HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **S146/2025**

BETWEEN:

TCXM

Appellant

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP

First Respondent

COMMONWEALTH OF AUSTRALIA

Second Respondent

RESPONDENTS' SUBMISSIONS

PART I: CERTIFICATION

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

PART II: CONCISE STATEMENT OF THE ISSUES

2. The questions arising in this appeal are as follows:[1]

   (a) Does the *Home Affairs Legislation Amendment (2025 Measures No. 1) Act 2025* (Cth) (**Amending Act**), properly construed, have the effect that the procedural fairness challenge to the Commonwealth's entry into the Interim Third Country Reception Arrangement (**Interim Arrangement**) with the Republic of Nauru (**Nauru**) must fail?

   (b) If the answer to question (a) is "no", does the challenge to the Commonwealth's entry into the Interim Arrangement raise a justiciable issue?

   (c) If the answer to question (a) is "no" and the answer to question (b) is "yes", was the exercise of power to enter into the Interim Arrangement impliedly conditioned on the provision of procedural fairness to the appellant?

   (d) Does the appellant's health condition mean that his removal to Nauru is not "reasonably practicable" within the meaning of s 198(2B) of the ***Migration Act*** *1958* (Cth)?

   (e) If the answer to question (d) is "no", is s 198(2B) invalid in its application to the appellant as punishment imposed contrary to Ch III of the Constitution?[2]

PART II: SECTION 78B NOTICE

3. The appellant has given notice under s 78B of the *Judiciary Act 1903* (Cth) separately in respect of the constitutional issues arising within grounds 1 and 2.[3] No further notice is required.

PART IV: MATERIAL FACTS

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

5. The respondents accept the summary set out at in the Appellant's Submissions (**AS**) at [7]-[20], although the matters in **AS [8]** need to be understood in their context. The respondents also rely on the following additional matters found by the primary judge.

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1 The respondents do not press ground 2 of the notice of contention, which related solely to the original Ground 2 of the appeal, which is no longer pressed by the appellant: see Open Joint Cause Removed Book (**Open JCRB**), Tab 6, pp 89-90, Tab 7, pp 97-98.

2 This issue does not properly arise on the Further Amended Notice of Appeal dated 20 October 2025. That should be regularised.

3 Open JCRB, Tab 9, pp 102-106; Further Notice of Constitutional Matter filed on 27 October 2025.

4 Open JCRB, Tabs 2-3, pp 21-76.

6. Between September 2024 and January 2025, a number of meetings took place between Australian and Nauruan representatives. The participants discussed resettling some members of the *NZYQ* cohort in Nauru (J [39]). Some of the meetings involved the President of Nauru and the Minister for Home Affairs (Australia) (**Minister**) (J [39]). Australian and Nauruan officials and Ministers also communicated in writing during this period (J [40]).

7. On 31 January 2025, the Minister and the President of Nauru held a meeting in Nauru, following which the Minister provided a letter dated 31 January 2025 to the President, enclosing an attachment labelled "Interim Third Country Reception Arrangement" (J [41]-[42]).

8. On 4 February 2025, an officer sent an email to Nauruan officials with "client briefs" in relation to three individuals that Australia proposed that Nauru would receive under the Interim Arrangement, including the appellant (J [44]).

9. On 10 February 2025, the President of Nauru sent a letter to the Minister confirming that Nauru agreed to the Interim Arrangement (J [47]). On 12 February 2025, the Minister sent a letter to the President, advising that the letters of 31 January 2025, reply of 10 February 2025 and the subject letter together constituted the Interim Arrangement (J [49]).

PART V: ARGUMENT

Ground 1: Procedural fairness challenge to entry into the Interim Arrangement

10. The Interim Arrangement is an international agreement reached between two sovereign nations.[5] The appellant contends that the making of such an agreement is justiciable and was impliedly conditioned on procedural fairness (which it is presumably said was required to be afforded at some stage during the course of diplomatic negotiations conducted at the highest levels of government). The primary judge rejected the argument that the power to enter into the agreement was conditioned on the provision of procedural fairness, and on that basis found it unnecessary to decide the justiciability question (J [132]). While his Honour's conclusion was correct, it is not necessary to reach it having regard to the Amending Act.

(i) The Amending Act

11. The Amending Act commenced on 6 September 2025. In two ways, it makes clear that the Interim Arrangement is not invalid on the ground of denial of natural justice.

    (a) *First*, even if the Interim Arrangement would have been invalid because the rules of natural justice were not observed in the making of that arrangement (which is denied), item 10 validates that arrangement.

[5] See the factual summary at paragraphs 6 to 9 above.

(b) *Secondly*, the Amending Act introduced s 198AHAA(1), which provides that the "rules of natural justice do not apply 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 to" entering into such an arrangement.[6] By item 9(2), s 198AHAA applies to "a third country reception arrangement entered … before, on or after commencement".

12. As to the first argument, item 10(1) provides that item 10 applies "if a thing done, or purportedly done, before commencement" is covered by subitem (2) and would, apart from that item, "be wholly or partly invalid only because the rules of natural justice were not observed in doing, or purporting to do, the thing". The "things" covered by subitem (2) relevantly include "entering into … a third country reception arrangement with a foreign country". Where item 10 applies, the "thing done, or purportedly done" is "taken for all purposes to be valid and to have always been valid" (item 10(4)). For the purposes of item 10, "it does not matter whether the thing is done, or purportedly done, by" the Commonwealth as an exercise of executive power or as an exercise of statutory power under the Migration Act (item 10(3)).

13. The appellant accepts that item 10 validates entry into the Interim Arrangement, but submits that it did not thereby remedy its unlawfulness (**AS [38]-[40]**). He further submits that an injunction should go "to prohibit further action or removal based upon the Commonwealth's unlawful entry into the Interim Arrangement", despite its validation, relying on a passage from ***Project Blue Sky*** *Inc v Australian Broadcasting Authority*[7] (**AS [41]-[42]**). Those submissions should be rejected for the following reasons (even if the appellant could establish that the power to enter into the Interim Arrangement was justiciable, and that it was invalid for want of procedural fairness, both of which are denied).

14. **First**, the distinction drawn between "unlawfulness" and invalidity may be useful in the context of a breach of a statutory requirement that does not cause invalidity (such as the "directory" requirement in s 160(d) of the *Broadcasting Services Act 1992* (Cth)).[8] However, if the Commonwealth's power to enter into the Interim Arrangement was conditioned by the requirements of procedural fairness, and if those requirements were breached, that would have been a jurisdictional error.[9] Such an error causes invalidity. No argument is advanced in this case that could produce "unlawfulness" except as a consequence of invalidity. That being so, when item 10 cured any invalidity, it necessarily also cured any unlawfulness. Specifically, by

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6 Amending Act, Sch 1, Part 1, item 3.
7 (1998) 194 CLR 355 at [100] (McHugh, Gummow, Kirby and Hayne JJ).
8 *Project Blue Sky* (1998) 194 CLR 355 at [100] (McHugh, Gummow, Kirby and Hayne JJ).
9 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at [3] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

providing that the entry into the Interim Arrangement is "taken for all purposes to be valid and to have always been valid", item 10 "attribute[s] the consequences of legal validity"[10] and "attach[es] new legal consequences and a new legal status to things done".[11] As any unlawfulness was a "legal consequence" of invalidity (where the invalidity stemmed from a denial of procedural fairness), item 10 operated to render entry into the Interim Arrangement lawful.

15. **Secondly**, for the reasons advanced below (at [21]-[27]), the primary judge was correct to hold (J [17(a)], [118]-[127]) that the Interim Arrangement was entered into in the exercise of a non-statutory executive power. Even if that non-statutory prerogative power or capacity was impliedly conditioned on the provision of procedural fairness, there is no basis to treat that requirement as akin to a "directory requirement". The appellant cites no authority in which a breach of procedural fairness has ever been characterised in that way, or that supports the proposition that an exercise of a non-statutory prerogative capacity can be unlawful without being invalid.

16. **Thirdly**, by force of item 10, the Interim Arrangement is "taken for all purposes" – which includes for the purposes of s 198AHAA(1) – to be valid and always to have been valid. Thus, the Interim Arrangement is taken to have been entered into in "exercise of the executive power of the Commonwealth" within the meaning of s 198AHAA(1) (cf **AS [36]**). Section 198AHAA(1) therefore excludes the rules of natural justice (it applying, by reason of item 9(2), to arrangements entered into before commencement). And, there being taken to have been no breach of natural justice, there is no foundation for the alleged unlawfulness.

17. **Finally**, even if entry into the Interim Arrangement was an exercise of statutory power, and even if any "unlawfulness" continued despite item 10 (both of which are denied), injunctive relief with respect to such unlawfulness would not issue. That follows because, on that premise, entry into the Interim Arrangement would have been a privative clause decision or purported privative clause decision under s 474(2) of the Migration Act,[12] and in *SZSSJ* this Court accepted that s 474(1) excludes review for non-jurisdictional error of law.[13]

18. As to the second argument identified in paragraph 11(b) above, this argument would be reached only if item 10 does not achieve its clear objective of ensuring that the Interim Arrangement is legally effective. In that event, item 3 (which inserted s 198AHAA) and item 9 would

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[10] ***Duncan*** *v Independent Commission Against Corruption* (2015) 256 CLR 83 at [15] (French CJ, Kiefel, Bell and Keane JJ), see also at [41] (Gageler J); *Australian Education Union v General Manager, Fair Work Australia* (2012) 246 CLR 117 (***AEU***) at [36] (French CJ, Crennan and Kiefel JJ). See also *CD v Commonwealth* (2025) 99 ALJR 1388 at [19] and [25] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ), [68] (Edelman J).

[11] *Duncan* (2015) 256 CLR 83 at [25] (French CJ, Kiefel, Bell and Keane JJ), see also at [41] (Gageler J); *AEU* (2012) 246 CLR 117 at [36], [53] (French CJ, Crennan and Kiefel JJ), [90] (Gummow, Hayne and Bell JJ).

[12] cf s 5E of the Migration Act defining "purported privative clause decision" by reference to "a failure to exercise jurisdiction" and "an excess of jurisdiction".

[13] *Minister for Immigration v* ***SZSSJ*** (2016) 259 CLR 180 at [60]-[61] (the Court).

nevertheless remedy any invalidity and unlawfulness. Unlike the first argument, the second argument depends on the Court accepting (as per [21]-[27] below) that the power to enter into the Interim Arrangement was non-statutory executive power (cf **AS [36]**). On that premise, s 198AHAA(1) provides a complete answer to ground 1, because item 9(2) has the effect that s 198AHAA(1) applies to a third country reception arrangement entered into with a foreign country before commencement (with the result that the rules of natural justice never conditioned the power to enter into the Interim Arrangement).

19. The appellant's argument in response to the above is circular (**AS [36]**). He contends that there was no "exercise of the executive power" within the meaning of s 198AHAA(1)(a) because entry into the Interim Arrangement was ultra vires for denial of procedural fairness. That argument seeks to rely on the very ground that is cured by s 198AHAA(1) when read with item 9(2). It is not open to read items 3 and 9 together as referring only to third country reception arrangements that are already legally valid, because in order for item 9(2) to make sense the words "exercise of the executive power of the Commonwealth" in s 198AHAA(1) must include a purported exercise of power to enter into a third country reception arrangement (ie entry into an arrangement in fact).[14] The target of items 3 and 9(2) being clear, the Court's "function is to see that it is hit: not merely to record that it has been missed".[15]

20. By either of the above paths, the effect of the Amending Act is that ground 1 cannot succeed. In those circumstances, it is not necessary for the Court to consider whether the learned primary judge was correct in rejecting the appellant's procedural fairness challenge. However, against the possibility that the Court may choose to consider that issue, it is addressed briefly below.

(ii) Entry into the Interim Arrangement was an exercise of non-statutory executive power

21. The premise for the primary judge's procedural fairness analysis was that entry into the Interim Arrangement involved an exercise of the non-statutory prerogative capacity to conduct foreign relations (J [17(a)], [118]-[127]).[16] For the reasons that follow, that conclusion was correct.

22. The appellant submits that entry into the Interim Arrangement should have been held to involve an exercise of statutory power impliedly conferred by s 76AAA and/or s 198AHB, apparently

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[14] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v* ***Moorcroft*** (2021) 273 CLR 21 at [20] (Kiefel CJ, Keane, Gordon, Steward and Gleeson JJ), citing *New South Wales v Kable* (2013) 252 CLR 118 at [52] (Gageler J); *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 272 CLR 33 at [95] (Edelman J); *FEL17 v Minister for Immigration and Multicultural Affairs* (2025) 99 ALJR 775 at [14]-[15] (Gageler CJ, Gordon, Steward, Gleeson and Jagot JJ).

[15] *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 424 (McHugh JA), citing an extra-judicial comment of Lord Diplock, quoted with approval in *Federal Commissioner of Taxation v Douglas* (2020) 282 FCR 204 at [91] (the Court).

[16] ***Plaintiff M68****/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [178] (Gageler J), see also [68] (Bell J), [201] (Keane J). In the tripartite classification explained by Brennan J in ***Davis*** *v Commonwealth* (1988) 166 CLR 79 at 108, the act was done in the exercise of a non-statutory prerogative capacity.

because it triggered statutory consequences under those sections (**AS [22]-[28]**). That submission conflates the source of the power to enter the Interim Arrangement with its legal effect.

23. Section 198AHB(1) provides that the "section applies if the Commonwealth enters into an arrangement … with a foreign country". That language assumes, rather than supplies, a power to enter into third country reception arrangements. The power assumed is the non-statutory prerogative capacity to conduct relations with other countries.[17] That includes the power to "establish[] relations at any time with other countries", including by entry into international agreements,[18] the Commonwealth being vested with responsibility "for the conduct of the relationships between Australia and other members of the community of nations".[19]

24. The primary judge correctly recognised that s 198AHB(1) is in materially the same terms as s 198AHA(1) (J[119]-[120]). In *Plaintiff M68*,[20] Bell, Gageler and Keane JJ each separately accepted that the source of authority to enter into a Memorandum of Understanding that would enliven s 198AHA was non-statutory executive power.[21] The appellant attempts to distinguish *Plaintiff M68* on the ground that the memorandum in that case was executed prior to the enactment of s 198AHA (**AS [28]**). However, that argument finds no expression in the analysis in the judgments. Further, as the primary judge pointed out (J [122]), that suggested ground of distinction does not confront the fact that s 198AHA retrospectively conferred authority to do the things to which it applied.

25. The appellant's submission that prerogative powers "may be displaced or abrogated" "when a matter is regulated by statute" (**AS [22]**) is true, but of no relevance, because s 198AHB(4) makes plain that s 198AHB does not oust or displace the relevant prerogative power by expressly providing that it does not limit the executive power of the Commonwealth. Similarly, the words "in force" in s 76AAA(1)(c) say nothing about the source of the power to enter a third country reception arrangement (cf **AS [26]**).

26. When s 198AHB(1) applies, s 198AHB(2) empowers the Commonwealth to take "any action" or "make payments … in relation to the third country reception arrangement". The definite article refers to the third country reception arrangement mentioned in sub-s (1). Subsection (2) thereby

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17 *Plaintiff M68* (2016) 257 CLR 42 at [178] (Gageler J), also [68] (Bell J); ***Barton*** *v Commonwealth* (1974) 131 CLR 477 at 498 (Mason J); *Davis* (1988) 166 CLR 79 at 92-94 (Mason CJ, Deane and Gaudron JJ), 107-108 (Brennan J).

18 *R v* ***Burgess****; Ex parte Henry* (1936) 55 CLR 608 at 643-644 (Latham CJ), cited in *Plaintiff M68* (2016) 257 CLR 42 at [68] (Bell J); *Barton* (1974) 131 CLR 477 at 498-499 (Mason J); *Davis* (1988) 166 CLR 79 at 108 (Brennan J). See also *Victoria v Commonwealth* ***(Industrial Relations Act Case)*** (1996) 187 CLR 416 at 483 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

19 *Barton* (1974) 131 CLR 477 at 498 (Mason J).

20 (2016) 257 CLR 42.

21 *Plaintiff M68* (2016) 257 CLR 42 at [68] (Bell J), [178] (Gageler J), [201] (Keane J). The other Justices did not consider it necessary to decide that question.

provides statutory power to do things consequent upon an arrangement, once such an arrangement has been entered into in the exercise of prerogative power. There is no basis for the appellant's apparent assumption that the source of power to enter into the Interim Arrangement must be statutory simply because, once entered into, it enlivens a statutory power (**AS [24], [28]**).

27. Nothing said by the Minister in his letter of 31 January 2025 can be read as an admission that the Interim Arrangement was entered in the exercise of statutory power (cf **AS [25]**). The Minister's statements that amendments to the Migration Act "confirm and enhance Australia's ability to undertake third country reception arrangements" can fairly be read as referring to the confirmation and enhancement of power to take steps in implementing or undertaking an arrangement once it has been made.[22] In any event, a statement of the opinion of the Minister can have no bearing upon the question of statutory construction addressed above.[23]

(iii) Entry into the Interim Arrangement with Nauru is non-justiciable

28. By ground 1 of the notice of contention,[24] the Commonwealth contends that the primary judge ought to have dismissed grounds 1 and 2 on the basis that the entry into the Interim Arrangement was non-justiciable. His Honour considered it unnecessary to decide that point (J [132]).

29. It has long been recognised that the conduct of relations between sovereign nations is non-justiciable.[25] The proposition that a court might judicially review the Commonwealth's decision to enter into a treaty was described by Mason J in *Koowarta* as "a course bristling with problems".[26] To similar effect, in ***Blackburn*** *v Attorney-General*,[27] Lord Denning MR held that the actions of Ministers in negotiating or signing a treaty "cannot be challenged or questioned in these courts". In *Minister for Arts, Heritage and Environment v* ***Peko-Wallsend*** *Ltd*, Wilcox J referred to *Blackburn*, observing that courts "have disclaimed the entitlement to adjudicate upon decisions by the Executive concerning the exercise of its treaty-making power".[28] Similarly, Kirby J described the conduct of foreign relations as "peculiarly the responsibility of the Executive

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22 Being powers the Commonwealth might not otherwise have had, for example, to make payments to Nauru, or to disclose information which might otherwise be subject to non-disclosure obligations (s 198AAA(2)(c)).

23 *Brown v Tasmania* (2017) 261 CLR 328 at [486] (Edelman J), citing *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at [40]-[43] (Gleeson CJ, Gummow, Kirby, and Hayne JJ).

24 Open JCRB, Tab 7, pp 96-98, [1].

25 ***Koowarta*** *v Bjelke-Petersen* (1982) 153 CLR 168 at 229 (Mason J); *Tasmanian Wilderness Society Inc v Fraser* (1982) 153 CLR 270 at 274 (Mason J); ***Gerhardy*** *v Brown* (1985) 159 CLR 70 at 138-139 (Brennan J); ***Thorpe*** *v Commonwealth (No 3)* (1997) 71 ALJR 767 at 777 (Kirby J); ***Brodie*** *v Singleton Shire Council* (2001) 206 CLR 512 at [92] (Gaudron, McHugh and Gummow JJ); *Re* ***Ditfort;*** *Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 367, 369-370 (Gummow J); *Salaman v Secretary of State for India* [1906] 1 KB 613.

26 *Koowarta* (1982) 153 CLR 168 at 229.

27 [1971] 1 WLR 1037 at 1040.

28 *Peko-Wallsend* (1987) 15 FCR 274 at 307.

Government of the Commonwealth".[29] To the same effect, in *Gamogab v Akiba*, Kiefel J (albeit in dissent) accurately summarised the position as being that "negotiations and agreements between Australia and another country are not to be the subject of judicial determination for the reason that they might cause embarrassment and affect relations between the countries".[30]

30. *Ditfort*, on which the appellant relies (**AS [32]**), was not concerned with the decision to enter an agreement with a foreign country. It concerned whether the court could consider – in determining an application for annulment of bankruptcy under s 154 of the *Bankruptcy Act 1966* (Cth) – an argument about non-compliance with assurances given by Australia to another country in relation to the applicant's extradition. It was in that context that Gummow J accepted that there was a justiciable "matter". However, Gummow J recognised that a different question as to the existence of a "matter" would arise in a case where an applicant sought an "extension of the court's true function into a domain that does not belong to it, namely the consideration of undertakings and obligations depending entirely on political sanctions", which his Honour considered would not give rise to a "matter".[31] That is why his Honour specifically noted that the applicant in *Ditfort* was "not seeking judicial review of the decisions of the Australian Government with respect to its dealings with a foreign State".[32] *Ditfort* therefore supports, rather than casts doubt on, the principle that it is not possible to seek judicial review of agreements with foreign governments. The Full Court of the Federal Court has interpreted *Ditfort* consistently with that submission.[33]

31. The appellant's argument seeks to impugn an agreement with a foreign state on the ground that he was not afforded procedural fairness before that agreement was made. It is hard to imagine a bolder intrusion into a field that courts have consistently accepted as non-justiciable. If it is reached, ground 1 of the Notice of Contention should be upheld.

(iv) Entry into the Interim Arrangement was not conditioned on procedural fairness

32. The primary judge held that the exercise of the power to enter into the Interim Arrangement was not subject to a requirement of procedural fairness. His Honour accepted that it was possible for an exercise of non-statutory executive power to attract such a requirement, but recognised that whether it did so "depends on the nature of the power and the circumstances of its exercise".[34] In

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[29] *XYZ v Commonwealth* (2006) 227 CLR 532 at [135], citing *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 (***Spycatcher***) at 50-51 (Brennan J) and *Thorpe* (1997) 71 ALJR 767 at 777-779 (Kirby J).

[30] (2007) 159 FCR 578 at [34].

[31] *Ditfort* (1988) 19 FCR 347 at 370 (Gummow J).

[32] *Ditfort* (1988) 19 FCR 347 at 372 (Gummow J).

[33] *Petrotimor Companhia de Petroleos Sarl v Commonwealth of Australia* (2003) 126 FCR 354 at [65]-[68] (Black CJ and Hill J).

[34] J [130], citing ***CPCF*** *v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at [508]-[509] (Keane J); *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 at 411 (Lord Diplock).

concluding that there were "insuperable difficulties" in applying the principles of procedural fairness to the decision to enter the Interim Arrangement, his Honour reasoned that (J [130]):

> The Interim Arrangement was an agreement or arrangement between Australia and a foreign state. Agreements of this kind are necessarily the product of negotiations at the highest levels of government. Such negotiations will often be conducted in secrecy owing to the political and diplomatic sensitivity of their subject matter. There were likely issues of timing in relation to the communications that were sent by the Australian government to Nauru, such that an obligation to afford procedural fairness to the applicant may well have interfered with the Australian government's capacity to conduct relations with Nauru. In light of these matters, it would have been wholly impractical and incongruous for entry into the Interim Arrangement to have been conditioned on an obligation to afford the applicant procedural fairness (no matter how attenuated the content of procedural fairness might have been).

33. If the source of power to enter the Interim Arrangement was non-statutory executive power (consistently with the submission above at [21]-[27]), the appellant submits that this power is conditioned on procedural fairness as an aspect of the common law (**AS [31]**). However, the appellant cites no authority in which the prerogative power to enter into international agreements has ever been held to be subject to an implied obligation of procedural fairness (cf **AS [31]**). That is unsurprising, given the consistent line of authority discussed above demonstrating that such an allegation is not justiciable. Further, the appellant does not grapple with or answer the compelling reasons of incongruence identified by the primary judge in the passage quoted above.

34. If the source of power to enter the Interim Arrangement is the "execution and maintenance" limb of s 61 of the Constitution, the appellant submits that the Migration Act and/or s 61 "would require procedural fairness" because of the statutory effects on rights it triggered (**AS [30]**). In support of that submission, the appellant cites *Plaintiff S10/2011 v Minister for Immigration and Citizenship*[35] and *AAG15 v Minister for Immigration and Border Protection*,[36] but in those cases some members of this Court reasoned that non-statutory executive action relating to the "execution and maintenance" of legislation at issue in each case was not conditioned on procedural fairness. Further, the appellant identifies no reason why locating the source of power in the "execution and maintenance" limb of s 61, rather than in the prerogative with respect to foreign relations, would produce a different conclusion with respect to the applicability of the rules of procedural fairness.

35. Even if the power to enter into the Interim Arrangement was statutory, the conclusion is the same. The appellant relies on a "strong presumption" of procedural fairness where a statutory power affects rights (**AS [29]**). But even if the power was statutory that presumption would not be

[35] (2012) 246 CLR 636 at [51] (French CJ and Kiefel J).
[36] [2016] HCATrans 131 at 18.770-772 (Nettle J).

engaged, because entry into the Interim Arrangement did not itself have any effect on rights (as its terms recognised: J [49]). In particular, the Interim Arrangement did not itself enliven the duty to serve a s 76AAA notice, it being only one condition precedent to service of such a notice (and not the last in time, because the making of the arrangement necessarily preceded the grant of a visa pursuant to that arrangement) (ss 76AAA(1)(b), (c)).

36. In any event, even if the presumption applied, it was displaced by the statutory scheme[37] because an obligation to afford procedural fairness would be incongruous for the reasons extracted in [32] above. In addition, there is a fluctuating class of persons who might be resettled under a third country reception arrangement, which highlights the impracticability of any member or potential member of that class having an entitlement to be heard before such an arrangement is entered into. It would be wholly incongruous for Parliament to have excluded the rules of natural justice from the exercise of power in s 76AAA(2) (as it did in s 76AAA(5)) – that being the point at which the inclusion of a particular non-citizen in the relevant class would crystallise in a manner that may otherwise have attracted an obligation of procedural fairness – while at the same time allowing those rules to apply at the anterior stage of entry into an international agreement that might (depending on its terms) apply to an indeterminate group of non-citizens.

37. Accordingly, whatever the source of the power to enter into a third country reception arrangement, it was not subject to procedural fairness. Irrespective of the order in which the issues are approached, Ground 1 should be dismissed.

Ground 2: s 198 of the Migration Act

38. The issue raised by this ground is whether the settled construction of the words "as soon as reasonably practicable" in s 198 of the Migration Act should be overruled.[38] The respondents submit that the settled construction, which is addressed in [41] to [48] below, is correct. On that construction, the words "as soon as reasonably practicable" are concerned with the practicability of the process of removal itself, rather than events which may or may not occur after removal is complete. In that connection, removal is complete (at the latest) when the person removed has been admitted by, and into, the receiving country. The appellant and the proposed intervener submit that the phrase "reasonably practicable" implies a limit on the removal duty that requires consideration of the "real risks" or alternatively "foreseeable risks" following removal. For the reasons below, that dramatic rewriting of s 198 should not be accepted.

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[37] *Disorganised Developments Pty Ltd v South Australia* (2023) 280 CLR 515 at [33] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *SZSSJ* (2016) 259 CLR 180 at [75] (the Court).

[38] The Respondents have identified at least 35 decisions in the Federal Court or above that cite the relevant passages in ***NATB*** *v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506, including four Full Court decisions and this Court's decision in *Minister for Immigration and Multicultural Affairs v* ***MZAPC*** (2025) 99 ALJR 486. No decisions have doubted the construction in *NATB*.

(i) The duty to remove in the scheme of the Migration Act

39. Before turning to the words of s 198, it is important to bear in mind two critical aspects of context. **First**, the object of the Migration Act is "to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens" (s 4(1)). To advance that object, the Migration Act "provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted" (s 4(4)). In many cases, non-citizens will be removed to less economically developed countries, in which the general living conditions may expose a person to risks that they would not face (or would not face to the same degree) in Australia, including for reasons of personal safety, economic opportunity, or because the person will have access to a lower standard of healthcare than is available to them in Australia. But that is an inherent aspect of the removal that the Migration Act requires. Parliament must have understood and accepted the obvious reality that attends some exercises of the removal duty. It plainly did not intend that non-citizens could not be removed from Australia – even after being refused a visa – to countries that are prepared to accept them, in circumstances where those countries cannot provide the same level of support or services (including a standard of healthcare) that is available in Australia.

40. **Secondly**, the Interim Arrangement contemplates that Nauru will grant long term stay visas to those to be settled under the Arrangement. The terms and conditions of a long term stay visa include that the holder of the visa shall have access to local health services including telehealth.[39] Further, in the Interim Arrangement, Nauru committed to provide people who are resettled in Nauru with health services to achieve minimum outcomes "in line with Nauruan standards of living".[40] Accordingly, the appellant will have access to the same level of healthcare as the Nauruan population. If s 198 does not authorise the removal of the appellant to Nauru because his asthma means that his removal is not reasonably practicable (even if he is fit to travel to Nauru), then the same conclusion would necessarily follow in respect of the removal to Nauru of a Nauruan citizen with a comparable health condition. That would confer a de facto right to remain in Australia without a visa on any non-citizen with a serious medical condition that can be treated in Australia but not in their home country.

(ii) The settled construction of "reasonably practicable" in s 198

41. The settled construction of s 198 has its roots in the decision in ***M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs***.[41] There, a Full Court of the Federal Court

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[39] *Immigration (Long Term Stay Visa) Regulations 2025* (Nauru) (**Nauruan Regulations**), Sch 3, item 3(d): see Respondents' Book of Further Materials (**RBFM**), Tab 3, p 46.
[40] Interim Arrangement, Letter of 31 January 2025, Annexure A, [7]: see RBFM, Tab 2.1, p 30.
[41] (2003) 131 FCR 146.

held that it was not possible to read s 198(6) as limited by non-*refoulement* obligations.[42] The word "reasonably" in the term "reasonably practicable" was held to "limit[] or qualif[y] what would otherwise be an almost absolute obligation … The removal of a non-citizen may be practicable in the sense that it is feasible, but not "reasonably practicable" as required by s 198(6)".[43] The Full Court referred with approval to the observations of French J in ***WAIS*** *v Minister for Immigration and Multicultural and Indigenous Affairs*, where his Honour said:[44]

> The term "as soon as reasonably practicable" in s 198 is an evaluative term which is to be assessed by reference to all the circumstances of the case. What is reasonable is to be determined, inter alia, by reference to the practical difficulties that may lie in the way of making arrangements for removal which involve the cooperation of other countries whether in respect of the particular applicant or generally in relation to the class of applicants of which he is a part.

42. In *NATB*, another Full Court of the Federal Court observed that the word "practicable" bore an ordinary meaning associated with a capability of being put into practice or effected.[45] Endorsing the analysis in *M38*, the Full Court recognised that determinations about reasonable practicability are "not necessarily limited to physical considerations", but would encompass other matters such as the "willingness of another country to allow the person to enter its territorial boundaries".[46] Nevertheless, the words "reasonably practicable" were directed to "practical considerations", noting that the "context for determining reasonable practicability is the proposed physical removal of the person from Australia".[47] Their Honours continued:[48]

> This second limitation is of critical importance to the resolution of the appellants' principal argument. In our opinion, the reference to reasonable practicability in the subsection 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.

43. The Full Court considered that Parliament, in using the words "reasonably practicable", did not intend that persons coming within the wide definition of "an officer" would need to assess the risk that a person would be likely to suffer death, torture or persecution in the country of removal.[49]

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42 (2003) 131 FCR 146 at [72] (Goldberg, Weinberg and Kenny JJ).
43 (2003) 131 FCR 146 at [65].
44 [2002] FCA 1625 at [58] (emphasis added), quoted in *M38* (2003) 131 FCR 146 at [68] (the Court).
45 *NATB* (2003) 133 FCR 506 at [47] (Wilcox, Lindgren and Bennett JJ).
46 *NATB* (2003) 133 FCR 506 at [52].
47 *NATB* (2003) 133 FCR 506 at [52].
48 *NATB* (2003) 133 FCR 506 at [53] (emphasis added).
49 *NATB* (2003) 133 FCR 506 at [54]-[55].

Instead, Parliament had guarded against that risk by providing for protection visas,[50] as well as personal non-compellable powers.[51] That is also how Hayne J construed s 198(6), albeit well before *M38* and *NATB* were decided, in *Re Minister for Immigration and Multicultural Affairs; **Ex parte E***.[52]

44. Subsequently, in *WAJZ v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (***WAJZ (No 2)***), French J considered a case in which one of the claims was that the applicant's post-traumatic stress disorder and depressive disorder prevented his removal because of risk of harm resulting from exacerbation of those conditions once he was back in Iran. Justice French accepted that it was "at least probable" that his conditions would worsen by reason of return to Iran and there may be a risk of self-harm or suicide, but there was no physical incapacity of actually making the journey.[53] Applying *M38* and *NATB*, his Honour held that an officer is not required to "take into account the possibility that removal would lead to the deterioration of a person's mental disease or disorder".[54]

45. In ***ASF17** v Commonwealth*, Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ confirmed that, in the absence of a protection finding that engages s 197C(3), "the power and duty to remove an alien detainee under s 198(1) or s 198(6) of the Act is not affected by any non-refoulement obligations".[55] Thus, "a claim on the part of a detainee facing removal to fear harm in a country to which the detainee might be removed is insufficient to preclude removal to that country irrespective of whether that claim might be found on investigation to be genuine or well-founded. The scheme of the Act accommodates 11th-hour claims of that nature exclusively through the potential for the exercise of one or other of the personal non-compellable powers conferred on the Minister".[56] That reasoning recognises that, even if a claim to fear harm is genuine or well-founded, in the absence of a protection finding the Act authorises removal unless the Minister exercises a personal non-compellable power to intervene. Thus, a risk of harm following removal does not prevent removal from being "reasonably practicable". Those words are concerned with "whether there are steps which are practically available to be taken" which can realistically be predicted to result in removal (including "administrative processes directed to

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50 *NATB* (2003) 133 FCR 506 at [57].
51 *NATB* (2003) 133 FCR 506 at [58]-[59].
52 (1998) 73 ALJR 123 at [14]-[19].
53 *WAJZ (No 2)* (2004) 84 ALD 655 at [42]-[43].
54 *WAJZ (No 2)* (2004) 84 ALD 655 at [82].
55 (2024) 98 ALJR 782 at [38].
56 *ASF17* (2024) 98 ALJR 782 at [38] (emphasis added). In separate reasons, Edelman J explained (at [113]) that the various non-compellable powers in the Act "provide a safety valve for cases that fall within [the] gaps" in the protection visa scheme.

removal which require the cooperation of the detainee").[57] That analysis is wholly consistent with *NATB* and the other authorities discussed above.

46. Most recently, in *MZAPC*, Gageler CJ, Gordon, Gleeson and Jagot JJ stated:[58]

> It may be accepted that the core meaning of the qualification on the power and duty in s 198(6) ("as soon as reasonably practicable") is as Gummow J described in *Al-Kateb v Godwin*. That is, s 198(6) involves a "temporal element, supplied by the phrase 'as soon as'" and a substantive element conveyed by the term "practicable" meaning "that which is able to be put into practice and which can be effected or accomplished" (which is qualified by "reasonably"). Another formulation which has been adopted is that "reasonably practicable" involves the question "whether the removal is possible from the officer's viewpoint". These observations do not suggest, however, that the concept of "reasonable practicability" is confined to "physical possibility" (emphasis added).

47. Their Honours supported that reasoning with citations to both *M38* (at [65]-[69]) and *NATB* (at [47]-[55]). The part of *NATB* to which their Honours referred included the holding that Parliament did not intend to avert a result where a non-citizen is removed to a country where they would be likely to suffer death, torture or persecution by use of the expression "as soon as reasonably practicable" (that consideration having been addressed elsewhere in the statutory regime).[59] As the joint judgment recognised, the adverb "reasonably" qualifies the word "practicable", which is concerned with practical notions of what can be effected. Again, that is a clear endorsement of the longstanding recognition in the cases that the phrase "reasonably practicable" is directed to the process of removal.[60]

48. In short, protection visas can be granted to non-citizens who face a risk of serious or significant harm following removal on a wide range of grounds.[61] Further, even if a protection visa is not available or not granted, s 197C(3) will often prevent removal to a country where such a risk has been found to exist. And, even when no protection finding has or can be made, the prospect that a person might suffer harm following removal is accommodated within the statutory scheme by the Minister's personal non-compellable powers (including s 195A).[62] The fact that s 195A "can be used for a variety of reasons" does not mean that it is irrelevant (cf Proposed Intervener's Submissions (**PIS**) **[60]**). Nor does the existence of room to debate the adequacy of those powers, for they constitute the "safety valve" that Parliament has chosen.[63] Within this statutory scheme,

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57 *ASF17* (2024) 98 ALJR 782 at [41] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).
58 (2025) 99 ALJR 486 at [35] (footnotes omitted).
59 *NATB* (2003) 133 FCR 506 at [55] (Wilcox, Lindgren and Bennett JJ).
60 *WAIS* [2002] FCA 1625 at [58] (French J).
61 *Applicant S270/2019 v Minister for Immigration and Border Protection* (2020) 94 ALJR 897 at [34]-[35] (Nettle, Gordon and Edelman JJ).
62 *Ex parte E* (1998) 73 ALJR 123 at [19] (Hayne J); *M38* (2003) 131 FCR 146 at [79]-[81] (Goldberg, Weinberg and Kenny JJ); *NATB* (2003) 133 FCR 506 at [55]-[59] (Wilcox, Lindgren and Bennett JJ).
63 *NATB* (2003) 133 FCR 506 at [59] (Wilcox, Lindgren and Bennett JJ). See also *ASF17* (2024) 98 ALJR 782 at [38] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ), [112]-[113] (Edelman J).

whether the removal of a non-citizen to a particular country is "reasonably practicable" does not involve any consideration of whether the non-citizen may or will be subjected to harm following removal. It directs attention to "that which is able to be put into practice and which can be effected or accomplished";[64] that is to say, "whether the removal is possible from the officer's viewpoint".[65]

49. Applying the settled construction of s 198, the matters specified in **PIS [16]** may be taken into account by an officer in the assessment of what is reasonably practicable, as they are matters that concern the process of removal. So, for example, this Court held in *MZAPC* that the existence of an interlocutory injunction is a matter that goes to practicability, as the officer carrying out the process of removal "would be contravening an order of a court and exposing themselves to being found to be in contempt",[66] that is: the process of removal would expose the officer to that risk, rather than its outcome. So, too, will removal not be reasonably practicable where a receiving country will not agree to receive a person[67] or where a person's health does not permit them to make the journey to the receiving country.[68] With respect to that last matter, the primary judge accepted evidence that the Department considers health risks in the process of removal by engaging a medical professional approximately seven days prior to removal (J [101]). Removal only occurs if that professional assesses the non-citizen as fit to travel, and if medical escorts are recommended, they are invariably provided (J [101]).

50. Some care must be taken with respect to the reference to "utter civil anarchy" or a "severe natural disaster" in the receiving country (cf **PIS [33], [54]**). Those examples, which were given in *M38*[69] before *NATB* and *WAJZ (No 2)* had been decided, must be understood to refer to circumstances affecting the willingness of the country to receive a person, or the practical ability of the officer to effect removal (e.g. if there are no operating airports).

51. The appellant and the proposed intervener rely heavily on the removal duty being "qualif[ied] by reference to reason" (cf **AS [55]; PIS [13]-[14]**). However, as the foregoing analysis shows, "reason" or, more accurately, "reasonableness" does not operate as a freestanding qualification on the removal duty. Indeed, Hayne J held as much in *Ex parte E*.[70] What is "qualif[ied] by

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64 *MZAPC* (2025) 99 ALJR 486 at [35] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

65 *MZAPC* (2025) 99 ALJR 486 at [35] (Gageler CJ, Gordon, Gleeson and Jagot JJ), quoting *M38* (2003) 131 FCR 146 at [65] (Goldberg, Weinberg and Kenny JJ).

66 *MZAPC* (2025) 99 ALJR 486 at [35] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

67 ***NZYQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at [5] (the Court); ***Plaintiff M70****/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [92] (Gummow, Hayne, Crennan and Bell JJ); *NATB* (2003) 133 FCR 506 at [52]; *M38* (2003) 131 FCR 146 at [68] (the Court).

68 *NATB* (2003) 133 FCR 506 at [52]; *Li v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 181 at [7] (Merkel J, Heerey and Conti JJ agreeing).

69 *M38* (2003) 131 FCR 146 at [69].

70 (1998) 73 ALJR 123 at [18]-[19].

reference to reason" is the practicability of removal. Section 198 does not require an officer to ask whether a country is "a prudent … place to send them" (**PIS [18]**): what must be asked is whether the steps in the process of removal are "reasonably practicable".

(iii) Legislative history and consequences of the proposed intervener's construction

52. The proposed intervener seeks to make much of the fact that, although Parliament intended to reverse the effect of certain decisions of this Court and the Federal Court by introducing s 197C(1),[71] it "only did so in relation to Australia's international non-*refoulement* obligations" (**PIS [20], [46]**). The submission appears to be that Parliament intended that the words "reasonably practicable" would require consideration of the prospect of harm following a person's removal, except to the extent that the harm might engage Australia's non-refoulement obligations (**PIS [9(c)], [58]**).

53. That submission should be rejected. The evident reason why Parliament, in enacting s 197C, specified that non-refoulement obligations did not limit the duty to remove under s 198 was that it was only in that respect that court decisions had confined that duty. The settled construction of s 198 otherwise being that which had been identified in *M38* and *NATB*, there was no occasion for Parliament to address it. To the contrary, as the proposed intervener recognises (**PIS [49]**), the Explanatory Memorandum to the Bill that led to the introduction of s 197C made clear that the intention of that section was to "restore the situation to that arising prior to the jurisprudence noted above" to that which had obtained in *M38*.[72]

54. The proposed intervener's construction leads to two further unlikely consequences. **First**, on its construction, an "officer" would need to determine – at every stage of removal – whether a claimed risk of harm is a consequence that "does, or is claimed to" engage international or domestically enacted non-*refoulement* obligations (**PIS [6], [9(a)-(c)]**): ie whether the claimed risk of harm was a "Protection Consequence". If it was, it would be irrelevant to the duty to remove. But, as was recognised in *NATB*, it is most unlikely that the Migration Act intends such a complex evaluative judgment to be performed by an "officer", being a class that includes persons "who would have little or no capacity to form a reliable judgment" about such matters.[73] **Secondly**, because the *NZYQ* limit operates in terms of whether removal is or will become "reasonably practicable", the proposed intervener's argument would appear to have the

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[71] Particularly *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at [27] (the Court); *Plaintiff M70* (2011) 244 CLR 144 at [54] (French CJ), [95]-[98] (Gummow, Hayne, Crennan and Bell JJ), [237] (Kiefel J); *Minister for Immigration and Citizenship v* ***SZQRB*** (2013) 210 FCR 505 at [228]-[231] (Lander and Gordon JJ), [310], [312]-[313] (Besanko and Jagot JJ), [342] (Flick J).

[72] Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) at [1136]-[1137].

[73] *NATB* (2003) 133 FCR 506 at [59] (the Court). Compare, in a different context, *Moorcroft* (2021) 273 CLR 21 at [22] (Kiefel CJ, Keane, Gordon, Steward and Gleeson JJ).

consequence that the lawfulness of a person's detention prior to removal would fluctuate according to the level of risk to that person after removal is complete. In the appellant's case, for example, it might fluctuate depending on his present medical condition and the availability of certain pharmaceuticals or the engagement of a respiratory specialist in a Nauruan hospital at any given time. Having regard to the Court's concern in *NZYQ* to avoid "leaving the constitutional limitation to have an unstable operation as probabilities of removal fluctuate",[74] the premise for the Court's formulation of the constitutional limit in that case was that the practicability of removal provides a stable criterion (which it obviously would not do if it varied by reference to matters of the kind identified above).

(iv) The right to life and bodily integrity and international law

55. Both the appellant and the proposed intervener refer to the right to life in the context of the principle of legality, citing ***YBFZ*** *v Minister for Immigration, Citizenship and Multicultural Affairs*[75] (**AS [59]-[60], [64]**; **PIS [69]**). But a law that does no more than require the removal from Australia of a non-citizen who has no right to remain does not abrogate or curtail either of those rights. And, once removal is complete, any subsequent interference with those rights is not attributable to s 198 and cannot affect its construction.

56. The appellant attempts to distinguish the operation of s 198 in *NATB* on the ground that s 198AHB "creates ongoing control over, or involvement with, a person removed" (**AS [65]**). That submission suggests a false equivalence between "control over" and "involvement with" a person who has been removed. The Interim Arrangement makes clear that the persons to whom it applies are to "settle" in Nauru, with Nauru accepting "responsibility to provide support to settled persons to achieve minimum outcomes in line with Nauruan standards of living".[76] Resettled persons are entitled to "remain in the Republic for a minimum period of 30 years" while being "permitted to depart and re-enter the Republic".[77] A person who can live in Nauru in those circumstances has plainly been "removed" from Australia. There is no factual foundation for any suggestion that Australia exercises ongoing control over persons who have resettled in Nauru (and the existence of any such control is denied). As to "involvement", that is a vague concept the legal significance of which is unexplained and which may vary depending on the kind of "involvement" in question (ranging from, for example, providing funding to a State that it may spend at its discretion, through to constructing and managing a detention centre). Here, Australia's involvement is far less than was the case in *Plaintiff M68,* including because Australia is not procuring the provision of

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74 *NZYQ* (2023) 280 CLR 137 at [58] (the Court).
75 (2024) 99 ALJR 1.
76 Letter of 31 January 2025, Attachment A, [7]: see RBFM, Tab 2.1, p 30.
77 Nauruan Regulations, regs 7(1), 10, Sch 3, item 1, 2(f): see RBFM, Tab 3, pp 39, 46.

services in Nauru (whereas in *Plaintiff M68* it had contracted to procure and manage a range of services, including security services at detention facilities). The basis on which any "involvement" that does exist could affect the reasoning in *NATB* is unexplained.

57. The appellant otherwise seeks to rely on an alleged breach of Art 6 of the International Covenant on Civil and Political Rights (**ICCPR**), which recognises a general "right to life" (**AS [66]-[68]**). However, as this Court recognised in *CRI026 v Republic of Nauru*,[78] it is the combination of Arts 2, 6 and 7 of the ICCPR which "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". In their combined operation, those articles comprise "non-refoulement obligations" within the meaning of ss 5(1) and 197C(1) of the Migration Act. As such, they are "irrelevant … for the purposes of section 198" and cannot properly inform its construction. In any event, the appellant misstates the substantive content of international law. As the United Nations Human Rights Committee General Comment cited by the appellant (**AS [68] fn 96**) confirms, a breach of Art 6 does not occur in relation to a risk which "derive[s] merely from the general conditions in the receiving State, except in the most extreme cases".[79] Thus, even if it were relevant, the international jurisprudence would not justify a departure from the construction of s 198 that was adopted in *NATB*.

(v) Validity of s 198

58. The appellant makes a new submission on appeal that if s 198 would require removal to Nauru despite a "reasonably foreseeable risk of death", it would be invalid to that extent as reposing in the Executive an exclusively judicial power to impose a punishment (**AS [69]**). He submits that s 3A of the Act applies to require s 198 to be partially disapplied to that extent (**AS [69]**).

59. The power to remove an alien forms part of the "supreme power in a State … to refuse to permit an alien to enter … and to expel or deport",[80] that power being "an incident of sovereignty over territory".[81] In ***Falzon*** *v Minister for Immigration and Border Protection*, the plurality observed

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78 (2018) 92 ALJR 529 at [24] (the Court).

79 United Nations Human Rights Committee, International Covenant on Civil and Political Rights, General Comment No 36 (3 September 2019), [30]. That limitation on non-refoulement obligations finds reflection in s 36(2B) of the Act.

80 ***Re Woolley****; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at [18] (Gleeson CJ); ***Robtelmes*** *v Brenan* (1906) 4 CLR 395 at 400, 405 (Griffith CJ)*; Ah Yin v Christie* (1907) 4 CLR 1428 at 1431 (Griffith CJ); *CPCF* (2015) 255 CLR 514 at [261] (Kiefel J), [479] (Keane J); *Chu Kheng* ***Lim*** *v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 29-30, 32 (Brennan, Deane and Dawson JJ); *Commonwealth v* ***AJL20*** (2021) 273 CLR 43 at [20]-[21] (Kiefel CJ, Gageler, Keane and Steward JJ); *ASF17* (2024) 98 ALJR 782 at [42] (Gageler CJ, Gordon, Steward, Gleeson, Jagot, Beech-Jones JJ), see also at [62], [99] (Edelman J); *YBFZ* (2024) 99 ALJR 1 at [10] (Gageler CJ, Gordon, Gleeson and Jagot JJ); ***CZA19*** *v Commonwealth* (2025) 99 ALJR 650 at [38], [40] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), [91] (Edelman J).

81 *Lim* (1992) 176 CLR 1 at 29 (Brennan, Deane and Dawson JJ); *Re Woolley* (2004) 225 CLR 1 at [18] (Gleeson CJ); *CPCF* (2015) 255 CLR 514 at [182] (Crennan J).

that "[i]t has long been recognised that the deportation of aliens does not constitute punishment",[82] noting that it is a class characteristic of aliens that they remain vulnerable to removal. In the same case, Nettle J said that it has been settled since *Robtelmes* that Parliament can make laws "for the deportation of non-citizens for whatever reason Parliament thinks fit".[83]

60. Consistently with the above authorities, the power to remove aliens has been accepted in "*NZYQ*, and all preceding authority including *Lim*" as serving a legitimate and non-punitive purpose.[84] The power is so clearly non-judicial that an analysis of its validity does not lend itself to the "two stage" inquiry that has been adopted in recent cases to determine the answer to the "single question of characterisation" as to whether a law is punitive and thus an exclusively judicial power.[85] That two stage inquiry assists in determining the character of measures that impose detriments that are sought to be justified as necessary to achieve a legitimate and non-punitive purpose (such as detention pending removal, as was the issue in *NZYQ*, *ASF17* and *CZA19*). However, it makes no sense to ask whether a law requiring removal is "reasonably appropriate and adapted" to removal. The Court should therefore hold that a law that requires the removal of a non-citizen who has no right to remain in Australia is not punitive, for the simple reason that such a law does no more than is necessary to give effect to the absence of a right to remain. That is so irrespective of the conditions in the country to which the non-citizen is removed.

61. Alternatively, if the two-stage inquiry is reached, the result is the same. At the first stage, it is not prima facie punitive to remove a person to another country (including, often, to their country of origin) irrespective of circumstances in that country. Removal simply gives effect to the fact that a non-citizen has failed to obtain or retain permission to remain in Australia. Even if, in some factual applications, a law that requires removal may result in the exposure of a person to detriments arising from the prevailing conditions in the receiving country, the law requiring such removal cannot be characterised by reference to those detriments (unlike, for example, a law that requires detention or authorises serious interference with bodily integrity, being detriments that are necessarily caused by the law). In particular, such a law certainly is not properly characterised as "akin to a law requiring forfeiture of the appellant's right to life" (cf **AS [69]**) simply because, in some cases and for some non-citizens, a risk to life might arise at some time after removal is complete. The Ch III analysis should therefore end at the first stage. But, if the second stage is

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82 (2018) 262 CLR 333 at [47] (Kiefel CJ, Bell, Keane and Edelman JJ). See also at [29], [39] (Kiefel CJ, Bell, Keane and Edelman JJ), and [92] (Nettle J).

83 *Falzon* (2018) 262 CLR 333 at [92]. See also *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36 at 69 (Knox CJ); *O'Keefe v Calwell* (1949) 77 CLR 261 at 277-278 (Latham CJ), 287 (Dixon J).

84 *CZA19* (2025) 99 ALJR 650 at [38], [45] (Gageler CJ, Gleeson, Jagot and Beech-Jones J).

85 *NZYQ* (2023) 280 CLR 137 at [44] (the Court); *YBFZ* (2024) 99 ALJR 1 at [16] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

reached, s 198 plainly has the legitimate and non-punitive purpose of removal. Further, the duty to remove an unlawful non-citizen "as soon as reasonably practicable" is closely calibrated to that removal purpose. The attempt to identify the BVR regime as an example of a less restrictive measure (**AS [77]**) not only seeks impermissibly to import an implied freedom style proportionality analysis into Ch III, but also illustrates the problem with the appellant's analysis (because the BVR regime does not achieve the object of removal at all).

62. To the extent that the appellant relies on authority from the United States to support his argument that "removal of a long term resident alien" will more readily be characterised as a form of banishment (**AS [76]**), and thus punitive, that authority cannot be usefully translated to Australia. While a non-citizen may lose their status as an "immigrant" by being absorbed into the community, on settled authority they remain an "alien" and "vulnerable to deportation"[86] or removal unless naturalised.[87] In any event, the *obiter* statements cited by the appellant do not deny the longstanding US authority that confirms that deportation of an alien is not a punishment.[88]

PART VII: ESTIMATE

63. The respondents estimate that they will require 2.25 hours for oral argument.

Dated: 21 November 2025

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[86] ***Farmer*** *v Minister for Home Affairs* (2025) 99 ALJR 1408 at [237] (Jagot J).
[87] *Lim* (1992) 176 CLR 1 at 29-31 (Brennan, Deane and Dawson JJ); *Falzon* (2018) 262 CLR 333 at [39] (Kiefel CJ, Bell, Keane and Edelman JJ); *Farmer* (2025) 99 ALJR 1408 at [237] (Jagot J).
[88] *Fong Yue Ting v United States*, 149 U.S. 698 (1893) at 1028-1029 (Gray J, for the Court); *Harisiades v Shaughnessy*, 342 U.S. 580 (1952) at 587-588, 594 (Jackson J, for the Court); *Negusie v Holder* 129 S. Ct. 1159 (2009) at 1169 (Scalia J concurring, Alito J agreeing).

ANNEXURE TO THE RESPONDENT'S SUBMISSIONS

Pursuant to Practice Direction No 1 of 2024, the Commonwealth sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provision(s)	Reasons for providing this version	Applicable date or dates
Commonwealth					
Constitutional provisions					
1.	*Constitution* (Cth)	Current	s 61, Ch III	In force at all relevant times	All relevant times
Legislative provisions					
2.	*Home Affairs Legislation Amendment (2025 Measures No 1) Act 2025* (Cth)	Current	s 2, items 9 and 10 of Sch 1	Presently in force, retrospective application to relevant exercises of power	From 5 September 2025 (with retrospective effect)
3.	*Migration Act 1958* (Cth)	Current	ss 4, 5, 76AAA, 195A 197C, 198, 198AHA, 198AHAA, 198AHB, 501	Presently in force, incorporating amendments made after the 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 4, 5, 76AAA, 195A 197C, 198, 198AHA, 198AHB, 501	In force at the time of the judgment of the primary judge	At all relevant times to 26 May 2025