remained reasonably necessary.⁴³

Second, with respect to the 'procedural' dimension of the inquiry, their Honours held that the scheme involved an unjustified departure from the second and third elements of the constitutional paradigm.⁴⁴ The power was conferred on the Minister rather than a court, and the initial decision was made without procedural fairness. Conferring the power on the Minister, rather than a court, was not reasonably capable of being seen to be necessary for the stated purpose. Of course, procedural fairness and other judicial protections may be excluded from administrative processes, but not from judicial ones.⁴⁵ Their Honours observed that the exclusion of natural justice under s 76E was indicative⁴⁶ of this departure from the constitutional paradigm, and thus

³⁷ Ibid 17 [48]. See also *Brown v Tasmania* (2017) 261 CLR 328, 415–6 [276], 462–3 [422]; *Kruger v The Commonwealth* (1997) 190 CLR 1, 44–5, 63–8, 153–5; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 35 [2].

³⁸ *EGH19* (n 1) [21].

³⁹ Ibid.

⁴⁰ *EGH19* (n 1) [16]–[24].

⁴¹ Ibid [16]–[17].

⁴² Ibid [19].

⁴³ Ibid [52].

⁴⁴ Ibid [54]–[56].

⁴⁵ Ibid [54].

⁴⁶ Ibid [54]–[56]; Their Honours treated the exclusion of procedural fairness as indicative of a more fundamental departure from the constitutional paradigm, rather than as an isolated defect.

unjustifiable. This conclusion was supported by the existence of the Div 395 regime,⁴⁷ providing an example of a law conforming with the constitutional baseline.⁴⁸

As for the issue of constraining a person's liberty by reference to what a person might do in the future, their Honours suggested that the power is best conferred on a court (if at all), given the availability of legal representation, fair process and a right to reasons.⁴⁹

The precise interaction between the 'constitutional paradigm' and the application of the *Lim* principle is not made entirely clear in their Honours' reasons. At the very least, the paradigm is to be 'borne in mind'⁵⁰ when undertaking the inquiry. The implication seems to be that the paradigm provides some further colour to the analysis. Nonetheless, stating how, and by whom, punitive powers may be exercised can only assist so far when the question is whether or not a power is punitive.

B *Gordon J*

Gordon J similarly found cl 070.612A(1) to be invalid, although her Honour's reasoning differed in certain respects from that of the plurality. Her Honour characterised the purpose of the provision as the:

protect[ion of] any part of the Australian community from the substantial risk of serious harm of the kind caused by the commission of a 'serious offence' by the cohort of persons to whom the provision applies.⁵¹

Although describing the purpose in similar terms to the plurality, her Honour did not find that this purpose was legitimate and non-punitive. More specifically, her Honour argued that powers of this kind generally ought to be confined to addressing a 'grave and specific risk of harm',⁵² and that the impugned risk of harm was not sufficiently 'grave'. This meant that cl 070.612A was not directed to an 'exceptional case'.⁵³ Her Honour also observed that the provision contained no separate inquiry as to the seriousness of the harm,⁵⁴ presupposing that the risk of harm associated with the enumerated 'serious offences' was inherently

⁴⁷ See *Criminal Code Act 1995* (Cth) div 395.

⁴⁸ *EGH19* (n 1) [56]; Their Honours emphasised that the comparison with Div 395 of the Criminal Code was not a search for a less restrictive means, but an example of a law conforming with the constitutional baseline.

⁴⁹ *Ibid* [26], quoting *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 260–1 [90], quoting *Thomas v Mowbray* (2007) 233 CLR 307, 508 [599].

⁵⁰ *EGH19* (n 1) [19].

⁵¹ *Ibid* [63], [125]; See also *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 113–4 [79]; *YBFZ* (n 2) 23 [82]; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 588–9 [9], quoting *Veen v The Queen (No 2)* (1988) 164 CLR 465, 495; *Garlett v Western Australia* (2022) 277 CLR 1, 53 [145]–[148], 71 [190].

⁵² *EGH19* (n 1) [63].

⁵³ *Ibid*.

⁵⁴ *Ibid* [123].

serious. Her Honour's rationale for the 'grave and specific risk of harm' requirement was that if having 'protective purpose' was sufficient, there would be no meaningful limit on the state's exercise of coercive power.⁵⁵

Even if the impugned provisions had a legitimate and non-punitive purpose, Gordon J found that they were not reasonably capable of being seen as necessary for their purpose.⁵⁶ Her Honour pointed to the exclusion of the ordinary facets of the judicial process, including procedural fairness, rules as to evidence and proof, the duty on the decision-maker to provide reasons for their decisions, and appellate rights.⁵⁷

Her Honour observed that the provisions enabled the Minister to impose the conditions irrespective of whether they had actually committed any prior offences.⁵⁸ This decision was to be based on a 'broadly and ill-defined concept' of a 'serious offence' based on whatever information was available to the Minister at the time.⁵⁹ Her Honour also noted the arbitrary order in which the Minister was to consider each of the conditions, suggesting a disconnection between the means and the ends of the provisions.⁶⁰ Similar observations were made in respect of the twelve-month fixed period,⁶¹ and the fact that there was no time limit within which the Minister was to decide whether or not to grant a replacement visa without the impugned conditions.⁶²

C *Edelman J*

Edelman J similarly found cl 070.612A(1) to be invalid, although his Honour took a rather different route in reaching this conclusion. His Honour did not necessarily dispute the test to be applied but maintained several of the criticisms about it that he had initially raised in *YBFZ*.

At the centre of Edelman J's reasoning is an outright rejection of any strict distinction between 'punishment' and 'protection'.⁶³ In his Honour's view, the law should not be 'hoodwinked' by the notion that a punitive measure may cease to be punitive simply because it is also

⁵⁵ Ibid [85]; See also *YBFZ* (n 2) 23 [82].

⁵⁶ *EGH19* (n 1) [137].

⁵⁷ Ibid [137]–[152].

⁵⁸ Ibid [139].

⁵⁹ Ibid [65].

⁶⁰ Ibid [147]–[148].

⁶¹ Ibid [150].

⁶² Ibid [149].

⁶³ *EGH19* (n 1) [166], citing *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 149 [183]; *Alexander v Minister for Home Affairs* (2022) 276 CLR 336, 380 [111]; *Garlett v Western Australia* (2022) 277 CLR 1, 91 [249]; *YBFZ* (n 2) 34 [130].

protective.⁶⁴ Of course, incapacitation and deterrence (i.e., bastions of ‘protection’) are familiar purposes of criminal punishment.

In characterising the concept of punishment, his Honour considered HLA Hart’s ‘standard case’, which involves:

- (1) pain or unpleasant consequences; (2) for an offence against legal rules; (3) of an actual or supposed offender for their offence; (4) intentionally administered by humans other than the offender; and (5) imposed and administered by the authority constituting a legal system against which the offence is committed.⁶⁵

On that approach, the amended scheme remained punitive. The monitoring and curfew conditions imposed harsh consequences on liberty and bodily integrity. The curfew condition confined the visa holder to a specified place for a substantial period each day. The monitoring condition required the person to wear a physical device continuously attached to the body.

Importantly, the conditions were almost invariably imposed by reason of past offending. Although the amended provision was framed in forward-looking terms (a ‘substantial risk’ of future harm), the future risk would, in practice, almost always be assessed by reference to past criminal conduct.⁶⁶

This was the essence of what Edelman J described as ‘protective punishment’.⁶⁷ The punishment was not merely retributive in the narrow sense, not imposed solely to condemn past wrongdoing. Nevertheless, the fact that the provisions were ‘protective’ did not mean they were not punishment. It is quite apparent why, in his Honour’s view, the amendments post-*YBFZ* were wholly unconvincing – they had failed to ‘see the wood for the trees’.⁶⁸

His Honour also repeated his criticisms of the ‘structured’ *YBFZ* inquiry, cautioning against the application of the different ‘questions’ as rigid, independent steps.⁶⁹ His Honour emphasised that the inquiry remained a single question of characterisation, with the various ‘questions’ operating merely as overlapping indicia bearing on that single question.⁷⁰

Edelman J also repeated his criticism of the more orthodox *Lim* formulation. In his view, it involves a fiction to say that a law pursuing a non-punitive purpose becomes punitive because it is disproportionate

⁶⁴ *EGH19*(n 1) [166].

⁶⁵ *Ibid* [165], discussing HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 1968) 4–5.

⁶⁶ *EGH19*(n 1) [169].

⁶⁷ *Ibid*.

⁶⁸ *Ibid* [199].

⁶⁹ *Ibid* [170]–[174].

⁷⁰ *Ibid* [172].

to that purpose.⁷¹ If a law is disproportionate, that may raise a question about the scope of Commonwealth legislative power. But it does not explain why disproportionate detention should thereby become a matter reserved to the judiciary. Since Edelman J regarded the amended provision as punitive at the outset, he considered it unnecessary to reach the later question whether it was reasonably capable of being seen as necessary for a legitimate and non-punitive purpose.⁷²

D *Jagot J*

Jagot J took a simpler approach, reducing the invalidity of cl 070.612A(1) to five essential features.

First, her Honour concluded, in line with the Commonwealth's concession, that the monitoring and curfew conditions together constituted a deprivation of liberty which was material both in kind and duration.⁷³ In her Honour's view, the combined effect of both conditions was in fact involuntary detention. Her Honour took an expansive view of detention, suggesting that persons may be under the 'direct control' of another in a myriad of ways, partly thanks to technological advancements.⁷⁴ The 'degree of hardship' involved in detention was not seen to be relevant, provided that the nature, extent and duration of the interference was such as to constitute detention.⁷⁵

Second, her Honour noted that the power was conferred on the executive branch, and as such, not constrained by judicial process.⁷⁶

Third, the fact that the conditions were enforceable by way of criminal sanction – in particular, criminal sanction carrying a mandatory minimum sentence – was relevant.⁷⁷

Fourth, her Honour argued that the class of persons subject to the provision lacked a rational connection with the substance of the law, with no constitutional basis for distinguishing this cohort of persons.⁷⁸

Lastly, the exclusion of natural justice in the operation of the impugned provision was highly relevant.⁷⁹ Like the other members of the bench, Jagot J took issue with the fact that the obligation to notify BVR-holders of the imposition of the conditions arose only after the Minister had imposed those conditions.

⁷¹ Ibid [175]–[177].

⁷² Ibid [210]–[211].

⁷³ Ibid [333]–[335].

⁷⁴ Ibid [334].

⁷⁵ Ibid [333].

⁷⁶ Ibid [336].

⁷⁷ Ibid [337].

⁷⁸ Ibid [338].

⁷⁹ Ibid [340].

Overall, her Honour argued that the purpose of the law could not genuinely be characterised as legitimate and non-punitive, and that the provision ‘significantly exceed[ed] the scope of its avowed ends’.⁸⁰ Her Honour put her conclusion as follows:

Accordingly, the impugned law is *prima facie* punitive and is not reasonably capable of being seen to be reasonably appropriate and adapted for its stated legitimate and non-punitive purpose. Therefore, it is a law characterised as substantively punitive within the scope of exclusive judicial power purportedly but impermissibly conferred on the executive branch of government in contravention of the separation of judicial power effected by Ch III of the *Constitution*.⁸¹

More generally, her Honour wrote extensively on the various exceptions to the Lim principle which, in her Honour’s view, do not constitute a closed category.⁸² Her Honour concluded that, even where the detriment imposed by a law is of a lesser severity, any exception still ought to be regarded as an exception.⁸³

The ‘exceptions’, as considered by Jagot J, are: (1) arrest and detention pursuant to an executive warrant – described as ‘essential’ to the functioning of the criminal justice system and the exercise of judicial power;⁸⁴ (2) involuntary detention for circumstances involving mental illness or infectious disease – deemed ‘protective’ and not punitive;⁸⁵ (3) the power of Parliament to punish for contempt – seen as ‘fundamental’ to the constitutional separation of powers;⁸⁶ and (4) the power of military tribunals to punish for breaches of military discipline – described as ‘essential’ to the maintenance of disciplinary hierarchy.⁸⁷

Interestingly, her Honour conceded that the latter two ‘exceptional cases’ were indeed punitive, but emphasised the historical origins of these powers.⁸⁸ Whilst Jagot J emphasised the case-specificity of each of these exceptions, it may be observed that her Honour tended to adopt language of ‘essentiality’ or ‘fundamentality’ in describing the rationale behind many of these exceptions. Her Honour’s description of the second listed exception as ‘protective’ (in contradistinction to ‘punitive’) may also be noted.

⁸⁰ Ibid [341].

⁸¹ Ibid [342].

⁸² Ibid [313].

⁸³ Ibid [316].

⁸⁴ Ibid [318].

⁸⁵ Ibid.

⁸⁶ Ibid, citing *Constitution* ss 49, 50; *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

⁸⁷ *EGH19* (n 1) [318], citing *Haskins v The Commonwealth* (2011) 244 CLR 22, 39–40 [37]–[38].

⁸⁸ Ibid [318].

E *Steward J*

Steward J dissented, finding that cl 070.612A(1) was not contrary to *Lim*.

Despite the Commonwealth's concession, his Honour remained of the view that the conditions were not in fact *prima facie* punitive.⁸⁹ His Honour thought that detriments lesser than detention, even involving interferences with liberty, should not be equated with involuntary detention.⁹⁰ Nevertheless, given the concession, he moved past this point.

Although his Honour has not found the previous iteration of the impugned provisions to be invalid, his Honour argued that the amendments made to cl 070.612A(1) were sufficient to remedy the defects identified by the majority in *YBFZ*.⁹¹ As for the two 'remaining problems'⁹² – the exclusion of natural justice, and the fixed 12-month duration – Steward J argued that these attributes could not convert a protective power into a punitive one.⁹³ Having regard to the legitimate and non-punitive purpose (the protection of the community), his Honour thought the provision to be 'aptly calibrated'.⁹⁴

Much like Edelman J, his Honour thought HLA Hart's 'standard case' was a 'compelling starting point'⁹⁵ and agreed that an important aspect of punishment is that it acts as 'a sanction for certain proscribed conduct'.⁹⁶ He maintained that the essential element of punishment was the causative link between a person's (wrongful or unlawful) conduct and the imposition of detriment.⁹⁷

However, his Honour disagreed with Edelman J on two points. Firstly, his Honour did not accept that the imposition of consequences based on predictions of future behaviour based on past behaviour was always punishment.⁹⁸ His Honour argued that past conduct ought to be the reason for the detriment, rather than merely being used as evidence, for a detriment to constitute punishment. Secondly, and relatedly, his Honour did not accept that protection and punishment were indistinguishable. A protective law may be punitive, but it does not follow that every law directed to protection is punitive.⁹⁹ Of course, his Honour thought that the impugned provisions were indeed protective,

⁸⁹ Ibid [257]–[258].

⁹⁰ Ibid [225]–[226].

⁹¹ Ibid [259]–[266].

⁹² Ibid [267].

⁹³ Ibid [270].

⁹⁴ Ibid [266].

⁹⁵ Ibid [231].

⁹⁶ Ibid, quoting *Alexander v Minister for Home Affairs* (2022) 276 CLR 336, 424 [239].

⁹⁷ *EGH19*(n 1) [232].

⁹⁸ Ibid [234]–[235].

⁹⁹ Ibid [236]–[242]; See also *Kansas v Hendricks* (1997) 521 US 346.

with BVR-holders' past offending only relevant for this purpose, rather than for the exaction of retribution.

F *Beech-Jones J*

Beech-Jones J, much like Steward J, argued that the provisions were not invalid.

His Honour similarly accepted, on the basis of the Commonwealth's concession, that both conditions were *prima facie* punitive, but emphasised that this did not advance the case for invalidity too far.

As for the purpose of the provision, his Honour thought that the specification of the kind of harm – that being, a 'substantial risk' of 'seriously harming any part of the Australian community by committing a serious offence' – was sufficiently precise and grave. As such, his Honour argued that the provision carried a legitimate and non-punitive purpose.

On necessity, Beech-Jones J identified six features of the amended scheme that supported its validity: (1) the 12-month duration; (2) the positive threshold for satisfaction; (3) the requirement that the Minister be satisfied of reasonable necessity and reasonable adaptation; (4) the requirement to consider conditions in order; (5) the post-imposition representation process; and (6) the availability of judicial review.¹⁰⁰ Taken together, those features provided sufficient certainty that the conditions would not stray beyond their protective purpose.¹⁰¹

His Honour rejected reliance on Div 395 of the *Criminal Code*. To argue that a court-based scheme could achieve similar ends was, in his view, to introduce a form of proportionality analysis of the kind rejected in *Falzon v Minister for Immigration and Border Protection*.¹⁰²

V Disquiet in the Court?

The most obvious point of disagreement in *EGH19* concerns the relationship between protection and punishment. Edelman J rejected any strict separation between the two, meaning that a law may therefore be protective and punitive at the same time. The rest of the Court did not embrace that position. Several judgments continued to reason as though a protective purpose, if sufficiently particularised, tends against punitive characterisation. Gageler CJ and Gleeson J accepted that protection from a substantial risk of serious harm could be a legitimate non-punitive purpose. Steward and Beech-Jones JJ went further, treating the scheme's protective orientation as central to its validity.

¹⁰⁰ Ibid [377]–[382].

¹⁰¹ Ibid [384]–[385].

¹⁰² Ibid [386]–[387], citing *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 344 [31]–[32].

The Court also divided over the relevance of past offending. For Edelman J, the fact that the conditions would almost invariably be imposed by reason of past offending strongly supported the conclusion that the scheme was punitive. Although the provision was framed in terms of future risk, that risk would ordinarily be assessed by reference to past criminal conduct. By contrast, Beech-Jones J treated the connection with past offending as strengthening, rather than undermining, the scheme's protective rationale; past conduct mattered because it supplied an evidential basis for assessing future danger. For Gordon J, the fact that the scheme was not technically confined to persons with prior offending itself militated against validity, because it suggested that the class of persons subject to the power was too broad. It is awkward, to say the least, that the same premise is used to support several inconsistent conclusions.

A further difficulty concerns the language of 'exceptional cases'. In *Lim*, the basic proposition was that, exceptional cases aside, punitive detention is an incident of the exclusively judicial function of adjudging and punishing criminal guilt. In *EGH19*, the language of 'exceptional cases' appeared to hover over an inquiry, with many drawing comparisons between the impugned scheme and other recognised 'exceptions'. But of course, if a law is not punitive, it is not an 'exception' to the *Lim* doctrine at all. That leaves some uncertainty about what is really being asked: whether the law is punitive but an exception, whether it is justified despite being punitive, or whether the existence of a legitimate protective purpose means that it was never punitive in the relevant constitutional sense.

Similarly, the Court continued to describe the test as a single question of characterisation, although the reasoning did not always proceed that way. The Commonwealth's concession is a useful illustration of the problem. In conceding that the monitoring and curfew conditions were *prima facie* punitive, while still arguing validity at the later stages, the inquiry was effectively severed. The supposed single question became a staged analysis in which each part could be answered separately. There is force in Edelman J's warning that the 'test' risks hardening into a set of independent constitutional criteria.

Moreover, several judges placed significant emphasis on the fact that the power had been conferred on the Minister (as a member of the Executive government) rather than a court, although it is not clear how that fact could be relevant to the test as currently formulated. This is obviously relevant once it has been concluded that the power is punitive, given that a punitive power ordinarily cannot be conferred on the Executive government. However, this fact cannot answer the anterior question of whether the power is punitive to begin with, which is purportedly the question the Court sought to answer. This horse-and-

cart problem is perhaps indicative of a broader insufficiency in the current state of the inquiry.

VI Conclusion

The decision in *EGH19* does not leave the law in a particularly settled state. The amended provision was certainly more carefully drafted than its predecessor and responded directly to many of the criticisms made in *YBFZ*. Even so, the attempt still failed. That suggests the problem may not be resolvable through further legislative fine-tuning; the issues appear to be more fundamental.

The practical consequences of the decision have been immediate. More than 100 BVR holders are no longer subject to the monitoring and curfew conditions, and it remains unclear what the Commonwealth's next steps will be. If powers of this kind are to be conferred again, *EGH19* strongly suggests that they ought to be imposed by a court.

Ultimately, *EGH19* in many ways failed to resolve the unresolved, although the Commonwealth is unlikely to have much appetite for a third attempt any time soon.