HIGH COURT OF AUSTRALIA

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Details of Filing

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Form 27C—Intervener's submissions

Note: See rule 44.04.4.

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

SUBMISSIONS OF THE HUMAN RIGHTS LAW CENTRE

SEEKING LEAVE TO BE HEARD AS *AMICUS CURIAE*

Part I Certification

1. This submission is in a form suitable for publication on the internet.

Part II Basis of application for leave to be heard

2. The Human Rights Law Centre ("**HRLC**") seeks leave to be heard as *amicus curiae* on the question raised by Ground 2 of the Further Amended Notice of Appeal: whether, on its proper construction, s 198 of the *Migration **Act** 1958* (Cth) authorises or requires a non-citizen's removal to a place where it is reasonably foreseeable that she or he faces a real risk of death or serious injury.

Part III Why leave to be heard as amicus curiae should be granted

3. The HRLC conducts research, policy advocacy and casework advancing the rights of non-citizens under Australia's migration laws, particularly of persons detained or vulnerable to detention or removal from Australia. It has done this work for decades, and has institutional experience and expertise in respect of

the issues before the Court. The HRLC has offered this Court assistance as *amicus curiae* on five occasions.[1] The HRLC can provide "the benefit of a larger view of the matter before it than the parties are able or willing to offer."[2]

4. As the judgment below shows (*TCXM v Minister for Immigration and Multicultural Affairs* [2025] FCA 540; **J**), the construction of s 198 arises in the context of the Appellant being part of the "*NZYQ* cohort" (J[2], [39]). Many in that cohort may be affected by the scope of s 198 duties to remove.[3] The HRLC was granted leave (with the Kaldor Centre) to be heard as *amicus* in *NZYQ*.

5. If granted leave, the HRLC would add to the parties' arguments on the proper construction of s 198 of the Act, particularly the proper construction of the expression "reasonably practicable". The HRLC's submissions would not add materially to the parties' preparation or the length of the oral hearing itself.[4]

Part IV Argument

IV-1 Overview of argument

6. On its proper construction, s 198 of the Act enables and requires the taking into account of the consequences of a proposed removal (including, relevantly, the foreseeability of a real risk of death or serious harm), except where the consequences do, or are claimed to, engage *non-refoulement* obligations (whether as implemented in the Act or at international law)[5] ("**Protection Consequences**"). That construction involves two steps.

7. *First*, the words "reasonably practicable" in s 198 are broad and open-textured enough to permit (and require) taking account of consequences of removing a removee to a particular place. Indeed, reading the words that way: **(a)** accords with the text and context of s 198; **(b)** is consistent with its legislative and

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1 ***Momcilovic*** *The Queen* (2011) 245 CLR 1; *Attorney General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1; *Brown v Tasmania* (2017) 261 CLR 328; *Clubb v Edwards* (2019) 267 CLR 171; ***NZYQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137. See also affidavit of Sanmati Verma affirmed 31 October 2025 at [7]–[8].

2 *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 312 (French CJ).

3 Affidavit of Sanmati Verma affirmed 31 October 2025 at [12]–[17].

4 *Roadshow Films Pty Ltd v iiNet Limited (No 1)* (2011) 248 CLR 37 at [4] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

5 See *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582 at [13], [17]–[18], [20], [29], [32]–[33] (Kiefel CJ, Keane, Gordon, Steward JJ).

jurisprudential history; and **(c)** is consistent with the principle of legality.

8. *Second*, however, it is necessary constructionally to account for the Act's "specialised administrative regime"[6] for Protection Consequences, including the provisions in the Act concerning the grant of protection visas as well as s 197C.

9. The effect of the scheme is that:

(a) to the extent that a Protection Consequence does or is said to engage the criteria domestically enacted to implement international law *non-refoulement* obligations, such claims are made through the domestic protection visa regime (and may result in a "protection finding" for the purposes of s 197C(3));

(b) to the extent that a Protection Consequence does not or is not said to engage such criteria, it is irrelevant to the duty under s 198: s 197C(1);

(c) to the extent that a posited consequence is not a Protection Consequence—*i.e.*, it neither does nor is said to engage *non-refoulement* obligations (whether as implemented in the Act or at international law), then it can and must be taken into account in assessing the reasonable practicability of removal.

10. Because Protection Consequences have their own detailed regime, s 198 is to be read as not dealing with such claims: *expressum facit cessare tacitum*.

IV-2 The proper construction of s 198 of the Act

(i) The concept of "reasonable practicability", textually and contextually

11. Section 198 provides both power and duty to remove an unlawful non-citizen. That power and duty is not absolute. It is expressly qualified by the expression "as soon as reasonably practicable."[7] The meaning of the phrase "as soon as reasonably practicable", and thus the extent of the qualification on the power and duty to remove, is ascertained by reference to text, context, and purpose.[8]

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6 ***M38****/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at [73], [83] (the Court).

7 *Minister for Immigration and Multicultural Affairs v* ***MZAPC*** (2025) 99 ALJR 385 at [37] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

8 See, e.g., *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 273 CLR 21 at [15] (the Court).

(A) The text of s 198

12. A majority of this Court recently embraced the description of the term "practicable" as supplying a "substantive element" to s 198(6), and meaning, "that which is able to be put into practice and which can be effected or accomplished."[9] Another way of expressing the meaning of "practicable" is, "capable of being put into practice, done, or effected, especially with the available means or with reason or prudence; feasible".[10]

13. "Practicable" is qualified by the adverb "reasonably".[11] By contrast, in s 181 of the Act (dealing with "designated persons"), the word "practicable" appears alone. "Reasonable" means, relevantly, "endowed with reason", "agreeable to reason or sound judgement" or "not exceeding the limit prescribed by reason; not excessive".[12] This emphasises that removal is not to occur at all costs.

14. The "elastic" notions of reason, prudence, and feasibility bound up in the phrase "reasonable practicability" have "considerable flexibility."[13] It is an "evaluative term" the application of which will turn on all the circumstances of a particular case.[14] The text of s 198 can thus accommodate a wide range of considerations.

15. It is "removal" which must be "reasonably practicable." "Remove" means "remove from Australia": s 5(1). But while s 198 does not specify to where an unlawful non-citizen must be removed (so removal need not be to a person's home country),[15] there must necessarily be a destination. So, while removal to a place may not be the purpose of s 198,[16] what is "reasonably practicable" takes account of circumstances both in Australia and the possible receiving country.

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9 *MZAPC* at [35] (Gageler CJ, Gordon, Gleeson and Jagot JJ), citing ***Al-Kateb*** *v Godwin* (2004) 219 CLR 562 at [121] (Gummow J).

10 *MZAPC* at [66] (Edelman J), citing *Macquarie Dictionary*, 9th ed. (2023), Vol 2 at p 1210, "practicable", sense 1.

11 *MZAPC* at [35] (Gageler CJ, Gordon, Gleeson and Jagot JJ), citing *Al-Kateb* at [121] (Gummow J); *M38* at [65].

12 *Macquarie Dictionary*, 9th ed (2023), Vol 2 at p 1283, "reasonable", senses 1–3.

13 *MZAPC* at [66] (Edelman J), citing *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 305–306 (Stephen and Mason JJ).

14 ***NATB*** *v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506 at [51] (the Court); *M38* at [68]; ***WAIS*** *v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1625 at [58] (French J).

15 *Al-Kateb* at [227] (Hayne J).

16 *Al-Kateb* at [227] (Hayne J).

16. It has been held that, in assessing reasonable practicability, regard may be had to statutory and non-statutory executive powers related to potential removal;[17] orders of a court,[18] including interlocutory injunctions;[19] a person's physical condition,[20] including whether their health permits them to make the journey;[21] whether the person has a right of entry to or residence in the receiving country;[22] whether another country is willing to receive them into its borders;[23] conditions in the receiving country, such as civil anarchy or natural disaster;[24] cooperation of other countries in respect of the individual or a class to which they belong;[25] and investigations about statelessness and nationality.[26]

17. The concept takes in physical and non-physical circumstances,[27] factors relating to the person facing removal and the interests of third parties (such as third party states),[28] and all the "real world difficulties" attaching to removal.[29] There may be myriad factual reasons why it is not "reasonably practicable" to remove a person at a particular point in time.[30] This reflects the flexibility in the concept of "reasonable practicability". It also illustrates that the expression directs attention both to the circumstances in Australia, and to what would meet the person on the other end of their potential journey.

18. If a person's removal to a particular place would likely lead to serious harm, there is no textual reason for that harm to be irrelevant. That is not a prudent or feasible place to send them. It is not practicable to engage in a course of conduct leading to serious harm, let alone reasonably so. To reason that removal is

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17 *MZAPC* at [66] (Edelman J).
18 *MZAPC* at [35] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
19 *MZAPC* at [37] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
20 *M38* at [69].
21 *NATB* at [52]; ***Li*** *v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 181 at [7] (Merkel J, Heerey and Conti JJ agreeing).
22 *NZYQ* at [5] (the Court).
23 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 ("***Malaysian Declaration Case***") at [92] (Gummow, Hayne, Crennan and Bell JJ); *NATB* at [52]; *M38* at [68].
24 *M38* at [69].
25 *WAIS* at [58] (French J).
26 ***WKMZ*** *v Minister for Immigration* (2021) 285 FCR 463 at [115] (Kenny and Mortimer JJ).
27 *MZAPC* at [35] (Gageler CJ, Gordon, Gleeson and Jagot JJ); see also *NATB* at [52].
28 *M38* at [66].
29 *NZYQ* at [61], citing *WAIS* at [59] (French J).
30 *WKMZ* at [122] (Kenny and Mortimer JJ).

complete upon admission to a country, so that one must be deliberately blind to what will follow from that admission, is not justified by the text of s 198 or consistent with its actual application (as the examples given above show).

19. The word "must" in s 198 makes plain that, when the condition of "reasonable practicability" is met, removal is a duty, not a discretion.[31] Parliament not having intended to create executioners at one remove,[32] the fact that the officer has no choice but to remove once it is "reasonably practicable" weighs in favour of that condition not being met where removal would lead to serious harm.

(B) The context of s 198

20. Section 197C is constructionally informative for two main reasons. *First*, as the statutory and jurisprudential history of s 198 in Part IV-2(ii) shows, s 197C was inserted in response to authority of this Court confirming that the claim or existence of non-refoulement duties could be relevant to the availability of the power to remove. While the legislature intended to reverse that jurisprudence, it only did so in relation to Australia's international *non-refoulement* obligations (not other matters that could bear on reasonable practicability).

21. *Second*, the later insertion of s 197C(3)–(9), which prohibit removal of people in respect of whom a "protection finding" has been made in the course of considering a protection visa application (s 197C(3)(a)–(b)), confirms the legislature's desire that non-citizens not be removed to meet serious harm. In the case of Protection Consequences, non-citizens must use the Act's specialised administrative regime for making protection claims, that regime being Australia's response to international *non-refoulement* obligations. This leaves the legislature's presumed concern for fundamental rights of removees which are unrelated to Protection Consequences to be addressed elsewhere.

22. While there is a specialised administrative regime for considering Protection Consequences, the Act creates no such regime for consequences that are not Protection Consequences. A regime for addressing one kind of risk does not imply that other kinds of risk, which do not and are not said to engage *non-*

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31 *M38* at [54].

32 *NATB* at [54]–[55].

refoulement obligations internationally or as implemented in the Act, should be carved out of the scope of what is relevant to "reasonable practicability". Ministerial "intervention" powers (like s 195A) are limited, discretionary, and non-compellable, so cannot be construed as having been intended to fill the gap.

23. To recognise that "reasonable practicability" takes account of the likely risks to a person's life is not to give them unconditional admission into Australia. Even if it is not reasonably practicable to remove a person with serious health issues to a country which cannot treat him, he can be removed to any other country which can treat him and will admit him. Further, unlawful non-citizens who have not yet been removed (because it is not yet reasonably practicable) will (and must) be removed once relevant circumstances change—either of their health, or in the receiving country, or if another receiving country is identified.

(ii) A relevant statutory and jurisprudential history of s 198 of the Act

24. The *Migration Amendment Act 1992* inserted Pt 2, Div 4B (now Pt 2, Div 6), applying to "designated persons" (people arriving by boat after 19 November 1989 and before 1 December 1992, who did not have a visa or an entry permit (s 54K, now s 177)). For such people, detention was mandatory until removal or grant of an entry permit (s 54L; now s 178), subject to s 54Q (now s 182). The *Migration Reform Act 1992* then introduced ss 54W, 54ZD, and 54ZF (now, ss 189, 196, and 198), modelled on Pt 2 Div 4B but applicable to all "unlawful non-citizens". Three moments in s 198's history need attention.

25. *First*, in 2003–2004, there was a run of cases construing the term "reasonably practicable" in s 198. These included *M38*, *NATB*, and ***WAJZ*** *v Minister for Immigration and Multicultural and Indigenous Affairs* ***(No 2)*** [2004] FCA 1332. These cases are addressed in Part IV-2(ii)(A).

26. *Second*, between 2010 and 2013, the *Offshore Processing Case*,[33] the *Malaysian Declaration Case*, and *Minister for Immigration and Citizenship v* ***SZQRB*** (2013) 210 FCR 505 were decided. These involved studied departure from the *NATB* / *M38* construction, and are addressed in Part IV-2(ii)(B).

27. *Third*, in 2014 via the *Migration and Maritime Powers Legislation Amendment*

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[33] *Plaintiff M61 2010E v Commonwealth* (2010) 243 CLR 319.

***(Resolving** the Asylum Legacy **Caseload) Act** 2014* (Cth), the legislature inserted s 197C intending to reverse the outcome of those three cases. This and subsequent amendments to s 197C are addressed in Part IV-2(ii)(C).

(A) 2003–2004 cases on construction of "reasonably practicable" in s 198

28. Between about May 2003 and October 2004, more than fifteen judgments were delivered on the construction of s 198. The most relevant of these were *M38* (June 2003), *NATB* (December 2003), and *WAJZ (No 2)* (October 2004), which receive attention below.

29. ***M38***: *M38* was an appeal from *Applicant M38/2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 458. M38 was an Iranian national whose protection claims failed but who sought to restrain removal to Iran on the basis that removal there would breach *non-refoulement* obligations. This scenario—an unsuccessful asylum seeker seeking to "re-run"[34] protection claims to prevent removal—presents in nearly all of the early cases.

30. The Minister submitted that s 198(6) was "plain and unambiguous" and could "not [be] interpreted as if it were governed by the *Refugees Convention*" ([2003] FCA 458 at [17]). Justice Marshall accepted that submission (at [22]–[23]),[35] subject to a qualification that the duty was to be exercised "*bona fide*," which would preclude, for example, "removing a person … to a rock in the Pacific Ocean" (at [24]). Many judgments on s 198 state qualifications on the removal duty. Their significance is addressed below.

31. On appeal, the critical question was whether s 198(6) authorised and required removal to a place in respect of which, so M38 said, he had a well-founded fear of persecution on *Refugees Convention* grounds (at [21]). Accordingly, the case "turn[ed] on the relationship between … s 198 … and Art 33 of the *Refugees Convention*" (the *non-refoulement* obligation) (at [34]).

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34 See *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 185 at [21] (the Court), ***SAAK** v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 921 at [17] (Mansfield J); ***SDAE** v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 959 at [19] (Mansfield J).

35 Justice Marshall applied *Re Minister for Immigration and Multicultural Affairs; Ex parte SE* (1998) 73 ALJR 123, another case of a failed asylum seeker re-running protection claims, in which Hayne J rejected a construction incorporating non-refoulement into s 198 (at [18]).

32. The Court noted that it was for contracting states to decide how they implement international obligations (at [38]–[41]). The Act was Australia's effecting of at least some of its *Refugees Convention* obligations (at [42]). The scheme concerning protection visas (at [43]–[49]) was critical in rejecting a construction whereby s 198(6) permitted (or required) consideration of *non-refoulement* obligations (at [70]). "[B]y the time an officer is called upon to discharge the duty imposed by s 198(6) of the Act, any claim by a detainee for refugee status has been refused, or is taken to have been refused, in accordance with the processes established under the Act" (at [71]). That is, "so far as the question of refugee status can arise under Australian law, it has been determined adversely to the detainee" (at [78]), hence does not arise under s 198(6). The scheme for determining claims of refugee status impliedly excluded that same question from arising again at removal stage (see [71], [72], [78], [80]).

33. Nevertheless, s 198(6) was not absolute, because of the condition of "reasonable practicability" (at [64]). Practicability was concerned with feasibility, but "[r]easonably" limited or qualified what would otherwise be an "almost absolute obligation": removal might be practicable but not reasonably so (at [65]). So, "[w]hether the removal of an unlawful citizen will be 'reasonably practicable' in a particular case will depend upon all the circumstances, considered by reference to the statutory duty in s 198(6)" (at [67]). Examples of matters bearing on reasonable practicability included absence of a country willing to admit (at [68]), "some severe natural disaster or … a state of utter civil anarchy" in the receiving country (at [69]), or the removee's physical condition (at [69]).[36]

34. ***NATB***: *NATB* decided appeals regarding NATB, SAAK, and SDAE (at [1]–[4]). Each was an unsuccessful asylum seeker re-running protection claims to prevent removal.[37] NATB's application was dismissed based on *M38* ([2003]

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36 Citing ***Li*** [2002] FCAFC 181 at [7] (Merkel J, Heerey and Conti JJ agreeing). Li's argument was relevantly that he was not fit to travel. He had made no protection claims: *Li v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 667 at [2].

37 See *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 761 at [2]–[5] (Stone J), *SAAK* at [2]–[4] (Mansfield J), *SDAE* at [1]–[2] (Mansfield J).

FCA 761 at [15]).[38] He was given leave to appeal,[39] on the basis that *M38* was arguably distinguishable.[40] The leave Court said (at [22]) that *M38* made clear that reasonable practicability is "not confined literally to the capacity of the officer to put the unlawful non-citizen on an aircraft or ship leaving Australia," and that "[w]hat is likely to happen at the destination may be relevant."

35. On appeal ((2003) 133 FCR 506), the Court agreed with *M38*'s construction, with one qualification: whereas the *M38* Court thought that "reasonableness" and "practicability" may operate in opposing senses, the *NATB* Court did not (at [48]–[50]). What is in any event clear is that use of the word "reasonably" as modifying "practicable" either requires, or emphasises what is already required, that the power be exercised with reason, prudence, *etc.*, as articulated above.

36. The Court did not define "reasonably practicable" (at [51]), but identified two limits on it. *First*, the concept was "not necessarily limited to physical considerations, such as the health of the [removee], or the availability of an operating airport in the [receiving] country" (at [52]). Willingness of a country to admit the removee is a relevant "non-physical factor" (at [52]).

37. *Second*, "the reference to reasonable practicability … does not require an officer to take into account what is likely, or even virtually certain, to befall the [removee] after removal is complete; and removal is complete, at the latest, once the [removee] has been admitted by, and into, the receiving country" (at [53]). Even if it were "virtually certain" that the removee would be killed, tortured, or persecuted, on a *Refugees Convention* ground or not, that "is not a practical consideration going to the ability to remove"; it is a "consideration about a likely course of events following removal" (at [53]).

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38 SAAK's and SDAE's applications were refused based on *M38* and on Mansfield J's view that the leave Court in *NATB* ([2003] FCAFC 185) did not intend to "go behind or to qualify" *M38*'s holding that s 198(6) did not permit rerunning protection claims: *SAAK* at [17], see [16]–[20]; *SDAE* at [19]. See also, between *M38* and *NATB*, *Shahrooie v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 996 at [8]–[12], [42], [51], [64], [71]–[72] (Lander J); *SRFB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1021 at [5]–[6], [26], [28] (Lander J), *NAQK v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1360 at [1]–[3], [6] (Madgwick J).

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

40 Unlike M38, NATB had not sought review of the unfavourable visa decision and he relied on the *Torture Convention* as well as the *Refugees Convention*: [2003] FCAFC 185 at [20].

38. The Court said that Parliament could not have intended people to be removed "to a country where they would be likely to suffer death, torture or persecution," but that it was not through the concept of "reasonable practicability" that it effected that intent; that would have required express words (at [55]). Rather, Parliament's intent was effected by: **(a)** the availability of protection visas (at [56]), including the power in s 48B to permit a fresh application (at [57]); and (b) ss 351 or 417 permitting substitution of a favourable decision (at [58]).

39. That is, applying *M38*, s 198 does not require considering non-refoulement at the removal stage, given the Act's "specialised administrative regime" for such claims (at [60]–[61]). As for *Torture Convention* claims, where that convention had not yet been incorporated into the Act,[41] the Court said that "the two non-refoulement obligations are similar and there is substantial overlap between the circumstances to which they respectively apply," and the unlikely prospect of any gap was a matter for the legislature (at [69]).

40. ***WAJZ (No 2)***:[42] The first WAJZ judgment fell between *M38* and *NATB*. Justice French struck out all *Refugees Convention* claims (based on *M38*) but not other claims, pending the *NATB* appeal.[43] One of the other claims was that PTSD and depressive disorder prevented return to Iran because of risk of harm resulting from exacerbation of those conditions. That is, the claims had nothing to do with *non-refoulement* obligations, unlike the other cases considered above.

41. In *WAJZ (No 2),* French J found that the applicants had various combinations of PTSD and depressive disorder (at [41]), and that it was "at least probable that"

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41 The *Migration Amendment (Complementary Protection) Act 2011* (Cth) allowed claims engaging the *Torture Convention* and the *International Covenant on Civil and Political Rights,* "to be considered under a single protection visa application process": Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011, p 1.

42 After *NATB,* and before *WAJZ (No 2)*, SPKB's claims were dismissed. He was another unsuccessful asylum seeker re-running protection claims: *SPKB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 546 at [2]–[4], *SPKB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 296, *SPKB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 532, and *SPKB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 181. He was an Iraqi national who was to be removed to Syria. The finding in his protection claims was that he was not at risk of chain refoulement from Syria to Iraq. See also *WAEW v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 124.

43 *WAJZ v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1028.

the depressive conditions would worsen by reason of, and following, return to Iran, and (in some cases) there was risk of self-harm or suicide (at [42], [1]). There was no physical incapability of actually making the journey (at [43]).

42. From [75]–[81], French J summarised holdings from *M38* and *NATB*. The application of those principles to the claims of the applicants was in [82]:

> "It follows that if an officer is not required to take into account, under the rubric of 'reasonable practicability', the likelihood of persecution or death in the country of destination it can hardly be contended that he or she must take into account the possibility that removal would lead to the deterioration of a person's mental disease or disorder."

43. At [86], French J held, however, that it was relevant to reasonable practicability that the removee be capable of making the journey.

(B) Offshore Processing Case, Malaysian Declaration Case, and SZQRB[44]

44. In 2010, the *Offshore Processing Case* held that detention was lawful while steps were taken to determine whether a detainee should be permitted to make a valid visa application (at [25]–[26]). Part of the reason was that "the [Act] contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the [*Refugees Convention*]," that it "proceeds, in important respects, from the assumption that Australia has protection obligations to individuals," and that it "provides power to respond to Australia's international obligations" by granting a protection visa to, and not *refouling*, a person ([27]).

45. These observations were developed less than a year later, in the *Malaysian Declaration Case*. The plaintiffs submitted that neither s 198A nor s 198(2) authorised removal to Malaysia. As to s 198(2), it was said not to authorise removing persons who claimed to be owed protection obligations before those

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44 Over the years between 2004 and 2010, the smaller number of cases that were brought were mainly disposed of by reference to *M38*, *NATB*, and *WAJZ (No 2)*. See, *e.g.*, ***SYVB*** *v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 600 at [20], [22] (Nicholson J), *Beyazkilinc v Manager Baxter Immigration Reception and Processing Centre* [2006] FCA 16 at [8] (Mansfield J), *Kumar v Minister for Immigration and Citizenship* (2009) 176 FCR 401 at [80]–[82] (Besanko J), *Beyazkilinc v Manager, Baxter Immigration Reception and Processing Centre* (2006) 155 FCR 465 at [32]–[37] (Besanko J).

claims were assessed (at [80]). That was accepted by a majority of the Court.[45]

46. Having quoted the *Offshore Processing Case* about interconnectedness with international obligations (at [90]), the plurality said that Australia would breach such obligations if it *refouled* a refugee, and hence that it may breach them if it removed a person without assessing a claim of refugee status (at [94]). In this context, the plurality held that s 198 neither required nor permitted removal of asylum seekers before determination of refugee status (at [95], [97]). Construing the Act as authorising such removal would "deny the legislative intention evident from the Act as a whole: that its provisions are intended to facilitate Australia's compliance with the obligations undertaken in the [*Refugees Convention*]" (at [98]).

47. It could not have been overlooked that the reasoning in these two cases involved, at least, tension with *M38* and *NATB*. The headnote in the *Offshore Processing Case* records a submission by the Solicitor-General, citing *M38* and *NATB*, that the obligations to detain and remove are unaffected by the existence and outcome of the refugee status assessment process (243 CLR 329, fn 27).[46]

48. In *SZQRB*, Lander and Gordon JJ (Flick J relevantly agreeing) applied the *Offshore Processing Case* (at [130]–[164]) and the *Malaysian Declaration Case* (at [181]–[199]), and held that persons who had made protection claims under any of the *Refugees Convention*, the *Torture Convention*, or the *International Covenant on Civil and Political Rights* could not be removed without assessment of those claims (at [231], [272]). Largely the same approach was taken by Besanko and Jagot JJ (see [300], [310], [313]).

(C) The insertion of s 197C and its subsequent amendments

49. The Explanatory Memorandum for the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) made clear (at [1133]–[1139]) that one of its objects was to reverse the *Offshore Processing Case*, the *Malaysian Declaration Case*, and *SZQRB*, and what those cases said about reading the Act consistently with international

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45 *Malaysian Declaration Case* at [54]–[55] (French CJ), [95]–[99] (Gummow, Hayne, Crennan and Bell JJ), [237], [239] (Kiefel J).

46 See also *Plaintiff M61-2010E v Commonwealth* [2010] HCATrans 219 at 5095–5135.

obligations. The cases were said (at [1136]) to have involved departure from *M38*. The object of s 197C was to "restore the situation to that arising prior to the jurisprudence noted above by making it clear that the removal powers are separate from, unrelated and completely independent of, any provisions in the … Act which might be interpreted as implementing Australia's *non-refoulement* obligations" (at [1137]), and to "provide clarity" about the interpretation and implementation of *non-refoulement* obligations (at [1138]). Section 197C(1)–(2), as inserted, provided that, for the purposes of s 198, it was irrelevant whether Australia owed *non-refoulement* obligations, and the duty to remove arose irrespective of whether there had been an assessment of such obligations.

50. Over time it became apparent that, at least in some cases, s 197C was being ignored, in that steps were <u>not</u> being taken to remove people to countries where that would breach *non-refoulement* obligations.[47] The *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) was then enacted, adding subsections to s 197C providing that, despite s 197C(1)–(2), removal was not required of a non-citizen to a country if a "protection finding" (as defined) had been made in respect of that country for that non-citizen.

(D) Observations about existing jurisprudence

51. *First*, a sensible and correct starting point expressed in the 2003–2004 cases is that the Act could not be read as enabling a person whose protection claims have been rejected in the regime set up for assessing such claims to re-run them via a proceeding seeking to injunct removal (see, *e.g.*, *NATB* at [60]–[61]).

52. *Second*, however, it was an error to accommodate that starting point by reading the words "reasonably practicable" narrowly in <u>all</u> of their applications (*e.g.*, in relation to <u>every</u> kind of harm), rather than just in relation to harms already accommodated by the Act. The result—reading s 198 as concerned only with actual physical ability to effect removal, and not anything that might happen thereafter (*NATB* at [52]–[53])—produces contradiction and arbitrariness.

53. For example, it has been said that the power would not permit removal to a rock in the Pacific (at [30] above). But if that can physically be effected, why not?

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47 *AJL20 v Commonwealth* (2020) 279 FCR 549, *Commonwealth v AJL20* (2021) 273 CLR 43.

The answer given (it is not a *bona fide* exercise of power) can equally be used to stigmatise removal to any other place where the removee is exposed to the risk of death. The reason it is thought not to be "*bona fide*" is that Parliament cannot have intended Australia to be an "executioner … at one remove" by removing people to countries (or rocks) where they will die (*NATB* at [54]–[55]). The location for that limitation is in the term "reasonable practicability."

54. And, though the *NATB* construction says it precludes consideration of post-removal events, such matters are in fact often taken into account. Thus, in *M38*, their Honours accommodate taking into account a state of anarchy or a natural disaster in the receiving country as bearing on the reasonable practicability of removal (at [69]).[48] In the NATB leave judgment ([2003] FCAFC 185, Heerey, Finn and Conti JJ), the Court expressly said (at [22]) that "[w]hat is likely to happen at the destination may be relevant," which observation has not received much later attention.

55. Or, in *BHL19 v Commonwealth (No 2)* [2022] FCA 313 at [171], Wigney J referred to evidence that Syrian nationals could enter certain countries without a visa, the point being that Australia could remove to such a country without concern for what would happen when permission to remain there expired. For example, the removee might procure a "short term tourist visa" to Greece.[49] His Honour rejected (at [171]) that it would be reasonable for the Commonwealth to act in that way.[50] But if s 198 is unconcerned with the "likely course of events following removal from Australia" (*NATB* at [53]), why would removal on such a visa not be required? If the answer is that it would damage relations with (say) Greece, that cannot explain constructionally excluding *non-refoulement* obligations, breach of which would also damage, *a fortiori*, foreign relations.

56. What does in fact explain the exclusion of *non-refoulement* obligations from s 198 is the scheme for their consideration elsewhere in the Act. That implied exclusion does not apply to risks of harm which neither do nor are said to engage *non-refoulement* obligations (as implemented in the Act or at international law),

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48 See also *NATB* at [25]; *WAJZ (No. 2)* at [75] (French J).

49 *BVZ21 v Minister for Home Affairs* [2022] FCA 1344 at [15] (Wigney J).

50 See also *Bowman v Commonwealth of Australia* [2022] FCA 594 at [47] (Mortimer J).

for the consideration of which risks the Act otherwise provides no scheme.

57. *Third*, in any event, at least prior to s 197C it was not correct to read s 198 as though it was not part of the "elaborated and interconnected" provisions directed to responding to international obligations—*i.e.*, as if such obligations could never be relevant to the scope of the section. So far as *NATB* and *M38* held to the contrary, they were shown to be wrong in the *Offshore Processing Case* and the *Malaysian Declaration Case*, which are consistent with the concept that consequences of removal might bear on reasonable practicability of removal.

58. *Fourth*, s 197C(1)–(2) only negative that outcome for "*non-refoulement* obligations" (*i.e.*, not other kinds of harm). The Act thus enables and requires consideration of the consequences of removing a non-citizen, in two different ways. Protection Consequences are addressed by the specific protection visa regime, and removal causing that kind of harm is straightforwardly prohibited by s 197C(3)–(7). For other consequences (non-Protection Consequences), s 197C does not prohibit, and the phrase "reasonably practicable" in s 198 is broad enough on its proper construction to require, their consideration.

59. *Fifth*, it is true that provisions like ss 48B, 195A, 351, and 501J can be used to, "accommodate[] 11th-hour [protection] claims."[51] The HRLC's construction of s 198 accords with the statement in *ASF17* (at [38]) that such provisions "exclusively" provide such accommodation for such claims. The premise may be accepted that, where the Act makes provision for Protection Consequences in its protection visa scheme, including through the ability to permit further applications for a protection visa (s 48B) and to reverse adverse decisions in respect of such applications (s 501J), such consequences are not also accommodated in the removal power:[52] *expressum facit cessare tacitum*.

60. It does not follow from that premise, however, that all claims of harm are carved out of the breadth of the term, "reasonably practicable." There is no detailed statutory process for evaluating non-Protection Consequences of harm after and because of removal, nor (accordingly) do ss 48B or 501J avail. As for ss 195A

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51 *ASF17 v Commonwealth* (2024) 98 ALJR 782 at [38] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

52 This reasoning is deployed in, *e.g.*, *M38* at [80]; *NATB* at [59]; *SYVB* at [19].

and 351, they can be used for a variety of reasons and hence cannot (unlike, say, s 48B) be seen as a specific manifestation of legislative desire to avoid harms. And even if they were, their generality distinguishes them from the specific protection visa regime, meaning that their existence does not deny that s 198 can (and does) accommodate that same legislative desire.

61. In overview, what appears in the cases of principal focus—*M38*, *NATB*, *WAJZ (No 2)*—is one or two unwarranted extensions of a sensible and correct starting point: that s 198 cannot envision re-running protection claims. This was the central constructional point in *M38*: "by the time an officer is called upon to discharge the duty imposed by s 198(6) of the Act, any claim by a detainee for refugee status has been refused, or is taken to have been refused, in accordance with the processes established under the Act" (at [71], see also [72], [78]).

62. In *NATB*, this was extended to *Torture Convention* claims, despite that at that time there was no statutory process for making such claims. The Court seemed to view this as a minor extension, where the "two non-refoulement obligations … substantial[ly] overlap" (at [69]). Any non-overlap or "gap" was a matter for the legislature (at [69]). Respectfully, that was erroneous where the Court had earlier (correctly) recognised (at [55]) that Parliament cannot have intended that people would be removed to a country where they would likely suffer torture. The HRLC's proposed construction eliminates the gap, while not undermining the policy against re-running protection claims at removal stage.

63. If *NATB* at [53] is construed as speaking only to the kinds of claims there in issue (*i.e.*, claims considered to have a significant overlap with *Refugees Convention non-refoulement* claims), then *WAJZ (No 2)* involves a further significant extension to claims with no overlap with protection obligations. Or, if the *NATB* construction already rendered such claims irrelevant, then *WAJZ (No 2)* illustrated the breadth of the extension *NATB* made to *M38*. In either case, the reasoning in *WAJZ (No 2)* at [82] was that if Parliament did not intend to take account of death for convention reasons in a receiving country, it could not have intended to take account of death for other reasons. In fact, protection obligations were not considered at removal stage because of provision for their consideration elsewhere. This does not deny the potential relevance of non-

Protection Consequences to the reasonable practicability of removal.

(iii) Principle of legality

64. The principle of legality is well understood. Five points are key:

65. *First*, Courts do not impute to Parliament an intention to abrogate or curtail fundamental rights or freedoms without some clear evidence of that intention.[53]

66. *Second*, the principle is engaged if a right is curtailed and a "constructional choice" is open; there is no need for ambiguity.[54]

67. *Third*, the requisite intention to curtail rights is found by express words or necessary implication;[55] general words are not sufficient.[56]

68. *Fourth*, the principle's intensity is calibrated to the importance of the right and the extent of its potential limitation; a high degree of clarity is needed for an interpretation that would entail a severe breach of a "fundamental" right.[57]

69. *Fifth*, the rights to life and bodily integrity are among the most fundamental and important of rights;[58] a high degree of clarity will be required to find an intention to curtail or abrogate such rights. Deprivation of life itself constitutes the most severe form of breach of the right to life and bodily integrity.

70. The principle thus favours whichever available construction of "reasonably practicable" involves the least interference[59] with life and bodily integrity.

71. This Court has considered the principle of legality when considering the words "reasonably practicable" previously,[60] but not where the focus of the constructional question is on whether those words authorise consideration of

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53 *Plaintiff S157* at [30] (Gleeson CJ); see *Al-Kateb* at [19] (Gleeson CJ), ***Coco*** *v The Queen* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

54 *Momcilovic* at [43] (French CJ) (see also the cases there cited).

55 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [24] (French CJ and Crennan J), [125] (Hayne and Bell JJ), [157] (Kiefel J).

56 *Coco* at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

57 *Hurt v The King* (2024) 418 ALR 63 at [106] (Edelman, Steward and Gleeson JJ).

58 ***YBFZ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at [9] (Gageler CJ, Gordon, Gleeson and Jagot JJ), see also [12] (and the sources cited).

59 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [11] (French CJ, Kiefel and Bell JJ).

60 See *Al-Kateb* at [19] (Gleeson CJ), see also *NZYQ* at [19]; *MZAPC* at [70] (Edelman J).

reasonably foreseeable consequences of the removal after it has been effected.[61] Moreover, the decision below continues a line of Federal Court authority that follows the constructional choice in *NATB* (flowing from *M38*), which involved (as will be submitted below) an erroneous approach to the principle of legality.

72. The principle of legality was raised by the appellant in *NATB* (see [70]). It was considered at [55]–[59], [69] and [71], in the course of engaging in the constructional task. The reasoning at each point is problematic.

73. ***NATB* at [55]**. After (1) accepting that Parliament could not have intended that s 198 be used to "send persons to a country where they would be likely to suffer death, torture or persecution," the Court reasoned that (2) if Parliament had intended to guard against this possibility, "[the Court] would have expected it to do so expressly", such as by adding words to require the officer to be satisfied that "death, torture or persecution" was not likely.

74. While (1) is the correct starting point, (2) inverts the proper analysis. The question is not whether express words exist to protect rights; the question is whether express words or necessary implication show an intention to curtail rights. *NATB* [53] could only conform with the principle of legality if there were express words or a necessary implication that s 198 authorised removal to a place where the removee is likely to "suffer death, torture or persecution." No such words or implication exist. To "expect" Parliament to "guard against that possibility" by express words is contrary to principle.

75. ***NATB* at [56]–[59]**. The Ministerial powers referred to are general in nature and turn on open-textured criteria, such as the "public interest." While such powers generally can be exercised in a manner that would guard against the relevant possibility, their generality and the breadth of their application is such that they cannot evince the requisite intention (of curtailing rights) in relation to s 198 specifically. That is particularly so given the clarity needed to evince an intention to abrogate or curtail rights as important as life and bodily integrity.

76. ***NATB* at [69]**. The "gap" in coverage here identified (*i.e.*, a circumstance in

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[61] Cf *Al-Kateb* (concerned indefinite detention for purpose of removal); Cf *MZAPC* (concerned frustration of court processes by removal).

which, on the Court's proposed construction, s 198 would authorise and require sending a person to be killed or tortured, where Ministerial personal powers could not be used to prevent that outcome), reveals precisely the inconsistency of that proposed construction with the (correct) starting point that that cannot be what Parliament intended. Application of the principle of legality should, here, have led to a different construction. This (the possibility of "gaps") is further illustration why Ministerial powers do not evince the intention to curtail rights.

77. ***NATB* at [71]**. In reasoning that s 198(6) does not "abrogate or curtail fundamental rights or freedoms," the Court erred. A construction which authorises removal to a place where it is "virtually certain that [the removee] will be killed, tortured or persecuted," manifestly has the potential so to curtail or abrogate. Finding that removees have "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," is wrong in law. Such persons enjoy the protection of our law, including against "arbitrary punishment by deprivation of life, bodily integrity and liberty."[62] If Parliament wishes to abrogate those rights or curtail them to some extent, it must express an intention to do so with clarity.

78. Thus, application of the principle of legality provides a further reason for preferring the HRLC's construction of s 198 over the *NATB* construction, which is inconsistent with the principle of legality and misapplied that principle.

Part V Estimated time

79. If granted leave to be heard and to make oral submissions, the HRLC would seek to be heard orally for 20 minutes.

Dated 31 October 2025

Nick Wood
03 9225 6392
nick.wood@
vicbar.com.au

Jim Hartley
03 9225 8206
jim.hartley@
vicbar.com.au

Hannah Ryan
02 8029 0738
hannah.ryan@
elevenwentworth.com

Rohan Nanthakumar
03 9225 8444
r.nanthakumar@
vicbar.com.au

62 *YBFZ* at [9] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

ANNEXURE TO INTERVENER'S SUBMISSIONS

No.	Description	Version	Provisions	Reasons for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	*Migration Act 1958* (Cth)	Current	ss 5, 48A, 48B, 177, 178, 181, 182, 189, 195A, 196, 197C, 198, 351, 501J	Presently in force	From 6 September 2025
2.	*Migration Act 1958* (Cth)	Compilation ID: C2004C05377	ss 48B, 198, 351, 417	In force at the time of *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506	14 October 2003 – 24 March 2004
3.	*Migration Amendment Act 1992 (No. 24)* (Cth)	As made	s 3	No longer in effect, enacted ss 54K, 54L, 54Q	From 6 May 1992 to 9 March 2016
4.	*Migration Reform Act 1992* (Cth)	As made	s 13	No longer in effect, enacted ss 54W, 54ZD, 54ZF	From 6 to 7 December 1992
5.	*Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth)	As made	s 2	No longer in effect, enacted s 197C	From 15 December 2014 to 13 April 2015
6.	*Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth)	As made	s 2	In effect, enacted s 197C(3)-(7A)	From 24 May 2021