HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S146/2025

BETWEEN: **TCXM**
Appellant

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

AMENDED SUBMISSIONS OF THE APPELLANT

PART I CERTIFICATION

1 The redacted form of these submissions is in a form suitable for publication on the internet. Redactions have been made consistently with orders made by the Chief Justice on 9 October 2025.

PART II ISSUES

2 The Appellant, an unlawful non-citizen, has lived in Australia since 1990. The **Commonwealth** of Australia, being unable to remove him to Iran, in respect of which it owes him protection obligations, proposes instead to remove him to the Republic of **Nauru** under s 198(2B) of the ***Migration Act*** *1958* (Cth) in accordance with a "third country reception arrangement" within the meaning of s 198AHB(1) (**Interim Arrangement**).

3 The Interim Arrangement covered removal of three *NZYQ*[1]-affected unlawful non-citizens, including the Appellant, from Australia to Nauru. The Appellant was given no opportunity to be heard before the Interim Arrangement was entered.

4 An appeal from the decision of the primary judge to dismiss his application was removed to this Court. The following issues arise on this appeal.[2] *First*, was the authority to decide to make, to make, or to enter into the Interim Arrangement an exercise of (a) statutory power or (b) non-statutory executive power under s 61 of the *Constitution* (ground 1)? *Second*, was the authority to decide to make, to make, or to

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1 ***NZYQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137.
2 Appellant's Further Amended Notice of Appeal, Closed Joint Cause Removed Book (**Closed JCRB**) **tab 13 pg 172-178**; Respondents' Notice of Contention, **Closed JCRB tab 8, pg 155-157**.

enter into the Interim Arrangement justiciable or amenable to judicial review (notice of contention)? *Third*, if so, was entry into the Interim Arrangement conditioned by an obligation to afford the Appellant procedural fairness (ground 1)? *Fourth*, if so, can injunctive relief be granted despite the enactment of the *Home Affairs Legislation Amendment (2025 Measures No. 1) Act 2025* (Cth) (***Amending Act***) (ground 1)? *Fifth*, does s 198(2B) authorise and require officers of the Commonwealth to remove a person such as the Appellant to Nauru, despite a known risk of death (ground 2)?

PART III SECTION 78B NOTICE

5 The Appellant has given notice under s 78B of the ***Judiciary Act*** *1903* (Cth).[3] Fresh notices are intended to be served in relation to [69]–[77] below (ground 2).

PART IV CITATION OF JUDGMENT OF PRIMARY COURT

6 The judgment of Moshinsky J (the **primary judge**) is *TCXM v Minister for Immigration and Multicultural Affairs* [2025] FCA 540 (**J**).[4]

PART V FACTS

7 The Appellant is a citizen of Iran. He has resided in Australia since 1990 and is now 63 years old. He has never resided in Nauru and has no connection to that country.

8 The Appellant suffers from "a long history of severe and uncontrolled asthma, with multiple admissions in intensive care units": J [77] and [83(a)]. He is "very likely to have ongoing asthma attacks, which may worsen with age": J [84]. He is at risk of ongoing attacks "strongly associated with poor patient outcomes, including risk of death": J [84]. The possibility that he suffers from "Dysfunctional Breathing Syndrome" "adds further complexity … and is a further argument to his requiring specialised severe asthma service management": J [84]. He "requires ongoing professional or specialist help or treatment" for his condition — specifically, "regular specialist follow-up and management, ideally in a specialist asthma service": J [83(b)] and [86]. If those facilities are not available to him, "[t]he possible and likely consequences … are increasing frequency of asthma attacks and potentially of having a fatal asthma attack": J [87]. Nauru does not have those facilities: J [90] and [185].

9 On 23 November 1995, the Appellant was granted a subclass Z-866 (protection) visa. In 1999, he was convicted of murder and sentenced to 22 years' imprisonment: J [1].

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3 **Closed JCRB, tab 10 pg 161-165**.
4 **Closed JCRB, tab 2 pg 21-73** (redacted) and **tab 3 pg 74-132** (unredacted).

10 On 23 July 2015, the Appellant's visa was cancelled under s 501(3A) of the *Migration Act*. The Appellant's revocation request was refused. The Administrative Appeals Tribunal affirmed the non-revocation decision. An application for judicial review was dismissed.[5] An appeal against that decision was recently dismissed, by consent.[6] The Appellant has no extant valid application for a visa under the *Migration Act*.

11 On 23 March 2021, following an "International Treaties Obligation Assessment", the Department notified the Appellant that he was owed non-refoulment obligations because of his religious conversion.[7] On 8 September 2023, the Department notified the Appellant that the Minister had found he continued to engage Australia's protection obligations, as a complementary protection finding had been made engaging s 197C(5)(b) of the *Migration Act* (with respect to Iran): J [redacted] and [75]–[76].

12 On 24 November 2023, the Appellant was identified by the Department of Home Affairs as being *NZYQ*-affected. He was granted a Class WR (Bridging R) (Removal Pending) (subclass 070) visa (a **BVR**) and released from immigration detention: J [2].

13 On 5 December 2024, the *Migration Amendment Act 2024* (Cth) introduced ss 76AAA and 198AHB into the *Migration Act*: see J [3]. By s 76AAA(1) the section applies in relation to a non-citizen if: (a) the non-citizen holds a BVR, (b) the non-citizen has "permission (however described)", granted by a foreign country, to enter and remain in that country, (c) the foreign country is party to a third country reception arrangement within the meaning of s 198AHB, and (d) none of certain exceptions apply. Subs (2) requires the Minister to give notice. A notice's effect is that the BVR ceases to be in effect: s 76AAA(4). Subs (5) disapplies natural justice to the giving of a notice.[8]

14 The facts about entry into the Interim Arrangement, procurement of the Nauruan visa, and the steps taken to detain and remove the Appellant are set out in full at J [38]–[74].

15 On 12 February 2025, the Commonwealth and Nauru entered into the Interim Arrangement. On 14 February 2025, an officer of the Commonwealth applied for a "long term stay visa" for the Appellant to live in Nauru. The Nauruan government issued a "long term stay visa" to the Appellant on 15 February 2025 (**Nauruan visa**). The duration of the Nauruan visa is a minimum of 30 years: J [6], [47], [49], [54]–

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5 *TCXM v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 451.
6 By order of Burley, Downes and Owens JJ on 20 October 2025 in proceeding NSD316/2025.
7 *TCXM and Minister for Immigration, Citizenship, and Multicultural Affairs* [2022] AATA 2820, [9].
8 See the Revised Explanatory Memorandum to the Migration Amendment Bill 2024 (Cth), [12] and [16]-[17].

[56]. The Appellant was given no notice of the visa application made on his behalf.

16 On 15 or 16 February 2025, the Minister gave notice to the Appellant that s 76AAA applied to him. The Appellant was taken into immigration detention on 16 February 2025, with a view to removing him from Australia to Nauru: J [8]–[9], [57]–[58].

17 Between 15 and 21 February 2025, steps were taken to prepare the Appellant for removal on 24 February 2025. On 21 February 2025, the Appellant filed an application in the Federal Court of Australia seeking certiorari, declaratory relief, prohibition and injunctive relief. An interim injunction was granted on 23 February 2025.

18 On 16 and 17 April 2025, the Appellant's case was tried before the primary judge. On 26 May 2025, his Honour dismissed the Appellant's case: J [191].

19 On 5 September 2025, the *Amending Act* was enacted. The *Amending Act*, among other things, enacted s 198AHAA of the *Migration Act* with retrospective effect. Relevantly to ground 1, s 198AHAA(1) disapplied the rules of natural justice to "an exercise of the executive power of the Commonwealth" to "enter into a third country reception arrangement with a foreign country" or do anything preparatory thereto.

20 Section 198AHAA was enacted with retrospective effect: item 9(2) of Sch 1 of the *Amending Act*. Certain things done including in relation to the entry or purported entry into third country reception arrangements were also deemed "valid": see items 10(2)(a) and 10(4) of Sch 1 of the *Amending Act*. The Appellant remains in immigration detention and liable to removal purportedly in accordance with the Interim Arrangement and s 198(2B) of the *Migration Act*. As at the time of the primary judge's decision, "the medical services available in Nauru [were] inadequate to manage the [Appellant's] condition of severe asthma on an ongoing basis": J [90].

PART VI: ARGUMENT

Ground 1: Entry into the Interim Arrangement

21 The Commonwealth's entry into the Interim Arrangement was, when taken, conditioned by procedural fairness, whether it was an exercise of statutory power (which it was) or non-statutory executive power. No procedural fairness was given, so the act of entering into the Interim Arrangement was unlawful. The *Amending Act* does not, in terms or effect, cure that unlawfulness. That unlawfulness would found the injunctive relief that the Appellant has claimed in this matter, and the primary Judge erred in holding otherwise. This Court may grant that relief.

22 *An exercise of statutory power*. The s 61 executive power "includes the prerogative powers of the Crown",[9] which are "accorded"[10] and "in many respects defined"[11] by the common law, but are "subject to modification by valid legislation".[12] One such prerogative power (subject to legislative modification) is to conduct relations with other countries.[13] Before s 198AHB, the Commonwealth could use the prerogative to enter into something like the Interim Arrangement with another country. But when a matter is regulated by statute, prerogative power may be displaced or abrogated.[14] Statute may displace a prerogative by express words, or necessary implication.[15]

23 For the following reasons, the Court should conclude that has occurred here.

10 24 *First*, ss 198AHB and 76AAA (and 198(13)(d), 198AAA(2)(c)(i) and 198AD(11B)(f)) empowered the Executive to affect rights and liabilities, by statute, by doing a thing corresponding to the concept "third country reception arrangement". By s 76AAA, a "third country reception arrangement" triggers visa cancellation, detention and removal, and ss 198(13)(d) and 198AD(11B)(f) immunise an officer of the Commonwealth for things done "under" a "third country reception arrangement".

25 As explained by the Minister for Home Affairs (Australia) to the President of Nauru, "recent amendments to our *Migration Act* confirm and enhance Australia's ability to undertake third country reception arrangements and this proposal marks the first such arrangement under these new provisions": J [42] (underlining added).

20 26 *Second*, s 76AAA(1)(c) refers to "a third country reception arrangement … that is in force". As an "arrangement" can be "not … legally binding" (s 198AHB(5)), the term "in force" must be a reference to the thing done having present statutory effect.

27 *Third*, s 198AHB's limited purpose is to operate, with s 76AAA, on BVR-holders, to "facilitate arrangements for their removal",[16] by entering a "third country reception arrangement" "within the meaning of s 198AHB": 76AAA(1)(c). That purpose is further indicated by the matters in s 198AHB(2). That targeted purpose limits

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9 *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J)
10 *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J)
11 *Commissioner of Taxation (Cth) v Official Liquidator of EO Farley Ltd (In Liq)* (1940) 63 CLR 278, 304 (Dixon J).
12 *Commonwealth v Mewett* (1997) 191 CLR 471, 497- 498 (Dawson J, Toohey and McHugh JJ agreeing).
13 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 643-644 (Latham CJ).
14 ***CPCF** v Minister for Immigration and Border Protection* (2015) 255 CLR 514, [279] (Kiefel CJ).
15 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44, [85] (McHugh, Gummow and Hayne JJ); *Barton v The Commonwealth* (1974) 131 CLR 477, 491 (McTiernan and Menzies JJ), 501 (Mason J).
16 Revised Explanatory Memorandum, Migration Amendment Bill 2024 (Cth), 2 (underlining added).

s 198AHB, which would not be construed to capture any prerogative agreements "in relation to" matters of the kind in s 198AHB(1) concerning non-BVR-holders.[17]

28 *Contra* J [119]–[125], ***Plaintiff M68/2015*** *v Minister for Immigration and Border Protection* (2016) 257 CLR 42 can (if necessary) be distinguished. There, Bell J (at [68]), Gageler J (at [178]) and Keane J (at [201]) identified a memorandum of understanding executed on 3 August 2013 between the Commonwealth and Nauru as having been entered by the Commonwealth in exercise of a non-statutory executive power. Section 198AHA was enacted on 30 June 2015. Thus, s 198AHA could not have been the source of power at the time, it being "[w]hen a matter is directly regulated by statute" that the Executive "can no longer rely on a prerogative power".[18] Further, as the primary judge noted (J [125]), Gordon J expressly did not decide that the power was non-statutory. The reasoning of French CJ, Kiefel and Nettle JJ made it unnecessary for them to decide that question. In any event, unlike s 198AHB, s 198AHA did not empower the Commonwealth to do a thing having immediate statutory effect on fundamental rights.

29 *The statutory power was conditioned by procedural fairness*. The power being statutory, and capable of adversely affecting rights (by ss 76AAA, 189 and 198), a "'strong' common law presumption"[19] meant it was conditioned by procedural fairness. The adverse effect is that *NZYQ*-affected BVR-holders, owed protection obligations, must be detained and removed to a country to which they are a stranger, with the Commonwealth empowered by s 198AHB(2) to be involved in their "ongoing presence" in that country.[20] So targeted, the power affects individuals differently from the general public.[21] *A fortiori*, where the Interim Arrangement targeted three individuals. When the Commonwealth entered the Interim Arrangement, before s 198AHAA, no provision "by plain words or necessary intendment" (or at all) denied procedural fairness.[22] Subject to ground 2, the Appellant's right to life is also affected.

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17 Cf *R v Khazaal* (2012) 246 CLR 601, [33] (French CJ); *Mills v Meeking* (1990) 169 CLR 214, 233 (Dawson J).

18 *CPCF* (2015) 255 CLR 514, [279] (Kiefel J) (underlining added).

19 *Disorganized Developments Pty Ltd v South Australia* (2023) 410 ALR 508, [33] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [49] (Steward J).

20 See s 198AHB(1) and the definition of "third country reception functions" in s 198AHB(5).

21 *Disorganized Developments Pty Ltd v South Australia* (2023) 410 ALR 508, [34] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

22 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 576 (Mason CJ, Dawson, Toohey and Gaudron JJ).

The presumption applied, and the statutory power to enter a third country reception arrangement was conditioned by procedural fairness.

30 *The power was conditioned by procedural fairness if non-statutory*. If the power was non-statutory then, the prerogative power having been displaced, the non-statutory power was to perform "an executive function incidental to the administration of the Act and thus within that aspect of the executive power which 'extends to the execution and maintenance ... of the laws of the Commonwealth'",[23] s 61 of the *Constitution* permitting a "field of action"[24] necessary or incidental to execution of ss 76AAA and 198AHB.[25] That element of the executive power, which "finds its source in – and is controlled by – the statute and s 61 of the *Constitution*",[26] would require procedural fairness,[27] because of the statutory effects on rights it triggered, as discussed above.

31 Alternatively, if the power was prerogative, it was conditioned by a justiciable procedural fairness requirement. Some actions in pursuit of prerogative powers may be judicially reviewed.[28] In particular, powers the exercise of which affects individuals' rights can be conditioned on procedural fairness, which condition may be judicially reviewed.[29] This follows from four considerations: (1) prerogatives are from the common law; (2) ordinary requirements of procedural fairness are given by[30] and are a "deep-rooted principle of" the common law;[31] (3) the common law is ascertained as a coherent body of law,[32] and part of a larger "coherent system of law";[33] and

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23 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 1, [4] (Kiefel CJ, Gageler and Gleeson JJ) quoting with approval the judgment there appealed.

24 *Williams [No 1]* (2012) 248 CLR 156, [34] (French CJ).

25 *Williams [No 1]* (2012) 248 CLR 156, [22] (French CJ), citing *R v Kidman* (1915) 20 CLR 425, 440-441 and *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 464. Further: *Barton v The Commonwealth* (1974) 131 CLR 477, 498 (Mason J); *CPCF* (2015) 255 CLR 514, [484] (Keane J).

26 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 1, [88] (Gordon J).

27 Cf. *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, [51] (French CJ and Kiefel J); *AAG15 v Minister for Immigration and Border Protection* [2016] HCATrans 131, 18.770-2 (Nettle J).

28 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44, [69] (McHugh, Gummow and Hayne JJ); *Marks v The Commonwealth* (1964) 111 CLR 549, 564-565 (Windeyer J).

29 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 409 (Lord Diplock); *Victoria v Master Builder's Association of Victoria* [1995] 2 VR 121, 138-139 (Tadgell J), 147-9 (Ormiston J), 154-159 (Eames J); *Minister for Arts Heritage and Environment v Peko-Wallsend Limited* (1987) 15 FCR 274, 277-8 (Bowen CJ), 280-2 (Sheppard J), 301-4 (Wilcox J).

30 *Kioa v West* (1985) 159 CLR 550, 584 (Mason J).

31 *Commissioner of Police v Tanos* (1958) 98 CLR 383, 395-396 (Dixon CJ and Webb J).

32 *Hill v Van Erp* (1997) 188 CLR 159, 231 (Gummow J); *Perre v Apand Pty Ltd* (1999) 198 CLR 180, [122] (McHugh J).

33 *Aid/Watch Inc v Commissioner of Taxation of the Commonwealth of Australia* (2010) 241 CLR 539,

(4) therefore, ordinary requirements of procedural fairness attach to prerogative power on the same common law principles that attach them to statutory executive power. The rule "that a statutory authority having power to affect the rights of a person is bound to hear [them] … is both fundamental and universal"[34] is supported by the common law's role in interpreting the *Constitution* and the statutes made under it.[35]

32 Further, transgression would be justiciable. It is "error to support that every case or controversy which touches foreign relations lies beyond judicial cognizance".[36] Where an action in conduct of foreign relations concerns and affects municipal legal rights of individuals (*qua* individuals) under the protection of Australia's laws, those actions will be reviewable, and justiciable at the suit of the affected individual.[37] The Appellant's rights are so affected by the Interim Arrangement.

33 *Procedural fairness was not afforded*. For the foregoing reasons, the power to enter the Interim Arrangement was conditioned upon procedural fairness. The Appellant was not afforded any procedural fairness in respect of the Arrangement: J [15(a)].

34 *The Amending Act did not make it lawful.* Entry into the Interim Arrangement having breached the requirement to afford the Appellant procedural fairness, it was unlawful.

35 For the following reasons, the *Amending Act* does not make it lawful.

36 *First*, the *Amending Act* inserted s 198AHAA(1)(a), which disapplies natural justice to an "exercise of the executive power" of the Commonwealth, and is retrospective by Sch 1, item 9(2) of the *Amending Act*. But entry into the Interim Arrangement being ultra vires, there was no "exercise of the executive power" capable of being referred to by s 198AHAA(1)(a) (including as that provision is applied retrospectively). Further, because entry into the Interim Arrangement was an exercise of "statutory" power for the reasons advanced at [22]-[28] above, s 198AHAA(1) does not apply to it at all: s 198AHAA(1) uses "executive power", which is also used in

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555-556 (French CJ, Gummow, Hayne, Crennan and Bell J).

34 *Twist v Randwick Municipal Council* (1976) 136 CLR 106, 109 (Barwick CJ).

35 *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [2] (French CJ).

36 *Baker v Carr* 369 US 186 at 211 (1962) (Brennan J, delivering the opinion of the Court) cited with approval in *Re Ditfort; ex p Deputy Commissioner of Taxation* (1988) 19 FCR 347, 367 (Gummow J).

37 *Re Ditfort; ex p Deputy Commissioner of Taxation* (1988) 19 FCR 347, 370. Cf *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 385, 386 (identifying "[f]oreign affairs, especially the treaty making power" as being not justiciable on the assumption that "it does not affect the rights of citizens"), 387, 401, 408 and 417. See also *Regina (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1457, [26] (Lord Carrwath JSC, Lords Neuberger, Mance, Wilson and Sumption agreeing).

s 198AHAA(3)(a); by contrast to s 198AHAA(3)(b), which uses "statutory power".

37 *Second*, Sch 1, item 10 of the *Amending Act* provides that where a thing "would, apart from this item, be wholly or partly invalid only because the rules of natural justice were not observed" (item 10(1)(b)), and "the thing done was entering into, or purportedly entering into, a third country reception arrangement with a foreign country" (item 10(2)(a)) then "the thing done, or purportedly done" is "taken for all purposes to be valid and to have always been valid" (item 10(4)(a)).

38 The word "valid", used in item 10 of Sch 1, is a word with an evolved and established legal meaning: "[t]o say that a purported exercise of a power is valid is to say that it has the legal effect which the Parliament intended an exercise of the power to have".[38] Importantly, "valid" does not mean that the purported exercise of power was lawful. That is because an act may be valid and yet unlawful.[39] The word "valid" in item 10 would be accorded that evolved and established legal meaning on the principles that: (1) statutory words with meanings established by the common law will be presumed to bear those meanings,[40] as those meanings develop over time;[41] and (2) the statutory word "valid" in particular is to be given its evolved legal meaning.[42]

39 Furthermore, and consistent with the established legal meaning of the word "valid", that word as it appears in item 10 would not have effect to cause an unlawful and invalid action referred to by the item to be not only (as item 10 provides) valid, but also (as the *Amending Act* does not provide) lawful. That is because, where the text does not so provide, two principles operate. *First*, because the rule of law requires that adversely affected persons have access to court to challenge administrative decisions, "legislative provisions should not be construed as giving rise to an implication which gives an administrative decision greater force or effect than it would otherwise have

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38 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [41] (Brennan CJ). See also *Re Reference under Re Reference under Section 11 of the Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services* (1979) 2 ALD 86, 93 (Brennan J).

39 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [100], [101] and order 2 (McHugh, Gummow, Kirby and Hayne JJ).

40 *Davies v Western Australia* (1904) 2 CLR 29, 42–43 (Griffith CJ); *A-G (NSW); Ex rel Tooth & Co v Brewery Employees' Union (NSW)* (1908) 6 CLR 469, 531 (O'Connor J); *Yorke v Lucas* (1985) 158 CLR 661, 668 (Mason ACJ, Wilson, Deane and Dawson JJ).

41 Cf *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539, [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Brodie v Singleton Shire Council* (2001) 206 CLR 512, [31] (Gleeson CJ).

42 *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114, 157 (Isaacs J), cited in *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, [24] (Kiefel CJ, Gageler and Keane JJ).

unless that implication is strictly necessary";[43] and (2) it is presumed, as "an aspect of the rule of law", to be "highly improbable that Parliament would overthrow fundamental principles or depart from the general system of law, without expressing its intention with irresistible clearness".[44]

40 Item 10 therefore has not, in terms or in effect, caused the Commonwealth's entry into the Interim Arrangement in breach of a legal requirement of procedural fairness to have been lawful, and that entry was, from all temporal perspectives, unlawful.

41 *An injunction would issue.* This Court may grant an injunction if it concludes such an order "ought to have been made … in the original action".[45] Additionally, s 32 of the *Judiciary Act* confers power to grant the injunctive relief contemplated in s 75(v)[46] (which in any event could have been granted in the original action).[47] For the following reasons, an injunction would issue to prohibit further action or removal based upon the Commonwealth's unlawful entry into the Interim Arrangement.

42 *First*, where a body does an act that is valid but unlawful, a Court may grant "an injunction restraining [it] from taking any further action based on its unlawful action".[48] Such an injunction falls within s 75(v),[49] and would be given by ss 32 and 39B of the *Judiciary Act*. An injunction may issue to restrain an authority from taking further action based on an earlier action that, while valid, was taken unlawfully in breach of a statutory constraint.[50] Such an injunction issues "to vindicate the public

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43 *Minister for Immigration & Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, [48] (Gaudron and Gummow JJ, Callinan J agreeing at [67] fn 46).

44 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

45 *Attorney-General (NSW) v Commonwealth Savings Bank of Australia* (1986) 160 CLR 315, 325 (Mason, Wilson, Brennan, Deane and Dawson JJ); *Bogan v The Estate of Peter John Smedley (Deceased)* (2025) 99 ALJR 619, [43] (Gageler CJ, Gordon, Gleeson, Jagot and Beech-Jones JJ).

46 *Smethurst v Commissioner of Police* (2020) 272 CLR 177, [146] (Nettle J), [182] (Gordon J) and [227] (Edelman J).

47 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [94]-[95], [104]. Cf *Judiciary Act*, s 39B; *Migration Act*, s 474.

48 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [100] (McHugh, Gummow, Kirby and Hayne JJ), affirmed in *Miller v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 278 CLR 628, [25] (Gageler CJ, Gordon, Edelman, Jagot and Beech-Jones JJ).

49 *Smethurst v Commissioner of Police (Cth)* (2020) 272 CLR 177, [112] fn 180 (Gageler J).

50 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [99]-[100] (McHugh, Gummow, Kirby and Hayne JJ); *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966, [47] (Gaudron J); *Abebe v Commonwealth* (1999) 197 CLR 510, [105] (Gaudron J); *Smethurst v Commissioner of Police (Cth)* (2020) 272 CLR 177, [112] (Gageler J), [180] (Gordon J), [234] (Edelman J).

interest in the maintenance of due administration",[51] by restraining an officer of the Commonwealth from "doing some wrong".[52] Section 75(v) was enacted when "the injunction was used … to restrain injury to the rights of the plaintiff by administrative decisions tainted by abuse of power",[53] and it may be used "to restrain Commonwealth officers from exceeding or abusing power".[54] The s 75(v) injunction has often been described by reference to the concept of unlawfulness rather than jurisdictional error.[55]

43 *Second*, were the Commonwealth to act to remove the Appellant to Nauru, that presently would be action based upon the Commonwealth's unlawful action in entering the Interim Arrangement in breach of a condition of procedural fairness.

10 44 *Third*, an injunction being available, it would be granted in this Court's discretion.

Ground 2: removal is not authorised or required by s 198

45 The Appellant is not an "outlaw";[56] he "is entitled to the same fundamental rights as others",[57] and generally "enjoys the protection of our law", in particular the law's "protections against arbitrary punishment by deprivation of life, bodily integrity and liberty".[58] The law gives "pre-eminent value … to the protection of human life".[59]

46 It is important to reiterate the Appellant's relevant circumstances.

47 His protection visa was cancelled on character grounds. He is detained for the purpose of his removal under s 198(2B). "An officer must remove" him from Australia "as

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51 *Abebe v Commonwealth* (1999) 197 CLR 510, [104] (Gaudron J).

52 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [5] (Gleeson CJ), quoting Barton in the Convention debates.

53 Gummow, "The Scope of Section 75(v) of the Constitution: Why Injunction but No Certiorari?" (2014) 42 *Federal Law Review* 241, 242. And see at 250 ("As Professor Saunders has pointed out, sooner or later the Full Court is likely to be confronted by a s 75(v) proceeding, not based on jurisdictional error, where injunctive relief is not to be withheld on discretionary grounds").

54 *Smethurst v Commissioner of Police (Cth)* (2020) 272 CLR 177, [234] (Edelman J) (underlining added).

55 *Smethurst v Commissioner of Police (Cth)* (2020) 272 CLR 177, [180] fn 251 (Gordon J), citing *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 204-205, quoted in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, [20]; *Plaintiff S157/2002* (2003) 211 CLR 476, [5] (Gleeson CJ); Chief Justice Robert French, "The Interface between Equitable Principles and Public Law", paper delivered at the Society of Trust and Estate Practitioners, 29 October 2010, 17.

56 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 19 (Brennan, Dean and Dawson JJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [78] (Gummow J); *Farmer v Minister for Home Affairs* [2025] HCA 38, [90] (Edelman J).

57 *Farmer v Minister for Home Affairs* [2025] HCA 38, [90] (Edelman J); *Bradley v The Commonwealth* (1973) 128 CLR 557, 582 (Barwick CJ and Gibbs J).

58 ***YBFZ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 419 ALR 457, [9] (Gageler CJ, Gordon, Gleeson and Jagot JJ) (emphasis added) quoting *NZYQ* (2023) 280 CLR 137, [27] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 29 (Brennan, Deane and Dawson JJ, Mason CJ agreeing).

59 *YBFZ* (2024) 419 ALR 457, [12] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

soon as reasonably practicable if" the conditions in ss 198(2B)(a) to (c) are met.

48 He is owed protection by Australia and cannot be removed to Iran: s 197C(3).

49 He is detained and proposed to be removed to Nauru (with which he has no connection) pursuant to the Interim Arrangement: ss 76AAA and 198AHB.

50 He was not afforded a right to be heard before the Interim Arrangement was entered into or acted on, or a s 76AAA notice was issued, to facilitate his removal to Nauru.

51 The findings of the primary judge are to the effect that he faces a real and reasonably foreseeable risk of death (or serious harm) if removed to Nauru: see [8] above.

52 The present state of authority is that a non-citizen's "removal" may not be "reasonably practicable" within s 198 if their medical condition might practically impede their ability to travel.[60] But in ***NATB*** *v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506, Wilcox, Lindgren and Bennett JJ held (at [53]) that a person's removal was required by s 198(6), "[e]ven if it is virtually certain that he or she will be killed". By ground 2 the Appellant contends that the primary judge erred in holding that the Appellant's removal to Nauru was authorised and required by s 198, in circumstances where, by reason of his medical condition and Nauru's facilities, he faced a real risk of death. His Honour held he was bound by *NATB*: J [186]. This Court should hold that *NATB* does not require attributing to Parliament a command to the Executive to remove a non-citizen in the legal and factual circumstances of the Appellant to a real risk of death. The holding in *NATB* will be summarised below before arguing it is wrong or, at least, does not apply here.

53 *NATB*. The Full Court in *NATB* considered whether s 198(6) "allow[s] an officer to consider the possibility (even certainty) that the unlawful non-citizen will suffer persecution or torture (even death) in the country to which he or she is removed" (*NATB*, [3]). The focus was "the verb 'remove', and perhaps more importantly, its qualifier 'as soon as reasonably practicable'".[61] Each appellant was a non-citizen who had exhausted the visa application processes.[62] Each claimed they would face

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60 As to which, see *AHF18 v Minister for Immigration, Citizenship and Multicultural Affairs (No 2)* [2024] FCA 660, [11] (Bromwich J); *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506, [41]-[53] (Wilcox, Lindgren and Bennett JJ); *WAJZ v Minister for Immigration and Multicultural Affairs (No 2)* (2004) 84 ALD 655, [86] (French J).

61 *NATB* (2003) 133 FCR 506, [13].

62 Save that SDAE had a special leave application pending before this Court concerning a failed judicial review application from a decision of the Refugee Review Tribunal: [32].

persecution and certain death if removed to their home countries. Unlike the Appellant here (and other *NZYQ*-affected BVR-holders), none had protection findings in their favour and none was proposed to be removed to a country other than of their origin.[63]

54 The Full Court's central holding, at [53], was as follows:

> … the reference to reasonable practicability in [s 198(6)] does not require an officer to take into account what is likely, or even virtually certain, to befall the unlawful non-citizen after removal is complete; and removal is complete, at the latest, once the person has been admitted by, and into, the receiving country. Even if it is virtually certain that he or she will be killed, tortured or persecuted in that country, whether on a Refugees Convention ground or not, that is not a practical consideration going to the ability to remove from Australia. Rather, it is a consideration about a likely course of events following removal from Australia.[64]

55 *Text, context, and purpose.* Section 198, part of a scheme designed "to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens" (s 4(1)), gives effect to the sovereign right to exclude.[65] But no statute pursues its purposes "at all costs".[66] The duty under s 198 "is not absolute"; "Parliament's command … does not require or permit removal if removal is not 'reasonably practicable'".[67] Parliament intended, at least, to qualify the duty by reference to reason and practicability. The "concept of reasonable practicability" is not "confined to 'physical possibility'".[68] It is that which can be done "with reason or prudence", including in context of "other aspects of the statutory scheme of the [*Migration Act*] and … other relevant non-statutory exercises of executive power".[69] The broad, "open textured" text accommodates and yields to other powers and duties of Commonwealth officers.[70]

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63 NATB sought to restrain his removal to Algeria. SAAK and SDAE sought to restrain their removal to Iran.

64 The view that it was not "open to an officer to consider whether [a non-citizen's] removal and return to a particular country is conformable with the obligation against non-refoulement in Art 33(1) of the Refugee Convention", as expressed in *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146, [71]-[72] did not find favour with this Court in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 and *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

65 ***Falzon*** *v Minister for Immigration and Border Protection* (2018) 262 CLR 333, [92] (Nettle J); see also *Robtelmes v Brenan* (1906) 4 CLR 395, 400 (Griffiths CJ).

66 *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, [41] (the Court).

67 *Minister for Immigration and Multicultural Affairs v MZAPC* (2025) 421 ALR 483, [65] (Edelman J).

68 *Minister for Immigration and Multicultural Affairs v MZAPC* (2025) 421 ALR 483, [35] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

69 *Minister for Immigration and Multicultural Affairs v MZAPC* (2025) 421 ALR 483, [66] (Edelman J); *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 463, [115] (Kenny and Mortimer JJ, Abraham J agreeing at [165]).

70 *Minister for Immigration and Multicultural Affairs v MZAPC* (2025) 421 ALR 483, [70] (Edelman J) and [33], [36] and [40] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

56 What is "reasonably practicable" "is not confined literally to the capacity of the officer to put the unlawful non-citizen on an aircraft or ship leaving Australia".[71] The concept "directs attention to a range of considerations, including factors relating to the unlawful non-citizen facing removal, and the interests of third parties who may be directly affected".[72] Among those considerations may be the "physical condition of a person facing removal".[73] Thus, "expert medical evidence or material that the removal would expose [a] person to a real or serious risk to their health" "would raise a serious issue as to whether the power of removal should be exercised, as it may not be reasonably practicable to remove the person in those circumstances".[74]

10 57 While "practicable" may mean "that which is able to be put into practice and which can be effected or accomplished",[75] "reasonably" is broader. While "reasonably" has been understood to "introduce[] an assessment or judgment of a period which is appropriate or suitable to the purpose of the legislative scheme",[76] the text does not confine reasonableness to what occurs within Australia. As the Full Court recognised in *NATB* itself (before s 197C), "Parliament cannot be supposed to have intended that persons would be removed from Australia to a country where they would be likely to suffer death, torture or persecution".[77] *NATB* accommodated "other means" to "guard against the situation": the ability to apply for a protection visa and the existence of the Minister's non-compellable powers, then including under ss 48B, 351 and 417.[78]

20 58 *Principle of legality*. To apply *NATB* here is to attribute to Parliament a command to the Executive to remove a s 76AAA person, who has lived in Australia, and to whom Australia owes protection, to Nauru (with which they have no connection), "[e]ven if it is virtually certain that he or she will be killed". That is a hard proposition. It sits

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71 *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 185, [22].

72 ***M38/2002*** *v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146, [66] (Goldberg, Weinberg and Kenny JJ). See also *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 305-306 (Stephen and Mason JJ); *Minister for Immigration and Multicultural Affairs v MZAPC* (2025) 421 ALR 483, [66] (fn 107) (Edelman J).

73 *M38/2002* (2003) 131 FCR 146, [69] (Goldberg, Weinberg and Kenny JJ).

74 *Li v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 181, [7] (Merkel J, with whom Heerey and Conti JJ agreed (Heerey J delivering separate reasons)).

75 *Al-Kateb v Godwin* (2004) 219 CLR 562, [121] (Gummow J); see also *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1, [530] (Bell J adopting these observations).

76 Ibid.

77 *NATB* (2003) 133 FCR 506, [55].

78 See also *M38/2002* (2003) 131 FCR 146, [71]-[72], [78] and [80]-[81].

badly with the value of life at common law. Life being the most fundamental and important of rights, utmost clarity is required to curtail or abrogate it.[79]

59 In *NATB*, the principle of legality was argued, but not applied. The Full Court did not consider that s 198(6) could be said to abrogate or curtail fundamental rights or freedoms, because "unlawful non-citizens of the very special and limited class described in [s 198(6)] [had] no fundamental right or freedom to absolute protection in Australia from death, torture or persecution in the country to which they are to be removed".[80] Five points may be made.

60 *First*, to engage the principle, it is enough that the right to life is curtailed.[81] At least while in Australia, aliens "enjoy[] the protection of our law".[82] That the principle is engaged does not dictate the result: "modern legislatures regularly enact laws that take away or modify common law rights".[83] But the *NATB* reasoning belongs more naturally to the phase of analysis after the principle is engaged.

61 *Second*, s 197C now makes irresistibly clear that non-refoulement is no answer to s 198, except as in s 197C(3). But for the Appellant, facing s 198 via s 76AAA, non-refoulement is not in issue. There is no "attempt to re-run a protection visa application".[84] In *NATB*, each of NATB, SAAK and SDAE had been refused a protection visa, and failed on review, without any protection finding. The same is true of the appellant in *M38/2002*,[85] the applicant in *Ex parte SE*,[86] and others of that type.

62 Section 197C(3) is expressly incorporated by s 76AAA(1)(d)(ii), but that would only disapply s 76AAA if the Commonwealth made a s 198AHB arrangement with a country in respect of which *NZYQ*-affected BVR-holders had a s 197C(3)(b) protection finding; not Nauru. The Appellant's life is not threatened in Nauru on grounds in art 33(1) of the Refugee Convention. But his life is threatened, if removed there.

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79 *Hurt v The King* (2024) 418 ALR 63, [106] (Edelman, Steward and Gleeson JJ); *Minister for Immigration and Multicultural Affairs v MZAPC* (2025) 99 ALJR 486, [70] (Edelman J).

80 *NATB* (2003) 133 FCR 506, [71].

81 ***Electrolux*** *Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, [19] (Gleeson CJ).

82 See fn 58 above. See also Vattel, *The Law of Nations* (Chitty, 1883), bk 1, ch 11, [213].

83 *Electrolux* (2004) 221 CLR 309, [19] (Gleeson CJ).

84 *SAAK v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 921, [17] (Mansfield J).

85 *M38/2002* (2023) 131 FCR 146.

86 *Re Minister for Immigration and Multicultural Affairs; Ex parte SE* (1998) 73 ALJR 123.

63 *Third*, s 197C(3) cannot here be engaged by application under s 36(2)(aa) on grounds of real risk of serious harm,[87] because Nauru is not, in relation to the Appellant, a "receiving country" as defined in s 5(1).

64 *Fourth*, *NATB*'s reliance on non-compellable powers does not work here. A class characteristic of BVR-holders is being a person owed protection obligations (but not in respect of Nauru), to whom ss 48A(1) or (1B) applies. When s 198 applies because of s 76AAA, the Minister is very unlikely to exercise non-compellable powers; *a fortiori* where the Appellant was one of three people targeted by the Interim Arrangement. In any event, given that s 198 (the final step in the removal scheme) necessarily applies at a time when the Minister has not exercised such powers, the significance of those powers is unclear. If, in fact, a person's life is at risk on removal (as a Ch III court has here found), their right to life is curtailed. The existence of a non-compellable discretion does not alter that.

65 *Fifth*, there is an important point of distinction between the operation of s 198 in *NATB* and its operation here. There, removal was from Australian territory and Commonwealth responsibility. At common law, in certain circumstances aliens continue to have the protection of Australian law, despite being on foreign soil, by reason of ongoing control or involvement by the Commonwealth.[88] Here, s 198AHB creates ongoing control over, or involvement with, a person removed pursuant to a third country reception arrangement. The Interim Arrangement relates to the "ongoing presence" (ss 198AHB(1), (5)) of the Appellant in Nauru, which the Nauruan visa contemplates to be for 30 years. During that period, s 198AHB(2) empowers the Commonwealth to take "any action", and specifically to "make payments" in relation to "the taking of any action, by that country (including, if the foreign country so decides, exercising restraint over the liberty of a person) in connection with the role of that country as a country which has agreed to the acceptance, receipt or ongoing presence of persons". The powers conferred by s 198AHB(2), which serve limited purposes,[89] give the Commonwealth a level of control over the degree to which the

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87 See *ASF17 v Commonwealth of Australia* (2024) 98 ALJR 782, [36] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

88 See, eg, *Rahmatullah v Defence Secretary* [2013] 1 AC 614; *Plaintiff M68/2015* (2016) 257 CLR 42, [165] (Gageler J); *Plaintiff S99/2016 v Minister for Immigration and Border Protection* (2016) 243 FCR 17 (Bromberg J).

89 *Plaintiff M68/2015* (2016) 257 CLR 42, [46] (French CJ, Kiefel and Nettle JJ).

Appellant's rights are curtailed while in Nauru, if removed there. As such, what is "reasonably practicable" ought not to focus solely on what happens within Australia.

66 *Principle of consistency with international law.* In *NATB* at [71], the Full Court applied a formulation by Gleeson CJ[90] of the principle of consistency with international law as requiring ambiguity. With respect, that principle is stronger: "provisions should be interpreted, so far as possible, to be consistent with international law".[91] The expression in *Maxwell on Statutes* was "interpreted and applied as far as its language admits".[92] While less strong than the language *Maxwell* used for the principle of legality,[93] the principle does not require ambiguity. "Parliament, prima facie, intends to give effect to Australia's obligations under international law".[94]

67 The *Migration Act* is enacted in the context of international obligations.[95] This is evident in s 197C(3). An interpretation of s 198 as requiring removal to a real risk (or virtual certainty) of death or serious harm engages the principle of consistency.

68 Article 6 of the ICCPR recognises and protects a right to life of all human beings and that the right to life "shall be protected by law". Article 2 "impliedly obligates States Parties not to remove a person from their territory where there are 'substantial grounds' for believing that there is a real risk of irreparable harm of the kind contemplated by Arts 6 and 7 in the country to which such removal is to be effected".[96] These obligations do not fall within the *Migration Act*'s definition of "non-refoulement".[97]

69 *Validity*. If, contrary to the foregoing submissions, s 198 would, when construed with *NATB*, require that the Appellant be removed to Nauru despite a reasonably foreseeable risk of death (and in all the other circumstances described above), s 198 would transgress the limitation imposed by Ch III of the *Constitution*. Section 3A of the *Migration Act* would then apply in this case to read down, or disapply, s 198 to a

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90 In *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [29].

91 *Kingdom of Spain v Infrastructure Services Luxembourg sàrl* (2023) 275 CLR 292, [16] (the Court) (underlining added).

92 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J).

93 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 12 (Mason CJ).

94 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

95 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, [27] (the Court); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, [44] (French CJ), [90], [94]-[95] (Gummow, Hayne, Crennan and Bell JJ).

96 ***CRI026*** *v Republic of Nauru* (2018) 92 ALJR 529, [24] (Kiefel CJ, Gageler and Nettle JJ). And see United Nations Human Rights Committee, International Covenant on Civil and Political Rights, **General Comment No. 36** (3 September 2019), [30]–[32].

97 *CRI026* (2018) 92 ALJR 529, [24]; General Comment No. 36, [31].

person in his circumstances, who faces such risk of death.

70 This argument is made in support of ground 2, and is directed to the argument set out in particular E. The valid operation of s 198 is impugned only to the extent it would operate, as construed with *NATB*, to require removal to a real risk of death in Nauru.

71 While ultimately a "single question of characterisation",[98] in practice the Court's analysis has proceeded in two stages.[99] The Appellant would seek to show that, in its impugned application, s 198: (1) would be prima-facie punitive; and (2) would not be reasonably capable of being seen as necessary for a legitimate non-punitive purpose.

72 As to the first stage, the Appellant makes three points.

10 73 *First*, in its impugned application, s 198 (construed with *NATB*) would require that the Appellant be removed to Nauru, where he faces a real risk of death. In that application, s 198 is akin to a law requiring forfeiture of the Appellant's right to life cognised by the common law.[100] Ordinarily, that right could be forfeited only as an incident of punishment for an offence against Australia's laws. Interference with bodily integrity is commonly grouped with detention and banishment as a mode of punishment.[101]

74 *Second*, as explained at [65] above, once the Appellant is in Nauru, the Commonwealth will, pursuant to s 198AHB(2), make payments for, and have power to take actions in relation to, Nauru's "third country reception functions". These include Nauru taking any action in connection with Nauru's role under the Interim Arrangement as a country
20 which has agreed to the Appellant's "ongoing presence", including "exercising restraint over the liberty" of the Appellant. While Nauru is, of course, a sovereign power, the degree of the Commonwealth's control or involvement in the Appellant's "ongoing presence" there distinguishes the s 198 requirement from the ordinary expulsion of an alien. While he will not then be "within its jurisdiction",[102] in a territorial sense, the curtailment of his right to life will occur in a context of continued Commonwealth control or involvement.

75 Section 198AHA, in its application considered in *Plaintiff M168*, was "incidental to the implementation of regional processing functions for the purpose of determining

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98 *YBFZ* (2024) 99 ALJR 1, [16].
99 *Ravbar v Commonwealth of Australia* (2025) 99 ALJR 1000, [153] (Gordon J).
100 *YBFZ* (2024) 99 ALJR 1, [14].
101 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336, [72] (Kiefel CJ, Keane and Gleeson JJ, citation omitted).
102 *YBFZ* (2024) 99 ALJR 1, [9].

claims by UMAs to refugee status under the Refugees Convention".[103] Here, once s 198 operates, the Commonwealth's involvement under s 198AHB(2) will not be for processing, and nor for removal (both having concluded). There being no ongoing purpose related to the Appellant's alienage, the Commonwealth's ongoing control or involvement are properly characterised as prima-facie punitive: supporting the confinement of the Appellant, in an unfamiliar country where he faces a real risk of death, as a consequence of his conduct while in the Australian community.

76 *Third*, while s 198 generally operates in pursuit of the non-punitive purpose of expelling and deporting aliens in the exercise of the Commonwealth's sovereign right to do so for peace, order and good government,[104] in its operation as described in the previous two points, s 198 may be seen to tip over into a prima facie purpose akin to effecting a banishment. "In banishment, the object in general is to get rid of the malefactor; and what becomes of him afterwards is not minded".[105] The "suffering incident to banishment" may inhere in the malefactor's separation from "friends, relations", "loss of the opportunity of advancement", "want of acquaintance, with foreign languages" and with "the manners and customs" of those among whom the person is "cast".[106] Where the banishment involves elements of "territorial confinement" the punishment is "apt in some respects to be greater … than simple imprisonment".[107] Unlike expulsion, it is of the essence of the latter that it has a "mark of infamy annexed".[108] Further, removal of a long-term resident alien will more readily be characterised as banishment because "[t]o banish [aliens] from home, family, and adopted country is punishment of the most drastic kind"[109], and "a life sentence of exile from what has become home … is a savage penalty".[110] In its operation upon the

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103 *Plaintiff M68/2015* (2016) 257 CLR 42, [46] (French CJ, Kiefel and Nettle JJ).

104 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 29-30 (Brennan, Deane and Dawson JJ); *Falzon* (2018) 262 CLR 333, [52] (Kiefel, Bell, Keane and Edelman JJ) and [92] (Nettle J).

105 Jeremy Bentham, *The Rationale of Punishment* (Robert Heward, 1830) 138.

106 Jeremy Bentham, *The Rationale of Punishment* (Robert Heward, 1830) 140-141.

107 Jeremy Bentham, *The Rationale of Punishment* (Robert Heward, 1830) 139.

108 Vattel, *The Law of Nations* (1760), vol 1, bk 1, ch 19 at §213.

109 *Lehmann v United States,* 353 US 685, 691 (1957) (Justice Black)

110 *Jordan v DeGeorge*, 341 US 223, 243 (1951) (Justice Jackson). Cf *Di Pasquale v Karnuth*, 158 F 2d 878, 879 (2nd Cir. 1947) (Judge Learned Hand, stating that the deportation of one who "had come here as a boy" was "in substance [exile]"); *United States ex rel. Klonis v Davis*, 13 F. 2d 630, 631 (Judge Learned Hand there holding that "Deportation [whether the alien came here in arms or at the age of ten] is to him a dreadful punishment, abandoned by the common consent of all civilized people… . [That] our reasonable efforts to rid ourselves of unassimilable immigrants should in execution be attended by such a cruel and barbarous result should be a national reproach").

Appellant, s 198 (construed with *NATB*) would appear "as a section for the banishment, ostracism, deportation of undesirable persons".[111]

77 The second step inquires after "justification".[112] In general terms, s 198 can be characterised as connected to a legitimate non-punitive purpose — namely, regulation of the presence of aliens in the territory. But in its impugned application to the Appellant, s 198 is not reasonably capable of being seen to be necessary for the legitimate and non-punitive purpose of effecting his removal in the interest of protecting the peace, order and good government of the Commonwealth. The purposes of the *Migration Act* can reasonably be achieved by measures falling short of removing a person to death (or serious harm). Indeed, the current detention and BVR regime provides an example of a scheme that permits the regulation of aliens' presence in Australia in circumstances where efforts are being made to remove them. Further, denying procedural fairness is disproportionate[113] in connection with an action effecting what is, in substance, "civil death",[114] as well as a real risk of literal death.

PART VII: ORDERS SOUGHT

78 The Appellant seeks the orders set out in his Further Amended Notice of Appeal. If the Court concludes that the Appellant is correct on ground 2 as a matter of law, but that it is not in a position on this appeal to determine whether injunctive relief should follow on the facts, the matter ought be remitted to the Federal Court.

PART VIII: ESTIMATE OF TIME

79 The Appellant estimates 2.5 hours will be required for oral argument (including reply). **Dated**: ~~24 October 2025~~ **29 October 2025**

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111 Cf *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36, 112 (Higgins J).
112 *Falzon* (2018) 262 CLR 333, [33] (Kiefel CJ, Bell, Keane and Edelman JJ).
113 As to procedural fairness as an incident of the proportionality inherent in conferring a power on a court, see *EGH19 v Commonwealth of Australia* [2025] HCATrans 69, 38.1654-5 (Gageler CJ).
114 *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1, [101] (Edelman J, so describing banishment).

ANNEXURE TO THE SUBMISSIONS OF THE APPELLANT

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
			Constitutional provisions		
1.	*Commonwealth Constitution*	Current	s 61, Ch III	In force at all relevant times	All relevant times
			Statutory provisions		
2.	*Home Affairs Legislative Amendment (2025 Measures No. 1) Act 2025* (Cth)	Current	s 2, items 9 and 10 of Sch 1	Presently in force, resulted in retrospective validity of relevant matters	From 5 September 2025 (with retrospective effect)
3.	*Migration Act 1958* (Cth)	Current	ss 3A, 4, 5, 48A, 76AAA, 197C, 198, 198AHA, 198AHAA, 198AHB, 501	Presently in force, incorporating amendments made after judgment of the primary judge (including s 198AHAA)	From 5 September 2025
4.	*Migration Act 1958* (Cth)	Compilation No. 164 (21 February 2025 – 3 June 2025)	ss 3A, 4, 5, 48A, 76AAA, 197C, 198, 198AHA, 198AHB, 501	In force at the time of the judgment of the primary judge	All relevant times to 26 May 2025