HIGH COURT OF AUSTRALIA

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### Details of Filing

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### Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

**CANDACE OWENS FARMER**
Plaintiff

and

**MINISTER FOR HOME AFFAIRS**
First Defendant

**COMMONWEALTH OF AUSTRALIA**
Second Defendant

# DEFENDANTS' OUTLINE OF ORAL SUBMISSIONS

## 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

**Proper construction of "incite discord" in s 501(6)(d)(iv) (DS [9]-[24])**

2 Properly construed, a risk that a person would "incite discord" in s 501(6)(d)(iv) does not refer merely to causing disagreement or debate. It refers to the risk that the person would stir up strife or dissension in the Australian community (or a segment of it) of a kind that involves harm to that community or segment. That does not "read words into" s 501(6)(d)(iv), but answers a constructional choice posed by the breadth of "discord": *SZTAL* (2017) 262 CLR 362 (**Vol 5, Tab 23**) at [38] (Gageler J); cf **PS [9]**; **Reply [2]**.

3 ***Context:*** All of the limbs of s 501(6)(d) describe conduct that poses a risk of harm to the community or a segment thereof. The plaintiff's submission that limbs (i)-(iv) must be read expansively to operate independently of (v) (**PS [10]-[12]**) gives insufficient attention to the breadth of limb (v). It would be more plausible to read (v) *ejusdem generis* the other limbs. But the best reading of limbs (i)-(iv), consistent with their history, is that they are akin to an inclusive definition that guards against the possibility that the general language of (v) ("represent a danger to the community") might not include the specific conduct that those limbs identify: *BHP v NCC* (2008) 236 CLR 145 (**Vol 3, Tab 8**) at [32]. In those circumstances, the presumption against surplusage has no role: *Leon Fink v Australian Film Commission* (1979) 141 CLR 672 (**Vol 4, Tab 15**) at 679.

4 ***History:*** Limb (v) has its origin in para (c) of the public interest criteria previously found in the Migration Regulations. That paragraph was interpreted by the Federal Court to include the conduct now addressed in limbs (iii)-(iv), and not to extend to mere disagreement or debate: *Hand v Hell's Angels* (1991) 25 ALD 667 (**Vol 6, Tab 26**) at 672 (FFC); *Irving v Minister* (1993) 115 ALR 125 (**Vol 6, Tab 27**) at 138-9 (French J); *Irving* (1993) 44 FCR 540 (**Vol 6, Tab 28**) at 543-4 (Ryan J), 551 (Lee J), 557-8 (Drummond J).

5 The precursor of s 501(6)(d), being s 180A(1)(b), was not "deliberately broader" than para (c): cf **Reply [7]**. Nor was it directed to overcoming the result in *Hell's Angels* (cf **Reply [6]**); that was achieved by prior amendments to the regulations (**Vol 2, Tab 6**) and ultimately s 180A(1)(a). The explanatory memorandum (**Vol 7, Tab 35** at [16]) and second reading speech (**Vol 7, Tab 34** at 4121) support the conclusion that s 180A(1)(b)(i)-(iii) each concern persons who "represent a danger to the Australian community".

**The implied freedom of political communication (DS [25]-[48])**

6 ***Burden:*** Section 501(6)(d)(iv) does not burden the implied freedom, for two reasons.

7 *First*, it does not burden any right or liberty arising independently of the Act. Without a visa, an alien has no right or liberty to enter Australia: *Moorcroft* (2021) 273 CLR 21 (**Vol 4, Tab 18**) at [30]; *CZA19* [2025] HCA 8 (**Vol 3, Tab 12**) at [41]. Section 501 is one of the provisions of the Migration Act (**Vol 1, Tab 3**) which define when an alien will be granted a visa to enter Australia: ss 4, 65, 501.

8 The plaintiff's attempt (**PS [26(a)]**, **[33]**) to establish a burden by asserting that she has a "right" to a visa "but for" s 501(6)(d)(iv) is foreclosed by unchallenged authority:
10 *Mulholland v AEC* (2004) 220 CLR 181 (**Vol 4, Tab 19**) at [104]-[107] (McHugh J), [186]-[187] (Gummow and Hayne JJ), [337] (Callinan J), [354] (Heydon J); *Ruddick v Commonwealth* (2022) 275 CLR 333 (**Vol 5, Tab 22**) at [171]-[172] (Gordon, Edelman and Gleeson JJ), [174] (Steward J). *Mulholland* and *Ruddick* do not "produce absurdity": cf **Reply [12]**.

9 Section 501(6)(d)(iv) does not burden the liberty of Australian citizens and residents to engage in political communications with each other, or with aliens who are in Australia or who are located overseas: cf **PS [26(b)]**; **Reply [13]**. The implied freedom, being a restriction on legislative power, confers no right upon any person to require an alien to be granted permission to enter Australia to engage in political discussions here.

20 10 *Second*, s 501(6)(d)(iv) is a definitional provision. Even when read with s 501(3)(a), it imposes no burden unless the discretion is exercised to refuse an alien permission to enter Australia. If that provision is not valid in all its operations, it must be read down or partially disapplied so as "to permit only those exercises of discretion that are within constitutional limits": *Palmer v WA* (2021) 272 CLR 505 (**Vol 4, Tab 20**) at [122] (Gageler J); also Migration Act, s 3A.

11 Alternatively, any burden arising from s 501(6)(d)(iv) is slight. At most, it imposes some limits on the manner in which a small subset of political communication can occur.

12 ***Justification:*** If the defendants' construction of s 501(6)(d)(iv) is adopted, it is readily seen to be reasonably appropriate and adapted to the legitimate purpose identified in **DS [42]**.
30 The plaintiff's submission that an obvious and compelling alternative to s 501(6)(d)(iv) is reverting to the initial risk threshold (from "risk" to "would") (**PS [46]**) cannot be accepted,

because a provision in that form would not achieve Parliament's purpose to the same or a similar extent: **DS [47]**; cf **Reply [15]**. Further, the provision is adequate in its balance, for any burden is so slight that it cannot manifestly outweigh its legitimate purpose.

13 If the plaintiff's construction of s 501(6)(d)(iv) is adopted, the central issue is whether it is a legitimate purpose to seek to prevent "the eroding of social cohesion of the Australian community through disagreement and debate caused by the presence of certain non-citizens in Australia": **PS [40]**. That purpose is legitimate: were it otherwise, a law passed for that purpose would be incapable of justification in any circumstances. Under our system of representative government, the choice as to which aliens should be admitted into the
10 Australian community, and for what reasons, is properly made by the Australian community itself through its elected representatives. Promoting the social cohesion of the Australian community, by means that are appropriate and adapted to that end, is protective of the system of government, rather than inherently offensive to that system.

**The Minister did not misconstrue s 501(6)(d)(iv) (DS [49]-[55])**

14 The Minister did not use the term "incite discord" to refer merely to "disagreement or debate": cf **PS [52]-[53]**. He found there to be a risk that the plaintiff's expression of her views in Australia would "amplify grievances among communities and lead to increased hostility and violent or radical action": **SCB 104 [57]**; see generally **SCB 98-104**. That is the risk of discord that was found to engage s 501(6)(d)(iv). Nor did the Minister "equate
20 discord and harm": cf **PS [54]**: **SCB 105 [65]-[68]**.

**Peremptory mandamus should not issue if s 501(6)(d)(iv) is invalid (DS [56]-[58])**

15 If s 501(6)(d)(iv) is invalid, the Minister is under an enforceable duty to make a decision under s 65. But there is no basis upon which the Court should order the Minister to grant a visa. The material before the Court does not establish that the plaintiff either passes the other limbs of the character test or satisfies PIC 4001 (and, indeed, suggests otherwise): **SCB 37 [9]**; **SCB 106 [76], 109 [95]**. Neither *Plaintiff S297* (2015) 225 CLR 231 (**Vol 5, Tab 21**), nor the matters relied on in **PS [66]**, provide any support for such relief.

Date: 6 May 2025

**Stephen Donaghue** **Julia Watson** **Will Randles**