

LIM AFTER NZYQ: DELIMITING CONSTITUTIONAL CONSTRAINTS ON STATE POWER TO PUNISH NON-CITIZENS

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*For more than three decades the High Court’s decision in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 was frequently invoked (though without success) to challenge the legality of immigration detention powers serving to constrain the liberty of non-citizens for long and indefinite periods. In the period from 2020 to 2025, however, the ‘Lim principle’ has been revitalised, with its full implications progressively revealed in a series of cases about severe executive action. This article explores the constitutional scope of administrative power to constrain the liberty of non-citizens, and identifies gaps, rifts and trends in recent Lim case law. The article critically examines the jurisprudential development of key notions on which the Lim principle rests: ‘punitive’ measures and ‘legitimate’ purposes, and the analysis of ‘means and ends’. Three arguments are advanced across the article which, together, we advocate as a coherent and preferred approach to understanding the Lim principle in its contemporary applications. Specifically, we argue for a values-centred and substantive approach to the Lim principle, which acknowledges ‘proportionality’ as the relevant standard for assessing the relevant ‘means and ends’ relationship. The article concludes with a Postscript summarising the case of *EGH19 v Commonwealth* [2026] HCA 7 and outlining its impacts on our central arguments.*

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I INTRODUCTION

The *Lim* principle, ‘if it may still be called the *Lim* principle’,¹ underwent a period of rapid jurisprudential evolution (if not *revolution*) in the early 2020s. In light of these developments, this article undertakes a doctrinal analysis of this challenging body of case law to examine the principle’s evolution, contemporary scope, broader application, and implications, with a specific focus on administrative power to constrain the liberty of non-citizens. In doing so, our aims are threefold. Firstly, we articulate the present constitutional scope of this form of administrative power. Secondly, we identify gaps and rifts (as well as consistencies) in the recent conceptualisation and application of *Lim*. Thirdly, we advocate a cohesive approach to *Lim* which centres constitutional values (including liberty) in the analysis, adopts a substantive conceptualisation of ‘punishment’, and explicitly adopts a ‘proportionality’ frame to articulate and assess the relationship between ‘means and ends’ on which validity rests.

¹ *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1, 46 [183] (Steward J) (‘*YBFZ*’). Steward J is firmly of the view that the *Lim* principle is not being correctly applied by a majority of the current High Court.

The need to revisit the *Lim* principle arises from rapid jurisprudential developments between, particularly, 2021 and 2025. As originally conceived in the 1994 case of *Chu Kheng Lim Minister for Immigration, Local Government and Ethnic Affairs* ('*Lim*'),² the principle holds that federal separation of judicial power gives rise to an immunity from imprisonment except pursuant to a court order following a criminal trial. Specifically,

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.³

Of course, exceptions to this principle were accepted at the time; categories included administrative detention in cases of mental illness or infectious disease and imprisonment on remand pending trial.⁴ Equally, detention for the purposes of deportation or enabling an entry application to be made or considered has been accepted as aligning with ch III.⁵ This immigration-focused exception to the *Lim* principle supported mandatory immigration detention for unlawful non-citizens, often for years at a time.⁶ Critically, in the 2004 case of *Al-Kateb v Godwin* ('*Al-Kateb*'),⁷ the High Court affirmed the constitutional validity of the administrative detention of visa-less non-citizens even where their deportation or admission into the Australian community was unlikely; that is, it gave constitutional legitimacy to administrative detention without foreseeable end.

This changed with the 2023 case of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*NZYQ*'),⁸ wherein a unanimous High Court overturned the constitutional ruling in *Al-Kateb*.⁹ Specifically, the Court held that administrative

² (1992) 176 CLR 1 ('*Lim*'). Alternatively known as the *Cambodian 'Boat People' Case*.

³ Ibid 27 (Brennan, Deane and Dawson JJ). In *Lim*, Brennan, Deane and Dawson JJ wrote a joint judgment with which Mason CJ agreed. The views of those four members of the Court reflect the principles for which the case stands as authority. For a useful charting of key cases between *Lim* and *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 ('*NZYQ*'), see Raynor Thwaites, 'Australian Immigration Detention: Institutional Allocation of Power as Rights Protection?' in Kevin Cope, Stella Burch Elias and Jill Goldenziel (eds), *Oxford Handbook of Comparative Immigration Law* (Oxford University Press, forthcoming).

⁴ *Lim* (n 2) 28 (Brennan, Deane and Dawson JJ).

⁵ Ibid 33.

⁶ This remains a well-documented problem. See, eg, Department of Home Affairs (Cth), *Immigration Detention and Community Statistics Summary* (Report, 31 May 2025). This report notes at 12 that '[a]t 31 May 2025, the average period of time for people held in detention facilities was 443 days'.

⁷ *Al-Kateb v Godwin* (2004) 219 CLR 562 ('*Al-Kateb*').

⁸ *NZYQ* (n 3).

⁹ For valuable extra-curial reflections on the overturning of *Al-Kateb* in *NZYQ*, see James Edelman, 'Overturning *Al-Kateb v Godwin*: Unanswered Questions About The Rules Of Precedent' (Sir Harry

detention was prima facie (ie, by default) punitive and, as such, must be ‘reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose. In other words, detention is penal or punitive unless justified as otherwise.’¹⁰ This standard was said to express the principle articulated in *Lim* and was grounded in *Lim*’s application in the 2021 and 2023 cases of *Minister for Home Affairs v Benbrika* (*‘Benbrika [No 1]’*) and *Jones v Commonwealth* (*‘Jones’*) respectively.¹¹

Then, in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (*‘YBFZ’*) in 2024,¹² the Court significantly extended the *Lim* principle, declaring that interferences with individual liberty other than by executive detention in custody (namely, by electronic monitoring and nighttime curfews, which had been imposed on the now-released *‘NZYQ cohort’* of migrants) were captured by the *Lim* principle. These intrusions upon liberty were, in the circumstances, also characterised as prima facie punitive by the High Court and (in the absence of justification as *reasonably necessary* for a legitimate purpose) amounted to constitutionally impermissible instances of administrative punishment. Since *YBFZ*, the High Court has continued to grapple with the metes and bounds of *Lim* as the doctrine’s resurgence continues.

Our analysis of these developments proceeds in five Parts. Part II sets the jurisprudential context for the constitutional limits upon the regulation of non-deportable non-citizens. It updates and complements the existing body of scholarship discussing *Lim* case law from 1994 to 2022,¹³ as well as the few publications grappling with the principle’s dynamic status since then.¹⁴ As Thwaites

Gibbs Memorial Oration, The Samuel Griffith Society, 25 May 2024) <www.hcourt.gov.au/resources-and-publications/speeches/the-hon-justice-james-edelman-ac>.

¹⁰ *NZYQ* (n 3) 157 [39] (The Court).

¹¹ See, eg, *Lim* (n 2) 10 (Mason CJ), 33 (Brennan, Deane and Dawson JJ), 58 (Gaudron J), 65–6, 71 (McHugh J); *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 (*‘Benbrika [No 1]’*); *Jones v Commonwealth* (2023) 280 CLR 62 (*‘Jones’*).

¹² *YBFZ* (n 1).

¹³ See, eg, Jeffrey Gordon, ‘Imprisonment and the Separation of Judicial Power’ (2013) 36 *Melbourne University Law Review* 41; Flyn Wells, ‘Does *Lim* Truly have “Nothing to Say” About the Commonwealth’s Regional Processing Arrangements? Habeas Corpus as a Vehicle for Testing the Constitutional Validity of Offshore Detention’ (2022) 45(2) *Melbourne University Law Review* 779; Michael Kirby, ‘Municipal Courts and the International Interpretive Principle: *Al-Kateb v Godwin*’ (2020) 43(3) *UNSW Law Journal* 930; AJ Brown, ‘When Liberty Divides: Judicial Cleavages and their Consequences in *Al-Kateb v Godwin* (2004)’ in Andrew Lynch (ed), *Great Australian Dissents* (Cambridge University Press, 2016) 311.

¹⁴ Thwaites (n 3); Zachary Gomes, Aryan Mohseni and Charlie Ward, ‘Going out on a *Lim*: Reconceptualising the Constitutional Limit on Preventative Detention’ (2025) 99 *Australian Law Journal* 550. We note that Thwaites’s publication (as available on SSRN, which remains forthcoming) does not cover *YBFZ*, whereas Gomes, Mohseni and Ward do so in a brief ‘postscript’. We, however, centre this case as one of the most critical cases in the field (a reflection of how quickly that field has moved).

observes, ‘the arc of the [*Lim*] jurisprudence has been long’;¹⁵ rather than revisit that well-trodden terrain, this article focuses more closely on developments in the first half of the 2020s. More practically, Part II sets out the relevant facts and findings in, not only the seminal cases of *Lim*, *Al-Kateb*, and *NZYQ*, but the cases following *NZYQ*, namely *AZC20 v Secretary, Department of Home Affairs (No 2)* (*‘AZC20’*),¹⁶ *ASF17 v Commonwealth* (*‘ASF17’*),¹⁷ *CZA19 v Commonwealth; DBD24 v Minister for Immigration and Multicultural Affairs* (*‘CZA19’*),¹⁸ and *YBFZ*. This provides insights into the legislative and particular individual contexts in which *Lim* issues arise for visa-less migrants. Moreover, the case summaries allow the remainder of the article to focus more closely on doctrinal developments across this rapidly evolving suite of case law.

The article progresses to explore discreet aspects of the contemporary *Lim* principle to (1) map its roots and recent evolution, (2) identify unresolved aspects of its interpretation and relevant divisions of opinion on the High Court, and (3) advance our views on the preferable resolution of these judicial interpretive rifts. Thus, Part III begins with the constitutional foundations for *Lim* through lenses of formalism, functionalism, values, and history. Part III culminates in an argument for a multifactorial but values-centred approach to *Lim*. The discussion in this Part also reveals the foundations for *NZYQ* in earlier cases — particularly *Benbrika [No 1]* and *Alexander v Minister for Home Affairs* (*‘Alexander’*),¹⁹ in which questions of liberty squarely arose outside the immigration context.

In Part IV, we turn to the place of punishment in the *Lim* framework. The identification of (1) measures, and (2) their purposes, as ‘punitive’ or ‘non-punitive’ is critical to *Lim*; however, the nature of punishment itself remains hotly contested. In this Part, we argue for a broad(er) and substantive (albeit binary) approach to punishment in this constitutional context and reflect on the distinction between ‘legitimate’ and ‘illegitimate’ purposes.

Part V turns to the next step, and arguably the vaguest aspect, of the *Lim* framework: the relationship between ‘means and ends’. This Part traces the waning and waxing of this element of the *Lim* principle, revealing a consistent stream of reasoning despite contrary approaches in some cases (including *Al-Kateb*). Building on this analysis and our foundational arguments for a values-centred, substantive approach to *Lim*, we conclude Part V by advocating for the explicit acknowledgment of

¹⁵ Thwaites (n 3) 1.

¹⁶ [2023] FCA 1497 (*‘AZC20’*).

¹⁷ (2024) 98 ALJR 782 (*‘ASF17’*).

¹⁸ (2025) 99 ALJR 650 (*‘CZA19’*).

¹⁹ (2022) 276 CLR 336 (*‘Alexander’*).

‘proportionality’ as the relevant standard for assessing the relevant relationship between means and statutory ends under *Lim*. We close, in Part VI, by reflecting on how recent jurisprudence has both reaffirmed and reshaped the *Lim* principle and by summarising the cohesive interpretative approach advocated through the article.

II MIGRATION DETENTION AND THE STREAM OF AUTHORITY FROM LIM TO YBFZ

The system of executive detention, introduced by the *Migration Reform Act 1992* (Cth), applies to those non-citizens without a valid visa and has permitted the prolonged and indefinite deprivation of people’s liberty. Notoriously, the scheme of mandatory detention does not address the circumstances of individual detainees,²⁰ has ‘no fixed chronological end point’,²¹ and infringes some of the most basic human rights and freedoms known to the common law,²² with social harms reverberating beyond those detained.²³

There can be no deprivation of individual liberty by mere executive action absent valid statutory authority or judicial mandate.²⁴ That no person shall be imprisoned except pursuant to lawful authority is a ‘fundamental and long-established principle’.²⁵ Moreover, involuntary detention must not infringe the *Constitution*, including the strict separation of federal judicial power derived from ch III.²⁶ Necessarily, immigration detention must be subject to judicial oversight. This is required in order to enforce express and implied constitutional limits and also, for administrative law purposes, to ensure that executive action adheres to legislative criteria — criteria that cannot be so vaguely formulated as to avoid judicial scrutiny.²⁷

The power of the federal Parliament to authorise or require the executive government to detain a non-citizen (absent a judicial order) is granted by the

²⁰ *Al-Kateb* (n 7) 562 [12] (Gleeson CJ).

²¹ *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 463, 495 [123] (Kenny and Mortimer JJ).

²² See, eg, *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 359 [94]–[95] (Nettle J) (*Falzon*).

²³ M Peterie (ed), *Immigration Detention and Social Harm: The Collateral Impacts of Migrant Incarceration* (Routledge, 2024).

²⁴ *Re Bolton; ex p Beane* (1987) 162 CLR 514, 528 (Deane J); *Lim* (n 2) 19 (Brennan, Deane and Dawson JJ).

²⁵ *NZYQ* (n 3) 153 [27] (The Court).

²⁶ This strict separation is grounded in the ‘two limbs of *Boilermakers*’, referring to the Court’s decision in *R v Kirby; ex p Boilermakers’ Society of Australia (Boilermakers Case)* (1956) 94 CLR 254 (*Boilermakers*’).

²⁷ *Commonwealth of Australia v AJL20* (2021) 273 CLR 43 (*AJL20*).

naturalisation and aliens power in s 51(xix) of the *Constitution*.²⁸ Crucially, ‘the amplitude of the legislative power conferred by s 51(xix) is qualified by the implications of ch III of the *Constitution*,’²⁹ including the *Lim* principle.

A From *Lim* to *Al-Kateb*

In *Lim*, the High Court was asked to decide whether laws authorising the mandatory detention of two designated groups of asylum seekers (all Cambodians arriving by boat) were invalid for infringing the separation of powers. The impugned law provided for detention in custody — for a period capped at 273 days after making an entry application — until the unlawful non-citizens had been removed from Australia or granted an entry permit. The Court upheld the provisions but, in doing so, formulated the broad ‘immunity’³⁰ from involuntary detention by the state outlined above.

Essentially, a majority of the Court asserted that immigration detention is one of a few exceptions to a general constitutional principle that detention is punitive in character and, therefore, only within judicial power to impose. Detaining an alien in custody must, however, be limited to a period that is reasonably capable of being seen as necessary for limited non-punitive purposes.³¹

The strength of the Court’s ruling in *Lim* (and the status of the *Lim* principle itself) was undermined by successive unsuccessful attempts to invoke its protection.³² Arguably the most important case in this respect came a decade after *Lim*, in the 2004 case of *Al-Kateb*.

²⁸ *Lim* (n 2) 10 (Mason CJ), 32 (Brennan, Deane and Dawson JJ). Also see, eg, *CZA19* (n 18) 660–1 [40]–[43] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), [75] (Gordon J), [86] (Edelman J).

²⁹ *AJL20* (n 27) 63 [22] (Kiefel CJ, Gageler, Keane and Steward JJ).

³⁰ *Lim* (n 2) 28 (Brennan, Deane and Dawson JJ).

³¹ Thus, the connection between the non-punitive purpose and length of detention was highly relevant to the Court’s ruling about the validity of laws extant at the time, as McHugh J explained in *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) 225 CLR 1, 36 [88] (*Re Woolley*). The presence of restraints on detention, including statutory terms fixing time limits on the period of detention (273 days) after making an entry application, and a legislative requirement to remove a designated person ‘as soon as practicable’ after the refusal of an entry application and finalisation of appeals, were important factors in *Lim* that ensured detention powers were ‘reasonably necessary’ for non-punitive purposes: *Lim* (n 2) 10 (Mason CJ), 33 (Brennan, Deane and Dawson JJ), 46 (Toohey J). See also *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 332, 369–370 [139]–[140] (Crennan, Bell and Gageler JJ) (*Plaintiff M76*), cited with approval in *NZYQ* (n 3) 155 [33] (The Court).

³² See, eg, *Kruger v The Commonwealth* (1997) 190 CLR 1, 109–110 (Gaudron J); *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 498–9 (Gleeson CJ) (*Behrooz*); *Al-Kateb* (n 7) 648–9 [257]–[258] (Hayne J); *Benbrika [No 1]* (n 11) 94–5 [25]–[27] (Kiefel CJ, Bell, Keane and Steward JJ).

In *Al-Kateb*, a majority of the High Court determined that it was — as a matter of statutory construction and constitutional interpretation — lawful for a stateless Palestinian man to be detained indefinitely if there were even a faint possibility that his removal might become practicable in the future. The primary focus of the Court's inquiry was on the purpose of the detention, which was deemed to be non-punitive.³³ Ultimately, immigration detention appeared to be *prima facie* valid unless it could be said to have an identifiably punitive purpose. Neither the length of detention itself nor its impacts on the detainee appeared to be sufficient to render it punitive or to set it outside the bounds of valid executive power.

The effect of *Al-Kateb* was harsh, described as 'segregation by incarceration ... for an indefinite period, perhaps for life'.³⁴ That legal position endured for twenty years, during which time the High Court found it unnecessary, or declined, to revisit *Al-Kateb* on three occasions.³⁵ For the purposes of this article, we turn directly to *NZYQ*, in which the High Court finally re-opened and overturned the constitutional ruling in *Al-Kateb*.³⁶

³³ See, eg, *Al-Kateb* (n 7) 584 [44]–[45] (McHugh J).

³⁴ M Head, 'Detention without Trial: A Threat to Democratic Rights' (2005) 9 *UWSLR* 33, 34.

³⁵ *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1 ('*M47/2012*'); *Plaintiff M76* (n 31); and *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 ('*M47/2018*'). Indefinite immigration detention, *Al-Kateb*, and its aftermath prompted far-reaching critique and commentary. See, eg, Justice AM North and Peace Declé, 'Courts and Immigration Detention: The Australian Experience' (2002) 10 *Australian Journal of Administrative Law* 5; Jane McAdam, 'Asylum Seekers: Australia and Europe: Worlds Apart' (2003) 28(4) *Alternative Law Journal* 193; Matthew Groves, 'Immigration Detention vs Imprisonment: Differences Explored' (2004) 29(5) *Alternative Law Journal* 228; Eloise Dias, 'Punishment by Another Name? Detention of Non-Citizens and the Separation of Powers' (2004) 15 *Public Law Review* 17; James Allan, "'Do the Right Thing": Judging: The High Court of Australia in *Al-Kateb*' (2005) 24(1) *University of Queensland Law Journal* 1; Stephen McDonald, 'Involuntary Detention and the Separation of Judicial Power' (2007) 35(1) *Federal Law Review* 25. Justice McHugh, who was in the majority in *Al-Kateb*, even harnessed the case to highlight 'the continuing failure of this country to have a Bill of Rights' and to highlight the importance of public agitation for greater rights protection: Justice Michael McHugh, 'The Need for Agitators: The Risk of Stagnation' (Speech, Sydney University Law Society Public Forum, 12 October 2005) <www.hcourt.gov.au/sites/default/files/assets/publications/speeches/former-justices/mchughj/mchughj_12oct05.pdf>.

³⁶ The High Court agreed (*NZYQ* (n 3) [19]–[23]) with the majority's reasoning in *Al-Kateb* on the statutory construction issue, citing cumulative considerations that pointed away from re-opening that matter: (i) legislative reliance and implicit legislative endorsement of *Al-Kateb* since 2004; and (ii) the recent case of *AJL20* (n 27) 150–2 [33]–[34], where a majority endorsed *Al-Kateb* on the statutory construction point. For further discussion, see Edelman (n 9).

B *Al-Kateb Overturned: NZYQ*

NZYQ concerned a stateless Rohingya man who had his visa revoked on adverse character grounds.³⁷ In the absence of a third country willing to accept him he remained liable to executive detention for an unlimited period. In a single judgment, the High Court held that executive detention must be for a ‘legitimate and non-punitive purpose’ and be ‘reasonably capable of being seen as necessary for’ that purpose.³⁸ Thus, where there was, in fact, no real prospect of achieving the removal of a detainee or granting them a visa in the foreseeable future, it could not be said that the purpose of their detention was related to the (legitimate and non-punitive) purposes of removal or entry.³⁹ This placed the continued detention of NZYQ beyond executive power.

In NZYQ, the Court described *Al-Kateb* as having ‘come increasingly to appear as an outlier in the stream of authority which has flowed from *Lim*’. Overruling *Al-Kateb* formed a critical step in the Court’s reasoning.⁴⁰ *Al-Kateb* may have been a *jurisprudential* outlier (as will become apparent as this article progresses),⁴¹ but it had formed the basis of successive governments’ immigration detention policies, responsible for the continued incarceration of hundreds of non-citizens with no foreseeable prospect of release.⁴²

The jurisprudential importance of NZYQ is heightened by the Court’s delivery of a single judgment — in contrast to the split decisions and contrasting approaches which tended to characterise preceding *Lim* cases.⁴³ Unusually, however, that single judgment contained four paragraphs explaining ‘[t]he approach of Edelman J’.⁴⁴ Although Edelman J agreed with the core findings and orders, his Honour based invalidity on the *disproportionality* between the law’s legitimate non-punitive object and its continuation without foreseeable end.⁴⁵ The importance of this distinction is elaborated upon in Part V.

³⁷ A stateless refugee, NZYQ was found to be a danger to the community and had his protection visa refused under s 36(1C) *Migration Act 1958* (Cth) because of his conviction and sentence for child sexual offences.

³⁸ NZYQ (n 3) 157 [39] (The Court).

³⁹ Slightly different reasoning was adopted by Edelman J on this point. See *ibid* [51]–[54] and discussion below in Part IV.

⁴⁰ *Ibid* 156 [35].

⁴¹ See discussion below in Part V.

⁴² Peter Billings, ‘Causing a Stir: Unwanted Aliens and the Cauldron of Crimmigration Controls Post-NZYQ’ (2025) 44(3) *University of Queensland Law Journal* 1.

⁴³ See, eg, *Al-Kateb* (n 7); *Falzon* (n 22); *AJL20* (n 27); *Benbrika [No 1]* (n 11).

⁴⁴ See further Stephen McDonald, ‘NZYQ: A New Style of Unanimous Judgment for the High Court of Australia’, *AUSPUBLAW* (Blog Post, 31 January 2024) <<https://www.auspublaw.org>>.

⁴⁵ NZYQ (n 3) 158 [44]. See discussion below in Part IV.

Ultimately, what had been the lawful detention of NZYQ since 2018 was re-characterised as ‘punitive’ for constitutional purposes — infringing the separation of powers — triggering the immediate release of NZYQ and others. The Court justified this as restoring the authority of constitutional principles authored in *Lim*.

C *Capacity, Cooperation and Unachievable Removal: AZC20, ASF17 and CZA19*

NZYQ was unable to be removed from Australia because he was stateless. But what of circumstances where removal is impractical on other bases — such as ill-health or where a long-term detainee deliberately frustrates attempts to bring about their removal? After *NZYQ* two cases quickly came before the Federal Court of Australia (‘FCA’). Both cases dealt with the thorny question of whether the constitutional limit on detention is reached when a detainee is ‘un-cooperative’ with officials with respect to making their removal practicable. This was distinguishable from the factual underpinnings of *NZYQ*.⁴⁶ In the 2023 case of *AZC20* the FCA considered the case of an Iranian who, without any criminal conviction or character concerns, had been detained for ten years.⁴⁷ The applicant had been refused protection but was profoundly opposed to returning home because he believed he would be persecuted. On this basis, he would not meet with Iranian officials. Thus, as involuntary returnees are rejected by Iran, the FCA found that there was no real prospect of removal to Iran becoming practicable in the reasonably foreseeable future.⁴⁸

Kennett J reasoned that *AZC20* had not embarked on a deliberate strategy to frustrate removal from Australia. Rather, he resisted removal to Iran because he strongly believed that he would face persecution in Iran.⁴⁹ Moreover, he had developed mental health problems during his lengthy period of detention, so realistically it was not ‘within his power to change his approach to one of cooperation with removal to Iran’.⁵⁰ With removal not in prospect in the reasonably foreseeable future, the constitutional line between punitive and non-punitive detention had been crossed. The applicant was duly released pursuant to the writ of habeas corpus.

⁴⁶ *Ibid* [62].

⁴⁷ *AZC20* (n 16).

⁴⁸ *Ibid* [66].

⁴⁹ *Ibid* [65(b)–(c)]. Cf *M47/2018* (n 35), a case in which the High Court found that a detainee had been deliberately uncooperative with officials in progressing their removal without good reason for that posture: at [32] (Kiefel CJ, Keane, Nettle and Edelman JJ). A ‘good reason’ includes medical explanations for non-cooperation: at 297 [30], 301–2 [47].

⁵⁰ *AZC20* (n 16) 25 [65(d)]. He had also attempted suicide many times while in detention.

AZC20 was then distinguished in the 2024 High Court case of *ASF17*,⁵¹ a matter involving an Iranian man who had been held in detention for almost ten years pending the outcome of administrative and judicial proceedings about his status in Australia. He was uncooperative with officials with respect to removal to Iran due to a declared fear of persecution based on bisexuality.⁵² Moreover, no third country removal was in prospect. *ASF17* argued that the fact of his resolute non-cooperation negated his removal prospects and, consequently, the constitutional limit on detention was reached.

The High Court disagreed, finding that a person in the position of *ASF17*, who was neither stateless nor officially declared a refugee by the government, but who was deliberately uncooperative with administrative officials and stymied removal processes, may be kept in detention indefinitely. In a joint judgment, six members of the Court rejected the arguments that (1) the bare fact of a detainee's non-cooperation with authorities was sufficient to refute the existence of the non-punitive purpose of the detention (ie, removal), and (2) a genuine subjective fear of harm could amount to a 'good reason' for a person being uncooperative in the reasonably foreseeable future. The 'short point' was that 'conformably with the *Lim* principle, continuing detention for a non-punitive purpose that is occurring because of a voluntary decision of the detainee cannot be characterised as penal or punitive'.⁵³

In brief, a detainee who, for health reasons, lacks capacity to engage and cooperate with their involuntary removal process is on firm ground to invoke ch III and secure release from detention; whereas indefinite detention will remain 'non-punitive'

⁵¹ *ASF17* (n 17).

⁵² He had been refused a visa by the government due to the provision of a bogus document. Subsequently, in the detention proceedings, *ASF17* deposed that he feared persecution in Iran based on his bisexuality, a claim not previously raised in his visa application. The Federal Court of Australia ('FCA') considered this new 'collateral' claim, but the judge disbelieved *ASF17* due to the inconsistent accounts about his subjective fears given to officials and in later court proceedings: *ASF17* (n 17) 807 [126]–[127] (Edelman J).

⁵³ *ASF17* (n 17) 791 [42] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ). See also 792 [48] where their Honours conclude: 'ASF17 could be removed to Iran if he cooperated in the process of obtaining the requisite travel documents from Iranian authorities. He has decided not to cooperate. He has the capacity to change his mind. He chooses not to do so.' In *Lim* (n 2), the ability of the detainee to bring about an end to their detention by requesting removal was one factor (statutory time limits on detention being another) that ensured detention powers were 'reasonably necessary' for non-punitive purposes: at 34 (Brennan, Deane and Dawson JJ), 10 (Mason CJ, agreeing).

where a detainee has the capacity to cooperate with the removal process but decides not to.⁵⁴

In 2025, *CZA19* confirmed that detaining two confirmed refugees, for whom there was no real prospect of removal from Australia, *could* nonetheless constitute valid administrative detention for the legitimate non-punitive purpose of visa processing.⁵⁵ The process of considering and determining a visa application during a period of detention may well take a long time (months and even years) but the High Court emphasised that the detention remained justified by reason of its ‘visa processing’ aim. This is because detention: makes an unlawful non-citizen available for investigations into their identity, criminal history, security profile and health; allows suitable visa conditions to be imposed on the non-citizen before they enter the community; and reduces the risk of the non-citizen absconding before their visa application is determined.⁵⁶ The fact that very little had been done to actually process the detainee’s visas during their detention was answered by the availability of the writ of mandamus, to compel performance of the implied statutory requirement to complete processing within a reasonable time, rather than engaging questions of constitutional validity.⁵⁷

D *Lim Extended: YBFZ*

In contrast to this suite of cases which clarified the application of *NZYQ*, *YBFZ* took the *Lim* principle into wholly new terrain — the scope of which, at the time of writing, was being litigated in the High Court, and which is now addressed in the Postscript (see Part VIII below).⁵⁸

The legislative background to *YBFZ* begins with the *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth), enacted within a fortnight of orders being made in *NZYQ*, to amend the *Migration Regulations 1994* (Cth). This was part of a broader suite of reforms in response to the High Court’s decision and was supplemented by further changes to the regulations following the delivery of the Court’s reasons for

⁵⁴ There are older Federal Court cases dealing with statutory interpretation that held the lawful limits on detention were not reached in cases where a person frustrated their own removal: eg. *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 [137].

⁵⁵ *CZA19* (n 18) 664 [59].

⁵⁶ *Ibid* 661–2 [46] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) and 668 [75] (Gordon J).

⁵⁷ *Ibid* 662 [49], 663 [53], 664 [57]–[59] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) and 675 [116] (Steward J). Cf Gordon J at 665 [79]. See P Billings, ‘Immunised and Indifferent to Incarceration: The Corrosive Effect of Immigration Detention Laws on Officialdom’ in M Peterie (ed), *Immigration Detention and Social Harm: The Collateral Impacts of Migrant Incarceration* (Routledge, 2024) 175, for a discussion of the application of mandamus to promote timely and lawful visa processing.

⁵⁸ *EGH19 v Commonwealth of Australia* (case no S55/2025).

judgment.⁵⁹ The new reg 2.25AA conferred a power on the Minister to grant a particular bridging visa to non-citizens for whom there was no real prospect of removal becoming practicable in the reasonably foreseeable future. In this way, the new visa powers specifically targeted the 'NZYQ cohort': then, a group of 153 non-deportable and (thanks to NZYQ) non-detainable migrants (though that figure has risen over time). All but four of this group had prior criminal convictions,⁶⁰ and, despite prior criminality not being a necessary factor for the impugned conditions, the measures were politically justified by reference to the risks presented by releasing these individuals into the community.⁶¹

The new regulations provided that certain conditions 'must' be imposed 'unless the Minister is satisfied that it is not reasonably necessary to impose that condition for the protection of any part of the Australian community'.⁶² This included condition 8620 which imposed a curfew between 10 pm and 6 am (or another period, up to eight hours, specified by the Minister),⁶³ and condition 8621 which required the visa-holder to wear an electronic monitoring device at all times.⁶⁴ Practically speaking, that device was an ankle bracelet that was 'neither small nor discreet' and which required charging from a mains power supply for two 90-minute sessions per day.⁶⁵ Both conditions were subject to a 12-month limit, though subsequent visas could be issued on similar terms.⁶⁶ Non-compliance with the conditions was a criminal offence attracting a minimum sentence of one year and maximum of five years' imprisonment.⁶⁷

The curfew and monitoring conditions were imposed on the man known as YBFZ, a stateless Eritrean who had arrived in Australia in 2002, aged 14, under a refugee visa. That visa was cancelled following YBFZ's convictions for offences for which he served prison sentences. Like Al-Kateb and NZYQ, YBFZ's statelessness effectively removed any real prospect of his removal from Australia. He had been either in immigration detention or hospitalised for mental health treatment since he left

⁵⁹ See *YBFZ* (n 1) 15–6 [33]–[36] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

⁶⁰ This tally is as agreed in the special case for *YBFZ*, see *ibid* 47–8 [193] (Steward J).

⁶¹ See, eg, Andrew Giles and Clare O'Neil, 'Government Action in Response to NZYQ High Court Decision' (Media Release, 14 November 2023); Billings (n 42).

⁶² *Migration Regulations 1994* (Cth) sch 2 cl 070.612A(1), as amended by the *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth) (emphasis added).

⁶³ *Ibid* sch 2 cl 070.612A(1)(a). Edelman J rejected the phrase 'curfew condition' as 'an inapt euphemism', stating the condition exceeded a mere curfew and was 'more appropriately described as "home detention": *YBFZ* (n 1) 27–8 [104] (Edelman J). Cf 52 [216] (Steward J).

⁶⁴ *Migration Regulations 1994* (Cth) sch 2 cl 070.612A(1)(d).

⁶⁵ *YBFZ* (n 1) 19 [58]–[59] (Gageler CJ, Gordon, Gleeson and Jagot JJ), 68 [300] (Beech-Jones J).

⁶⁶ *Migration Regulations 1994* (Cth) reg 2.25AE.

⁶⁷ *Migration Act 1958* (Cth) ss 76C, 76D, 76DA.

prison in 2018.⁶⁸ At the time of his High Court hearing, YBFZ faced a total of six charges for failing to comply with either the monitoring or curfew conditions.⁶⁹

In *YBFZ* the High Court (Steward J and Beech-Jones J dissenting) held that the monitoring and curfew conditions constituted administrative punishment in violation of the *Lim* principle. Accordingly, for the first time, *Lim* was applied to impositions on liberty less severe than executive detention. (The application of *Lim* to citizenship-stripping is discussed below.)

For the plurality (Gageler CJ, Gordon, Gleeson and Jagot JJ), scrutiny of both the curfew and monitoring conditions revealed them to be prima facie punitive in substance and effect, notwithstanding they stopped short of imposing full-time detention in a state facility. Critically, both measures imposed ‘material and relatively long-term’ encroachments on liberty and bodily integrity.⁷⁰ This prima facie punitive character was not displaced by a legitimate and non-punitive purpose. Specifically, their Honours interpreted the statute to ‘mean precisely what it says, that its object is the “protection of any part of the Australian community” in the broad sense’,⁷¹ rather than narrower alternative purposes such as guarding against future offending or protecting the community from harm.⁷² This broad purpose was described as ‘unparticularised’ and ‘indeterminate’⁷³ and, thus, failed the ‘legitimate and non-punitive purpose’ test established in *NZYQ*.

Edelman J also held that the conditions were administrative punishment in contravention of *Lim* but applied his own conceptualisation of ‘punishment’ to do so (explored below in Part IV). This allowed his Honour to favour a narrower harm-preventive purpose which was nonetheless classified as ‘punitive’.⁷⁴ In separate dissenting opinions, Steward J and Beech-Jones J interpreted the provisions as having one or more *purely* non-punitive purposes. Moreover, whilst satisfied that the curfew condition was prima facie punitive, Beech-Jones J rejected this categorisation of the monitoring condition.⁷⁵

The important cases summarised above provide the edifice for understanding the present constitutional boundaries of administrative powers to regulate non-deportable non-citizens. From that jurisprudence, what emerges is that

⁶⁸ *YBFZ* (n 1) 26 [96] (Edelman J).

⁶⁹ *Ibid* 17 [45] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

⁷⁰ *Ibid* 18 [52], 19 [60].

⁷¹ *Ibid* 20 [76].

⁷² *Ibid* 20–2 [66]–[76].

⁷³ *Ibid* 20 [76].

⁷⁴ *Ibid* 24–5 [91]. See also 42–3 [162]–[168] (Edelman J).

⁷⁵ *Ibid* 68–70 [303]–[310] (Beech-Jones J).

administrative detention (and certain other liberty-restrictive measures) will be invalid if not reasonably capable of being seen as necessary for a legitimate and non-punitive purpose, a purpose that is particularised and practically capable of fulfilment. The scope of *Lim* is, however, far from settled; as much is clear from the submissions in *EGH19 v Commonwealth*,⁷⁶ a *Lim* challenge to curfew and monitoring visa conditions similar to those struck down in *YBFZ* but amended to account for that decision (most prominently to make their imposition contingent upon a risk assessment rather than the individual's likelihood of deportation). We return to *EGH19* in the Postscript (see Part VIII).

In what follows, we closely examine different aspects of the *Lim* test: charting how each developed through previous case law, looking forward to consider unresolved aspects and future developments, and advocating for a particular (substantive and values-driven) interpretive approach. We begin with *Lim*'s principled and historical foundations.

III CONSTITUTIONAL FOUNDATIONS AND VALUES

Lim has its roots in the strict separation of federal judicial power enunciated in *R v Kirby; ex p Boilermakers' Society of Australia (Boilermakers Case)* ('*Boilermakers*').⁷⁷ This doctrine restricts federal courts to 'judicial power' (and non-judicial powers which are ancillary or incidental to the court's judicial functions).⁷⁸ It also withholds federal judicial power from non-courts. Thus, strict demarcations between courts and non-courts, and between (federal) judicial and non-judicial powers, are constitutionally required. This may be doctrinally clear, but in practice the *Boilermakers* doctrine has attracted considerable controversy and critique,⁷⁹ centring on the difficulty in drawing bright-line distinctions between judicial and non-judicial powers. This is compounded by the (often uncertain but potentially determinative) influence of history and values on the interpretation of ch III.⁸⁰

The *Boilermakers* doctrine is "formalist" in the sense that its starting point is the strict separation of governmental functions based on their identification as judicial,

⁷⁶ *EGH19 v Commonwealth of Australia* (n 58).

⁷⁷ *Boilermakers* (n 26).

⁷⁸ *Ibid.*

⁷⁹ See, eg, Gabrielle Appleby, 'Imperfection and Inconvenience: *Boilermakers*' and the Separation of Judicial Power in Australia' (2012) 31(2) *University of Queensland Law Journal* 265; James Stellios, 'Reconceiving the Separation of Judicial Power' (2011) 22 *Public Law Review* 113; Sir Anthony Mason, 'A New Perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1; *R v Joske; ex p Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87, 90 (Barwick CJ).

⁸⁰ See, eg, Brendan Lim, 'Attributes and Attribution of State Courts: Federalism and the *Kable* Principle' (2012) 40 *Federal Law Review* 31.

legislative or executive in nature. Conversely, “functionalist” approaches to interpretation are ‘more flexible and therefore more difficult to define at large’.⁸¹ Functionalism tends to place definitions to one side and focus instead on some other standard, such as the purpose of the separation or, relatedly, constitutional values.⁸² As will be seen, however, there is scope for constitutional doctrine and method to embody both formalist and functionalist elements.⁸³ Sitting alongside these approaches is the vexed question of the role of history in constitutional interpretation.⁸⁴ As will be seen, history can be harnessed to inform definitional scope in a formalist approach or, for instance, the nature and application of constitutional values in a functionalist approach.

The identification of punitive detention as an *exclusively judicial* function in *Lim* rests on the formalistic approach set out in *Boilermakers*. Specifically, it involves the identification of ‘the adjudgment and *punishment* of criminal guilt’ in a criminal trial as a paradigmatic example of exclusively judicial power. However, the separation of *powers* between courts and non-courts, by reference to their categorisation as judicial or non-judicial, is not an end in itself. Powers are categorised and separated for reasons. These can be rooted in the values underlying the constitutional compact (eg, the rule of law, or the independent and impartial administration of justice), as well as in history (eg, a power long exercised by courts indicates its judicial nature, or the classification of a power as ‘judicial’ recognises an historical fact).⁸⁵

⁸¹ Rebecca Welsh, ‘A Path to Purposive Formalism: Interpreting Chapter III for Judicial Independence and Impartiality’ (2013) 39 *Monash University Law Review* 66, 69. See also Peter Gerangelos, ‘Interpretational Methodology in Separation of Powers Jurisprudence: The Formalist/Functionalist Debate’ (2005) 8 *Constitutional Law and Policy Review* 1; Martin H Redish, ‘Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of *Morrison* and *Mistretta*’ (1989) 39 *DePaul Law Review* 299.

⁸² On the latter in particular, see Rosalind Dixon, ‘Functionalism and Australian Constitutional Values’ in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart, 2018) 3.

⁸³ See, eg, the approach advanced in Welsh (n 81).

⁸⁴ See Caitlin Goss, ‘The Use of History in Constitutional Law Litigation’ in Jelena Gligorijević, John Griffiths and James Stellios (eds), *Issues in Australian Constitutional Law: Volume 3* (2026, Federation Press, forthcoming); Reva Siegel, ‘The “Levels of Generality” Game’ (2024) 47(3) *Harvard Journal of Law and Public Policy* 563; Emily Bazelon, ‘How “History and Tradition” Rulings Are Changing American Law’ *New York Times Magazine* (online, 29 April 2024) <www.nytimes.com/2024/04/29/magazine/history-tradition-law-conservative-judges.html>; and specifically with respect to the interpretation of ch III, Rebecca Ananian-Welsh, ‘CATs, Courts and the Constitution: The Place of Super-Tribunals in the National Judicial System’ (2020) 43(3) *Melbourne University Law Review* 852, 873–4.

⁸⁵ See Rosalind Dixon (ed), *Australian Constitutional Values* (Hart, 2018), particularly for present purposes Dixon (n 82), Sarah Murray, ‘Impartial Justice’ 121, James Stellios, ‘Liberty as a Constitutional Value: The Difficulty of Differing Conceptions of “The Relationship of the Individual to the State”’ 177. On the role of history in constitutional interpretation see, eg, Goss (n 84).

Both values and history shaped the progress of the *Lim* principle but would become pivotal themes in *YBFZ*, in which an arguably functionalist and decidedly values-driven approach won the day over Steward J's more formalistic historically-centred reasons.⁸⁶ The *Lim* cases of the 2020s laid the groundwork for this more recent extension of the principle by emphasising the *liberty*-protective role of the separation of judicial power, a more substantive approach to ch III, and the default characterisation of detention as punitive. This Part explores that jurisprudential journey and argues that the present focus on values ought to prevail over the apparently contrary approach of historical primacy — albeit recognising some place for history in both avenues.

In *Lim*, Brennan, Deane and Dawson JJ supported their identification of an 'immunity' from executive detention on the basis of Dicey's fêted statement that every citizen is 'ruled by the law, and by the law alone' and 'may with us be punished for a breach of the law, but he can be punished for nothing else',⁸⁷ and Blackstone's observation that '[t]he confinement of the person, in any wise, is an imprisonment' requiring court order or warrant.⁸⁸ As outlined in Part II, this focus on detention as inherently punitive was absent from *Al-Kateb*.⁸⁹ That case, and those which swiftly followed, adopted a narrower, less substantive mode of analysis which allowed the Court to hold that *immigration* detention would *not* be punitive, despite its impacts, even where it was imposed: indefinitely;⁹⁰ on children as well as adults;⁹¹ despite non-compliance with Australia's international obligations;⁹² and involving harsh or inhumane conditions.⁹³

In the lead-up to *NZYQ*, however, the constitutional underpinnings of the *Lim* principle were unpacked in ways that ran counter to this jurisprudence. These cases emphasised both the punitive *nature* of detention and the *liberty*-protective role of *Lim*. Ultimately, these cases lent contemporary weight to the 'authoritative'⁹⁴ statements in *Lim* which had been undermined by *Al-Kateb*. They achieved this by affirming that the separation of judicial power (and specifically the *Lim* principle)

⁸⁶ See Rebecca Ananian-Welsh, 'History and Values in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*' (2025) 36(1) *Public Law Review* 3 ('History and Values in *YBFZ*').

⁸⁷ *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1, 16 [36] (Kiefel CJ, Gageler, Gleeson and Jagot JJ) ('*Benbrika [No 2]*'), citing *Lim* (n 2) 27–28, in turn quoting AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 202.

⁸⁸ *Lim* (n 2) 27.

⁸⁹ See, eg, *Re Woolley* (n 31) 32 [77] (McHugh J).

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Behrooz* (n 32).

⁹³ *Ibid.*

⁹⁴ *NZYQ* (n 3) 153 [26] (The Court).

not only serves a liberty-protective function but should be interpreted in that light, and that detention is *prima facie* punitive.⁹⁵

The emergence of these themes is most notable in two *Lim* cases not concerning immigration detention. Acknowledging this reveals *NZYQ* as a continuation of previous authority, just as the Court claimed in *NZYQ*,⁹⁶ despite its outward appearance as a radical jurisprudential turning point.

In the 2021 case of *Benbrika [No 1]*, a majority of the Court upheld a scheme which provided for the involuntary post-sentence detention of terrorist offenders on the basis of a judicial assessment that they posed an ‘unacceptable risk’ of committing a serious (ie, terrorism-related) offence, under pt 5.3 of the *Criminal Code 1995* (Cth), if released into the community.⁹⁷ Gageler and Gordon JJ each dissented in that case, their Honours focussing on the (lack of) connection between some of the conduct captured by pt 5.3 offending and potential ‘harm’ to the community.⁹⁸ Despite being in dissent, their Honours’ views on the *Lim* principle proved influential in *NZYQ*.⁹⁹

In *Benbrika [No 1]* Gageler J situated Brennan, Deane and Dawson JJ’s ‘canonical observation’¹⁰⁰ in *Lim* in historical context to emphasise the value of separated institutions and practices in safeguarding liberty. For Gageler J, this informed modern understandings of judicial power by revealing the independent judiciary’s important, and distinctive, function in proceedings where the life or liberty of the individual is in jeopardy.¹⁰¹

The constitutional assignment of the exclusive function of adjudging and punishing criminal guilt to the judicial power of the state was *protective of liberty*, Gageler J explained, ‘by preventing detention in custody at the initiative of the executive other than through an independent and impartial tribunal’¹⁰² affording procedural fairness. His Honour continued:

Default characterisation of detention in custody as penal or punitive, and therefore as capable of imposition only through judicial pronouncement of a sentence that gives effect to the prescribed penal consequence for a liability determined to have arisen from the operation of positive law on past events or conduct, underpins the protection of liberty by demanding

⁹⁵ On the Court’s treatment of liberty as a constitutional value, see *Stellios* (n 85).

⁹⁶ *NZYQ* (n 3) 156 [35].

⁹⁷ *Criminal Code 1995* (Cth) s 105A.7(1). Specifically, a pt 5.3 offence punishable by seven years or more: s 105A.2.

⁹⁸ *Benbrika [No 1]* (n 11) 119 [95] (Gageler J).

⁹⁹ *YBFZ* (n 1) 44 [176] (Steward J).

¹⁰⁰ *Benbrika [No 1]* (n 11) 108 [65] (Gageler J).

¹⁰¹ *Ibid* 108–111 [66]–[71].

¹⁰² *Ibid* 111 [72].

constitutional justification for any detention in custody to be constitutionally permitted outside that paradigm. ...

The requirement for detention in custody to be justified as exceptional to escape characterisation as penal or punitive operates as a check on legislative and executive power against tendencies long recognised that have been borne out by experience.¹⁰³

Likewise, Gordon J observed that the default characterisation of detention as punitive was the ‘central principle derived from *Lim*, as reflected in subsequent decisions of this Court’.¹⁰⁴

Gageler and Gordon JJ’s shared understanding of the role of the *Lim* principle in protecting liberty was embraced in *Alexander*.¹⁰⁵ In *Alexander*, the High Court extended the *Lim* principle to invalidate executive action authorising denationalisation (or ‘citizenship stripping’) of dual nationals on security grounds under s 36B of the *Citizenship Act 2007* (Cth). This was supported by an emphasis on ‘the fundamental value accorded to the liberty of the individual’ as

the rationale for the strict insistence in the authorities that the liberty of the individual may be forfeited for misconduct by that person only in accordance with the safeguards against injustice that accompany the exercise of the judicial power of the Commonwealth.¹⁰⁶

On this basis, the Court again emphasised that ‘[a]s was said in *Lim*, whether a law provides for the adjudication and punishment of criminal conduct is a matter of substance, not form’.¹⁰⁷ In this vein, the Court held that s 36B effected executive punishment contrary to *Lim*. This rested on the substantive determination that denationalisation was punitive because of its practical effect on the right to liberty in Australia as conferred by citizenship.¹⁰⁸ This was in addition to the more orthodox path of reasoning focused on statutory interpretation of s 36B; that is, a majority of the Court held that s 36B was punitive because its purpose was retribution.¹⁰⁹

¹⁰³ Ibid 111 [73]–[74], 131 [136] (Gordon J). See also *Benbrika [No 2]* (n 87) 27 [67] (Gordon J), 33 [86] (Edelman J).

¹⁰⁴ *Benbrika [No 1]* (n 11) 131 [134] (Gordon J).

¹⁰⁵ *Alexander* (n 19).

¹⁰⁶ Ibid 368 [73] (Kiefel CJ, Keane and Gleeson JJ).

¹⁰⁷ Ibid 368 [73], 370 [79].

¹⁰⁸ Ibid 579 [71]–[79], 583 [95]–[96] (Kiefel CJ, Keane and Gleeson JJ), 583 [98] (Gageler J), 597 [166] (Gordon J), 613 [248] (Edelman J).

¹⁰⁹ Ibid 367 [75], 371 [82], 375 [95] (Kiefel CJ, Keane and Gleeson JJ), 398 [163]–[164] (Gordon J). For Gageler J (at 383 [120]), the legislative purpose was ‘denunciation and exclusion from membership of Australia’, and that was a reason for deeming s 36B as punitive. Steward J dissented by interpreting the purpose of denationalisation as aligning with that stipulated in the Explanatory Memorandum,

In the 2023 sequel to *Alexander*, the Court (Steward J dissenting again and on similar terms)¹¹⁰ in *Benbrika v Minster for Home Affairs ('Benbrika [No 2]')* held that conviction-based denationalisation powers constituted executive punishment in violation of the *Lim* principle. In doing so, their Honours sustained their substantive approach to the *Lim* principle and re-affirmed the centrality of liberty and judicial independence to the interpretation and application of that principle.¹¹¹

These cases, among others, laid the groundwork for overturning *Al-Kateb* in *NZYQ*. If the separation of powers has a role in *protecting liberty*, and if detention is *prima facie* punitive, then it follows that executive detention threatens the separation of powers if the achievement of a legitimate and non-punitive purpose is not a practical possibility within a reasonable period. However, the liberty-protective, substantive interpretation of *Lim* was applied in novel ways by the plurality in *YBFZ* and questioned by Steward J.

For Gageler CJ, Gordon, Gleeson and Jagot JJ in *YBFZ, NZYQ* emanated from

a broader stream of common law and constitutional principle based on the pre-eminent value the law of this country gives to the protection of human life (from arbitrary capital punishment), limb, now called bodily integrity (from arbitrary corporal punishment), and liberty (from arbitrary detention). This reflects the common law's acceptance of the inherent and irreducible status of each human being in the compact between the individual and the state, a compact which this country inherited and within which the Constitution was enacted.¹¹²

Having thus emphasised the *Constitution's* role in protecting life, liberty and bodily integrity, the plurality pointed to the independent judiciary as a 'bulwark of liberty' and protector of 'basic rights'.¹¹³ Then, from this values-centred position, their Honours assessed the curfew and monitoring measures to be 'prima facie punitive' and subject to the *Lim* limit on administrative punishment.

Beech-Jones J acknowledged that '[c]h III enhances the protection of the right to liberty' but emphasised that the core constitutional concern was with 'preserving

namely, to 'recognise a person's repudiation of her or his allegiance to Australia and to prescribe a consequence for this repudiation, namely denationalisation': at 460 [337]–[338].

¹¹⁰ See, eg, *Benbrika [No 2]* (n 87) 60 [163] (Steward J).

¹¹¹ See, eg, *ibid* 16 [36] (Kiefel CJ, Gageler, Gleeson and Jagot JJ) citing *Lim* (n 1) 27–28, in turn quoting Dicey (n 82) 202.

¹¹² *YBFZ* (n 1) 11 [12] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

¹¹³ *Eg R v Quinn; ex p Consolidated Foods Corporation* (1977) 138 CLR 1, 11 (Jacobs J) quoted in *ibid* [13] (Gageler CJ, Gordon, Gleeson and Jagot JJ). See also *Vella v Commissioner of Police* (2019) 269 CLR 219, 276 [141].

the courts' exclusive function of adjudging and punishing criminal guilt'.¹¹⁴ Thus, his Honour was content to apply *Lim* to lesser deprivations of liberty (than incarceration in a state facility), but held that the monitoring condition was not *prima facie* punitive.

Steward J reacted adversely, warning that the plurality's approach had the potential 'to introduce incrementally into our Constitution a judge-made form of a Bill of Rights whenever a law of the Commonwealth in some way relevantly harms, or infringes upon, the liberty of a person'.¹¹⁵ His Honour added that a 'real danger' arose from 'reasoning from highly generalised, undefined and abstract concepts, or perhaps aspirations, which will inevitably mean very different things to very different people and judges'.¹¹⁶ Instead, Steward J stressed that the key constitutional concern was the contours of exclusively judicial power. These contours were effectively *historical*. While judicial power is not 'frozen in time', the *Lim* principle's existence was justified by 'legal heritage',¹¹⁷ such that its application must be 'anchored in' that heritage, the importance of which 'cannot be overstated'.¹¹⁸ For Steward J, the problem with the direction in which *Lim* had developed (subject to his Honour's dissenting voice in, eg, *Alexander* and *Benbrika [No 2]*) was that:

From preserving to a court, and only to a court, a function which is clearly and exclusively judicial, the principle has, with respect, been used to strike down laws passed validly by Parliament concerning matters which have not ever, historically or otherwise, been the exclusive preserve of the courts.¹¹⁹

Thus, looking first to history, Steward J found no basis to find that the impugned powers were of a kind that was or, relatedly, ever had been exclusively judicial.¹²⁰

¹¹⁴ *YBFZ* (n 1) 70 [312] (Beech-Jones J).

¹¹⁵ *Ibid* 46 [183] (Steward J). For an analysis contrasting *Lim* to codified constitutional rights protection, see Thwaites (n 3), who concludes that the 'dynamics' of *Lim* case law 'share a structural similarity, though not an equivalence, with rights reasoning': 18. It must be noted that Thwaites was writing prior to the extension of *Lim* in *YBFZ* — though it is unclear whether that case would impact his overall conclusion (based on the distinction between structural and rights-based limits on governmental powers).

¹¹⁶ *YBFZ* (n 1) 46 [184]. See also 47 [188]–[189] (Steward J).

¹¹⁷ *Ibid* 45 [181].

¹¹⁸ *Ibid* 46–7 [187].

¹¹⁹ *Ibid* 44 [176].

¹²⁰ Support was found in Kitto J's statement that determining the scope of exclusively judicial power involved 'considering how similar or comparable powers were in fact treated in this country at the time when the Constitution was prepared': *R v Davison* (1954) 90 CLR 353, 382, quoted at *ibid* 46–7 [187] (Steward J).

History played a more minor role in the other judgments. For instance, Edelman J pointed to ‘historical treatment until, and at, the time of Federation, of the power to be exercised’ as relevant to characterisation of functions ‘at the periphery between judicial and executive power’.¹²¹ However, Edelman J’s analysis remained multifactorial.

Similarly, Beech-Jones J saw history as one of a range of relevant factors that could be usefully drawn upon to determine whether a measure was relevantly punitive in difficult (or ‘peripheral’) cases.¹²² Applying this approach, Beech-Jones J used historical analogy to conclude that detriments will not necessarily be punitive because they cause shame or stigma.¹²³

Drawing history and values together, the plurality said:

It is the evolution of the common law's repeated rejection of arbitrary punishment of the individual, and its expression in the doctrine of the separation of powers, which is of fundamental importance. In this evolution, the question whether courts alone historically exercised a power to order punishment by an interference with human life, bodily integrity, or liberty is relevant to but has never been determinative of the boundaries of exclusively judicial power for the purpose of [c]h III.¹²⁴

Ultimately, four judges of the High Court have embraced an overtly values-centred approach to *Lim* (raising questions of how much further through ch III or indeed the *Constitution* this may extend). The *Lim* principle is founded on a veritable swathe of constitutional values. Arising from ch III, it reflects the values of judicial independence and impartial justice, with their associated roots in the rule of law. Being based on punishment of citizens by the state, the principle is undoubtedly founded on respect for liberty and bodily integrity, effecting, as it does, strict limits on the state’s capacity to intrude on either without a criminal trial.¹²⁵ Rarely (in Australia) has the articulation of this relationship carried such authority and clarity as in the plurality judgment in *YBFZ*.

Lim too is founded in historical fact and experience since, at least, federation. Punishment under law and detention are the traditional purview of courts associated with criminal justice. However, history alone cannot provide a full view

¹²¹ *YBFZ* (n 1) 35 [135] (Edelman J).

¹²² Beech-Jones J identified those factors as the nature and severity of the detriment, whether it was of a kind historically imposed as punishment or commonly imposed by courts, and whether it was imposed selectively on an individual or on a broader section of society: *ibid* 57 [242]–[244].

¹²³ *Ibid* 69 [307]–[308] (Beech-Jones J).

¹²⁴ *Ibid* 11 [14] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

¹²⁵ See Gomes, Mohseni and Ward (n 14) for insightful discussion of the role of United States case law in the *Lim* decision.

of the scope of judicial or administrative powers. As Mohseni, Gomes and Ward articulate:

To treat history as decisive is to pull oneself up by one's bootstraps, by reference to a constitutional system that had no separation of powers and would overlook that, upon Federation, 'everything adjusted'.¹²⁶

Moreover, while history is a compelling indicator that a power is administrative or otherwise, it does not suggest that governmental powers are divided for division's own sake. *Why* a power is historically exercised by courts, or not, matters. Here, values and principles have a crucial role.

Therefore, the future of *Lim* seems to look to certain values (as well as to history) to support the frequently complex task of categorising public powers. All judges in *YBFZ* were multifactorial in their approaches; the stark interpretive divisions were at the level of which factor (values, history, or otherwise) should be given greatest weight in the analysis. As Steward J warns, the plurality's values-centred approach takes the Court into vague territory. However, history can be just as unclear.¹²⁷

We submit that a values-centred approach has three clear advantages over a historical one. First, it is well-suited to testing novel legislative and administrative schemes without risking the ratchetting effect of progressive analogies.¹²⁸ Second, it maintains a contemporary grounding and avoids (or lessens) the problems which historically-based reasoning encounters in constitutionally important distinctions across time and context.¹²⁹ Third, it complements and balances the formalist, definitions-based, *Boilermakers* framework within which *Lim* operates; that is, it uses principles not as a freestanding test but as a means to resolve ambiguities within the rigid formalist identification of whether a relevant function is 'judicial' or not.¹³⁰

These advantages operate in addition to the wider arguments in favour of functionalist reasoning,¹³¹ and embrace a definite — though neither primary nor determinative — role for history in applying *Lim* within the formalist *and* functionalist positions it simultaneously occupies. As will be seen, this opens the

¹²⁶ *Ibid* 9, quoting *Burns v Corbett* (2018) 265 CLR 304, 347–8 [72] Gageler J. For similar conclusions on the problems associated with historically-focussed reasoning in another ch III context, see Rebecca Ananian-Welsh, 'Fair Process in Courts' in Jelena Gligorijević, John Griffiths and James Stellios (eds), *Issues in Australian Constitutional Law: Volume 3* (2026, Federation Press, forthcoming).

¹²⁷ See, eg, Goss (n 84).

¹²⁸ See, eg, criticisms of the Court's employment of 'imperfect' analogies to support a finding of constitutional validity in *Thomas v Mowbray* (2007) 233 CLR 307: Welsh (n 81).

¹²⁹ See Goss (n 84).

¹³⁰ See, broadly, the kind of approach to ch III argued for in Welsh (n 81).

¹³¹ See Dixon (n 82) 3.

door to acknowledging the punitive impacts and experiences of measures other than involuntary detention in a state facility, to which we now turn.

IV (MIS)UNDERSTANDING PUNISHMENT

A *Punitive and Non-Punitive Measures: A Binary or Spectrum?*

The *Lim* principle initially rested on the point that detention is *prima facie* punitive in nature, and this has received renewed emphasis since *NZYQ*. Moreover, a punitive measure can escape characterisation as punitive if it is justified: that is, reasonably capable of being seen as necessary to effect a legitimate and non-punitive purpose. So, what *is* punishment? And how does one distinguish punitive from non-punitive measures or purposes?

For the most part, a dichotomous notion of punishment emerges from the *Lim* case law,¹³² whereby measures and their purposes are capable of classification as *either* punitive or non-punitive. This is evident in *Al-Kateb* and other cases from that period, where the severe impacts of detention did nothing to detract from a measure's classification as 'non-punitive' by reference to statutory purpose. However, in *NZYQ* the High Court reasoned that the *prima facie* punitive characterisation of detention can be altered if a law is 'reasonably capable of being seen as necessary for a legitimate and non-punitive purpose'. This approach was adopted and extended-upon in *YBFZ*, where the majority's analysis began by considering whether home detention (by curfew) and electronic monitoring were 'prima facie punitive' in nature and then, if so, whether that characterisation was displaced by a legitimate *and non-punitive* purpose. Evidently, all these approaches presume a sharp distinction between punitive and non-punitive measures and purposes.

In *YBFZ* the plurality eschewed a definition of punishment *per se*. However, in assessing whether the curfew or monitoring conditions were *prima facie* punitive, their Honours focused upon the law's operation, and on the substance and effect of the conditions on people: specifically, the degree and duration of those measures' effects on liberty and bodily integrity (operationalising the values-centred approach). The measures' *prima facie* punitive nature was established, therefore, by the fact that their impacts on liberty and bodily integrity were 'material and relatively long-term'.¹³³

¹³² Although the dichotomous view of executive detention was challenged by Gummow J in *Al-Kateb* (n 7) 611 [135], who stated that 'there is often no clear line between purely punitive and purely non-punitive detention'.

¹³³ *YBFZ* (n 1) 18 [52], 19–20 [60]–[62] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

This approach was rejected by both Edelman J and Steward J. For Steward J, the plurality had adopted a broad concept of punishment detached from the more confined traditional understanding, that is, the judicial infliction of measures taken, in accordance with applicable sentencing principles, to exact just retribution on those who have offended against societal laws. For Steward J, the plurality's approach to *Lim* encompassed measures which impose any punishment or harm, *simpliciter*.¹³⁴

Elucidating the bounds of exclusively judicial punishment required recourse to history which, Steward J argued, demonstrated no constitutional guarantee against executive detention and,¹³⁵ certainly, no constitutional limit on administratively imposed visa conditions which infringe non-citizens' liberty or bodily integrity.¹³⁶ The closest Steward J came to providing a definition of punishment was to observe that '[t]he State is not seeking further *retribution against the plaintiff for the crimes he committed in the past*.'¹³⁷

Edelman J considered that the determination of whether something harsh or unpleasant constitutes 'punishment' should be made by reference to: 'the standard or core case of punishment' (being 'the power of adjudication and punishment of criminal guilt' or a consequence for the purpose of 'retribution and general or specific deterrence'); analogy with those standard or core cases of punishment;¹³⁸ and the harshness of the consequence itself.¹³⁹ Beyond this Edelman J's approach to the foundational issue of 'punishment' was unique. Rather than argue that the plurality was departing from *Lim*, as Steward J reasoned, Edelman J took issue with *Lim* itself, saying that in that case

this Court extended the constitutional concept of punishment, beyond any meaning that the concept is capable of bearing, to circumstances where legislation providing for detention in order to deport aliens had the effect that some aliens were detained for a period that was longer than was reasonably capable of being seen as necessary for their deportation. In other words, legislation that employed means to achieve its purposes in a disproportionate fashion was said to be 'punitive' in its disproportionate application to particular individuals. I have previously adopted and applied this use of the language of 'punishment', although

¹³⁴ Ibid 45 [182] (Steward J).

¹³⁵ Ibid 51–2 [208]–[214].

¹³⁶ Ibid 53 [220].

¹³⁷ Ibid 53 [221] (emphasis added). Similarly, Beech-Jones J hinted at his own core conceptualisation of punishment by saying that a power exercised for *retribution* or *denouncement* of past conduct would be punitive: 66 [283]–[286].

¹³⁸ Ibid 35 [134]–[136] (Edelman J).

¹³⁹ Ibid 36–7 [140].

noting that it involves the use of ‘punishment’ in a sense that is ‘novel’ or and ‘loose’. Transparency requires explicit recognition that this distorted extension of the concept of punishment in *Lim* is a fiction.¹⁴⁰

This ‘*Lim* punishment fiction’ was compounded by the ‘*NZYQ* purpose fiction’: ‘that a legitimate general purpose will be deemed not to be Parliament’s purpose in particular cases where it is not practically achievable in the reasonably foreseeable future in those particular cases’.¹⁴¹ (We return to this below in Part V.)

Having rejected the conceptualisations of punishment adopted in *Lim* and by the rest of the Court in *YBFZ*, Edelman J went on to apply his own distinct concept. Critically, his Honour rejected the blunt distinction between punitive and protective measures as a ‘category error’¹⁴² and, drawing on the scholarship of HLA Hart and Lucia Zedner, applied a notion of ‘protective punishment’.¹⁴³ Edelman J had first proposed this notion in *Benbrika [No 1]*, where he rejected ‘narrow definitions of criminal punishment in traditional terms confined to primarily backwards-looking orders of State retribution upon the adjudication of offences’.¹⁴⁴ His Honour explained that ‘punishment’ is not a binary but exists on a spectrum:

At one end of the spectrum are orders that are distant from traditional notions of criminal punishment. There, the orders can be characterised as purely protective. An example is orders confining in detention those who, by reason of extreme mental illness, pose a danger to the public ...

At the other end of the spectrum are orders that are much closer to traditional notions of criminal punishment. These orders might be described as ‘protective punishment’ to recognise both the contrasts and commonalities with traditional criminal punishment.¹⁴⁵

On this basis, Edelman J maintained that the post-sentence detention orders challenged in *Benbrika [No 1]* were an instance of ‘protective punishment’ — punitive in nature but with a non-punitive (protective) purpose. The curfew and monitoring conditions in *YBFZ* were also conceived of as protective punishment, as the ‘commission of past offending, and the nature of that offending, is central to the exercise that the Minister is required to perform’.¹⁴⁶

¹⁴⁰ Ibid 25 [92].

¹⁴¹ Ibid 25 [93].

¹⁴² Ibid 34 [130]; *Benbrika [No 1]* (n 11) 149 [183] (Edelman J).

¹⁴³ *YBFZ* (n 1) 32–4 [124]–[130] (Edelman J).

¹⁴⁴ *Benbrika [No 1]* (n 11) 154–5 [196] (Edelman J).

¹⁴⁵ Ibid 155 [197]–[198].

¹⁴⁶ *YBFZ* (n 1) 32 [123], 24–5 [91]. See also 42–3 [162]–[168] (Edelman J).

Having reasoned like this since 2021, Edelman J has faced the challenge of fitting this nuanced categorisation of punishment into the *Lim* principle (founded, as it is, on sharp punitive/non-punitive distinctions and a notion of punishment that his Honour dismisses as a ‘fiction’). His Honour has achieved this by reading *Lim* as encompassing a ‘broad understanding of punishment’,¹⁴⁷ such that detention for ‘protective-punitive’ purposes requires an exercise of judicial power in a judicial way.¹⁴⁸ Therefore, the impugned post-sentence detention orders in *Benbrika [No 1]* were constitutionally *valid* because they were *judicially* authorised; whereas the curfew and monitoring conditions in *YBFZ* were *invalid* instances of *executive* protective punishment.

Hence, while both Steward J and Edelman J have expressed strong misgivings about the notion of punishment underlying the prevailing interpretation of *Lim* (ie, one focused on a measure’s substantive impacts on liberty and bodily integrity), Steward J would *narrow* this by (primary) reference to the historic scope of judicial and administrative powers. Edelman J, however, would *broaden* it to include protective punishment, a notion his Honour develops primarily by reference to scholarship. Neither variation seems poised to win the day, yet neither Justice shows any indication of adopting the approach favoured by a majority of the current High Court.

It remains to be seen how the substantive, impacts-focused, notion of punishment favoured by at least four members of the Court will play out in respect of different measures outside the detention and denationalisation contexts. *YBFZ* has opened a doorway to many other impositions on liberty and bodily integrity by the federal executive government being queried for *Lim* validity. The advantage of this approach is a truly substantive, rather than formal, assessment of punishment, one that no longer allows statutory language to trump the true nature or effects of administrative intrusions on liberty and bodily integrity. However, this is new terrain; the test to determine whether a measure is ‘prima facie punitive’ is presently underdeveloped, as is the exact place of the punitive/non-punitive binary in the plurality’s substantive, essentially functionalist, approach.

Acknowledging the difficulties surrounding the punitive/non-punitive distinction prior to *YBFZ*, Mohseni, Gomes and Ward have argued for excluding ‘punishment’ as a relevant factor from the *Lim* immunity. They focus instead on *Lim*’s recognition that the imposition of involuntary detention is a judicial function which the federal Parliament may only confer outside ch III courts in exceptional cases (ie, those

¹⁴⁷ *Benbrika [No 1]* (n 11) 162–3 [214].

¹⁴⁸ *Ibid* 167–8 [222].

justified by reference to history or principle developed by reference to historical analogues).¹⁴⁹ While this focus on the *Boilermakers* foundations for the *Lim* principle, and an emphasis on historical reasoning, resonates with Steward J's approach, it appears to have been scuttled by the majority finding in *YBFZ*. In that case, the curfew condition may well have amounted to detention,¹⁵⁰ but the monitoring condition was not. It follows, incontrovertibly, that *Lim* now extends to some interferences with liberty and bodily integrity which are both *lesser than* detention and *not* traditionally within the exclusive purview of judicial power.¹⁵¹

It seems inevitable that *Lim* jurisprudence will continue to focus on whether executive measures short of detention significantly interfere with liberty and bodily integrity and are 'punitive' in nature. Clearly, greater clarity is needed around the type and degree of interference with liberty or bodily integrity required to bring a measure within the scope of *Lim*'s limits on executive power. The sheer breadth of executive power to intrude on people's life, liberty and bodily integrity — both now and historically — means that a vague standard (whereby, eg, punishment means any significant imposition on liberty) could create problematic degrees of constitutional uncertainty and unnecessary litigation. Clarification will come, with further challenges to immigration measures on foot, and it would seem a constrained approach which limits punishment to clear cases and severe impositions on liberty or bodily integrity is most appropriate.

B *Non-Punitive Purposes: The Legitimate and Non-Punitive Ends of Migration Measures*

Having reaffirmed that detention is, by default, punitive in character, a majority of the Court in *Benbrika [No 1]* (and the cases which followed) drew on *Lim* for the next step in their analysis, namely, whether the law in question is 'reasonably capable of being seen as necessary' to achieve a legitimate and non-punitive purpose.¹⁵² If non-citizens are to suffer detention without judicial order or warrant, detention

¹⁴⁹ Gomes, Mohseni and Ward (n 14) 551, 556–7.

¹⁵⁰ See *YBFZ* (n 1) 27–8 [104] (Edelman J): "There is a distinction between a "curfew" and "home detention". A curfew only prevents movement after nightfall. Condition 8620 goes further and confines the subject to a particular place and empowers the Minister to impose the eight hours of detention over a period that could include daytime. Condition 8620 is more appropriately described as "home detention".

¹⁵¹ *Ibid* 11–12 [15] (Gageler CJ, Gordon, Gleeson, Jagot JJ).

¹⁵² *Lim* (n 2) 33, quoted in *Benbrika [No 1]* (n 11) 113 [78] (Gageler J); see also 119 [95] (Gageler J), 168–9 [225], [210] (Edelman J). This test was also applied in the denationalisation cases of *Alexander* (n 19) and *Jones* (n 11), and aligns with the joint judgment's observation in *Falzon* (n 22) that the 'detention of a person by the executive without more is likely to permit an inference to be drawn that, for some reason, the legislature wishes to punish the person': 342 [24] (Kiefel CJ, Bell, Keane and Edelman JJ).

laws must be justified — capable of being seen to be necessary for a *legitimate and non-punitive* purpose — as a critical step to being constitutionally compliant. It is this test that was given the full force of the Court’s single judgment in *NZYQ* and applied in subsequent cases.¹⁵³

‘Legitimate and non-punitive’ purposes, capable of displacing default characterisation as punitive, are ‘exceptional’.¹⁵⁴ Exceptional purposes include, but are not limited to: detention in cases of infectious disease to protect public health; detention in cases of mental illness to promote individual welfare or community safety; committal to custody to secure a person awaiting a trial for an offence; and immigration detention for the regulation of certain aliens.¹⁵⁵ In these instances courts have recognised that the purpose of detention is not punishment in the classical sense of the term. Moreover, to qualify as ‘legitimate’, a non-punitive purpose must be capable of achievement in the reasonably foreseeable future and not be vague or ill-defined.¹⁵⁶

In the context of a constitutional inquiry into a law’s true purpose, the legislated text is the start of the identification of purpose but not the end. As Gageler J explained in *Alexander*, a legislature of limited powers

cannot, merely by including a statement of purpose in legislated text, require a court to identify the purpose of a law as something that it is not. Not unknown in our constitutional history is for a law which purports to be designed to achieve a constitutionally permissible purpose to be found on close inspection ‘in truth’ to pursue a constitutionally impermissible purpose.¹⁵⁷

Indeed, *Alexander* and *Benbrika [No 2]* are cases in which the stated non-punitive objects of the impugned denationalisation provisions were held to not be their *true* purposes (by all Justices bar Steward J).¹⁵⁸ Nonetheless, a political (eg, statutory) statement as to why a law is enacted is treated as presumptively accurate.¹⁵⁹

¹⁵³ *NZYQ* (n 3).

¹⁵⁴ *Ibid* 157 [40] (The Court) citing *Lim* (n 2) 27–28.

¹⁵⁵ See, eg, *Lim* (n 2) 55 (Gaudron J), 71 (McHugh J); *Benbrika [No 1]* (n 11) 131 [134] (Gordon J). Two exceptional cases of *punitive* detention by *non-judicial* bodies are the powers of Parliament to punish for contempt and of military tribunals to punish for breach of military discipline: *Benbrika [No 2]* (n 87) 23–4 [58] (Gordon J).

¹⁵⁶ *NZYQ* (n 3) 157 [40] (The Court); *YBFZ* (n 1) 22 [76] (Gageler CJ, Gordon, Gleeson, Jagot JJ).

¹⁵⁷ *Alexander* (n 19) 382 [117] (Gageler J).

¹⁵⁸ *Ibid* 375–6 [96] (Kiefel CJ, Keane and Gleeson JJ); *Benbrika [No 2]* (n 87) 17–8 [41] (Kiefel CJ, Gageler, Gleeson and Jagot JJ). Steward J dissented in both cases: *ibid* 463 [344]–[345]; *Benbrika [No 2]* (n 87) 57 [157].

¹⁵⁹ *Alexander* (n 19) 383 [119] (Gageler J).

The general object of the *Migration Act 1958* (Cth) is to regulate, in the national interest, the coming into and presence within Australia of non-citizens,¹⁶⁰ as well as the removal or deportation of those non-citizens whose presence is not permitted by the Act.¹⁶¹ As the High Court explained in *Plaintiff S4/2014 v Minister for Immigration and Border Protection* ('*Plaintiff S4*'):

More particularly, the Act gives the Executive power to detain non-citizens in the context, and for the purposes, of the Executive's statutory power to remove from Australia an alien who is an unlawful non-citizen. ... The detention which the Act authorises in respect of an alien who is an unlawful non-citizen can be described most generally as detention under and for the purposes of the Act. *Detention under the Act is not an end in itself*. It is not detention in execution of any conviction.¹⁶²

According to a majority of the High Court in *Lim*, laws authorising detention are valid if they are capable of being seen as reasonably necessary to effect purposes relating to entry and removal. Put differently, detention is legally justified by the need 'to support and facilitate the exercise of executive power' over entry and removal.¹⁶³ These powers extend to the supervision and control of non-citizens pending the determination of their entry claims, and the expulsion of those whose claims are rejected (requiring those non-citizens to be available for removal).¹⁶⁴ These legitimate and non-punitive purposes can equally justify administrative constraints on liberty short of detention, even where those measures are prima facie punitive (as in *YBFZ*).¹⁶⁵

C *Illegitimate or Incidental Purposes: Segregation, Protection and Deterrence*

In *NZYQ*, the Court rejected the possibility that segregation from the community — that is, separation of an alien from the community by means of detention — was a legitimate independent purpose for detention:

¹⁶⁰ *Migration Act 1958* (Cth) s 4(1).

¹⁶¹ *Ibid* ss 4(4), 198.

¹⁶² *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, 230–231 [23]–[24] (The Court) (emphasis added) ('*Plaintiff S4*').

¹⁶³ *Falzon* (n 22) 342 [24] (Kiefel CJ, Bell, Keane and Edelman JJ). See also *CZA19*, in which the Court particularised how detention is capable of being seen as reasonably necessary for the purpose of entry (or visa processing) with reference to making an unlawful non-citizen *available for investigations* (into health, character, security profile etc) and promoting the *integrity of the visa process* (which would be undermined by unlawful non-citizens absconding into the community before applications were determined) and the *integrity of visa conditions* that might be imposed: (n 18) 661–2 [46] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), 669 [84], 674 [108] (Edelman J).

¹⁶⁴ *Falzon* (n 22) 360 [97], 361 [98] (Nettle J).

¹⁶⁵ *YBFZ* (n 1).

The principle in *Lim* necessitates that the purpose of detention, in order to be legitimate, must be something distinct from detention itself. ... If 'separation from the Australian community' is equated with separation from the Australian community by means of detention, as was necessarily implicit in the defendants' formulation, then the postulated purpose impermissibly conflates detention with the purpose of detention and renders any inquiry into whether a law authorising the detention is reasonably capable of being seen to be necessary for the identified purpose circular and self-fulfilling.¹⁶⁶

In short, 'detention is the thing to be justified by a legitimate purpose. Detention is not the purpose itself.'¹⁶⁷

A further potential purpose for detention and other constraints on liberty and bodily integrity is community protection. *NZYQ* offered no support for the view, articulated by a minority of judges in *Al-Kateb* and later in *Plaintiff M47/2012 v D-G of Security*,¹⁶⁸ that community protection could be a *stand-alone*, legitimate, purpose for immigration detention. While community protection would come to dominate the political aftermath of *NZYQ*, this justification did not feature in argument or the Court's resolution of that case.¹⁶⁹ That said, the Court explained in *CZA19* that purposes related to mitigating risks to community health and safety can be *incidental* to the legitimate independent purpose of visa processing.¹⁷⁰

Overlapping community safety and migration purposes are evident where non-citizens' liberties are constrained because of prior criminality — as was politically, though not legally, the case in *YBFZ*, and as is raised more directly in *EGH19* (see Part VIII). In *YBFZ* community protection — whether generally, or from harm, or specifically from criminal offending was unclear — was the stated purpose of the impugned provisions.¹⁷¹ As discussed above, this 'unparticularised' and 'indeterminate' purpose failed the legitimate and non-punitive purpose test.¹⁷² Moreover, their Honours reasoned that a narrower construction of the provisions' purpose would not save the law from invalidity. Protection *from harm*, even from

¹⁶⁶ *NZYQ* (n 3) 159–60 [49].

¹⁶⁷ *ASF17* (n 17) 795 [67] (Edelman J). See also *CZA19* (n 18) 668 [75]–[76] (Gordon J).

¹⁶⁸ *M47/2018* (n 35).

¹⁶⁹ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCATrans 154 (8 November 2023). Community protection is, perhaps, a legitimate non-punitive purpose that is incidental to the limited legitimate purposes (entry and removal) identified in *Lim* and affirmed in *NZYQ*.

¹⁷⁰ *CZA19* (n 18) 661–2 [46] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), 669 [84], 674 [108] (Edelman J).

¹⁷¹ See Ananian-Welsh, 'History and Values in *YBFZ*' (n 86).

¹⁷² *YBFZ* (n 1) 22 [76] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

harm relating to *criminal offending*, remained too vague to pass the relevant test.¹⁷³ Even if that threshold had been satisfied, the conditions were not reasonably capable of being seen as necessary, appropriate and adapted to effect those purposes.¹⁷⁴ Ultimately, community protection *can* justify detention and other incursions on liberty outside a criminal trial context¹⁷⁵ — but the Court has sent clear signals that the purpose must be carefully calibrated and targeted in a migration setting .

Another purpose of immigration detention, identified politically if not in legislation, is deterrence.¹⁷⁶ The object of deterrence has a punitive character,¹⁷⁷ but with respect to detention this object appears to be incidental to the administrative regulation of non-citizens for the twin purposes cited in *Lim* and affirmed in *NZYQ*. As McHugh J observed in *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* ('*Re Woolley*'), detention laws 'will not be characterised as punitive in nature unless deterrence is one of the principal objects of the law and the detention can be regarded as punishment to deter others'.¹⁷⁸ Linking deterrence to community protection, Beech-Jones J observed in *YBFZ*:

Ultimately, the question of whether a particular statutory regime that expressly or impliedly promotes the 'protection' of the community

¹⁷³ Ibid 23 [82].

¹⁷⁴ Ibid 12 [18], 23 [84].

¹⁷⁵ See, eg, *Benbrika [No 1]* (n 11); *ibid* (n 1) 58 [248] (Beech-Jones J). Protective detention and constraints on liberty have also been the subject of ch III challenges in the states, invoking the *Kable* doctrine. The relationship between *Lim* and *Kable* is a topic of some disagreement on the Court and is beyond the scope of this paper. For discussion, see Rebecca Ananian-Welsh et al, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (8th ed, Federation Press, 2024) 696–8.

¹⁷⁶ G Hand, Migration Amendment Bill 1992, Second reading, *House of Representatives, Hansard* (5 May 1992) p 2372: 'I believe it is crucial that all persons who come to Australia without prior authorisation not be released into the community... *The Government is determined that a clear signal be sent that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community*' (emphasis added). The threat and consequence of long-term detention '*offshore*' has been used since September 2001 to discourage and police unauthorised maritime arrivals: see S Pickering and L Weber, 'New Deterrence Scripts in Australia's Rejuvenated Offshore Detention Regime for Asylum Seekers' (2014) 39(4) *Law and Social Inquiry* 1006.

¹⁷⁷ See, eg, *YBFZ* (n 1) 35 [136] (Edelman J).

¹⁷⁸ *Re Woolley* (n 31) 26 [61]. See also *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 131 [263] (Keane J): 'A deterrent effect [on the movement of asylum seekers] may be an intended consequence of the operation of regional processing arrangements, but the immediate purpose of s 198AHA [*Migration Act*] is the facilitation of the removal of unauthorised maritime arrivals from Australia.' In that case, a majority of the Court (French CJ, Kiefel, Keane and Nettle JJ) found that the *Lim* principle had no application to the detention of an alien by another State under its own laws. *Lim* was said to be limited to the detention of an alien in the custody of Australia (cf Bell and Gageler JJ).

through deterrence in fact pursues a ‘non-punitive purpose’ turns on how the scheme seeks to effect that protection.¹⁷⁹

In summary, the case law reveals a strictly limited set of legitimate objects served by immigration detention laws and, it seems, lesser constraints on liberty (though this is yet to be fully explored in the jurisprudence). This legal understanding is not, however, reflected in popular and political opinions about immigration detention (as serving objects traditionally associated with criminal law and punishment), as displayed in Parliament and the media post *NZYQ*.

V MEANS AND ENDS

NZYQ made clear that the existence of a legitimate and non-punitive purpose is insufficient to render a scheme of executive detention constitutionally valid. For the whole Court:

The application of the principle in *Lim*, although ultimately directed to a single question of characterisation (whether the power is properly characterised as punitive), requires an assessment of both means and ends, and the relationship between the two.¹⁸⁰

In this Part, we trace the development of this aspect of the *Lim* test in order to: firstly, reveal that *Al-Kateb* was indeed an outlier in the stream of authority; secondly, sketch the present means/ends element of *Lim*; and thirdly, argue that the language of proportionality is appropriate in this context.

A *A Stream of Authority Flowing from Lim?*

The *Lim* test for assessing the validity of detention laws requires, firstly, the identification of a legitimate non-punitive purpose and, secondly, an assessment of whether the law is ‘reasonably necessary’ to achieve that purpose. If the purpose of a law is deemed to be legitimate and non-punitive but the law fails the ‘reasonable necessity’ test, it is unconstitutional.

None of the majority Justices in *Al-Kateb* fully applied the *Lim* principle as determinative of whether immigration detention was punitive. Essentially, the majority focussed on the existence of a continuing relevant purpose for detention, holding that ‘[a] law that authorises detention will not offend the separation of powers doctrine *as long as its purpose is non-punitive*’.¹⁸¹ As the primary purpose (or ‘end’) of detention in *Al-Kateb* was to make the alien available for removal, detention

¹⁷⁹ *YBFZ* (n 1) 58 [249].

¹⁸⁰ *NZYQ* (n 3) 158 [44] (The Court).

¹⁸¹ *Re Woolley* (n 31) 32 [77] (McHugh J) (emphasis added).

was deemed to be non-punitive and, thus, constitutionally valid. The extended duration of detention and unlikelihood of removal occurring were not factors that altered the constitutional character of the detention.

Consequently, the authority and effect of *Lim* were somewhat weakened, with McHugh J expressing confidence that '[n]othing in the reasoning or the decision in *Lim* assists Mr Al-Kateb'.¹⁸² Discussing the application of *Lim* to indefinite detention, Hayne J said that 'the purpose of detention for removal would not be spent until it had become reasonably practicable to remove the non-citizen concerned'.¹⁸³ Indeed, his Honour considered that the 'reasonable necessity test' was only suitable for addressing the question of whether a law was connected to a particular head of legislative power, and unsuited to the separate ch III question.¹⁸⁴

In the 19-year period between *Al-Kateb* and *NZYQ*, several cases pointed to the relevance and constitutional importance of considerations related to the achievement of statutory purpose. These cases progressively revealed *Al-Kateb* as an outlier.¹⁸⁵ For instance, there were indications of shifting judicial opinion about the constitutional limits on detention in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship ('Plaintiff M76')*,¹⁸⁶ a matter involving a refugee with an adverse security assessment. Although Kiefel and Keane JJ thought that the reasoning in *Al-Kateb* was correct, and Hayne J was against re-opening it,¹⁸⁷ other Justices were less certain — though they did not reconsider the matter because it was unwarranted on the facts.¹⁸⁸ In a joint judgment, Crennan, Bell and Gageler JJ explained the 'constitutional holding' in *Lim* in terms of the temporal limits and limited purposes being *connected*, such that the power to detain was not unconstrained:

The constitutional holding in *Lim* was therefore that conferring limited legal authority to detain a non-citizen in custody as an incident of the statutory conferral on the executive of powers to consider and grant permission to remain in Australia, and to deport or remove if permission is not granted, is consistent with ch III if, but only if, the detention in

¹⁸² *Al-Kateb* (n 7) 586 [49].

¹⁸³ *Ibid* 633 [251].

¹⁸⁴ *Ibid* 635 [256]. See further below Part VI.

¹⁸⁵ *NZYQ* (n 3) 158 [44] (The Court). For discussion of *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (n 57) in this respect, see Thwaites (n 3) 5–6.

¹⁸⁶ *Plaintiff M76* (n 31).

¹⁸⁷ *Ibid* 345 [35]–[36], 365–6 [124]–[125], 366–7 [128]–[129] (Hayne J), 383 [199] (Kiefel and Keane JJ).

¹⁸⁸ *Ibid* 334–5 [4] (French CJ), 368–9 [136] [145]–[149] (Crennan, Bell and Gageler JJ). Administrative processes had not been exhausted, nor was it possible for the Court to infer that there was no realistic prospect of removal in the reasonably foreseeable future.

custody is limited to such period of time as is reasonably capable of being seen as necessary for the completion of administrative processes directed to those purposes.¹⁸⁹

Another influential development in *Plaintiff M76* is seen in the reasoning of Hayne J. His Honour underlined that there would be detention at the unconstrained discretion of the executive if the Minister were able, at any time, to refuse to conclude, or stop, administrative steps. This was because the non-citizen had been detained for the very purpose of the Minister making administrative 'entry' inquiries.¹⁹⁰ Hayne J identified certain limits on detention and necessity of judicial supervision over its lawfulness:

[D]etention is authorised only if the detention is under and for the purposes of the Act. The bounds of that further detention must be ascertainable, and enforceable, at all times during its continuance. The lawfulness of the detention (as to both its purpose and its duration) must be capable of being fixed, and be fixed, by a criterion or criteria determined at the start of the detention.¹⁹¹

This passage was then embraced by the High Court in *Plaintiff S4*,¹⁹² another case involving the lengthy detention of a protection visa applicant pending a decision. The Court stated that because

[detention] is an incident of the execution of particular powers of the Executive, it must serve the purposes of the Act and its duration must be fixed by reference to what is both necessary and incidental to the execution of those powers and the fulfilment of those purposes.¹⁹³

Relying upon these cases, Crennan J affirmed the connection between the temporal bounds and limited purposes of detention in *CPCF v Minister for Immigration and Border Protection* ('*CPCF*').¹⁹⁴ Importantly, her Honour affirmed the judiciary's capability to judge whether the achievement of statutory purposes was, *in fact*, a practical possibility.¹⁹⁵ In separate reasons in *CPCF*, Gageler J accepted the proposition that ch III requires that a federal statute authorising detention must limit the duration of detention to what is reasonably capable of being seen as necessary to effectuate an identified statutory purpose which is capable of being

¹⁸⁹ Ibid 369 [140]. Cited with approval in *NZYQ* (n 3) 155 [33] (The Court).

¹⁹⁰ See further J Chia, 'Back to the Constitution: The Implications of Plaintiff S4/2014 for Immigration Detention' (2015) 38(2) *University of New South Wales Law Journal* 628.

¹⁹¹ *Plaintiff M76* (n 31), 359 [99].

¹⁹² *Plaintiff S4* (n 162).

¹⁹³ Ibid 232 [29] (The Court).

¹⁹⁴ *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514.

¹⁹⁵ Ibid 585 [218].

achieved.¹⁹⁶ Similar statements were made by his Honour in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*.¹⁹⁷

This unequivocal understanding of the temporal constraints on laws authorising executive detention — the linking of the permissible period of detention with the accomplishment of statutory ends — marked a clear departure from the majority reasoning in *Al-Kateb* by the judge who would become Australia's fourteenth Chief Justice just two days before the delivery of orders in *NZYQ*.¹⁹⁸ Seen through this lens, *Al-Kateb* was indeed, as the High Court stated, an outlier in a stream of authority since *Lim*.

B *Falzon and AJL20: Islands in the Stream?*

NZYQ may have overruled *Al-Kateb*, but it did not disturb the authority of cases which apply a similar reasoning process, such as *Falzon v Minister of Immigration ('Falzon')*¹⁹⁹ and *Commonwealth Government v AJL20 ('AJL20')*.²⁰⁰ Notably, the joint judgment of Kiefel CJ, Bell, Keane and Edelman JJ in *Falzon* indicated that the *Lim* enquiry was really directed to identifying the *true purpose* of a law authorising detention. Although the joint judgment maintained that if a statutory power 'goes further than to achieve the limited purpose [of removal or deportation] it may be inferred that it has a purpose to effect punishment',²⁰¹ their Honours swiftly distinguished that form of enquiry from 'proportionality' testing, stating:

Whether a legislative power of detention is necessary in the [c]h III sense is an enquiry as to the true purpose of the law authorising detention, it is not an enquiry as to whether that law is necessary to the achievement of a relevant legislative purpose.²⁰²

Indeed, the joint judgment went further, echoing McHugh J's statement in *Re Woolley* that 'questions of proportionality cannot arise' under ch III.²⁰³ Edelman J

¹⁹⁶ *Ibid* 625 [374].

¹⁹⁷ [2016] 257 CLR 42, [184]. See also *Plaintiff M96A v Commonwealth of Australia* (2017) 261 CLR 582, 600 [44]–[45] (Gageler J).

¹⁹⁸ In an unusual step, orders were delivered in *NZYQ* following a brief recess at the end of the hearing in Canberra: *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCATrans 154 (8 November 2023). Justice Gageler had been sworn in as Chief Justice of the High Court in a special ceremonial sitting on 6 November 2023: Ceremonial Sitting on the Occasion of the Swearing-in of the Chief Justice the Honourable Stephen John Gageler AC [2023] HCATrans 151 (6 November 2023).

¹⁹⁹ *Falzon* (n 22).

²⁰⁰ *AJL20* (n 27).

²⁰¹ *Falzon* (n 22) 343–4 [29] (Kiefel CJ, Bell, Keane and Edelman JJ).

²⁰² *Ibid* 344 [31]; *Re Woolley* (n 31) 34 [80].

²⁰³ *Falzon* (n 22) 344 [30]–[32] (Kiefel CJ, Bell, Keane and Edelman JJ).

subsequently, and repeatedly, recanted this statement, beginning in the case of *Jones* (a point we return to below).²⁰⁴

By a majority, the High Court in *AJL20* ruled that where the executive failed to comply with its statutory duty to remove a non-citizen as soon as reasonably practicable, the appropriate remedy to enforce this restraint on detention (what the Court termed a ‘hedging’ duty) was mandamus.²⁰⁵ The majority held that a writ of habeas corpus would be inapt because it would undermine the intended effect of the wider statutory scheme that separates lawful from unlawful non-citizens:

[A] non-citizen can be lawfully within the Australian community only if he or she has been granted a visa. Otherwise, an unlawful non-citizen must be detained until such time as he or she departs Australia²⁰⁶

In so deciding, the majority endorsed key aspects of the majority ruling in *Al-Kateb* and certain parts of *Plaintiff M76*,²⁰⁷ which identified that the binary scheme of the *Migration Act 1958* (Cth) meant the release of an unlawful (visa-less) non-citizen into the community was barred. Thus, detention laws seemingly required the segregation of unlawful non-citizens because the ‘evident intention of the Act is that an unlawful non-citizen may not, in any circumstances, be at liberty in the Australian community’.²⁰⁸

Before the High Court delivered judgment in *NZYQ*, the Minister relied upon parts of the majority’s reasoning in *AJL20*, including the following passage:

The detention authorised by ss 189(1) and 196(1) of the Act is reasonably capable of being seen as necessary for the legitimate non-punitive purposes of segregation pending investigation and determination of any visa application or removal. This is because the authority and obligation of the Executive to detain unlawful non-citizens is hedged about by enforceable duties, such as that in s 198(6), that give effect to legitimate non-punitive purposes. Upon performance of these duties, the detention is brought to an end.

²⁰⁴ *Jones* (n 11). See also, eg, *YBFZ* (n 1) 38 [147] (Edelman J).

²⁰⁵ *AJL20* (n 27). Mandamus has no utility to enforce the statutory duty to remove when removal is impracticable, eg due to a person’s statelessness, refugee status, or an uncooperative ‘home’ country.

²⁰⁶ *Ibid* 66–74 [35] (Kiefel CJ, Gageler, Keane and Steward JJ).

²⁰⁷ *Plaintiff M76* (n 31) 380 [183]–[184] (Kiefel and Keane JJ) addressed an ‘alien’s right to be at liberty’ as a matter of statutory construction. Their Honours opined that the *Migration Act 1958* (Cth) did not support the view that an unlawful non-citizen may be lawfully at liberty within Australia.

²⁰⁸ *AJL20* (n 27).

... [Sections] 189(1) and 196(1) are valid. There is no need to read them down to save their validity. *They are valid in all their potential applications*.²⁰⁹

This reasoning encouraged the government's belief that the detention laws were constitutionally valid in *all* their possible applications, including the harsh and intractable removal cases that could take years to resolve.

The High Court was free to reject this argument in *NZYQ* because the majority in *AJL20* had explicitly stated that the 'correctness of the constitutional holding in *Al-Kateb* ... [did] not arise for consideration in the present case'.²¹⁰ Accordingly, 'none of the passages' in *AJL20* were 'directed to the constitutional issue' arising in *NZYQ*.²¹¹ Indeed, rather than assisting the government's case the majority ruling in *AJL20* undermined it. As the Court explained, the 'hedging duties' sourced in s 198, which limit the duration of detention and are enforceable by the writ of mandamus,

would be futile if there were no real prospect of removal becoming practicable in the reasonably foreseeable future and understandably that remedy has not been sought by the plaintiff in the proceeding.²¹²

That reasoning is constitutionally important because the existence of the hedging duties, and their judicial enforcement from time to time, is the means of bringing detention to an end. Thus, executive detention can be seen to be within Parliament's power under s 51(xix) of the *Constitution* as limited by the implications of ch III. If the hedging duties cannot be properly enforced by the judiciary, because a statutory duty is practically incapable of achievement, then the hedging duties are written in sand and detention is, temporally, unlimited and unconstitutional.

C *The Contemporary Means-Ends Connection*

The *Lim* principle's broader application in cases involving legislative responses to terrorism further exposed *Al-Kateb*'s status as an outlier by emphasising the necessary connection between means and ends. While the 'reasonably capable of being seen as necessary' test originates from *Lim*, its problematisation in the years that followed,²¹³ and later clarification in the 2020s, meant that during argument in

²⁰⁹ Ibid 70–71 [44]–[45] (Kiefel CJ, Gageler, Keane and Steward JJ) (emphasis added).

²¹⁰ Ibid 64 [26].

²¹¹ *NZYQ* (n 3) 159 [47] (The Court).

²¹² Ibid 148–9 [13].

²¹³ Such that Gordon (n 13) described the case law by 2012 as 'near-chaotic': at 43.

NZYQ it was instead framed by counsel for the detainee as the ‘Benbrika/Jones framework’.²¹⁴

As discussed in Part II, in *Benbrika [No 1]* Kiefel CJ, Bell, Keane and Steward JJ, jointly, upheld the validity of post-sentence detention provisions (under div 105A of the *Criminal Code*) aimed at protecting the community from terrorism offending.²¹⁵ In reaching this conclusion, their Honours emphasised the ‘singular threat to civil society’ presented by terrorism,²¹⁶ concluding: ‘Detention in prison is prima facie penal or punitive; however, that characterisation may be displaced by an evident non-punitive purpose. Division 105A has an evident non-punitive, protective purpose.’²¹⁷

In separate judgments, Gordon and Gageler JJ dissented, based on a *disconnection* between the non-punitive purpose and the scope of relevant terrorism-related offences. Essentially, some of those offences involved relatively innocuous conduct — the possession of certain things, for instance — which had no directly harmful consequences.²¹⁸ For Gordon and Gageler JJ, the lack of careful calibration between statutory ends and means spelt constitutional invalidity (in whole, for Gordon J; in part, for Gageler J).²¹⁹ This involved the application of a test phrased in terms that are now familiar:

The difficulty in determining whether Div 105A is *reasonably capable of being seen as necessary for a legitimate non-punitive objective* lies in the lack of close correspondence between the ultimate non-punitive objective of protecting against terrorist acts and the immediate statutory object of preventing serious Pt 5.3 offences.²²⁰

Notably, Gageler J also emphasised that, ‘in constitutional law, the legitimacy of legislative objective falls to be determined by reference to what the impugned law is designed to achieve in fact ... *the concern is with substance and not mere form*’.²²¹ This approach was reiterated in the case of *Jones*,²²² one week before orders were given in NZYQ. A key point indicated by these cases — that legitimacy of statutory purpose

²¹⁴ This was the term used in argument for the plaintiff, NZYQ, by Craig Lenehan SC: see, eg, *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCATrans 153 (7 November 2023) line 3391.

²¹⁵ *Benbrika [No 1]* (n 11) 97 [34]–[36].

²¹⁶ *Ibid.*

²¹⁷ *Ibid* 99–100 [40].

²¹⁸ *Ibid* 106 [57]–[58] (Gageler J), 145–6 [169]–[175] (Gordon J).

²¹⁹ See, eg, *ibid* 119 [95] (Gageler J).

²²⁰ *Ibid* (emphasis added).

²²¹ *Ibid* 113 [78] (emphasis added).

²²² *Jones* (n 11) 79 [34], 80–1 [38]–[39] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), 103–4 [106]–[107] (Edelman J), 130–1 [188] (Steward J).

is tied to its capacity for practical accomplishment in individual cases — featured prominently in *NZYQ*.

With reference to the meaning of the ‘reasonable necessity’ test in *Lim*, the joint judgment in *Jones* explained that ‘necessary’ meant reasonably appropriate and adapted,²²³ but rejected ‘structured proportionality’ as a means to apply the reasonable necessity criterion.²²⁴ Gordon J agreed, observing:

The application of the *Lim* doctrine therefore requires an assessment of the relationship between means and ends. Labels such as ‘proportionality’ are misleading to the extent that they import notions of structured proportionality.²²⁵

Prior to 2023 it was clear that a punitive purpose would render executive detention constitutionally invalid. However, it was difficult to discern a clear position on whether and how a relationship between a non-punitive purpose and the *means* engaged to achieve a particular non-punitive *end* might be relevant to assessing validity. Only in *Jones* (and the companion case of *Benbrika [No 2]*) did a dominant approach emerge with strong High Court authority.

Any lingering uncertainty was put to rest in *NZYQ*. That case applied the *Benbrika/Jones* framework and, thereby, advanced a renewed focus on the ‘means and ends’ aspect of *Lim*. For six Justices, an objectively unachievable purpose fails the ‘legitimate and non-punitive purpose’ aspect of *Lim*.²²⁶ Thus, the validity of administrative measures which are ‘prima facie punitive’ depends on the relationship between their aims and how they achieve them, that is, means and ends.

The language of proportionality is not used by most of the High Court (Edelman J aside, see below) with respect to the means and ends assessment.²²⁷ However, the similarities to a proportionality analysis are apparent. The High Court accepts, unequivocally, that a legislative aim must be clearly identified, and then the means for achieving that aim must be assessed for suitable calibration. The standard employed is ‘reasonably capable of being seen as necessary’, in which inhere notions of necessity and objective reasonableness related to proportionality.²²⁸ The risk of a

²²³ Ibid 81–2 [42] (Kiefel CJ, Gageler, Gleeson and Jagot JJ) citing *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 [39].

²²⁴ The problems of adopting structured proportionality in the ch III context are discussed in *Gomes, Mohseni and Ward* (n 14) 557–8.

²²⁵ *Jones* (n 11) 93 [78]. Cf Edelman J, who did not regard the ‘reasonable necessity’ test expressed in *Lim* as fundamentally different from the staged approach under a structured proportionality enquiry: 119 [151].

²²⁶ *NZYQ* (n 3) 158 [44] (The Court).

²²⁷ See discussion by Edelman J in *YBFZ* (n 1) 37–8 [144], 38 [148].

²²⁸ See discussion in *Gomes, Mohseni and Ward* (n 14).

structured proportionality test finding its way into ch III jurisprudence seems to be implicitly recognised as something to be avoided. This is understandable considering some Justices' long-standing aversion to that approach. For now, the adoption of structured proportionality in a ch III context would be highly unlikely in light of the 2025 rejection of structured proportionality as a necessary test by the Court in its once-accepted terrain of the implied freedom of political communication.²²⁹ Nonetheless, one does have to wonder whether judicial reluctance to label the reasonable necessity assessment as a form of 'proportionality' analysis is cogent, and whether that hesitancy will persist.

Certainly, the means/ends analyses undertaken in *ASF17* and *YBFZ* was also framed around the purpose of the relevant measures. In *ASF17*, the Court was satisfied that detention remained reasonably capable of being seen as necessary for the purpose of removal, as the prospective removal was deemed to be practicable. In *YBFZ*, only Beech-Jones J resolved the matter at the means/ends stage.²³⁰ His Honour held that the curfew condition (but not the monitoring condition) was punitive, but was reasonably capable of being seen as necessary to protect the community from the risk of criminal offending and, moreover, to protect the integrity of the immigration system from certain conduct of the visa holder.²³¹ Ultimately, then, *YBFZ* reveals a scenario familiar in contexts which employ proportionality to test constitutional validity: that is, the construction of statutory purpose and the degree to which a measure burdens the relevant constitutional right or principle will be critical to resolving the proportionality question.

D *Proportionality Embraced: The Approach of Edelman J*

Edelman J has criticised the rest of the Court as introducing the '*NZYQ* purpose fiction', namely, 'that a legitimate general purpose will be deemed not to be Parliament's purpose in particular cases where it is not practically achievable in the reasonably foreseeable future in those particular cases'.²³² This 'fiction' has been criticised more broadly, with Mohseni, Gomes and Ward calling it 'awkward at best, logically incoherent at worst'.²³³ Recanting his earlier statement in *Falzon* to the effect that proportionality had no place in ch III allowed Edelman J to adopt his

²²⁹ See, eg, *Babet v Commonwealth* (2025) 99 ALJR 883: "The flexible application of all or any of the steps of structured proportionality is to be understood as a "tool of analysis", express or ritual invocation of which is by no means necessary in every case.' at 896–7 [49] (Gageler CJ and Jagot J, Gordon J agreeing at 900–1 [72], Beech-Jones J agreeing at 936 [242]).

²³⁰ The plurality and Edelman J found the visa conditions lacked a legitimate and non-punitive purpose; Steward J held the measures were not punitive in the first place.

²³¹ *YBFZ* (n 1) 73 [325], 70 [310].

²³² *Ibid* 25 [93]. See also 38 [145]–[146].

²³³ Gomes, Mohseni and Ward (n 14).

particular approach to *Lim* in *NZYQ*, which focused more explicitly on proportionality than the rest of the Court.²³⁴ For Edelman J, the ‘reasonably capable of being seen as necessary’ requirement in *Lim* and structured proportionality testing²³⁵ are different expressions of the same principle, with the *Lim* principle formulated at a comparatively higher level of generality.²³⁶

Edelman J did not consider the general legislative purpose of detention to be ‘refuted’ simply because it was impracticable to remove a person in their circumstances.²³⁷ His Honour stated that the problem with the majority decision in *Al-Kateb* was not the recognition of the continuing legitimacy of the purpose of detention (to ensure an unlawful non-citizen will be available for removal) but rather that the Court in that case ‘either ignored or paid insufficient attention to the proportionality requirement in *Lim*’.²³⁸ Accordingly, Edelman J treated mandatory immigration detention as punitive, and thus contrary to ch III, because the legislative provisions supplied *means* that exceeded what was reasonably necessary for securing a legitimate *end* (removal), when, on the agreed facts, removal was impracticable in the foreseeable future:

This proportionality limit on Parliament's ability to create executive power to detain reflects the jealous treatment of individual liberty as generally the province of the judiciary and, at a high level of generality, informs the constitutional separation of powers.²³⁹

In *ASF17*, Edelman J thought that the application of immigration detention to a person — such as AZC20, discussed earlier — who was incapable of consenting to their removal, due to medical issues or psychiatric illness, was not reasonably capable of being seen as necessary and was, therefore, punitive.²⁴⁰ However, his Honour viewed the detention provisions as ‘necessary for the purpose of removal of aliens who might refuse, without any incapacity ... or protection finding under the *Migration Act*, to provide the necessary assistance in the removal process’.²⁴¹ For the class of aliens — such as ASF17 — who are capable of consenting but refuse to be removed to a country that requires voluntary removal, detention is reasonably necessary

²³⁴ See, eg, *YBFZ* (n 1) 39 [152].

²³⁵ See, eg, *McCloy v New South Wales* (2015) 257 CLR 178, 217 (French CJ, Kiefel, Bell and Keane JJ).

²³⁶ *Jones* (n 11) 119–20 [150]–[154].

²³⁷ *NZYQ* (n 3) 161 [53] (The Court). Edelman J reiterated this point in *ASF17* (n 17) 801–2 [101].

²³⁸ *NZYQ* (n 3) 161–2 [54] (The Court).

²³⁹ *ASF17* (n 17) 802 [104] (Edelman J).

²⁴⁰ *Ibid* 793 [59].

²⁴¹ *Ibid* 794 [62].

for their removal from Australia because there is a real prospect that aliens in that class (perhaps with counselling, advice and relocation assistance) will consent to be removed from Australia in the reasonably foreseeable future.²⁴²

On this approach, there is no ‘legal fiction’ that treats removal as practicable when it is not.²⁴³ But Edelman J’s approach is grounded upon the questionable assumption that, with appropriate supports, a detainee may in the reasonably foreseeable future consent to removal to avoid the tragedy of indefinite detention. For ASF17 and others similarly placed, whose steadfast refusal to consent to expulsion to certain countries is borne of genuine (though unsubstantiated) fear of persecution, indefinite detention may be regarded as the lesser of two evils notwithstanding any assistance or guidance offered.

There is much to commend Edelman J’s explicit ‘proportionality approach’ to *Lim*. It carries logic in describing a test focused on means, ends and the relationship between the two. It suits the substantive, values-centred approach adopted by the plurality. However, it should be approached with caution and not allowed to overrun conventional ch III reasoning, focussed necessarily on the appropriate allocation of branch powers. For instance, Mohseni, Gomes and Ward warn that viewing all exceptions to *Lim* through the lens of proportionality (rather than, eg, history)

has all the folly of one ‘Very big idea’. It is not fit for purpose. The exceptions are better treated as particular instances sanctioned by continued history and custom, which may be developed bottom-up, incrementally, by analogy, rather than by reasoning downward from a broad conception of what the exceptions illustrate. To do otherwise would allow the tropical growth of exceptions by a process which Gageler J stigmatised as a ‘domino method of constitutional adjudication’.²⁴⁴

VI AN ALTERNATIVE ROLE FOR PROPORTIONALITY: THE SCOPE OF S 51(XIX)

As outlined above, Edelman J’s criticisms of the recent development of the *Lim* principle rest largely on what his Honour terms the ‘*Lim* punishment fiction’ and ‘*NZYQ* purpose fiction’. Like Steward J, Edelman J rejects the premise that administrative detention for a period of time which is reasonably capable of being

²⁴² Ibid 803 [108].

²⁴³ Ibid 797 [75], 799 [88]: “The removal of an alien is “practicable” only by a legal fiction which deems that they will or should “cooperate”.”

²⁴⁴ Gomes, Mohseni and Ward (n 14) 558, quoting *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, 598 [80] (Gageler J) and *Garlett v Western Australia* (2022) 277 CLR 1, 55 [154] (Kiefel CJ, Keane and Steward JJ), respectively.

seen as necessary for visa processing or removal can be valid, but that the same detention can, subsequently, assume a punitive character and so become 'exclusively judicial'. In *YBFZ* Edelman J derided this as not reflecting 'rational constitutional design' and concluded that '[i]t borders on the absurd to describe the latter as an exclusively judicial power. It is not judicial at all.'²⁴⁵

While applying his own version of the *Lim* principle to resolve the challenge in *YBFZ* (discussed above), in obiter dicta Edelman J advanced a more radical solution to these perceived problems. This involved 'reconceptualising' *Lim* in a way that retained the limit on state power and Edelman J's favoured 'proportionality' approach but centred the inquiry on whether the law was 'with respect to' a constitutional head of power, rather than on ch III. His Honour offered this summary:

The relevant role for proportionality that may reflect the true basis for the *Lim* punishment fiction may be as follows: a law that effects a large imposition or constraint, at least upon a person's bodily integrity or liberty, such as a serious violation of their liberty by custodial detention, may not be a law with respect to the relevant head of power to the extent that the imposition or constraint is not reasonably capable of being seen as necessary for the purpose of the law. Expressed in these terms, the issue is one of the scope or boundaries of a head of power. Every head of power has boundaries.²⁴⁶

Edelman J found support for this approach in Hayne J's judgment in *Al-Kateb*, as well as Gaudron J's sceptical approach to the *Lim* principle in *Kruger v Commonwealth*.²⁴⁷ His Honour also sought support in *Lim* itself, arguing that the case rested on a 'hidden premise' that 'the serious interference with fundamental rights of aliens as part of the core of the law requires proportionate treatment of aliens in the same way that it would if aliens were only an incidental subject matter of the law'.²⁴⁸

Although Edelman J's framing of these issues employs a novel identification of layered 'fictions', the arguments are not wholly new. That said, there is a long way to go before they have significant (let alone majority) support within the High Court. Today, *Lim* has a solid precedential basis as a limit on state power derived from ch III, and that basis has strengthened considerably since the Court's unanimous decision in *NZYQ*. Conversely, there is scant authority to support a proportionality approach

²⁴⁵ *YBFZ* (n 1) 41-2 [161].

²⁴⁶ *Ibid* 39 [150].

²⁴⁷ *Ibid*, citing *Al-Kateb* (n 7) 647 [253] and *Kruger v Commonwealth* (1997) 190 CLR 1, 110-11.

²⁴⁸ *YBFZ* (n 1) 41 [158].

to determining the scope of the aliens power,²⁴⁹ let alone to link *Lim*'s liberty-focused constraint on power to s 51(xix). Ultimately, Edelman J's proposed reconceptualisation remains the obiter dicta of one Justice and contains several debateable assertions. It remains to be seen whether Edelman J's views in *YBFZ* might gain traction — in whole or in part — as the doctrine continues to develop in coming years.

VII CONCLUSION

This article has focused on the development of the *Lim* principle in the 2020 to 2025 period. The principle first emerged in 1994 as a necessary limit on the government's power to, essentially, punish people via executive detention. Until *Alexander* in 2022, unsuccessful attempts to invoke *Lim* undermined the principle and prompted judges to suggest its reformulation into a weaker, more limited, principle.²⁵⁰ In this respect, the 2004 case of *Al-Kateb* highlighted the largely unconstrained nature and bounds of immigration detention laws — especially with respect to the fulfilment of purposes only faintly realisable. The overturning of *Al-Kateb* in *NZYQ* not only clarified and reaffirmed the original *Lim* test but emphasised the centrality of liberty as a constitutional value, and of punishment as being, typically, an exclusively judicial power. The test laid down in *NZYQ* carries a greater authority than any preceding articulation of *Lim*; while it built directly on cases such as *Benbrika [No 1]* and *Alexander*, its unanimity played an important role in clearing up decades of debate and division around the scope, nature and even existence of this constitutional limit on administrative detention power.

NZYQ brought an end to immigration detention for a relatively small number of intractable cases, if not an end to *prolonged* detention for non-citizens awaiting an entry decision, nor an end to detention for uncooperative detainees. As Williams adroitly observes, '*NZYQ* was never going to be the end of the High Court's involvement in these [detention] issues', and the constitutional principle laid down will be 'scrutinised and refined across a succession of cases over the coming years'.²⁵¹ *ASF17* clarified that a temporal limit on immigration detention is important for constitutional validity, but also that the reasons why detention has no reasonably

²⁴⁹ See, eg, *Plaintiff S156/2013 v Minister for Immigration* [2014] HCA 22; although Edelman J mounted a contrary argument by reference to certain opinions in *Cunliffe v Commonwealth* (1994) 182 CLR 272. See *ibid* 40–1 [154]–[157].

²⁵⁰ See, eg, *Benbrika [No 1]* (n 11) 94–5 [25]–[27] (Kiefel CJ, Bell, Keane and Steward JJ).

²⁵¹ George Williams, 'Perilous Legal Path Through Migrant Detention Quagmire', *The Australian* (19 April 2024). See also Rhiannon Down, 'Judges on Deck: Panel Called in as More Immigration Chaos Looms', *The Australian* (7 July 2024), reporting that a high volume of legal challenges was engulfing the FCA.

foreseeable end are relevant. Most radically, *YBFZ* extended the *Lim* principle to all 'prima facie punitive' measures, including those which do not impose detention in a state facility but, rather, interfere with liberty or bodily integrity in a sustained and severe way. Inevitably, further legal challenges to immigration detention will arise with distinctive factual scenarios. Moreover, as the High Court has now adopted a substantive approach to *Lim*, further constitutional questions will ensue requiring analysis of how the principle applies to other measures with profound effects on people's liberty.

The Gageler Court is significantly evolving the *Lim* principle. Firstly, this reflects a functionalist, values-focused turn in constitutional interpretation, which aligns more with *Lim* than later cases, but which has also supported an extension of the *Lim* principle beyond its previous scope. Secondly, the operative focus of this shift has been on conceptualising the relationship between regulatory means and ends, though it has also impacted the Court's approaches to constitutional interpretation (focussing on values) and statutory interpretation (focussing on the substantive experience of constraints on liberty). Thirdly, without downplaying the importance of *NZYQ*, that case aligned with selected judicial reasoning in a stream of case law, whereas a grander shift is seen in *YBFZ*. The true ramifications of that shift will be worked out through further litigation.

With these and future developments in mind, this paper has advanced three arguments which together present a coherent conceptualisation of *Lim*.

First, we acknowledge that any consideration of *Lim's* application will, and should, be multifactorial — considering, history, values, principles and, as relevant, select scholarship. However, we advocate giving values the primary role of resolving ambiguities in the allocation and administration of public powers by the executive and judicial branches — as reflected in the plurality judgment in *YBFZ*.

Second, and relatedly, we argue for a substantive approach to 'punishment', capable of recognising the severe (and punitive) nature and impacts of state-imposed measures other than imprisonment and involuntary administrative detention. That approach can help to offset some of the potentially deleterious (and frankly illogical) consequences of the binary approach to 'punishment' which underpins *Lim*. There is much attraction to, and rationality in, Edelman J's insistence that punishment is a spectrum rather than a binary; however, incorporating that conceptual shift into *Lim* would involve rewriting the principle from the ground up, which seems unlikely given the High Court's current composition and, ultimately, jurisprudentially inadvisable.

Finally, we argue for a frank acknowledgment that the *Lim* principle incorporates a form of proportionality analysis, albeit one distinct from that which characterises, for example, the constitutional implied freedom of political communication.

VIII POSTSCRIPT: EGH19 v COMMONWEALTH

The opening lines of this article observe the ‘rapid jurisprudential evolution’ of the *Lim* principle in recent years. That trend has continued such that, on 18 March 2026 (as this article was going to press), the High Court delivered judgment in *EGH19 v Commonwealth* (*EGH19*).²⁵² This case deserves, and no doubt will receive, detailed commentary and consideration. For present purposes, this Postscript notes the critical findings in *EGH19* and their impacts on this article’s three central arguments.

Recall that, in *YBFZ*, constitutional invalidity centred on the curfew and monitoring provisions’ prima facie punitive nature; their imprecisely-framed purpose (ie, ‘for the protection of any part of the Australian community’);²⁵³ and their blanket operation in respect of the *NZYQ* cohort (ie, *unless* the Minister was satisfied, in individual cases, that the conditions were not reasonably necessary to achieve their protective purpose). In response to *YBFZ*, the government amended the provisions such that the Minister would *only* impose the conditions if satisfied, on balance, that: firstly, ‘the [visa] holder poses a substantial risk of seriously harming any part of the Australian community *by committing a serious offence*’; and secondly, that the relevant condition was reasonably necessary and reasonably appropriate and adapted ‘for the purpose of protecting any part of the Australian community *from serious harm by addressing that substantial risk*.’²⁵⁴ ‘Serious offence’ was, in turn, defined to include crimes involving, inter alia, loss of life, personal harm, sexual assault, domestic and family violence, people smuggling, and ‘threatening or inciting violence towards a person or group of persons’ on the ground of a particular attribute of the person or group.²⁵⁵ Otherwise, the provisions were effectively identical to those struck down in *YBFZ*.²⁵⁶

Responding to what Edelman J described as the Commonwealth’s ‘failure to see the wood for the trees’,²⁵⁷ a majority of the Court held that these amendments did not effectively address the constitutional vices identified in *YBFZ*.²⁵⁸ Indeed, the Court

²⁵² [2026] HCA 7 (*EGH19*).

²⁵³ *Migration Regulations 1994* (Cth) sch 2 cl 070.612A(1).

²⁵⁴ *Migration Regulations 1994* (Cth) sch 2 cl 070.612A(2)(b)–(c) (emphasis added).

²⁵⁵ *Ibid* sch 2 cl 070.111.

²⁵⁶ See *EGH19* (n 252) [8], [36] (Gageler CJ and Gleeson J).

²⁵⁷ *Ibid* [199] (Edelman J).

²⁵⁸ Both the majority and dissenting Justices adopted largely similar reasoning across these two cases. See, eg, *ibid* [50]–[53] (Gageler CJ and Gleeson J), [350] (Beech Jones J).

split along the same lines in both cases. Steward and Beech-Jones JJ again dissented, finding that the provisions were (if anything, more) reasonably capable of being seen as necessary for a legitimate protective purpose. Edelman J again applied his notion of ‘protective punishment’ to find the provisions remained punitive in both purpose and effect. The joint judgment of Gageler CJ and Gleeson J and the judgments of Gordon J and Jagot J emphasised similar but distinct legislative and procedural characteristics as demonstrating constitutional invalidity.

Gageler CJ and Gleeson J based invalidity on the ‘means and ends’ analysis, and were particularly concerned by the conditions’ fixed 12-month duration and the absence of natural justice in the initial issuing process.²⁵⁹ Gordon J rested more on the concept of ‘legitimacy’ (which we comment on below), and went on to list a combination of eight factors — including the duration and procedural fairness factors relied on by Gageler CJ and Gleeson J — to find the provisions were for an illegitimate purpose and *also* failed the ‘means and ends’ stage of the test.²⁶⁰ Jagot J applied the test most directly as a ‘single question of characterisation’, identifying five primary elements (among others) which rendered the provisions *both* prima facie punitive and unjustified.²⁶¹ Jagot J’s five elements were that the provisions: effectively amount to a deprivation of liberty (ie, detention); were not inherently constrained by the context of an exercise of judicial power or judicial process; were enforceable by criminal sanction with no scope for judicial discretion as to the materiality of the contravention; had no rational connection to membership of the relevant group to which they apply (ie, the ‘NZYQ cohort’); and excluded natural justice.²⁶²

At its core, *EGH19* reaffirms that the presence of a non-punitive statutory purpose may *not* suffice to save administrative punishment from invalidity, even where (1) that purpose is precisely stated and confined (unlike in *YBFZ*), and (2) similar purposes have supported valid *judicial* orders imposing detention (or other impositions on liberty) outside the criminal trial context.²⁶³ The clarification of the law’s purpose also allowed a majority of the Court to focus on the impacts of the scheme’s procedural elements and to explain when and how certain factors, such as

²⁵⁹ *Ibid* [50]–[55].

²⁶⁰ *Ibid* [124]–[125], [132], [137]–[151].

²⁶¹ *Ibid* [332].

²⁶² *Ibid* [333]–[343].

²⁶³ See in particular *Thomas v Mowbray* (n 128) and *Benbrika [No 1]* (n 11), discussed, eg, at *ibid* [24]–[27] (Gageler CJ and Gleeson J).

a denial of natural justice or lack of constraint on the sources on which a decision may rest, can support constitutional invalidity.²⁶⁴

Our first argument in this article was in support of a values-centred approach to *Lim*. In a variety of ways, *EGH19* reinforces that approach (as adopted by the *YBFZ* plurality). Not only were liberty and bodily integrity central to the reasoning in *EGH19*,²⁶⁵ but the rule of law (and Dicey's observation, quoted in *Lim*, that the individual is 'ruled by the law, and by the law alone' and may 'be punished for a breach of law, but ... for nothing else') featured in the judgments of Gageler CJ and Gleeson J, Gordon J and Jagot J.²⁶⁶ Moreover, their Honours variously explored and unpacked the relationship between the *Constitution*, separation of powers, and foundational values such as liberty and the rule of law. In these ways, a majority of the Court has further entrenched an approach to *Lim* which builds upon the separation of powers' role in protecting individuals from arbitrary state intrusion. This effectively prioritises the protection of liberty and bodily integrity in interpreting the scope of branch power.²⁶⁷ That majority is slender however, with Beech-Jones J, Edelman J and Steward J each persisting in their own distinct interpretive focus and path.²⁶⁸

EGH19 also maintained the substantive approach to punishment advocated for in this article. Generally, speaking, their Honours maintained their respective *YBFZ* conceptualisations of 'punishment', with Steward J dedicating a significant portion of his judgment in *EGH19* to unpacking and explaining his own, albeit unique, definition.²⁶⁹ Thus, 'punishment' remains a topic keenly debated in *EGH19*, with Edelman and Steward JJ giving more detailed consideration to its meaning than the remainder of the Court.

The third key argument advanced in this article concerned the 'means and ends' stage of analysis. *EGH19* shows no indication that the Court (bar Edelman J)²⁷⁰ is prepared to acknowledge a role for proportionality in *Lim* (despite Gordon J

²⁶⁴ See, eg, *EGH19* (n 252) [50]–[56] (Gageler CJ and Gleeson J).

²⁶⁵ See, eg, *ibid* [62], [67]–[80] (Gordon J), [279], [291]–[292] (Jagot J).

²⁶⁶ *Ibid* [18] (Gageler CJ and Gleeson J), [77] (Gordon J), [285] (Jagot J).

²⁶⁷ See, eg, [279], [292] (Jagot J).

²⁶⁸ Steward J has maintained his strident criticism of the majority's approach. History played a less obvious role in his Honour's decision compared to *YBFZ* (though see [225], and a useful discussion of the role of historical reasoning in ch III per Jagot J at [325]). On the other hand, Steward J emphasised 'allegiance to the rule of law' in *EGH19*, but to a different end to the other judges, saying the rule of law 'ultimately demand[s] faithful adherence and loyalty to those laws passed by the people's representatives, and to the legislative choices embedded in them, subject only then to the *Constitution*': at [271].

²⁶⁹ *Ibid* [227]–[242].

²⁷⁰ See, eg, [187] (Edelman J).

accepting that “[n]ecessary” means “reasonably appropriate and adapted”).²⁷¹ On the contrary, Beech-Jones J invoked the debatable statement in *Falzon* that ‘[q]uestions of proportionality cannot arise under [c]h III’²⁷² and criticised what he saw as the plaintiff’s attempts to ‘introduce a form of proportionality’ by pointing to the existence of a less-intrusive available option that would achieve the same statutory aims.²⁷³

Finally, an aspect of the *Lim* test which received welcome attention in *EGH19* was the ‘legitimacy’ of non-punitive purposes. In *EGH19*, Gageler CJ, Gleeson J and Gordon J cited *NZYQ* to emphasise that constitutional ‘legitimacy’ means compatibility ‘with the constitutionally prescribed system of government’.²⁷⁴ Gageler CJ and Gleeson J then introduced notions of a ‘constitutional baseline’ and ‘constitutional paradigm’ to extend this idea. For their Honours: ‘An aspect of compatibility with the constitutionally prescribed system of government is compatibility with the constitutional paradigm.’²⁷⁵ This paradigm, in turn, ‘posits the imposition of a penal or punitive detriment only: (1) by a court; (2) in the exercise of judicial power; and (3) in the performance of the exclusively judicial function of adjudging and punishing criminal guilt’.²⁷⁶ Each of these three ‘cumulative’ elements was further unpacked to encompass, inter alia, the separation of powers, judicial independence and impartiality, the imposition of detriments by judicial process, and procedural fairness.²⁷⁷ ‘Legitimacy’, for Gageler CJ and Gleeson J, appears to provide a doorway through which a host of foundational constitutional principles and values may enter the analysis. A ‘legitimate and non-punitive purpose’ seems to be one which aligns with the underlying constitutional framework, broadly understood.

By contrast, Gordon J focused on ‘legitimacy’ encapsulating the *exceptional* nature of valid protective purposes (much as discussed in Part IV above). Gordon J said that:

Where the purpose of depriving a person of their liberty or interfering with their bodily integrity is the protection of the community from harm, the relevant harm must be both ‘grave and specific’ for that purpose to be legitimate.²⁷⁸

²⁷¹ [138] (Gordon J)

²⁷² *Falzon* (n 22) 344 [31]–[32].

²⁷³ *EGH19* (n 252) [387] (Beech-Jones J).

²⁷⁴ *Ibid* [20] (Gageler CJ and Gleeson), [84] (Gordon J), all quoting *NZYQ* (n 3) 157 [40].

²⁷⁵ *EGH19* (n 252) [20].

²⁷⁶ *Ibid* [16].

²⁷⁷ *Ibid* [17].

²⁷⁸ *Ibid* [85] (Gordon J). Cf [238] (Steward J).

Thus, her Honour harnesses 'legitimacy' to support a high threshold for harm-preventive purposes capable of supporting prima facie punitive administrative action.

These approaches to 'legitimacy' are different sides of the same coin. Both arise from the central point made in *Lim* that, generally, prima facie punitive measures will be ordered by courts following a finding of guilt in a criminal trial. Indeed, Jagot J harnesses both these approaches in her opinion, which focuses primarily on the contours of the separation of powers arising from the text, structure and interpretation of the *Constitution* over time.²⁷⁹ What is clear from *EGH19* is that the 'legitimate purpose' aspect of the *Lim* test has the potential to carry a significant constitutional load. What is also clear is that the scope and application of *Lim* will attract yet more debate, analysis and jurisprudential evolution in the future.

²⁷⁹ Ibid [285]–[286].