HIGH COURT OF AUSTRALIA

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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

PLAINTIFF'S SUBMISSIONS IN REPLY

PART I: CERTIFICATION

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

PART II: REPLY

ISSUE 1: THE MEANING OF SECTION 501(6)(d)(iv)

2. The construction of s 501(6)(d)(iv) in **DS [9]** represents a change in defendants' position from where it stood in the defendants' response at **SCB 7 [6]** and the insertion of yet more words into the provision. Now, according to **DS [9]**, the discord referred to by s 501(6)(d)(iv) must not only involve "*harm*" to the Australian community but must be such as to mean the person in question "*represents a danger*" to the Australian community or a segment thereof. Contrary to **DS [10]**, this is not the adoption of *any* of the ordinary meanings of "*discord*" identified by the parties.

3. Contrary to **DS [11]**, that "*incite*" is used to describe the causation of unlawful conduct in other legal contexts says little about the meaning of "*discord*" in the present context. There is no difference between the parties' constructions of "*incite*". The synonyms quoted by both parties (**PS [20]; DS [11]**) are just other ways of saying "*cause*".

4. The lynchpin of the defendants' submissions is the contention that s 501(6)(d) retains the operation of its predecessor, s 180A(1)(b), and that each of the limbs (i)–(iv) only apply to persons who would "*represent a danger*" to the Australian community if they entered or remained in Australia: **DS [14], [18]**. But s 180A(1)(b) was never so limited.

5. By s 180A(1)(b)(iv), Parliament gave the Minister the power to refuse a person a visa if the Minister was satisfied that if that person were allowed to enter or remain in Australia, that person would represent a danger in <u>any way</u>. That means that the defendants' construction of each of the other three paragraphs of s 180A as containing a requirement of dangerousness renders them all otiose. Given the breadth of s 180A(1)(b)(iv), and the specifically enumerated examples in s 180A(1)(b)(iv) itself, it does not make sense that Parliament would have drafted three additional limbs (i)–(iii) merely containing further examples of circumstances completely encapsulated in s 180A(1)(b)(iv): cf **DS [18]**. There is no warrant for reading into any of limbs (i)–(iii) a requirement that the person represents a danger to the Australian community. For example, it is not necessary for limb (i) that the Minister be satisfied not only that the person might engage in criminal conduct in Australia but also that that person would represent a danger to the Australian community. Unlike limb (iv), limbs (i)–(iii) deliberately omit any such requirement.

6. The defendants' construction frustrates the purpose of s 180A(1)(b), which was to enable the Minister to succeed where he had failed in *Hand*: see **PS [15]-[16]**. None of the evidence before the Minister referred to in *Hand* was capable of showing that any of the applicants represented the requisite danger, as it did not connect them to personal criminality or wrongdoing.[1] The defendants' construction would mean the Minister would still have insufficient power to refuse visas to these applicants.

7. The *Irving* cases support the plaintiff's construction: cf **DS [16]-[17]**. They confirm that "*vigorous expressions of disagreement and condemnation*"[2] were not within the previous public interest criterion. Section 180A(1)(b) was deliberately broader in its ambit.

8. The defendants' reliance on judicial statements to the effect that "*the protection of the Australian community lies at the heart*" of s 501 or s 501(6)(d) (**DS [21]-[22]**) also do not assist them. That tells one nothing about <u>what</u> Parliament sought to protect the Australian community from in enacting s 501(6)(d)(iv).

9. For reasons given in **PS [8]-[19]** and the preceding paragraphs, the defendants' construction is not "*reasonably open*": cf **DS [24]**.

ISSUE 2: INVALIDITY OF SECTION 501(6)(d)(iv)

10. ***Burden.*** The quibbling in **DS [27]** goes nowhere. When read with s 501(3)(a), s 501(6)(d)(iv) enacts "*substantive law*" with "*operative effect*". By challenging the validity of s 501(6)(d)(iv), the plaintiff challenges the way it causes s 501(3)(a) to operate. The plaintiff does not ignore that this involves the exercise of a discretion; it is an aspect of the plaintiff's challenge: **PS [30], [46]**. The defendants suggest no way that s 501(6)(d)(iv), or s 501(3)(a), could be "*read down*": cf **DS [27] fn 38**.

11. The defendants' reliance on the requirement that there be "*proof that the challenged law burdens a freedom that exists independently of that law*" (**DS [28]-[34]**) is wrong. A majority of this Court in *Mulholland* did <u>not</u> hold that the challenge failed "*because there was no right to have a party name printed on the ballot paper arising independently of the impugned Act*": cf **DS [30]**. Gummow and Hayne JJ, who held up in **DS [30] fn 42** as making up an alleged majority in favour of this proposition, merely held that Mr Mulholland could not rely on the <u>provisions</u> that he challenged as the source of the requisite right.[3] Contrary to **DS [31]**, Gummow and Hayne JJ expressly noted that, in the

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1 (1991) 25 ALD 667 at 673-675 (Black CJ, Lockhart and Ryan JJ).

2 *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 115 ALR 125 at 139-140 (French J), approved in *Irving v Minister for Immigration for Local Government and Ethnic Affairs* (1993) 44 FCR 540 at 543-544 (Ryan J) and 558-559 (Drummond J).

3 (2004) 220 CLR 181 at [186]-[187], [192].

event of invalidity, there would have been a "*real question*"[4] as to severance. Similarly, this Court in *Ruddick* did not approve the defendants' reading of *Mulholland*: cf **DS [30]**. When the Court said that Mr Mulholland's challenge failed because his political party "*had no right to be included on the ballot paper, independently of the provisions of [the impugned Act]*",[5] that was, again, a reference to the fact that Mr Mulholland challenged the very provisions that he claimed conferred the right.

12. The defendants' position produces absurdity. It means there would be a different outcome if Parliament chose to confer a right in one Act and impose a limitation in another, rather than dealing with the matter in a single Act. Further, if Parliament amended a statute conferring the right to receive government entitlements to make that right contingent upon abstinence from public expressions of support for specified political parties, could it really be doubted that this kind of legislation would at least burden the implied freedom? On the position that the defendants ask the Court to accept, they are driven to say that no challenge to this legislation under the implied freedom could ever succeed.

13. The Court can infer from the nature of s 501(6)(d)(iv), as well as its effect in the present case, that it burdens political communication in Australia: **cf DS [34]**. **DS [36]** is wrong to assert that there is no burden on communications by Australian citizens: **PS [26(b)]**. That there have been only two published cases involving challenges to exercises of power based on s 501(6)(d)(iv) (**DS [37]**) says nothing about how often it is exercised without challenge; in any event, the magnitude of the burden is not assessed only historically and numerically but as a matter of substantive effect. The suggestion that it is merely "*speculation*" that it is less effective for a person to communicate their political ideas at an in-person event compared to via an audio-visual link is risible: **cf DS [38]**.

14. ***Legitimate purpose.*** Since the defendants' construction of s 501(6)(d)(iv) is erroneous, its claimed purpose of the provision must be rejected: see **DS [42]**. The defendants' submissions directed at establishing the legitimacy of the plaintiff's claimed purpose of s 501(6)(d)(iv) must also be rejected: see **DS [43]-[44]**. While Parliament has broad legislative power on the subject of immigration, it is subject to the implied freedom. Parliament cannot use this power for the purpose of curbing what all parties accept is an inherent incident of that freedom – disagreement and debate: see **DS [44]**. That an alien starts from being outside Australia does not alter this conclusion, in circumstances where Parliament seeks to exclude the alien to curb disagreement and debate in Australia.

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4 (2004) 220 CLR 181 at [138].

5 (2022) 275 CLR 333 at [172] (Gordon, Edelman and Gleeson JJ), [174] (Steward J).

15. ***Necessity.*** Assuming the defendants' description of the object of s 501(6)(d)(iv) in **DS [42]** is correct, s 501(6)(d)(v) achieves that object to the same degree but is less restrictive of the freedom: consistently with *Irving*, it would not include "*vigorous expressions of disagreement and condemnation*" as something that renders a person dangerous and doing so is not an aspect of the object of s 501(6)(d)(iv) according to the defendants: cf **DS [47]**. As for an alternative based on "*would*" rather than "*risk*", that cannot be rejected on the glib basis that it would not achieve the object to the same extent "*probability-wise*": cf **DS [47]**. Precise identity of effect cannot be required as otherwise it is difficult to see how any law could ever fail the necessity test: it is sufficient if the alternative achieves the object "*to the same or a similar extent*".[6]

ISSUE 3: INVALIDITY OF THE DECISION

16. The defendants' attempt to reconstruct the Minister's reasoning at a high level **(DS [49]-[55]**) does not deal with a large number of textual indications in **PS [52]-[54]** showing that the Minister construed s 501(6)(d)(iv) differently to how the defendants now construe it. In particular, the defendants do not explain why in the section dealing with s 501(6)(d)(iv), the Minister did not make a finding that the discord in question was such as to cause harm, or identify that harm or who would suffer it. It also needs to be said in light of **DS [54]** that the Minister's reliance on an alleged connection between the plaintiff and the Christchurch terrorist attack was scandalous: see **SCB 338 [18]**.

ISSUE 4: RELIEF

17. The defendants make no real attempt to argue that there is not a heightened risk that the Minister's return to an ordinary writ of mandamus will be sufficient. There is not an "*unresolved dispute*" about whether s 501(6)(d)(iii) or (v) are enlivened: **DS [58]**. The defendants make no attempt to deal with the major factual problems in the Minister's reasoning (**SCB 334-343**), nor develop a serious argument as to why those provisions could apply. The combination of features referred to in **PS [66]** means that this is an exceptional case where peremptory mandamus should issue, as it did in the cases referred to at **PS [66]** where there was no prior writ of mandamus.

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[6] *Clubb v Edwards* (2019) 267 CLR 171 at [479] (Edelman J).