HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 09 Dec 2025 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S146/2025
File Title:	TCXM v. Minister for Immigration and Citizenship & Anor
Registry:	Sydney
Document filed:	Form 27F - Respondents' Outline of oral argument
Filing party:	Respondents
Date filed:	09 Dec 2025

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

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

OUTLINE OF ORAL SUBMISSIONS OF THE RESPONDENTS

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The HALA Act is a complete answer to Ground 1 (CS [10]-[27])

2. The *Home Affairs Legislation Amendment (2025 Measures No. 1) Act 2025* (Cth) (**HALA Act**) (**Vol 1, Tab 1**) was enacted after the decision below and confirms the primary judge's findings regarding procedural fairness.

3. *First*, item 10 of Sch 1 to the HALA Act provides that things done or purportedly done, including entering into a third country reception arrangement (**TCRA**), are "taken for all purposes" to be valid and to have always been valid. Item 10 cures "unlawfulness" as well as invalidity, as it "attach[ed] new legal consequences and a new legal status" to the entry into the interim TCRA: eg *Duncan v ICAC* (2015) 256 CLR 83 at [25], [41]; *CD v Commonwealth* (2025) 99 ALJR 1388 at [19], [25], [68].

4. *Second*, and alternatively, s 198AHAA of the *Migration Act 1958* (Cth) (**Migration Act**) and item 9(2) of Sch 1 of the HALA Act make clear that the rules of natural justice did not apply to entry into the Interim TCRA. Section 198AHAA(1) excludes any obligation to afford natural justice in the exercise of executive power (meaning non-statutory executive power) to enter into a TCRA, and item 9(2) gave retrospective effect to that exclusion.

5. The primary judge correctly held that entry into the Interim TCRA involved the exercise of non-statutory executive power under s 61 of the Constitution (J [17(a)], [118]-[127]). Section 198AHB did not supply statutory power to enter into that arrangement: *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 (**Vol 5, Tab 18**) at [24], [45] (French CJ, Kiefel and Nettle JJ), [68] (Bell J), [178] (Gageler J), [201] (Keane J). The appellant's submission that s 198AHAA refers only to valid exercises of the executive power is circular as it relies on the very ground of invalidity that s 198AHAA is designed to cure. In any event, even if s 198AHAA refers only to a valid exercise of executive power, the entry into the Interim TCRA was validated by item 10 "for all purposes", including for the purposes of s 198AHAA and item 9(2).

6. *Third*, if the Commonwealth's entry into the Interim TCRA was an exercise of statutory power, then the appellant's attempt to avoid the operation of item 10 collides with s 474

of the Migration Act. Section 474 precludes the grant of relief in respect of decisions under the Migration Act that are affected by non-jurisdictional errors (ie errors involving unlawfulness without invalidity): *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 (**Vol 4, Tab 14**) at [60]-[61]; *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [47]; *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at [20], [22].

The decision to enter into the Interim TCRA was not subject to an obligation to afford procedural fairness (CS [32]-[37])

7. The primary judge correctly held that the power to enter into the Interim TCRA was not subject to a requirement to afford procedural fairness: PJ [129]-[130]. That is so whether the relevant power was the prerogative power to conduct foreign affairs or the non-statutory executive power to execute and maintain the laws of the Commonwealth.

Section 198 is not contrary to Ch III of the Constitution (CS [58]-[62])

8. The power to remove an alien is undoubtedly an executive power: *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 (**Vol 4, Tab 12**) at [26], [29], [39], [47] (Kiefel CJ, Bell, Keane and Edelman JJ), [92] (Nettle J). There is no need to assess "means and ends, and the relationship between the two", because the means and ends are the same: *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 (**Vol 4, Tab 16**) at [44]. The power and duty to remove an alien who has no right to remain simply gives effect to the absence of that right. It cannot be characterised as punitive.

The removal duty is enlivened wherever it is practicable to perform it (CS [41]-[57])

9. Section 198 requires the removal of an unlawful non-citizen where that is "reasonably practicable". "Reasonable practicability" is concerned with the process of removal itself, and not the prevailing circumstances in the country once removal is complete. Removal is complete (at the latest) upon admission by, and into, the receiving country.

10. The text of s 198 makes plain that it is concerned with what can be effected or accomplished, and with what is possible from the viewpoint of the removing officer: *Minister for Immigration and Multicultural Affairs v MZAPC* (2025) 99 ALJR 486 (**Vol 6, Tab 35**) at [35]. Section 198 takes its place as part of the statutory regime for the removal of an "unlawful non-citizen": a person who has failed to obtain or retain permission to remain: Migration Act, s 4.

11. Section 197C does not alter that position. This Court has recently held that a detainee facing removal who fears harm in a country to which they can practicably be removed must nevertheless be removed: *ASF17 v Commonwealth* (2024) 98 ALJR 782 (**Vol 6, Tab 24**) at [38]. *Plaintiff M61/2010E*, *Plaintiff M70*, and *SZQRB*, on which the intervener relies (**IS [44]-[48**]), identified an implication from the Migration Act as a whole, namely, that because its provisions are intended to facilitate Australia's compliance with its non-*refoulement* obligations, s 198 does not authorise removal contrary to those obligations or where a claim to be owed such obligations has not been assessed: *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (**Vol 5, Tab 19**) at [94], [98]. That implication did not depend on any conclusion that removal was not "reasonably practicable". Section 197C(1) was introduced to reverse that implication, but its enactment said nothing about the principle in *NATB* that "reasonable practicability" concerns only the process of removal itself: Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (**Vol 8, Tab 45**) at [1133], [1136], [1137]. The intervener's construction leads to unlikely consequences and gives the *NZYQ* limit an unstable operation.

12. The appellant's reliance on the principle of legality must fail. Section 197C reflects the Parliament's exhaustive statement about the kinds of post-removal harm that can affect the operation of the removal duty. Where the prospect of such harm results in a protection finding, removal is not authorised. Absent a protection finding, removal is required and authorised notwithstanding the prospect that a person might be harmed following removal, even if that harm is of a kind that would otherwise attract non-refoulement obligations. With respect to other risks of harm, Parliament intentionally left undisturbed the interpretation of the phrase "reasonably practicable" that was adopted in *NATB*, that having been the law for over a decade by the time s 197C was introduced.

13. Parliament also gave the Minister non-compellable personal powers. Those mechanisms are the way Parliament has addressed concerns about risks of harm post-removal. *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506 (**Vol 6, Tab 37**) decided accordingly. It is consistent with the reasoning of Hayne J in *Re Minister for Immigration and Multicultural Affairs; Ex parte E* (1998) 73 ALJR 123 (**Vol 7, Tab 40**) at [14]-[19].

Dated: 9 December 2025

Stephen Donaghue **Patrick Knowles** **Bora Kaplan** **Michael Maynard**