

# HIGH COURT OF AUSTRALIA

GAGELER CJ,  
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

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CANDACE OWENS FARMER

PLAINTIFF

AND

MINISTER FOR HOME AFFAIRS & ANOR

DEFENDANTS

*Farmer v Minister for Home Affairs*

[2025] HCA 38

*Date of Hearing: 6 May 2025*

*Date of Judgment: 15 October 2025*

S160/2024

## ORDER

*The questions stated for the opinion of the Full Court in the special case filed on 13 March 2025 be answered as follows:*

*Question (1): Is s 501(6)(d)(iv) of the Migration Act 1958 (Cth) invalid because it unjustifiably burdens the implied freedom of political communication?*

*Answer: No.*

*Question (2): If the answer to question 1 is "no", is the decision of the Minister to refuse to grant the plaintiff the Temporary Activity (Class GG) visa invalid on the ground that the Minister adopted an incorrect construction of s 501(6)(d)(iv)?*

*Answer: No.*

*Question (3): If the answer to question 1 or question 2 is "yes", what, if any, relief should be granted to the plaintiff?*

*Answer: Unnecessary to answer.*



*Question (4): Who should pay the costs of the Special Case?*

*Answer: The plaintiff.*

### **Representation**

P D Herzfeld SC with T C Smartt for the plaintiff (instructed by Gillis Delaney Lawyers)

S P Donaghue KC, Solicitor-General of the Commonwealth, with J D Watson and W C H Randles for the defendants (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **Farmer v Minister for Home Affairs**

Constitutional law (Cth) – Implied freedom of communication about government or political matters – Where s 501(6)(d)(iv) of the *Migration Act 1958* (Cth) provides that person does not pass character test if risk they would, if allowed to enter Australia, "incite discord in the Australian community or in a segment of that community" – Where Minister for Home Affairs ("Minister") refused visa to controversial political commentator on basis of s 501(6)(d)(iv) – Whether there need be risk of harm to Australian community or segment of that community in order to satisfy s 501(6)(d)(iv) – Whether s 501(6)(d)(iv) invalid for infringing implied freedom of communication about government or political matters – Whether Minister misconstrued s 501(6)(d)(iv) in decision to refuse visa.

Words and phrases – "aliens power", "character test", "controversial views", "danger", "definitional", "discord", "dissension or strife", "effectively burdens", "extremist views", "free flow of political communication", "harm", "implicature", "implied freedom of political communication", "in the Australian community or a segment of that community", "incite discord", "national interest", "no liberty to enter", "non-citizens", "personal right", "political communication", "practical burden", "right-wing extremism", "visa".

*Constitution*, ss 7, 24, 51(xix), (xxvii).

*Migration Act 1958* (Cth), ss 65, 501(3), 501(6)(d)(iv), 501(6)(d)(v).



1 GAGELER CJ, GORDON AND BEECH-JONES JJ. The implied freedom of political communication under the *Constitution* denies legislative and executive power to restrict freedom of communication on governmental or political matters unless the restriction is imposed to fulfil a constitutionally legitimate purpose and the restriction is reasonably appropriate and adapted to advance that purpose by constitutionally legitimate means. To be constitutionally permissible, both the purpose and the means of achieving it must be compatible with the system of representative and responsible government for which the *Constitution* provides. The implied freedom of political communication is not a personal right.

2 The plaintiff, Ms Farmer, a citizen and resident of the United States of America, intended to undertake a speaking tour in Australia in November 2024. She intended to visit multiple cities and, at each event, to speak about political matters that she believed would be relevant and interesting to the audience and to take questions from the audience, which in her experience from prior international speaking tours would mostly concern political matters. Ms Farmer also intended to host private and VIP events where she and the attendees would speak about mostly political matters. On 12 September 2024, Ms Farmer applied under the *Migration Act 1958* (Cth) for a Temporary Activity (Class GG) visa ("the Visa") to enter Australia to undertake the speaking tour.

3 The object of the *Migration Act* is "to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens".<sup>1</sup> To advance that object, the *Migration Act* "provides for visas permitting non-citizens to enter or remain in Australia" and is intended to be "the only source of the right of non-citizens to so enter or remain".<sup>2</sup> Section 65 of the *Migration Act* relevantly provides that, after considering a valid visa application, the Minister "is to grant the visa" if satisfied that, among other things, the criteria prescribed by the *Migration Act* or the *Migration Regulations 1994* (Cth) have been satisfied,<sup>3</sup> and the grant is not prevented by s 501 or any other relevant section of the *Migration Act*.<sup>4</sup>

4 Section 501, headed "Refusal or cancellation of visa on character grounds", is important. Section 501(3) provides that the Minister may refuse to grant a visa

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1 *Migration Act*, s 4(1).

2 *Migration Act*, s 4(2).

3 *Migration Act*, s 65(1)(a)(ii).

4 *Migration Act*, s 65(1)(a)(iii).

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to a person,<sup>5</sup> or may cancel a visa that has been granted to a person,<sup>6</sup> if the Minister reasonably suspects that the person does not pass the character test in s 501(6)<sup>7</sup> and the Minister is satisfied that the refusal or cancellation is in the national interest.<sup>8</sup> The power under s 501(3) may only be exercised by the Minister personally<sup>9</sup> and the rules of natural justice do not apply to a decision under s 501(3).<sup>10</sup>

5 For the purposes of s 501(3)(c), a person does not pass the *character test* relevantly if:<sup>11</sup>

- "(d) in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would:
  - (i) engage in criminal conduct in Australia; or
  - (ii) harass, molest, intimidate or stalk another person in Australia; or
  - (iii) vilify a segment of the Australian community; or
  - (iv) *incite discord in the Australian community or in a segment of that community*; or
  - (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in

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5 *Migration Act*, s 501(3)(a).

6 *Migration Act*, s 501(3)(b).

7 *Migration Act*, s 501(3)(c).

8 *Migration Act*, s 501(3)(d).

9 *Migration Act*, s 501(4).

10 *Migration Act*, s 501(5). If the Minister makes a decision under sub-s (3) in relation to a person, the Minister must cause notice of the making of the decision to be laid before each House of the Parliament within 15 sitting days of that House after the day the decision was made: s 501(4A).

11 *Migration Act*, s 501(6).



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violence threatening harm to, that community or segment,  
or in any other way; or

...

Otherwise, the person passes the *character test*." (emphasis added)

6 On 25 October 2024, the first defendant, the Minister, decided to refuse to grant Ms Farmer the Visa ("the Decision"). In making the Decision, the Minister decided that he reasonably suspected that Ms Farmer did not pass the "character test" on the basis that, if Ms Farmer were allowed to enter Australia, there was a risk that she would "incite discord in the Australian community or in a segment of that community", within the meaning of s 501(6)(d)(iv), and that he was also satisfied that the refusal of the Visa was in the national interest, within the meaning of s 501(3)(d).

7 On 1 November 2024, Ms Farmer made representations to the Minister pursuant to s 501C(3) and (4) of the *Migration Act* seeking revocation of the Decision. On 15 November 2024, Ms Farmer wrote to the Department of Home Affairs and informed it that, if she was not notified that a decision had been made pursuant to s 501C(4) of the *Migration Act* by 22 November 2024, she intended to bring proceedings in the Federal Court of Australia or in this Court seeking appropriate relief.<sup>12</sup> On 22 November 2024, a representative of the Minister wrote to Ms Farmer saying that her revocation request would be considered and decided within a reasonable period of time but that the exact timing of that process could not be confirmed. No determination of whether to revoke the Decision had been made at the time of the filing of the special case.

8 By her amended application for a constitutional or other writ filed in this Court, Ms Farmer sought a declaration that s 501(6)(d)(iv) of the *Migration Act* is invalid on the ground that it infringes the implied freedom of political communication, a writ of certiorari quashing the Decision, and a writ of peremptory mandamus commanding the Minister to grant her the Visa or, in the alternative, a writ of mandamus commanding the Minister to remake the Decision according to law. Ms Farmer also contended, in the alternative, that in making the Decision the Minister misconstrued s 501(6)(d)(iv) of the *Migration Act*.

9 At the time of her application for the Visa, Ms Farmer met all relevant legal requirements to be issued with the Visa, except for the requirement she satisfy

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12 The special case incorrectly records the relevant provision to be s 501(4).

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public interest criterion 4001<sup>13</sup> and the character test under s 501(6) of the *Migration Act*. Ms Farmer maintains that she satisfies those requirements. The defendants say she does not.<sup>14</sup>

10 The parties agreed on questions of law for the opinion of the Full Court. Those questions, and the answers, are as follows:

- (1) Is s 501(6)(d)(iv) of the [*Migration Act*] invalid because it unjustifiably burdens the implied freedom of political communication?

No.

- (2) If the answer to question 1 is "no", is the Decision invalid on the ground that the Minister adopted an incorrect construction of s 501(6)(d)(iv)?

No.

- (3) If the answer to question 1 or question 2 is "yes", what, if any, relief should be granted to the plaintiff?

Unnecessary to answer.

- (4) Who should pay the costs of the Special Case?

The plaintiff.

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13 *Migration Regulations*, Sch 2, cl 408.216(1). Public interest criterion 4001 (in Sch 4) requires that the person satisfy the Minister that they pass the character test, or that the Minister be satisfied, after appropriate inquiries, that there is nothing to indicate they would fail to do so, or that the Minister decide not to refuse to grant the visa despite reasonably suspecting that they do not, or despite not being satisfied that they do, pass the character test.

14 Ms Farmer has not provided a letter of support that meets the requirements of cl 408.221 read with cl 408.111 definition of "passes the support test" of Sch 2 to the *Migration Regulations*. However, the organisation that invited Ms Farmer to Australia confirmed that it would provide a compliant letter of support swiftly if there was an indication that Ms Farmer was likely to receive permission to enter Australia.

## The Decision

11 In making the Decision, the Minister said that, in considering the character test in s 501(6)(d)(iv) as it applied to Ms Farmer, he had turned his mind to her profile as a political commentator, author and activist known for her controversial and conspiratorial views. The Minister also observed that Ms Farmer had been the subject of significant media reporting as a result of her comments.

12 The Minister then proceeded to examine some of Ms Farmer's views and comments in detail. That examination was conducted under the headings "Holocaust denial", "Islamophobia", "Anti-racism, Black Lives Matter and anti-Semitism", "Women's and LGBTQIA+ rights", and "COVID-19 and anti-vaccination". After that examination, the Minister turned his mind to whether, if Ms Farmer were allowed to enter Australia, there was a risk that her presence would incite discord in the Australian community (or a segment of it), given her views and comments, which the Minister stated he found to be "extremist and inflammatory comments towards Muslim, Black, Jewish and LGBTQIA+ communities which generate controversy and hatred".

13 The Minister observed that the Director-General of the Australian Security Intelligence Organisation ("ASIO") stated, on 5 August 2024, when raising the National Threat level from "possible" to "probable", that "while the threats to our way of life remain elevated", ASIO was seeing "an increase in extremism". The Director-General warned that "inflamed language could lead to inflamed community tensions" and that "while political differences, political debates and political protests are essential parts of a healthy economy [ASIO was] seeing spikes in political polarisation and intolerance, uncivil debate and unpeaceful protest". The Minister then referred to submissions from ASIO and the Australian Federal Police in 2021 to the Parliamentary Joint Committee on Intelligence and Security on its inquiry into extremist movements and radicalism in Australia about the rising threats and challenges in Australia posed by right-wing extremism, including through online connectivity.

14 Next, the Minister quoted from an article published by Mr Greg Barton, the Chair in Global Islamic Politics, Alfred Deakin Institute for Citizenship and Globalisation at Deakin University, which, in turn, quoted the former Race Discrimination Commissioner, Mr Tim Soutphommasane, who said, in part, that "[h]ate speech leads to political violence if you allow it to escalate". The Minister referred to the fact that Mr Barton stated that "limiting space for hateful extremism reduces the likelihood of violent extremism".

15 The Minister accepted this information from government authorities, law enforcement and academic researchers as being credible and then stated that these "sources collectively describe the causal link between individuals who

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promote and encourage right wing extremism via online platforms and how this supports greater intent and capacity to [undertake] violent acts". The Minister said he was "satisfied these sources provide well evidenced and consistent assessments of the potential for persons who espouse ideologically motivated extremist views to pose a risk of inciting discord in the Australian community".

16 The Minister referred, among other things, to Ms Farmer's "inflammatory comments about the Black Lives Matter movement [and] the Israel-Hamas conflict" and stated that she had "expressed anti-Semitic, [I]slamophobic and other controversial views", the gravity of which was emphasised by her suspension from YouTube in 2023 for promoting hatred against protected individuals or groups. He noted "the magnitude and number of [her] comments, their recency and the topical and high profile issues [Ms Farmer had] elected to concentrate upon". On the basis of the information and material before the Minister, he found that Ms Farmer "uses various online platforms to spread misinformation and promote her controversial views and ideologies which leads to fostering division and fear in communities". The Minister further found that the evidence was clear that the "use of platforms for inflammatory rhetoric can lead to increased hate crimes, radicalisation of individuals and heightened tensions in communities".

17 Notwithstanding Ms Farmer's social media influence of over 18 million followers across all platforms worldwide, including Australia, and accepting her ability to influence and incite discord through her online platforms, the Minister considered whether, in the event that she were allowed to enter Australia, there was a risk that she would incite discord in the Australian community or a segment of it. After stating that he accepted that Ms Farmer had not used her influence and various social media platforms to promote direct and overt violence, and that her representative had provided a signed undertaking that Ms Farmer would abide by her visa conditions and not engage in any disruptive or violent behaviour towards the Australian community, the Minister stated that, in considering the matter, he was "not limited to Ms Farmer's personal behaviour whilst in Australia, but [may also consider] the effect her presence may have on others in the community".

18 The Minister said:

"In the current environment where the Australian community is experiencing heightened community tensions, as per the advice of Australia's security apparatus, I find that there is a risk that Ms Farmer's controversial views will amplify grievances among communities and lead to increased hostility and violent or radical action. I have carefully considered that Ms Farmer has an online presence but that her physical presence in Australia at this time, when there are community tensions, would have the potential to galvanise discord than it otherwise may,

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in particular because her events would attract onshore media attention, including main stream media and her shows would garner interest. I consider that the normalisation of controversial rhetoric that dehumanises and targets specific communities has the propensity to galvanise individuals and incite discord in the community."

The Minister found that, should Ms Farmer be allowed to enter Australia, there was a risk she would incite discord in the Australian community and that he was thereby satisfied that Ms Farmer did not pass the character test by virtue of s 501(6)(d)(iv) of the *Migration Act*.

19       The Minister then went on to consider whether the refusal of the Visa was in the national interest, noting that this was a separate and distinct question from whether the Minister reasonably suspected that Ms Farmer did not pass the character test. The Minister "considered the need to protect the Australian community from harm". In doing so, he "considered the seriousness of Ms Farmer's conduct (this being her views and comments) having regard to the circumstances and nature of the conduct, the likelihood of [her] engaging in ongoing conduct, and the risk she pose[d] to the Australian community if such a likelihood eventuated, in particular the risk of Ms Farmer inciting discord in the Australian community".

20       As part of that analysis, the Minister stated that:

"[t]he Australian Government is committed to protecting the Australian community from harm as a result of criminal activity or other *serious conduct* by non-citizens. Entering or remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they are, and have been, law abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community. In this case, with Ms Farmer that harm is about a risk of inciting discord." (emphasis in original)

The Minister found "that Ms Farmer's conduct, that being her views and comments are controversial and her presence in Australia ha[d] the potential to incite discord and in the course of such to cause physical and/or psychological harm to segments of the Australian community, or our society in general".

21       The Minister concluded that he reasonably suspected that Ms Farmer did not pass the character test in s 501(6)(d)(iv) of the *Migration Act* because there was a risk that she would "incite discord in the Australian community or in a segment of that community" and that he was satisfied that the refusal to grant her the Visa was in the national interest. The Minister exercised the power under s 501(3)(a) to refuse the Visa.

## Issues

22 As we have seen, Ms Farmer challenged the validity of s 501(6)(d)(iv) on  
the basis that it infringes the implied freedom of political communication.  
Ms Farmer also contended, in the alternative, that in making the Decision  
the Minister misconstrued s 501(6)(d)(iv) of the *Migration Act*.

23 The first step is to construe the statutory language.

### Construction of s 501(6)(d)(iv)

24 As we have seen, s 501(6)(d)(iv) of the *Migration Act* provides that a person  
does not pass the character test if "in the event the person were allowed to enter or  
to remain in Australia, there is a risk that the person would ... *incite discord* in  
the Australian community or in a segment of that community" (emphasis added).  
It may be accepted that s 501(6)(d)(iv) is definitional,<sup>15</sup> but it is challenged to  
the extent that it affects the scope of the operation of s 501(3).

25 It was common ground that the word "discord" is a broad term capable of  
carrying multiple meanings, from the benign – disagreement, debate – to the  
serious – war, strife, dissension<sup>16</sup> – and that the breadth of the word presents  
a constructional choice as to which of those meanings it carries in s 501(6)(d)(iv).<sup>17</sup>  
At one end of the spectrum, Ms Farmer's argument was that a person would not  
pass that aspect of the character test if, in the event that the person were allowed  
to enter or remain in Australia, there is a risk that the person would cause  
disagreement or debate in the Australian community, or a segment of it.  
At the other end of the spectrum, a risk that a person would "incite discord"  
in s 501(6)(d)(iv) does not refer merely to causing disagreement or debate but 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 causes danger.

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15 See *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 72 [185].

16 See, eg, *Macquarie Dictionary*, online, "discord", meaning 3 ("strife; dispute; war");  
*Oxford English Dictionary*, online, "discord", meaning 1a ("mutual antagonism;  
dissension, contention, strife").

17 *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd*  
(2021) 274 CLR 565 at 594-595 [88]-[89], citing *Taylor v Owners – Strata Plan*  
*No 11564* (2014) 253 CLR 531 at 557 [66] and *SAS Trustee Corporation v Miles*  
(2018) 265 CLR 137 at 149 [20]. See also *Acts Interpretation Act 1901* (Cth),  
s 15AA.

26 Within that spectrum lies the construction ultimately contended for by the defendants: that a person would not pass the character test in s 501(6)(d)(iv) if, in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would stir up dissension or strife in the Australian community, or a segment of that community, "of a kind that involves harm to that community or segment".

27 For the reasons that follow, the construction of "incite discord" most consistent with the text, context and purpose of s 501(6)(d)(iv) is that it applies where, in the event that the person were allowed to enter or to remain in Australia, there is a risk that the person would stir up or encourage dissension or strife in the Australian community, or a segment of that community, of a kind or to a degree that is harmful to that community or segment. "Incite discord" is a compound criterion which directs attention to risk – the risk of a person inciting discord in the Australian community or a segment of that community which is of a kind or to a degree that causes the requisite harm.

28 The construction of "discord" as referring to "dissension or strife", and not merely disagreement or debate, derives support from, and reflects, the fact that "discord" is part of the collocation "incite discord". It may be accepted, and the parties agreed, that "incite" means "to rouse, to stimulate, to urge, to spur on, to stir up, to animate"<sup>18</sup> and that "incite" in this context does not require any intention or mental element. As Ms Farmer accepted, it is possible to "incite public outrage" without intending to do so. But, as the defendants submitted, "incite" is narrower and more nuanced than simply "to cause". To "incite", an act must be "one which could encourage or spur others"<sup>19</sup> to a particular reaction. The "risk" spoken of in s 501(6)(d) is not a theoretical risk but a real or appreciable risk.

29 The effect of the phrases "in the Australian community" and "in a segment of that community" in s 501(6)(d)(iv) is that the risk that a person would stir up or encourage dissension or strife – "incite discord" – is not in relation to discord between two people or perhaps even a small number of people. Rather, it is the risk that the person would stir up or encourage dissension or strife on a larger scale – in the Australian community, or a segment of that community (including between segments of the community). Those phrases assist in identifying the kind and degree of the risk.

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18 *Sunol v Collier* [No 2] (2012) 289 ALR 128 at 135 [26], citing *Young v Cassells* (1914) 33 NZLR 852 at 854.

19 *Sunol* (2012) 289 ALR 128 at 135 [28]. See, eg, *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207 at 212 [16].

30       Next, the risk that a person might stir up or encourage dissension or strife in the Australian community, or a segment of it, will not alone be sufficient for s 501(6)(d)(iv) to apply. The phrase "incite discord" in s 501(6)(d)(iv) requires that there be a real or appreciable risk that the person would stir up or encourage harmful or deleterious dissension or strife in the Australian community, or a segment of it. Violent dissension or strife would suffice but s 501(6)(d)(iv) is not limited to the circumstance where there is a real or appreciable risk of physical danger to the Australian community, or a segment of it. Consistent with s 501(6)(d)(iii) and (v), harmful dissension or strife includes the intimidation, vilification or victimisation of, or disruption within or to, a segment of the Australian community. On the other hand, it would not be sufficient if only the feelings or sensitivities of the Australian community or a segment of the community would be hurt or adversely affected. No more precise elucidation of inciting discord is necessary to decide this case. The facts which are said to engage s 501(6)(d)(iv) will always be important.

31       Section 501(6)(d)(iv) must also be construed in context. This Court and the Federal Court have long recognised that "the protection of the Australian community lies at the heart" of s 501<sup>20</sup> and that the risk of harm to the Australian community is the mischief to which s 501 is directed.<sup>21</sup> This reinforces the view that s 501, and, more particularly, the "discord" in "incite discord" in s 501(6)(d)(iv), require that there be a risk of discord of a kind or to a degree (nature or effect) that causes relevant harm. Section 501(6)(d)(iv) is not enlivened merely by debate or disagreement or even merely dissension or strife.

32       Moreover, that view is reinforced by s 501(6)(d) read as a whole. As the defendants submitted, the common feature of all five limbs of s 501(6)(d) is that "each ... involves protection of the Australian community ... against some kind of harm, disadvantage or unacceptable or undesirable consequence".<sup>22</sup> Given the seriousness of the harms addressed in s 501(6)(d)(i)-(iii) and (v), it would be wrong to construe s 501(6)(d)(iv) as providing that the character test

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20    *ENT19 v Minister for Home Affairs* (2023) 278 CLR 75 at 99 [69], citing *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 279 FCR 1 at 17 [57], in turn quoting *Djalil v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292 at 310 [68].

21    *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v ERY19* (2021) 285 FCR 540 at 562 [86], cited by *ENT19* (2023) 278 CLR 75 at 99 [69] fn 84.

22    *Moana v Minister for Immigration and Border Protection* (2015) 230 FCR 367 at 379 [50]; see also 380 [58].



could be failed because there is a risk that a person would merely incite "debate or disagreement" or even merely dissension or strife. And the limbs are not mutually exclusive. So, for example, s 501(6)(d)(v), which is broad and addresses people who would "represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way", provides no basis to read down the limbs which precede it, including s 501(6)(d)(iv). As the defendants submitted, the presumption against surplusage is never determinative.<sup>23</sup>

33 That is especially so where, as here, the legislative history indicates that s 501(6)(d)(i)-(iv) were included "to guard against the possibility that the general might be read as *not* including the particular".<sup>24</sup> Section 501(6)(d) was originally enacted in 1992 as s 180A(1)(b) of the *Migration Act*. Prior to the introduction of s 180A(1)(b), the *Migration Regulations 1989* (Cth) provided that an applicant for a visa must meet the "public interest criteri[on]"<sup>25</sup> that the applicant "is not determined by the Minister ... to be likely to become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community". The Minister had relied on that criterion in refusing applications for visas made by members of the Hells Angels Motorcycle Club. After those refusals were set aside by the Federal Court in 1991,<sup>26</sup> there was "close scrutiny of the decision-making regime for the exclusion of persons ... who may represent a danger to the Australian community".<sup>27</sup> The result was s 180A.<sup>28</sup> Section 180A, like s 501(6)(d)(iv), included separate limbs for persons who "incite discord" (s 180A(1)(b)(iii)) and persons who "represent a danger" (s 180A(1)(b)(iv)). In the Second Reading Speech, the Minister for Immigration, Local Government and Ethnic Affairs said that the power under s 180A(1)(b) was intended to be exercised in line with "well-accepted Australian values, such that it

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23 *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 39 [46].

24 *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 679 (emphasis added).

25 *Migration Regulations 1989*, reg 2(1) para (c) of the definition of "public interest criteria" (as in force on 1 October 1991).

26 *Hand v Hell's Angels Motorcycle Club Inc* (1991) 25 ALD 667.

27 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 December 1992 at 4121.

28 Inserted by the *Migration (Offences and Undesirable Persons) Amendment Act 1992* (Cth), s 5.

is aimed at those persons who may regard entry to this country as a means to attack those values".<sup>29</sup> In like terms, the Explanatory Memorandum described s 180A(1)(b)(iv) as applying where a person "*otherwise* represent[s] a danger to the Australian community or part of that community".<sup>30</sup>

34 In 1994, s 180A was renumbered as s 501.<sup>31</sup> In 1998, s 501 was repealed and substituted with a new s 501 as part of a suite of amendments directed to giving the Government "greater control over the entry into, and presence in, Australia of certain non-citizens who are unable to satisfy the Minister that they pass the 'character test'".<sup>32</sup> Changes were said to ensure that "the objective of protecting the Australian community [took] precedence in immigration decision-making".<sup>33</sup>

35 That history reinforces the view that the preferable construction of s 501(6)(d)(iv) is that it is concerned with where, in the event that the person were allowed to enter or to remain in Australia, there is a risk that the person would stir up or encourage dissension or strife in the Australian community, or a segment of that community, of a kind or to a degree that causes relevant harm. It does not include a requirement of intention on the part of the person. The risk need not necessarily result in such harm. But the risk must be such that the dissension or strife that may be incited by the person is of a kind, or to a degree, that causes relevant harm in the Australian community or a segment of that community.

### **Implied freedom of political communication**

36 The concept of representative government in a democracy is of government by the people through their elected representatives or, in constitutional terms, a sovereign power residing in the people, exercised by their elected

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29 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 December 1992 at 4121.

30 Australia, House of Representatives, *Migration (Offences and Undesirable Persons) Amendment Bill 1992*, Explanatory Memorandum at 4 [16] (emphasis added).

31 *Migration Legislation Amendment Act 1994* (Cth), s 83.

32 Australia, Senate, *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1998*, Explanatory Memorandum at 2 [1]; see also 13 [52].

33 Australia, Senate, *Parliamentary Debates* (Hansard), 11 November 1998 at 60.

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representatives.<sup>34</sup> The implied freedom of political communication is an indispensable incident of that system of representative government for which the *Constitution* provides<sup>35</sup> – a system in which electors are able to exercise a free and informed choice when choosing their representatives and, for them to be able to do so, a system in which there is a free flow of political communication. The implied freedom of political communication is also an indispensable incident of the constitutionally prescribed system of responsible government,<sup>36</sup> which facilitates the political accountability of Ministers to the House of Representatives and the Senate.<sup>37</sup>

37 The implied freedom is not a "personal right",<sup>38</sup> is not unlimited and is not absolute.<sup>39</sup> It is a limit on legislative and executive power that invalidates a law that so burdens freedom of communication on governmental or political matters that the impugned law may be taken to affect the system of government for which the *Constitution* provides, a system which depends for its existence upon that freedom.<sup>40</sup>

38 To that end, the implied freedom invalidates a law that impairs or tends to impair the constitutionally prescribed system of representative and responsible government by burdening freedom to communicate on governmental or political

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34 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 548 [17], citing *Australian Capital Television Pty Ltd v The Commonwealth* ("ACTV") (1992) 177 CLR 106 at 137-138.

35 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560, 567; *Unions NSW* (2013) 252 CLR 530 at 548 [17].

36 *Lange* (1997) 189 CLR 520 at 561.

37 *Comcare v Banerji* (2019) 267 CLR 373 at 410 [59] and the authorities cited.

38 ACTV (1992) 177 CLR 106 at 150; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 149; see also 162, 168; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 326-327; *Lange* (1997) 189 CLR 520 at 560; *Levy v Victoria* (1997) 189 CLR 579 at 625-626; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 73-74 [166]; *McCloy v New South Wales* (2015) 257 CLR 178 at 202-203 [30]; *Banerji* (2019) 267 CLR 373 at 395 [20].

39 *Unions NSW* (2013) 252 CLR 530 at 548 [18]-[19].

40 *Unions NSW* (2013) 252 CLR 530 at 548-549 [19]. See also *Levy* (1997) 189 CLR 579 at 594; *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 564-565 [75]-[77].

matters unless the law has a purpose compatible with that system and is reasonably appropriate and adapted to advancing that purpose in a manner that is consistent with that system.

- 39       Where a law is alleged to infringe the implied freedom of political communication, the first question is: does the impugned law effectively burden freedom of communication about governmental or political matters in its terms, operation or effect? Next, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? And third, is the impugned law reasonably appropriate and adapted to advance that purpose in a manner that is compatible with the maintenance of that constitutionally prescribed system of government?<sup>41</sup> If the first question is answered "yes", and if either of the second or third questions is answered "no", the law is invalid.

*Effectively burden?*

- 40       The first question asks whether s 501(6)(d)(iv) of the *Migration Act* effectively burdens freedom of communication about governmental or political matters in its terms, operation or effect.<sup>42</sup> The phrase "effectively burdens" means "nothing more complicated than that the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications".<sup>43</sup> That inquiry requires consideration as to how the impugned law – in its terms, operation or effect – affects the free flow of communication on

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41   See the test identified in *Lange* (1997) 189 CLR 520 at 561-562, 567-568, as modified and refined in *Coleman v Power* (2004) 220 CLR 1 at 50 [93], 51 [95]-[96], *McCloy* (2015) 257 CLR 178 at 193-195 [2] and *Brown v Tasmania* (2017) 261 CLR 328 at 359 [88], 363-364 [104], 375-376 [156], 398 [236], 413 [271], 416-417 [277]-[278], 431-433 [316]-[325].

42   *Coleman* (2004) 220 CLR 1 at 30 [27], 49 [91]; *Unions NSW* (2013) 252 CLR 530 at 553 [35]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 578-579 [146]; *Brown* (2017) 261 CLR 328 at 360 [90], 383 [181], 458 [408]; *Clubb v Edwards* (2019) 267 CLR 171 at 186 [5(1)]; *Farm Transparency* (2022) 277 CLR 537 at 587-588 [154]; *Babet v The Commonwealth* (2025) 99 ALJR 883 at 895 [38], 900-901 [72], 907 [104]; 423 ALR 83 at 95, 102, 111.

43   *Monis v The Queen* (2013) 249 CLR 92 at 142 [108]; *Unions NSW* (2013) 252 CLR 530 at 574 [119]; *McCloy* (2015) 257 CLR 178 at 230-231 [126]; *Brown* (2017) 261 CLR 328 at 382-383 [180].

governmental or political matters generally.<sup>44</sup> The free flow of political communication is "not simply a two-way affair between electors and government or candidates";<sup>45</sup> it extends to communication between electors and between electors and other persons who may seek to influence the ultimate choice of the people as to whom they elect as their representatives.

41 Section 501(3)(a) read with s 501(6)(d)(iv) permits the Minister to deny a person a visa on the basis that, in the event that the person were allowed to enter or to remain in Australia, there is a risk that the person would stir up or encourage dissension or strife in the Australian community, or a segment of that community, of a kind or to a degree that causes harm in the Australian community or a segment of that community.

42 In assessing the legal operation or practical effect of the impugned law, there was much focus on the fact that Ms Farmer's right to enter Australia, or to enter and remain in Australia, was contingent on her satisfying the conditions in the *Migration Act*, including s 501(6)(d)(iv) read with ss 65 and 501(3). It must be accepted that Ms Farmer has no existing right or liberty to enter or remain in Australia, absent a visa.<sup>46</sup> But that is not the only legal operation or practical effect of s 501(6)(d)(iv).

43 In any application of s 501(6)(d)(iv) to keep a person out of Australia, or to prevent them remaining in Australia, because there is a risk that the person would stir up or encourage dissension or strife on political matters in the Australian community, or a segment of that community, of a kind or to a degree that causes relevant harm, the inhibition or limiting of the making and receiving of political communications is inevitable. Section 501(6)(d)(iv) diminishes or limits the ability of a segment of the Australian community to participate in political discussion and debate. For example, in this case, a segment of the Australian community is prevented from attending speaking events with the speaker in person about political matters that may be relevant and interesting to that segment of the Australian community, asking live questions of the speaker in person,

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44 *Unions NSW* (2013) 252 CLR 530 at 551 [30], 553 [35]. See also *Wotton v Queensland* (2012) 246 CLR 1 at 15 [25], [28]-[29], 31 [80].

45 *Unions NSW* (2013) 252 CLR 530 at 551 [30].

46 cf *Levy* (1997) 189 CLR 579 at 622; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 223-224 [105]-[107], 247 [186]-[187], 298 [337], 303 [354]; *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 391-392 [155], 396-397 [171]-[172], 398 [174]; *Babet* (2025) 99 ALJR 883 at 901 [73], 906 [97], 921 [170], 929 [205]; 423 ALR 83 at 103, 109-110, 129, 139-140.

and attending private and VIP events with the speaker to speak about political matters in person. Moreover, the communication of controversial political views by the speaker in Australia likely would have generated further political communication between people who attended the events and by people who did not attend the events, including as a result of media reporting and conversations between family members and friends – all of which is prevented or limited by the operation of s 501(6)(d)(iv). Those examples are not exhaustive. In each of those cases, the free flow of communication between electors and between electors and the non-citizen is impaired.<sup>47</sup>

44 Preventing a person's entry to Australia *because* of what they will or may say on political matters practically affects or impedes the freedom of members of the Australian community to communicate (an element of which is the freedom to communicate in person) which has also enjoyed special recognition at common law.<sup>48</sup> Section 501(6)(d)(iv) imposes a meaningful constraint on freedom of political communication.<sup>49</sup> That burden on freedom of political communication is obvious and not insubstantial.

45 None of this analysis suggests that the implied freedom of political communication is a personal right. What is important is not that the conduct of an individual is restricted by the challenged law but that the existing freedom to communicate on political matters, and thus the free flow of political communication, is burdened by it. By that law, a segment of the population has its ability to make and receive political communication diminished. None of that analysis is affected by the fact that no one, whether Ms Farmer or anyone with whom she might communicate in Australia, has any right that Ms Farmer enter Australia.

*Mulholland, Ruddick and Babet*

46 The defendants submitted that Ms Farmer's attempt to establish that s 501(6)(d)(iv) imposes a burden on freedom of political communication was "foreclosed by [the] unchallenged authority" of *Mulholland v Australian Electoral*

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47 See *Unions NSW* (2013) 252 CLR 530 at 551 [29]-[30]; *McCloy* (2015) 257 CLR 178 at 201-202 [26]-[27].

48 *Tajjour* (2014) 254 CLR 508 at 545 [28]. See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 31 and the authorities cited at fn 95; *Adelaide City Corporation* (2013) 249 CLR 1 at 31 [43] and the authorities cited; *Monis* (2013) 249 CLR 92 at 128 [60]; *Brown* (2017) 261 CLR 328 at 498 [545].

49 *Brown* (2017) 261 CLR 328 at 378 [162].

*Commission*.<sup>50</sup> No party applied to reopen *Mulholland*. The defendants submitted that *Mulholland* establishes that a statute which confers a right if certain conditions are met cannot impose a burden on freedom of political communication. In this case, the defendants submitted that, because s 65 of the *Migration Act* obliges the Minister to grant a visa if statutory conditions are met, a condition for the grant of a visa which relates to political communication cannot burden freedom of political communication.

47 There are at least three reasons why the defendants' submissions cannot be accepted.

48 First, the general proposition advanced – that no grant of a statutory right on conditions being met can ever amount to a burden on freedom of political communication even if one or more of the conditions relates to or affects whether the applicant for the right can, will, or may participate in political debate – overlooks that the implied freedom is concerned with the free flow of political communication<sup>51</sup> and the need to consider the practical effect or operation of a particular law on that free flow of political communication,<sup>52</sup> including its effect on the recipient or audience of the political communication.

49 Second, none of *Mulholland*, *Ruddick v The Commonwealth*,<sup>53</sup> or *Babet v The Commonwealth*<sup>54</sup> support the wider proposition now advanced. Each of *Mulholland*, *Ruddick* and *Babet* concerned an entitlement to engage in a particular form of political communication – to have a candidate's political party affiliation appear on the ballot paper. The ability to engage in that particular form of political communication was granted by statute. The statutory entitlement to have candidates' party affiliation appear on the ballot paper was available only if certain conditions were met. It existed only by and under the statute – the *Commonwealth Electoral Act 1918* (Cth).

50 As McHugh J explained in *Mulholland*, the challenged provisions in that case were "the conditions of the entitlement to have a party's name placed on the ballot-paper", and those conditions did not "burden rights of communication on political and government matters that exist[ed] independently of

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50 (2004) 220 CLR 181.

51 *Unions NSW* (2013) 252 CLR 530 at 551 [27], 571 [104].

52 See fns 43 and 44 above.

53 (2022) 275 CLR 333.

54 (2025) 99 ALJR 883; 423 ALR 83.

the entitlement".<sup>55</sup> Any political communication that was involved in the delivery and lodging of a ballot paper resulted solely from the Australian Electoral Commission's statutory obligation to hold elections and deliver ballot papers in a prescribed form.<sup>56</sup>

51 *Ruddick* and *Babet* also concerned provisions of the *Commonwealth Electoral Act* that were the conditions of, and could not be considered to be independent of, the entitlement of a candidate to have their party affiliation appear on the ballot paper.<sup>57</sup> The conclusion that there was no burden on freedom of political communication was reached in light of the specific legal and factual context of each case. By contrast, this case does not involve an entitlement to participate in political communication which arises only by or under the statute. On the contrary, as has been explained, members of the Australian community have freedom to communicate, which includes meeting and communicating in person, and that freedom is burdened by s 501(6)(d)(iv).

52 Third, in *Mulholland*, there was no submission that the challenged law burdened the ability of parties or candidates to use their party name beyond the context of the ballot paper.<sup>58</sup> In *Ruddick* and *Babet*, the plaintiffs submitted that there was such a practical burden.<sup>59</sup> But in *Ruddick*, the plaintiff could not establish that candidates' freedom to communicate their party affiliation was otherwise impaired.<sup>60</sup> And in *Babet*, the issue was not reached because a majority of this Court concluded that it was unnecessary to consider the plaintiffs' application to

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55 (2004) 220 CLR 181 at 223 [105]; see also 223 [107], 247 [186]-[187], 298 [337], 303 [354].

56 (2004) 220 CLR 181 at 223 [105].

57 *Ruddick* (2022) 275 CLR 333 at 396-397 [171]-[172], 398 [174]; *Babet* (2025) 99 ALJR 883 at 897 [55], 906 [97], 921 [170], 928 [201], 929 [205], 932 [222], 938 [255]; 423 ALR 83 at 98, 109-110, 129, 138, 139-140, 143, 151.

58 (2004) 220 CLR 181 at 182-183, 191 [17], 195-196 [28]-[30], 200 [41], 202 [45(3)], 218 [90], 247 [186]-[187], 293 [321], 303 [352].

59 *Ruddick* (2022) 275 CLR 333 at 367-368 [78]; *Babet* (2025) 99 ALJR 883 at 907 [103]; 423 ALR 83 at 111.

60 (2022) 275 CLR 333 at 377-378 [109].



reopen *Mulholland* in circumstances where any burden imposed by the challenged law was justified.<sup>61</sup>

*Legitimate purpose*

53 The next question is whether the purpose of the law is constitutionally legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of government.

54 The object or purpose of a law is what the law is designed to achieve in fact, which is akin to what mischief the law is designed to address.<sup>62</sup> As we have seen from the extrinsic materials and the legislative history,<sup>63</sup> s 501(6)(d)(iv) is part of a suite of provisions intended to serve a protective purpose.<sup>64</sup> It seeks to protect the Australian community from a risk that a person who is not part of that community would stir up or encourage dissension or strife on political matters in the Australian community, or a segment of that community, of a kind or to a degree that is harmful to that community or segment.

55 That purpose is legitimate in the sense that it is compatible with the preservation of the integrity of the system of representative and responsible government. Consistent with the maintenance of the integrity of that system, the legislature has a wide power to determine the circumstances in which a non-citizen should be permitted to enter Australia.<sup>65</sup> While that legislative power is subject to the implied freedom of political communication, and while it may be accepted that Parliament cannot use this power for the purpose of curbing political

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61 (2025) 99 ALJR 883 at 897 [55]-[56], 932 [223], 934 [235], 939 [259]; cf 907 [103], 929 [205]; 423 ALR 83 at 98, 143-144, 146, 152; cf 111, 139-140.

62 *McCloy* (2015) 257 CLR 178 at 232 [132], citing *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 394 [178].

63 See [33]-[35] above.

64 See also, in relation to s 501 of the *Migration Act* more broadly, *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 348-349 [52], 357 [89], 359 [94]; *ENT19* (2023) 278 CLR 75 at 99 [69] and the authorities cited at fn 84 including *Djalil* (2004) 139 FCR 292 at 310 [68].

65 *Constitution*, s 51(xix) and (xxvii); *Falzon* (2018) 262 CLR 333 at 348-349 [52], 357 [89], 358 [92], 359 [94]; *Love v The Commonwealth* (2020) 270 CLR 152 at 190 [74], 209 [130], 217-218 [167], 239-240 [244]-[245].

disagreement and debate inside Australia,<sup>66</sup> that is not the purpose or practical effect of s 501(6)(d)(iv) when it is construed in the manner described.

*Reasonably appropriate and adapted*

56 That leaves the third question: can the law be justified? In this case, is s 501(6)(d)(iv) reasonably appropriate and adapted to advance that legitimate protective purpose in a manner that is compatible with the maintenance of the constitutionally prescribed system of government which the freedom exists to protect? The answer is "yes".

57 Where, as here, the impugned law effectively burdens freedom of political communication and does so in pursuit of a legitimate purpose, the question is whether the means (the manner in which the law pursues that purpose) are reasonably appropriate and adapted to advance that purpose in a manner that is compatible with the maintenance of the constitutionally prescribed system of government.<sup>67</sup> In addressing this question, the nature and extent of the burden are relevant.<sup>68</sup> Here, although the burden is obvious and not insubstantial, it is indirect. Any effect on political communication is the indirect consequence of the Minister refusing to grant a person a visa to enter Australia. In its legal operation, the provision is viewpoint-neutral. However, in its practical operation the provision is likely to impact differentially on persons expressing "non-mainstream" political views, those being views that are more likely to incite "discord" which is of a kind or to a degree that causes the requisite harm.

58 Ms Farmer contended that, even if the purpose of s 501(6)(d)(iv) were to prevent harm to the Australian community of the kind described, s 501(6)(d)(iv) could not be justified because the threshold imposed by s 501(6)(d)(iv) is too low and, further, there are two "alternative, reasonably practicable, means of achieving the same object" with "a less restrictive effect on the freedom":<sup>69</sup> first, s 501 without s 501(6)(d)(iv), on the basis that s 501 would still have s 501(6)(d)(v), which Ms Farmer argued is sufficient to prevent harm to the Australian community

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66 See *Coleman* (2004) 220 CLR 1 at 53 [102], 54 [105], 79 [199], 91 [239], 98 [255].

67 See *Babet* (2025) 99 ALJR 883 at 896-897 [49], 901 [72], 936 [242]; 423 ALR 83 at 97, 102-103, 148.

68 *Brown* (2017) 261 CLR 328 at 367 [118], 389-390 [201], 433 [325] and the authorities cited.

69 *Brown* (2017) 261 CLR 328 at 371-372 [139], citing *Unions NSW* (2013) 252 CLR 530 at 556 [44].

from strife, dispute, disharmony and dissension; and second, the original formulation of s 180A(1)(b)(iii), which required the Minister to be satisfied that the person *would* incite discord, not merely that there was a *risk* that the person would do so. Each of those contentions must be rejected.

59 The first of Ms Farmer's contentions about s 501(6)(d)(iv) imposing too low a threshold falls away. On the proper construction of the provision, a person does not fail the character test in s 501(6)(d)(iv) if, in the event that the person were allowed to enter or remain in Australia, there is merely a risk that the person would cause *disagreement or debate* in the Australian community, or a segment of it, without there being a risk of inciting dissension or strife of a kind or to a degree (nature or effect) that causes the requisite harm.<sup>70</sup>

60 The second of Ms Farmer's contentions – that there are "alternative, reasonably practicable, means of achieving the same object" with "a less restrictive effect on the freedom" – also fails. There is no obvious and compelling, reasonably practicable means of achieving the purpose of s 501(6)(d)(iv) to the same extent which has a less restrictive effect on the freedom. Contrary to Ms Farmer's submission, s 501(6)(d)(v) is not less restrictive of the freedom; rather, it is directed to harm of a different character. The second "alternative" argued by Ms Farmer – namely, requiring a finding that the person "would" incite discord – would not achieve the purpose of s 501(6)(d)(iv) to the same extent because "would" implies that something must occur, thereby exposing the Australian community, or a segment of it, to an appreciably greater risk of harm. Similarly, Ms Farmer's further contention that, because "incite" does not require any intention or mental element, it places a significant unnecessary burden on freedom of political communication on the basis that the uncontrollable reaction of others can and does cause a person to fail the character test must be rejected. Not only would such a requirement be impractical, but it would not achieve the purpose of s 501(6)(d)(iv) to the same extent because it would again expose the Australian community, or a segment of it, to a greater risk of harm.

61 Section 501(6)(d)(iv) is justified because the nature and extent of the burden on political communication do not outweigh the provision's legitimate purpose.

### **Challenge to the Decision**

62 The content and structure of the Decision have been addressed.<sup>71</sup> Reading the Decision fairly, and as a whole, the Minister did not misconstrue

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70 See [24]-[35] above.

71 See [11]-[21] above.

s 501(6)(d)(iv). The Minister considered the risk of Ms Farmer inciting discord of a kind or to a degree that causes the requisite harm, rather than, as Ms Farmer contended, merely considering the prospect that Ms Farmer's "controversial" views might result in disagreement or debate.

63 The Minister found that Ms Farmer's comments amounted to "extremist and inflammatory comments towards Muslim, Black, Jewish and LGBTQIA+ communities which generate controversy and hatred".<sup>72</sup> The Minister then examined material that he found "collectively describe[d] the causal link between individuals who promote and encourage right wing extremism via online platforms and how this supports greater intent and capacity to [undertake] violent acts". The Minister was satisfied that that material "provide[d] well evidenced and consistent assessments of the potential for persons who espouse ideologically motivated extremist views to pose a risk of inciting discord in the Australian community".<sup>73</sup> Those findings refute any suggestion that the Minister thought "discord" meant no more than disagreement or debate.

64 The Minister then considered the risk posed by Ms Farmer's planned visit and found that it could "lead to increased hostility and violent or radical action", that it would "have the potential to galvanise discord", and that "the normalisation of controversial rhetoric that dehumanises and targets specific communities has the propensity to galvanise individuals and incite discord in the community".<sup>74</sup> Those findings underscore that the Minister's concern about Ms Farmer expressing her views in Australia was that this could lead not merely to disagreement or debate but, as he put it, to "hostility and violent or radical action".

65 The Minister's findings describe a state of affairs involving "hostility and violent or radical action" incited by Ms Farmer expressing views whilst in Australia that dehumanise and target specific communities and confirm that the Minister considered "incite discord" to refer to conduct of a kind or to a degree that causes the requisite harm to the Australian community or a segment of the Australian community.

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72 See [12] above.

73 See [13]-[15] above.

74 See [18] above.

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## **Conclusion**

66           The answers to the questions of law stated for the opinion of the Full Court are accordingly to be answered as has already been indicated.

EDELMAN J.

**A self-evident truth**

67 "[T]he freedom of some must at times be curtailed to secure the freedom of others. ... We cannot remain absolutely free, and must give up some of our liberty to preserve the rest. ... What then must the minimum be?"<sup>75</sup>

68 In every civilised society there is a minimum baseline of individual liberty with which political communication by others is not free to interfere. This principle of basic reason is reflected in common law and constitutional jurisprudence. For instance, there is no freedom to make a serious threat to kill an individual in order to communicate a political message.<sup>76</sup> There is no freedom to commit a battery upon a politician in order to communicate a political message.<sup>77</sup> There is no freedom to trespass on the land of another in order to communicate a political message.<sup>78</sup>

69 The principal issue in this special case should be decided by application of this principle of basic reason. That issue is whether provisions of the *Migration Act 1958* (Cth), concerning the exercise of the Minister for Home Affairs' power to admit aliens to Australia, impose a burden on freedom of political communication. It should be a self-evident truth that a freedom of political communication can only be burdened if the freedom exists in the first place. If there is no freedom to engage in an act of political communication, then there is no freedom that can be burdened. A law that restricts actions which people are not free to take cannot impose any burden upon a freedom of political communication. This remains a self-evident truth even if the witnessing of, or participation in, that political communication by assault, battery, or trespass were something that was desired by 10 other people, 100 other people, 1,000 other people, or even 10,000 other people.

70 Despite this self-evident truth, Ms Owens Farmer (as she describes herself in her application for a constitutional or other writ) claims that although she is an alien with no freedom to enter Australia, the implied freedom of political communication in the *Constitution* invalidates a law in the *Migration Act* which permits the Minister a discretion to refuse to *grant* aliens entry to Australia due to

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75 Berlin, "Two Concepts of Liberty", in Hardy and Hausheer (eds), *The Proper Study of Mankind: An Anthology of Essays* (1998) 191 at 198.

76 See *Watts v United States* (1969) 394 US 705 at 707.

77 *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 614 [241]. See also *Virginia v Black* (2003) 538 US 343 at 358-360.

78 *Levy v Victoria* (1997) 189 CLR 579 at 625-626.

a reasonable suspicion of a risk that the person would "incite discord in the Australian community or in a segment of that community".<sup>79</sup> In other words, Ms Owens Farmer claims that the implied freedom of political communication protects a freedom that (absent a visa) neither she nor any other alien holds, therefore precluding any liberty of anyone else in Australia to engage with her to the extent that such engagement relies upon her having a freedom to be present in Australia.

71 Ms Owens Farmer asserts that the implied freedom of political communication in the *Constitution* affords her a freedom from laws that restrict her entry to Australia to communicate political messages described by the Minister as involving "anti-Semitic" and "[I]slamophobic" views and "extremist and inflammatory comments towards Muslim, Black, Jewish and LGBTQIA+ communities which generate controversy and hatred". As the Minister explained, Ms Owens Farmer was described by the perpetrator of the terror attack on two mosques in Christchurch, New Zealand, where 51 people were killed and 35 others were injured, as the "person who influenced them the most to carry out the attack".

72 Ms Owens Farmer also asserts that the implied freedom of political communication affords a freedom to others in Australia to listen to her and to engage with her political message. Ms Owens Farmer is not content with the freedom, untouched by the *Migration Act*, for her to communicate the same message by audio-visual transmission. She asserts that provisions of the *Migration Act*, which concern the Minister's discretion to refuse her liberty to enter Australia, burden her ability to engage in political communication in person in Australia.

73 Ms Owens Farmer's submissions should be emphatically rejected. No member of Australian society has a liberty to engage in acts of assault, battery, or trespass in order to communicate a political message. Consequently, no other member of Australian society has a liberty to watch, or participate in, acts of assault, battery, or trespass. So too, no alien has a liberty to enter Australia and no member of Australian society has a liberty to hear an alien speak *in person*, or a liberty to engage with an alien *in person*, if the alien has not been permitted entry to Australia. The implied freedom of political communication is not engaged by a law that permits an alien, such as Ms Owens Farmer, to be denied entry to Australia on the basis that there is a risk that the alien would "incite discord in the Australian community or in a segment of that community".

### **A constitutional implied right or implied freedom of political communication?**

74 Sections 7 and 24 of the *Constitution* require that members of Parliament be "directly chosen by the people". One implication from those words is in the nature of an explication, an implication which draws its content primarily from the

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79 *Migration Act 1958* (Cth), s 501(6)(d)(iv), read with ss 501(3)(a), 501(3)(c).

words. That implication is that the Commonwealth Parliament cannot, unless reasonably necessary, burden either: (i) the quality of information that is intended to affect, or likely to affect, voting choice; or (ii) the people who are able to exercise that choice in Commonwealth elections and referenda.<sup>80</sup>

75 In *Lange v Australian Broadcasting Corporation*,<sup>81</sup> this Court recognised a separate, broader implication which draws more heavily from context and structure than from the words "directly chosen by the people" in ss 7 and 24 of the *Constitution*. The separate implication, an implicature which relies heavily on the underlying constitutional notion of representative democracy, is broader than notions of electoral choice or of the electoral franchise.<sup>82</sup> The implicature is that an Australian Parliament cannot enact either laws with an illegitimate end (purpose) of impairing free political communication or laws with the effect of impairing free political communication which adopt disproportionate means to achieve a legitimate purpose.

76 The constitutional implication of a freedom of political communication was said by this Court in *Lange*<sup>83</sup> to require that the following question be asked: "does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?" The emphasis upon a burden on *freedom* of political communication, rather than upon political communication generally, reflected words that had been carefully chosen by a unanimous Court. Even in the United States, where there is an express constitutional protection of freedom of speech generally, "[t]he First Amendment 'does not forbid the abridging of speech ... it does forbid the abridging of the *freedom* of speech'".<sup>84</sup>

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80 See *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 20 [24], 58-59 [157]-[161], 118 [372]-[374]; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 50-51 [34], 60-61 [61]-[63], 67-68 [85]-[87], 106-107 [244], 121-122 [293]; *Ruddick v The Commonwealth* (2022) 275 CLR 333. See also *Babet v The Commonwealth* (2025) 99 ALJR 883 at 912 [132], 917-918 [157]-[160], 925 [184]; 423 ALR 83 at 117, 124-125, 134.

81 (1997) 189 CLR 520 ("*Lange*").

82 See *Babet v The Commonwealth* (2025) 99 ALJR 883 at 912 [132]; 423 ALR 83 at 117.

83 (1997) 189 CLR 520 at 567 (footnote omitted).

84 *Fulton v City of Philadelphia, Pennsylvania* (2021) 141 S Ct 1868 at 1896, fn 28, quoting Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948) at 19 (emphasis added).



77 The Court in *Lange* quoted from Sir Owen Dixon, saying that "[t]he anterior operation of the common law in Australia is not just a dogma of our legal system, an abstraction of our constitutional reasoning. It is a fact of legal history."<sup>85</sup> The constitutional implication builds upon the freedom to communicate which the common law respects and protects, being "that [existing] freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors".<sup>86</sup> Since the protection afforded by the constitutional implication builds only upon existing freedom by constraining legislative power, the protection afforded by the constitutional implication does not create any individual rights, nor does the protection impose any duties upon the body politic.<sup>87</sup>

78 In a decision delivered later the same month as *Lange*, McHugh J (whose reasoning prior to *Lange* had been heavily drawn from in *Lange*<sup>88</sup>) explained why, if protesters had no liberty to enter a hunting area, there could be no burden upon any freedom of political communication if they were prevented from entering the area to protest.<sup>89</sup>

"The constitutional implication does not create rights. It merely invalidates laws that improperly impair a person's freedom to communicate political and government matters relating to the Commonwealth to other members of the Australian community. It gave the protesters no right to enter the hunting area. That means that, unless the common law or Victorian statute law gave them a right to enter that area, it was the lack of that right, and not the [impugned law], that destroyed their opportunity to make their political protest."

79 The operation of the implied freedom of political communication upon the baseline of constitutionally consistent<sup>90</sup> common law rules is not merely a matter of constitutional precedent. It is a matter of basic and fundamental principle. This basic principle does not even require a denial of the ovine bleating of political communication fundamentalists that Parliament should not disproportionately

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85 *Lange* (1997) 189 CLR 520 at 564, quoting Dixon, "Sources of Legal Authority", in *Jesting Pilate and Other Papers and Addresses* (1965) 198 at 199.

86 *Lange* (1997) 189 CLR 520 at 560.

87 *Lange* (1997) 189 CLR 520 at 560.

88 (1997) 189 CLR 520 at 570-571, quoting *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 264.

89 *Levy v Victoria* (1997) 189 CLR 579 at 625-626.

90 *Lange* (1997) 189 CLR 520 at 564-565.

burden *any* act of political communication, even an act that is independently unlawful. The basic principle simply denies that such a controversial proposition is constitutionalised. The basic principle rejects the bovine assertion that a *necessary*<sup>91</sup> prerequisite of representative and responsible government requires the proportionality of laws that burden even independently unlawful acts of political communication (acts which are not free).

80 Despite the inconsistency of such a constitutional restraint with basic principle, there have nevertheless been statements in this Court after *Lange* which might be taken to suggest that the implied freedom of political communication can lead to the invalidation of a law that burdens only "political communication", treating the "freedom of political communication" and "political communication" as concepts with the same content.<sup>92</sup> Such statements might be, as in the instance of a decision to which I was a party,<sup>93</sup> no more than semantic slips of the pen or on the keyboard. But they might also be carefully chosen words, attempts to expand the freedom of political communication, beyond the extent to which the implied freedom had been recognised in *Lange*, to encompass even independently unlawful acts of political communication which are not free. Such an expansion would be a considerable, unjustifiable, and unwarranted expansion of judicial power beyond even that contemplated by the First Amendment to the United States Constitution.

81 Almost from the moment of its unanimous acceptance by this Court in *Lange*, the broader implied freedom of political communication, as an implicature, has been controversial. The same month that the decision in *Lange* was delivered, Dawson J remarked that "[t]he freedom is often said to be implied in the Constitution but I do not think that it really is". By this, his Honour meant that the freedom of political communication recognised by the *Constitution* was only that which arose, as an explicature, from the words of ss 7 and 24, which his Honour described as speaking "in terms of representatives being directly chosen by the people at periodic elections". His Honour added that it was "clear ... that the

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91 *Lange* (1997) 189 CLR 520 at 561.

92 See, for instance, *Hogan v Hinch* (2011) 243 CLR 506 at 544 [50]; *Clubb v Edwards* (2019) 267 CLR 171 at 212 [118], 215 [127]-[128], 229 [175]-[176], 299-300 [368]-[369], 301-302 [377], 304 [386]; *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 36-37 [92]; *Unions NSW v New South Wales (Unions NSW [No 3])* (2023) 277 CLR 627 at 644 [30]-[31]; *Babet v The Commonwealth* (2025) 99 ALJR 883 at 939 [258]; 423 ALR 83 at 152; *Ravbar v The Commonwealth* (2025) 99 ALJR 1000 at 1017-1018 [32], 1098 [429]; 423 ALR 241 at 256, 365.

93 *Gerner v Victoria* (2020) 270 CLR 412 at 426-427 [24]-[25].

freedom does not rest upon an implication drawn from any underlying or overarching concept of representative government".<sup>94</sup>

82 These post-*Lange* remarks by Dawson J were not the first expressions of scepticism about an implied freedom of political communication that, as an implicature, is based more heavily in context than in text.<sup>95</sup> And they were far from the last.<sup>96</sup> Debate about the existence and boundaries of the implicature recognised in *Lange* becomes even more important as the implicature expands. Ultimately, the recognition and boundaries of implications are a matter of judgment. And a freedom of judicial communication and critique is essential for the coherent expression of that judgment in the long run.

83 In the exercise of the judgment that is required for the recognition of an implication in a written document, the more that an implication shades from explicature to implicature, and (consequently) the less that the implication relies upon any textual basis, the stronger must be the need for the implication in order for it to be recognised. Hence, in *Lange*<sup>97</sup> this Court said that the implied freedom of political communication "is limited to what is necessary for the effective operation of th[e] system of representative and responsible government provided for by the Constitution". That necessity supported the recognition of an implicature with two significant limits. One of the limits to the implicature was the concept of

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94 *Levy v Victoria* (1997) 189 CLR 579 at 607.

95 See also *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 569, 579, 615, 636; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 180-186, 227-233; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 189-190, 193-194, 195-207; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 257-258, 259; *Langer v The Commonwealth* (1996) 186 CLR 302 at 324; *McGinty v Western Australia* (1996) 186 CLR 140 at 234-236, 291.

96 See, eg, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 330-339 [337]-[348]; *Monis v The Queen* (2013) 249 CLR 92 at 181-184 [243]-[251]; *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 95 [249], 111-114 [298]-[304]; *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 398 [174]; *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 623-624 [270]; *Babet v The Commonwealth* (2025) 99 ALJR 883 at 929 [205]-[206]; 423 ALR 83 at 139-140; *Ravbar v The Commonwealth* (2025) 99 ALJR 1000 at 1065-1071 [272]-[295]; 423 ALR 241 at 321-328.

97 (1997) 189 CLR 520 at 561.

proportionality,<sup>98</sup> which was later developed with a structure that aimed to provide transparent analysis. Another was that the implicature was concerned only with burdens upon *free* political communication.

84 The existence of those two limits may have been the basis for members of this Court, such as McHugh J, to depart from a view that "the reasoning in *Nationwide News*, *Australian Capital Television*, *Theophanous* and *Stephens* in so far as it invokes an implied principle of representative democracy [is] fundamentally wrong and [is] an alteration of the Constitution without the authority of the people under s 128 of the Constitution".<sup>99</sup>

85 The abolition of either or both of the limits that constrain the constitutional implication as recognised in *Lange* would be contrary to principle and precedent because it would expand the implied freedom of political communication beyond that which is necessary for the effective operation of representative and responsible government. The abolition would also undermine the authority of this Court. The unanimous decision in *Lange* was described as a "major miracle explicable only by divine interference with the forces of nature",<sup>100</sup> by which this Court distanced itself from less justifiable aspects of decisions that had sparked a "political storm" while nevertheless confirming the implied freedom.<sup>101</sup> The more that this Court were to depart from the limits recognised in *Lange*, the more that it would become necessary to heed the words of Higgins J, said in the earliest years of the existence of this Court, that "[n]othing would tend to detract from the influence and the usefulness of this Court more than the appearance of an eagerness to sit in judgment on Acts of Parliament, and to stamp the Constitution with the impress which we wish it to bear".<sup>102</sup>

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98 *Lange* (1997) 189 CLR 520 at 562. See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 158.

99 *McGinty v Western Australia* (1996) 186 CLR 140 at 235-236.

100 Zines, "Legalism, realism and judicial rhetoric in constitutional law" (2002) 5 *Constitutional Law and Policy Review* 21 at 25.

101 Lee, "The Implied Freedom of Political Communication", in Lee and Winterton (eds), *Australian Constitutional Landmarks* (2003) 383 at 392, 401-402.

102 *Attorney-General for NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 590.

## The implied freedom of political communication and the aliens power

### *The aliens power and the lack of any freedom to enter Australia*

86 On the most extreme view of the aliens power in s 51(xix) of the *Constitution*, that power effectively sits outside the rest of the *Constitution* as a potentially unique power for the Commonwealth Parliament to determine *for itself* "who has and who does not have the legal status of alienage"<sup>103</sup> and to "[specify] the legal consequences of that legal status".<sup>104</sup> In other words, on that extreme view it is for the Commonwealth Parliament to "create and define the concept of ... alienage".<sup>105</sup> Whether or not any member of this Court could be taken to have intended to express that extreme view, or some variant of it,<sup>106</sup> "[e]veryone [else] agrees that the term 'aliens' does not mean whatever Parliament wants it to mean".<sup>107</sup> "Alien" is a constitutional term with a constitutional meaning and constitutional boundaries of operation.<sup>108</sup>

87 Putting to one side any issues concerning the application of the aliens power to persons who are refugees or owed obligations of protection by the Australian body politic,<sup>109</sup> one premise of the aliens power is that an alien has no liberty to enter Australia. That premise has a long history. In 1685, Jeffreys LCJ said that the "king had an absolute power to forbid foreigners ... from coming within his dominions; both in times of war and in times of peace, according to his royal will and pleasure".<sup>110</sup> In 1760, Vattel wrote that an alien "cannot then settle by a full right" but "ought to demand the permission of doing it of the superior of the place;

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103 *Love v The Commonwealth* (2020) 270 CLR 152 at 210 [132]. See also at 170-171 [5].

104 *Love v The Commonwealth* (2020) 270 CLR 152 at 193 [84].

105 *Love v The Commonwealth* (2020) 270 CLR 152 at 170-171 [5]. See also at 220 [172].

106 That Parliament can define the constitutional meaning of "alien" subject to limited exceptions: compare *Jones v The Commonwealth* (2023) 280 CLR 62 at 109-110 [126]-[127].

107 *Singh v The Commonwealth* (2004) 222 CLR 322 at 329 [5]. See also *Pochi v Macphee* (1982) 151 CLR 101 at 109, 112, 116.

108 *Jones v The Commonwealth* (2023) 280 CLR 62 at 108-109 [123]-[125].

109 See Vattel, *The Law of Nations* (1760), vol 1, bk 1, ch 19 at 98 §231, bk 2, ch 9 at 161 §125.

110 *East India Co v Sandys* (1685) 10 ST 371 at 530.

and if it is refused, it is his place to submit".<sup>111</sup> In 1765, Blackstone wrote that "it is left in the power of all states, to take such measures about the admission of strangers, as they think convenient".<sup>112</sup> In 1838, the Privy Council described the "supreme power of every state" as including a power to make laws for the exclusion of a foreigner.<sup>113</sup> In 1854, in a passage later endorsed by the Supreme Court of the United States,<sup>114</sup> Phillimore said that it was a "received maxim of International Law, that the Government of a State may prohibit the entrance of strangers into the country".<sup>115</sup> By 1946, there were centuries of support for the remark by Scott LJ that "[e]very alien in the United Kingdom is here only because his presence has been licensed by the King".<sup>116</sup>

88        The long history of this basic premise in the domestic law of the United Kingdom and in international law was recognised in Australian law by the Privy Council in 1891. In *Musgrove v Chun Teeong Toy*,<sup>117</sup> the Privy Council held that an alien had no liberty, enforceable by action, to enter the colony of Victoria so that an alien could bring no action in relation to a refusal of permission to enter. That decision was reaffirmed by the Privy Council, on appeal from Canada, in 1906.<sup>118</sup> The same year, in Australia, this basic premise was held to inform the application of the aliens power in s 51(xix). Although the application of the power to Pacific Islanders who were British subjects is a stain on the jurisprudence of this Court,<sup>119</sup> Griffith CJ was undoubtedly correct to affirm the centuries of acceptance of this basic premise when he said that the aliens power "must surely, if it includes

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111 Vattel, *The Law of Nations* (1760), vol 1, bk 1, ch 19 at 98 §230.

112 Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 7 at 251.

113 *In re Adam* (1838) 1 Moo PC 460 at 471 [12 ER 889 at 893].

114 *Nishimura Ekiu v United States* (1892) 142 US 651 at 659. See also *Fong Yue Ting v United States* (1893) 149 US 698 at 705; *Turner v Williams* (1904) 194 US 279 at 289-290.

115 Phillimore, *Commentaries Upon International Law* (1854), vol 1, pt 3, ch 10 at 233 §219.

116 *R v Bottrill* [1947] KB 41 at 51.

117 [1891] AC 272 at 282-283.

118 *Attorney-General for Canada v Cain* [1906] AC 542 at 547. See also *Johnstone v Pedlar* [1921] 2 AC 262 at 276, 283, 296.

119 *Robtelmes v Brenan* (1906) 4 CLR 395 at 403, 415. See Prince, "'Australia's Most Inhumane Mass Deportation Abuse': *Robtelmes v Brenan* and Expulsion of the 'Alien' Islanders" (2018) 5 *Law and History* 117.

anything, include the power to determine the conditions under which aliens may be admitted to the country".<sup>120</sup> In 1992, in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,<sup>121</sup> Brennan, Deane and Dawson JJ (with whom Mason CJ<sup>122</sup> and Gaudron J<sup>123</sup> agreed on this point) said that the vulnerability of an alien to exclusion from Australia "flows from both the common law and the provisions of the Constitution".

89 It would be a judicial revolution now for this Court to depart from this basic premise of s 51(xix).

*The interaction of the aliens power and the implied freedom*

90 An alien who is present in Australia is not an outlaw.<sup>124</sup> Other than in times of war, and subject to their liability to be removed from Australia in accordance with the proper legal process,<sup>125</sup> an alien who is present in Australia is entitled to the same fundamental rights as others in Australia.<sup>126</sup> The constitutional power to specify the legal consequences for a person who is an alien within the meaning of s 51(xix) of the *Constitution* is confined by limits in the *Constitution* in the same way as other heads of power. One of those limits is the implied freedom of political communication.

91 Nevertheless, the implied freedom of political communication cannot rise higher than the independent freedoms of an alien; it cannot create freedoms where none exist. Hence, while an alien is outside Australia, the basic premise that an alien has no liberty to enter Australia means that the implied freedom of political

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120 *Robtelmes v Brenan* (1906) 4 CLR 395 at 404.

121 (1992) 176 CLR 1 at 29.

122 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 10.

123 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 53.

124 *Kioa v West* (1985) 159 CLR 550 at 631; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 19.

125 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 611-612 [78].

126 See *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582. See also *Calvin's Case* (1608) 7 Co Rep 1a at 6a [77 ER 377 at 384]; *Johnstone v Pedlar* [1921] 2 AC 262 at 276.

communication cannot be burdened by any restrictions upon the ability of an alien to enter Australia.

92 The conclusion that the implied freedom of political communication cannot be burdened if a law prohibits an action of political communication that the person is not independently free to do is not merely supported by the self-evident truth with which these reasons began. It also underpins the reasons of at least a majority of this Court in *Mulholland v Australian Electoral Commission*,<sup>127</sup> which was endorsed by a majority of this Court in *Ruddick v The Commonwealth*<sup>128</sup> and applied by this Court in *Babet v The Commonwealth*.<sup>129</sup>

93 In *Mulholland*, this Court held that the impugned provisions did not burden any freedom of political communication because the freedom upon which the appellant relied did not exist independently of the scheme of which the impugned provisions formed a part. Thus, in *Mulholland* there was no burden imposed by a law that restricted the ability of candidates from some political parties to communicate their party affiliation to voters. The liberty to communicate party affiliation did not exist independently of the impugned provisions. The implied freedom was not a source of positive right or entitlement for candidates to be able to communicate party affiliation on the ballot.<sup>130</sup>

94 This conclusion, that the implied freedom of political communication cannot be burdened if a law prohibits an action of political communication that the person is not independently free to do, is further illustrated by contrast with two hypothetical circumstances raised during oral submissions. The first is a law of the Commonwealth Parliament, presumably under s 51(i),<sup>131</sup> that prohibited the importation of written political communications into Australia. Assuming, as the example does, that, absent such a law, an importer would have the freedom to import that material into Australia, such a law would burden the implied freedom of political communication by restricting the importer's freedom of political communication. But, unlike the position of an alien, the reason there would be a burden is that there was otherwise a liberty to import.

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<sup>127</sup> (2004) 220 CLR 181.

<sup>128</sup> (2022) 275 CLR 333.

<sup>129</sup> (2025) 99 ALJR 883; 423 ALR 83.

<sup>130</sup> *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 223 [105]-[107], 247 [186]-[187], 298 [337], 303-304 [354].

<sup>131</sup> *Milicevic v Campbell* (1975) 132 CLR 307 at 309. See also *Baxter v Ah Way* (1909) 8 CLR 626 at 645; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 189.



95 The second example raised in oral argument and relied upon by Ms Owens Farmer is that of a hypothetical condition subsequent which is placed on the visa of an alien who enters Australia prohibiting that alien from engaging in various forms of political communication. The absence of any liberty for an alien to enter Australia means that permission to enter can be made subject to conditions.<sup>132</sup> The effect of a condition subsequent that prohibited an alien's political communication in Australia would be to remove a liberty that the alien would have had, once the alien had entered Australia, to engage in political communication. The condition subsequent to the alien's visa would be, by definition, a condition that operated upon an alien after entry into Australia. Upon the entry by the alien into Australia, such a condition would be subject to the implied freedom of political communication.

**Section 501(6)(d)(iv) of the *Migration Act* imposes no burden upon freedom of political communication**

*Ms Owens Farmer challenged the wrong provision*

96 The principal question in the special case asks whether s 501(6)(d)(iv) of the *Migration Act* is invalid because it unjustifiably burdens the implied freedom of political communication. Section 501(6)(d)(iv) is concerned with a circumstance in which a person does not pass the character test in the *Migration Act*, where: "in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would ... incite discord in the Australian community or in a segment of that community".

97 The character test in s 501(6) of the *Migration Act* has no substantive effect. The substantive provisions, relevant to this case, that rely upon the character test are s 65 read with s 501(3). Section 65 provides that the Minister is to grant a visa if certain conditions are met, including that the grant of the visa is not prevented by s 501.<sup>133</sup> Section 501(3) relevantly provides, in ss 501(3)(a) and 501(3)(c), that "[t]he Minister may refuse to grant a visa to a person ... if the Minister reasonably suspects that the person does not pass the character test".

98 As the defendants (the Minister and the Commonwealth) correctly submitted, since s 501(6)(d)(iv) is merely a definitional provision it has no operative effect. Ms Owens Farmer argued that the defendants' submission

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132 *In re Adam* (1838) 1 Moo PC 460 at 471 [12 ER 889 at 893]; *Johnstone v Pedlar* [1921] 2 AC 262 at 296. See also Vattel, *The Law of Nations* (1760), vol 1, bk 2, ch 8 at 153 §100; Phillimore, *Commentaries Upon International Law* (1854), vol 1, pt 3, ch 10 at 233 §219.

133 See also *Migration Regulations 1994* (Cth), Sch 2, cl 408.216(1), Sch 4, Pt 1, public interest criterion 4001.

concerning the definitional nature of s 501(6)(d)(iv) was merely a "quibbl[e]". But however one characterises the objection, for a court to invalidate a provision that has no substantive or operative effect would amount to an advisory opinion about a law that did not affect the rights or liberties of any person.<sup>134</sup> Ms Owens Farmer therefore attempted, without seeking leave, to reframe her case as, in effect, a challenge to the application of s 501(3) insofar as that operative provision engaged s 501(6)(d)(iv). Her argument would require s 501(3) to be disappplied to the extent to which its application relies upon that part of the character test in s 501(6)(d)(iv).<sup>135</sup> It suffices to say that, for the reasons below, even Ms Owens Farmer's reformulated argument cannot succeed.

*Ms Owens Farmer has no liberty to enter Australia and nobody in Australia has any liberties derived from her being in Australia*

99           There is no dispute that Ms Owens Farmer is an alien within the meaning of s 51(xix). Ms Owens Farmer therefore has no liberty to enter Australia independently of the Minister's exercise of power under s 65 and s 501(3) of the *Migration Act*, including the power of the Minister in s 501(3)(c) to refuse the grant of such a liberty based on a reasonable suspicion that the person does not pass the character test.

100           A Commonwealth law that prohibited Ms Owens Farmer from appearing by audio-visual link to an audience in Australia to deliver a political message might burden the freedom of political communication of Australian people. That burden could arise because, absent any common law or valid statutory constraint, the people of Australia have a liberty to establish an audio-visual link overseas and to listen to, and engage with, Ms Owens Farmer by that link. But since Ms Owens Farmer has no freedom to enter Australia, neither she nor the people of the Commonwealth have any freedom to engage in political communication where that political communication would require Ms Owens Farmer to be present in Australia.

101           It may be that the exercise of the discretion to refuse Ms Owens Farmer entry into Australia to espouse political views described by the Minister as anti-Semitic and Islamophobic will constrain political discourse when compared with her liberty to appear by audio-visual link. As Professor Barendt wrote:<sup>136</sup>

"Restrictions on the free flow of political information are suspect because they invade the audience's interests in having enough material before it to

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134 See *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 72 [185].

135 See *Migration Act 1958* (Cth), s 3A.

136 Barendt, *Freedom of Speech*, 2nd ed (2005) at 25-26.

make informed choices and to participate fully in the democratic process. ... The arguments from truth and from democracy attach particular weight to the interests of recipients; ideas, as well as information, should be freely communicable in order to enable recipients to discover the truth and to participate fully in public discourse."

102 But to ask whether a restriction upon Ms Owens Farmer entering Australia is a burden on the flow of political information is to ask the wrong question. As explained in detail above, and as the precedent of this Court has consistently reiterated, the implied freedom of political communication is not concerned with political communication generally. The concern is with political communication that people are free to express. Since Ms Owens Farmer was not free to engage in political communication *in person* in Australia without the exercise of the Minister's discretion, no other member of the people of the Commonwealth had any freedom to engage with her *in person* in Australia. Nor did any of the people of the Commonwealth have any freedom to engage with each other concerning Ms Owens Farmer's political ideas to the extent that such engagement was dependent upon her presence in Australia.

**Any burden in s 501(3) applied with s 501(6)(d)(iv) of the *Migration Act* would be justified**

103 Section 501(3) of the *Migration Act*, when applied by reliance upon s 501(6)(d)(iv), would be justified even if, contrary to these reasons, the implied freedom of political communication constrained a law of the Commonwealth Parliament concerning the entry of an alien into Australia. This conclusion can be explained briefly.

*The meaning of s 501(6)(d)(iv) of the Migration Act*

104 Ms Owens Farmer's submission concerning the disproportionate operation of s 501(3), in its application with s 501(6)(d)(iv), relied upon a meaning of "discord" in s 501(6)(d)(iv) as "disagreement or debate" in the Australian community or in any segment of it. In her submission, that aspect of the character test in s 501(6)(d)(iv) was intended to be sufficiently broad for the Minister to refuse entry into Australia even to those whose opinions were only on scientific matters upon which the scientific community was strongly divided. The Minister could reasonably suspect that a person would fail the character test merely because their views would lead to strong scientific disagreement. On Ms Owens Farmer's submission, the Minister might reasonably suspect to be of bad character a modern equivalent to: René Descartes at the time he wrote on analytic geometry; Charles Darwin at the time he was exploring the origin of species; or Albert Einstein at the time of expounding his general theory of relativity.

105 The meaning of "discord" in s 501(6)(d)(iv) must be construed with regard to its purpose as part of the character test. It must also be construed in its context

as one of the five limbs of s 501(6)(d), all of which involve a risk of danger or significant physical or mental harm to the Australian community or a segment of it. It matters very little whether or not s 501(6)(d)(iv) has much further application than the harms considered in the other limbs, such as s 501(6)(d)(v). Where a so-called "presumption" against redundancy is relied upon to assert only that some words, or even a sub-section, of a provision are redundant, the presumption "seldom ... carries great weight".<sup>137</sup> And the "presumption" carries almost no weight when the provision is part of a scheme of overlapping circumstances,<sup>138</sup> such as the scheme of s 501(6)(d), which, as Gageler CJ, Gordon and Beech-Jones JJ explain, is intended to, and does, cover a variety of different and related sources of potential harm to the Australian community or a segment of the Australian community.

106 When s 501(6)(d)(iv) is interpreted in its context and in light of its purpose then, as Gageler CJ, Gordon and Beech-Jones JJ explain, a risk that a person would "incite discord" in the Australian community or in a segment of that community is a real or appreciable risk that the person would stir up dissension or strife in the Australian community or a segment of the Australian community. That includes intimidation, vilification, or victimisation of a segment of the Australian community.

*Justification of s 501(3) applied with s 501(6)(d)(iv)*

107 As McHugh J said in *Coleman v Power*,<sup>139</sup> it is "clear" that in *Lange* this Court "did intend ... that both [a law's] end and the manner of its achievement be compatible with the system of representative and responsible government" in order for the law to be justified. The existence of any incompatible purpose or any incompatible means to achieve that purpose will invalidate the provision. For the reasons expressed in various judgments in *Ravbar v The Commonwealth*,<sup>140</sup> as a matter of principle the implied freedom requires all of Parliament's ends (purposes) to be compatible with representative and responsible government and all of the means used by Parliament to involve a proportionate manner of achieving those ends having regard to the burden imposed on free political communication.

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137 *Walker (Inspector of Taxes) v Centaur Clothes Group Ltd* [2000] 1 WLR 799 at 805; [2000] 2 All ER 589 at 595. Discussed in *Palmanova Pty Ltd v The Commonwealth* [2025] HCA 35 at [74].

138 See *Palmanova Pty Ltd v The Commonwealth* [2025] HCA 35 at [73].

139 (2004) 220 CLR 1 at 50 [93].

140 (2025) 99 ALJR 1000 at 1038 [140], 1045-1047 [177]-[185], 1054-1056 [215]-[225], 1065 [270]-[271]; 423 ALR 241 at 283, 293-295, 305-308, 320-321.

108 The purpose of s 501(3) in its application with s 501(6)(d)(iv) should be expressed at an appropriate level of generality, which is almost always higher than the meaning of the words of the provisions.<sup>141</sup> The purpose is one of preventing the risk of harm to the Australian community or a segment of it by the admission of certain aliens to Australia. Contrary to the submissions of Ms Owens Farmer, which conflate purpose and means, that purpose is not properly expressed by reference to the manner in which the purpose is achieved, which is the burdening of some political communication by aliens, albeit political communication that would require the presence of the alien in Australia and which, therefore, is not free.

109 Ms Owens Farmer, properly following the test of structured proportionality that had been adopted for a decade in this Court prior to *Babet v The Commonwealth*,<sup>142</sup> submitted that s 501(3) in its application with s 501(6)(d)(iv) was disproportionate in the means it adopted—not reasonably appropriate and adapted—for two reasons. First, it was said that s 501(3) in its application with s 501(6)(d)(iv) was not necessary (perhaps more appropriately, was not reasonably capable of being seen as necessary) because there were obvious and compelling alternatives. Secondly, it was said that s 501(3) in its application with s 501(6)(d)(iv) was not adequate in its balance. Ms Owens Farmer, unsurprisingly, did not submit that s 501(3) in its application with s 501(6)(d)(iv) was not "suitable" because it lacked a rational connection with its purpose. Indeed, it is doubtful that "suitability" adds anything to the test of structured proportionality.<sup>143</sup>

110 Even if s 501(3) were to impose some burden on the freedom of political communication in its application with s 501(6)(d)(iv), it would be reasonably capable of being seen as necessary. This reasonable necessity must be addressed by reference to the false assumption that the freedom of political communication *in person* in Australia of an alien (or anyone who wishes to listen or engage in person with the alien or with each other to the extent that this depends on the presence of the alien in Australia) can be burdened despite the alien lacking any liberty to be present in Australia. But even on that assumption, Ms Owens Farmer's proposed alternatives are neither obvious nor compelling.

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141 *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 71 [183], 79 [204]; *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 425 [242]; *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at 157 [40].

142 (2025) 99 ALJR 883; 423 ALR 83.

143 *Babet v The Commonwealth* (2025) 99 ALJR 883 at 924-925 [181]; 423 ALR 83 at 133.

111 The first proposed alternative was removing s 501(6)(d)(iv) altogether since, it was submitted, s 501(6)(d)(v) would be sufficient to prevent harm to the Australian community from dissension or strife. The fifth limb of s 501(6)(d) is concerned with circumstances where the Minister reasonably suspects that the alien represents "a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way". This alternative is neither obvious nor compelling. The five limbs of s 501(6)(d) are part of a single scheme with only partially overlapping content. The removal of one of the limbs creates a new, and narrower, scheme in circumstances in which the stirring up of dissension or strife can have different and, in particular, clearer and more specific applications than the wider and more generalised limb concerning danger to the Australian community or to a segment of that community.

112 The second proposed alternative was for s 501(6)(d)(iv) to be expressed as requiring the Minister to be reasonably satisfied that the alien "would" incite discord rather than requiring only reasonable satisfaction of a risk to that effect. While the raising of that threshold might still achieve the purposes of Parliament, it is not an obvious and compelling alternative to achieve those purposes to the same or a similar extent.

113 As to the adequacy in the balance of s 501(3) in its application with s 501(6)(d)(iv), this criterion of structured proportionality lies at the very limits of judicial power, inviting a judicial invalidation of Parliament's pursuit of a legitimate policy by means that are reasonably capable of being seen as necessary.<sup>144</sup> Ms Owens Farmer's submission was effectively that the burden on the freedom of political communication in Australia was so great that Parliament's legitimate policy concern (preventing the risk of harm to the Australian community or a segment of it by the admission of certain aliens to Australia) could not be implemented by means that are reasonably capable of being seen as necessary. Even if there were any burden on, or even a substantial burden on, the freedom of political communication in Australia, it was plainly open to Parliament to adopt the means of s 501(3) in its application with s 501(6)(d)(iv), rather than some alternative policy such as requiring an intention of or negligence by the alien in relation to conduct that might stir up dissension or strife.

### **Ms Owens Farmer's administrative law challenge**

114 The second question in the special case challenges the decision of the Minister to refuse a visa to Ms Owens Farmer on the basis that the Minister incorrectly interpreted s 501(6)(d)(iv). On the assumption that "discord" would be interpreted by this Court, as it should be, to mean stirring up of dissension or strife,

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**144** *Babet v The Commonwealth* (2025) 99 ALJR 883 at 925 [182]; 423 ALR 83 at 134.

Ms Owens Farmer submitted that the Minister had misinterpreted the meaning of discord because: (i) he only used the word "disharmony" and did not use the words "strife" or "dissension"; (ii) the reference to Ms Owens Farmer's controversial views suggested that the Minister was concerned only with disagreement or debate; and (iii) the Minister failed to find that any discord, as he understood it, would be harmful.

115 It is unnecessary to repeat or summarise all the reasons of the Minister. It suffices to say that Ms Owens Farmer's submissions are an example of an approach to the review of reasons of an administrative decision-maker that has been consistently deprecated by this Court as "concerned with looseness in the language ... [l]or with unhappy phrasing" or involving the inappropriate construction of reasons "minutely and finely with an eye keenly attuned to the perception of error".<sup>145</sup> It is now well established that "the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned".<sup>146</sup>

116 The findings of the Minister included that Ms Owens Farmer, who had over 18 million followers across social media platforms worldwide, had made "extremist and inflammatory comments towards Muslim, Black, Jewish and LGBTQIA+ communities which generate controversy and hatred". The Minister referred to statements by the Director-General of Security that "[m]ore Australians are embracing a more diverse range of extreme ideologies and ... are willing to use violence to advance their cause" and statements by the former Race Commissioner that "[h]ate speech leads to political violence if you allow it to escalate". The Minister explained that Ms Owens Farmer's views "have previously been significant enough to influence the perpetrator of the terror attack on two mosques in Christchurch, New Zealand, where 51 people were killed and 35 others were injured". The Minister concluded that the sources to which he referred:

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145 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272, quoting *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 66 [23]; *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at 185 [25]; *Wilkie v The Commonwealth* (2017) 263 CLR 487 at 542 [131]; *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 274 CLR 565 at 602 [115].

146 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272. See also *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 628; *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533 at 554 [56]; *Minister for Immigration and Border Protection v SZSCA* (2014) 254 CLR 317 at 335 [50].

"collectively describe the causal link between individuals who promote and encourage right wing extremism via online platforms and how this supports greater intent and capacity to undertake[] violent acts. I am satisfied these sources provide well evidenced and consistent assessments of the potential for persons who espouse ideologically motivated extremist views to pose a risk of inciting discord in the Australian community."

117 The Minister did not dilute the requirement of a risk of inciting discord to one of mere disagreement or debate.

### Conclusion

118 The questions of law as stated in the special case should be amended to reflect Ms Owens Farmer's submissions and answered as follows:

- (1) Is s 501(3) of the *Migration Act* in its application by reliance upon s 501(6)(d)(iv) invalid because it unjustifiably burdens the implied freedom of political communication?

No.

- (2) If the answer to question 1 is "no", is the Decision invalid on the ground that the Minister adopted an incorrect construction of s 501(6)(d)(iv)?

No.

- (3) If the answer to question 1 or question 2 is "yes", what, if any, relief should be granted to the plaintiff?

Unnecessary to answer.

- (4) Who should pay the costs of the special case?

The plaintiff.



119 STEWARD J. I refer to the facts of the special case described by Gageler CJ, Gordon and Beech-Jones JJ and to their Honours' description of the relevant provisions of the *Migration Act 1958* (Cth) ("the Migration Act"). I agree that s 501(6)(d)(iv) is a valid law. However, I have reached that conclusion for a reason which differs from that of Gageler CJ, Gordon and Beech-Jones JJ. I am of the view that s 501(6)(d)(iv) did not "effectively burden freedom of communication about government or political matters either in its terms, operation or effect" (i.e. the first limb of the test in *Lange v Australian Broadcasting Corporation*).<sup>147</sup> It follows that it is unnecessary for me to consider whether the impugned law is justified. Four propositions compel this conclusion. They are set out below.

120 In that respect I also gratefully agree with the construction of "incite discord" in s 501(6)(d)(iv) preferred by Gageler CJ, Gordon and Beech-Jones JJ. The preferable construction of s 501(6)(d)(iv) is that it is concerned with where, in the event that the person were allowed to enter or to remain in Australia, there is a risk that the person would stir up or encourage dissension or strife in the Australian community, or a segment of that community, of a kind or to a degree that causes relevant harm. It follows that I also agree with Gageler CJ, Gordon and Beech-Jones JJ that the Minister did not adopt an incorrect construction of s 501(6)(d)(iv).

**Proposition one: Parliament has an unfettered power to decide when an alien may or may not enter Australia**

121 It is a basal constitutional proposition that s 51(xix) of the *Constitution* (the "naturalization and aliens" power) supplies Parliament with an unfettered power to pass laws which determine which aliens may enter Australia and which may not. In that respect, a law which denied entry to all aliens would be valid. The capacity to control the frontiers of Australia in this way is a fundamental attribute of sovereignty which of necessity cannot be impaired.<sup>148</sup> Section 501(6)(d)(iv) is a law of this kind. By giving the Minister a power to refuse a visa to an alien who might incite discord upon entry (it also being in the national interest to exclude that person), Australia's sovereignty is protected and enhanced.

122 The foregoing has been accepted by this Court as a fundamental attribute of statehood since the decision in *Robtelmes v Brennan* in 1906.<sup>149</sup> The same principles

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<sup>147</sup> (1997) 189 CLR 520 at 567.

<sup>148</sup> Whether the power to deport an alien is as absolute as the power to control who may enter this country need not be addressed in these reasons.

<sup>149</sup> (1906) 4 CLR 395.

were affirmed in 1992 in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.<sup>150</sup> Brennan, Deane and Dawson JJ said:<sup>151</sup>

"The legislative power conferred by s 51(xix) with respect to 'aliens' is expressed in unqualified terms. ... [A] law may, without trespassing beyond the reach of the legislative power conferred by s 51(xix), either exclude the entry of non-citizens or a particular class of non-citizens into Australia or prescribe conditions upon which they may be permitted to enter and remain; and it may also provide for their expulsion or deportation."

123 In 2002, in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*, Gleeson CJ said of *Robtelmes* that this Court, following the opinion of international jurists, and decisions of courts of the highest authority in England and the United States, had held that "it is an attribute of sovereignty that every State is entitled to decide what aliens shall or shall not become members of its community".<sup>152</sup> Gleeson CJ expressly referred to and approved the following passage from the judgment of Major and Binnie JJ of the Supreme Court of Canada in *Mitchell v Minister of National Revenue*:<sup>153</sup>

"Control over the mobility of persons and goods into one country is, and always has been, a fundamental attribute of sovereignty.

"It is commonly accepted that sovereign states have the right to control both who and what enters their boundaries. For the general welfare of the nation the state is expected to perform this role."

124 Then in 2015, in *CPCF v Minister for Immigration and Border Protection*, Keane J observed that it was "well-settled that the power of the Executive Government under the common law to deny entry into Australia of a non-citizen such as the plaintiff, including by compulsion, is an incident of Australia's sovereign power as a nation".<sup>154</sup>

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150 (1992) 176 CLR 1.

151 (1992) 176 CLR 1 at 25-26 (footnote omitted).

152 (2002) 212 CLR 162 at 170 [21].

153 *Ex parte Te* (2002) 212 CLR 162 at 171 [22], quoting *Mitchell* [2001] 1 SCR 911 at 989 [160], in turn quoting *R v Simmons* [1988] 2 SCR 495 at 528 per Dickson CJ.

154 (2015) 255 CLR 514 at 647 [479]. See also *Ruddock v Vadarlis* (2001) 110 FCR 491 at 543 [193].

125 More recently, in 2018, in *Falzon v Minister for Immigration and Border Protection*, Nettle J said:<sup>155</sup>

"As a sovereign nation, Australia has the sole right to decide which non-citizens shall be permitted to enter and remain in this country. Consequently, as was decided in *Robtelmes v Brennan* and has ever since been regarded as settled law, Parliament has power under s 51(xix) of the *Constitution* to make laws for the deportation of non-citizens for whatever reason Parliament thinks fit. And, as Gibbs CJ observed in *Pochi v Macphee*, it is only to be expected that it should be so; for such a power is essential to national security."

126 Finally, in 2021, in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft*, this Court, citing Nettle J in *Falzon*, unanimously stated that Parliament has the "sole right to decide which non-citizens shall be permitted to enter and remain in Australia".<sup>156</sup>

127 Given the unqualified potency and importance of the power to decide when, if ever, a given alien, or class of aliens, may be permitted entry to this country, during oral argument I raised with the Solicitor-General of the Commonwealth the possibility that the implied freedom of political communication might be directly inconsistent with such a power, and thus of no application at all. The Solicitor-General said it was unnecessary to embrace such a proposition because, he contended, it was clear that s 501(6)(d)(iv) did not in any event impose a burden on freedom of political communication. With respect, that contention is correct for the reasons given below. It is therefore otherwise unnecessary to determine whether the implied freedom may apply distributively, and then in different strengths, depending upon which head of power in s 51 of the *Constitution* is being qualified.

### **Proposition two: the plaintiff has no liberty or right to enter Australia**

128 Proposition two addresses whether s 501(6)(d)(iv) imposes a *direct* burden on the implied freedom; that is, does it impose a relevant burden on the plaintiff's freedom of political communication? In that respect, the first limb of the *Lange* test seeks to ascertain whether the impugned law (here, s 501(6)(d)(iv)) effectively burdens freedom of communication about government or political matters either in its terms, operation or effect.<sup>157</sup> This is an important limb – not to be skated over

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155 (2018) 262 CLR 333 at 358 [92] (footnotes omitted).

156 (2021) 273 CLR 21 at 42 [30] (footnote omitted).

157 (1997) 189 CLR 520 at 567. I otherwise refer to, and adhere to, my reasons in *Ravbar v The Commonwealth* (2025) 99 ALJR 1000; 423 ALR 241.

(as it appears to have been in the past)<sup>158</sup> – and which must be applied in the context of protecting the function of ss 7 and 24 of the *Constitution*.

129 It is now very much settled law – by reason of what McHugh, Gummow, Hayne, Callinan and Heydon JJ expressly approved in *Mulholland v Australian Electoral Commission*,<sup>159</sup> and which was approved again by Gordon, Edelman and Gleeson JJ (with whom I agreed) in *Ruddick v The Commonwealth*,<sup>160</sup> and again in *Babet v The Commonwealth*<sup>161</sup> – that the following proposition, taken from *Levy v Victoria*,<sup>162</sup> is foundational:

"[The implied freedom] gives immunity from the operation of laws that inhibit a right or privilege to communicate political and government matters. But, as *Lange* shows, that right or privilege must exist under the general law."

130 Thus, in *Levy*, McHugh J observed that a regulation<sup>163</sup> prohibiting persons from entering a hunting area did not burden the implied freedom, even though some of those persons wished to enter that area to protest against the hunting of ducks. That is because they had no pre-existing lawful right of entry into the area. His Honour said:<sup>164</sup>

"The constitutional implication does not create rights. It merely invalidates laws that improperly impair a person's freedom to communicate political and government matters relating to the Commonwealth to other members of the Australian community. It gave the protesters no right to enter the hunting area. That means that, unless the common law or Victorian statute

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**158** *Ravbar* (2025) 99 ALJR 1000 at 1067 [279]; 423 ALR 241 at 323.

**159** (2004) 220 CLR 181 at 223-224 [107]-[108] per McHugh J, 246 [184], 247 [186]-[187] per Gummow and Hayne JJ, 298 [337] per Callinan J, 303-304 [354] per Heydon J.

**160** (2022) 275 CLR 333 at 391-392 [155], 396-397 [172] per Gordon, Edelman and Gleeson JJ, 398 [174] per Steward J.

**161** (2025) 99 ALJR 883 at 906-907 [97]-[102] per Gordon J, 928-929 [202]-[203] per Edelman J, 929 [205], 930 [209] per Steward J; 423 ALR 83 at 109-111, 138-140.

**162** (1997) 189 CLR 579 at 622 per McHugh J.

**163** *Wildlife (Game) (Hunting Season) Regulations 1994* (Vic), reg 5.

**164** (1997) 189 CLR 579 at 625-626. McHugh J went on (at 626) to assume that the impugned regulation did nonetheless impose a burden because the parties had assumed that, absent it, there was a right to enter the hunting area to make a protest.

law gave them a right to enter that area, it was the lack of that right, and not the Regulations, that destroyed their opportunity to make their political protest."

131 To similar effect, Nettle J observed in *Brown v Tasmania* that the implied freedom does not supply a licence to do what is otherwise unlawful.<sup>165</sup> It does not "authorise or justify trespass to land or chattels, nuisance or the besetting of business premises, or negligent conduct causing loss".<sup>166</sup> And to like effect Edelman J observed in *Brown*:<sup>167</sup>

"[T]he constraint only applies to State or Commonwealth legislative power if there is a 'burden on the freedom'. This phrase is not entirely apt but it signifies that the constitutional implication only constrains legislative power where that power is exercised to impede legal freedom to communicate about government and political matters. If the conduct about which legislation is concerned is independently unlawful, so that there was no legal freedom to communicate about government or political matters, then there can be no 'burden' on the freedom. The implied constraint upon legislative power cannot operate."

132 This foundational principle is a fundamental feature of an implication that does not confer anything akin to a "First Amendment" right, but which instead is a limit on legislative power. The focus remains on whether a given impugned law burdens a pre-existing liberty or right conferred by law. The focus is not on whether there are any limitations on political communication or the capacity to so communicate; rather, the focus is on whether there are burdens on the "freedom" to make those political communications. The inquiry which must be made is to identify what pre-existing law gave or supplied that "freedom" and whether the impugned law now burdens it.

133 The importance of the foregoing is rendered critical in a case where the "freedom" in question derives from the exercise of a power conferred by a law which forms part of a broader scheme of regulation, and which may be the subject of legislative change from time to time. As Edelman J observed in *Babet*:<sup>168</sup>

"The baseline, or counterfactual, for the implied freedom of political communication therefore requires that the common law (as adapted to conform to the *Constitution*), and any other law separate from the scheme

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**165** (2017) 261 CLR 328 at 408 [259].

**166** (2017) 261 CLR 328 at 408 [259] (footnote omitted).

**167** (2017) 261 CLR 328 at 502-503 [557].

**168** (2025) 99 ALJR 883 at 921 [169]-[170]; 423 ALR 83 at 129 (footnotes omitted).

of which the impugned law forms part, respect the exercise of the liberty said to be burdened. ...

This reasoning applies with even greater force where an asserted and so-called 'freedom' is really a legal power (such as for a political party to register with the effect of being included on a ballot paper) that exists only by virtue of a scheme of which the impugned law itself forms an essential part. The provisions of the entire scheme of which the challenged law forms a part are not independent of the challenged law. Although such a scheme might be defined at different levels of generality, the need for an independent freedom, not contrary to common law or statute, before a burden on that freedom can be found has been expressly affirmed numerous times. A burden will therefore be denied not merely where no common law liberty exists but also where a valid or unchallenged law, independent of any scheme of which the challenged law forms an essential part, has removed the liberty upon which the asserted freedom of political communication depends."

134 Here, it was submitted that s 501(6)(d)(iv) imposed a burden on the freedom of political communication because it, in combination with the operative provision contained in s 501(3)(a), prevented the plaintiff from expressing her political views in Australia. In that respect, it was not disputed that the plaintiff was entirely free to communicate her beliefs using other means that did not necessitate her physical presence in Australia. She could, for example, have: given speeches virtually; sent emails containing her views; used, and no doubt does use, social media; and/or written a book which might have been sold here, or distributed for free. Thus, the only burden which s 501(6)(d)(iv) could have imposed was to deny her the benefit of expressing her views in person in this country. This is sometimes described as the "lightning bolt" effect of speaking in public.

135 But the plaintiff had no pre-existing right conferred by the common law or by statute to enter Australia to avoid the so-called detriment of being denied the "lightning bolt" effect of her words being spoken in person in this country. Indeed, absent an exercise of the power by the Minister to issue her with a visa, all other means of entry would have been illegal. The implied freedom cannot undo that reality and otherwise supply her with a lawful means of admission to Australia. The plaintiff's attempts to avoid that consequence, considered below, should be rejected.

136 Moreover, and in any event, the implied freedom is concerned with a law that "*effectively* burden[s]" the freedom of political communication;<sup>169</sup> the burden must be real and not theoretical. The implied freedom is not concerned with any kind of burden, or, in particular, with burdens that do not realistically affect

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169 *Lange* (1997) 189 CLR 520 at 567 (emphasis added).

political communication. As French CJ observed in *Tajjour v New South Wales*, "an effective burden is unlikely to be inferred simply from the forensic construction of causal connections between the law and some unlikely hypothetical restriction on the implied freedom".<sup>170</sup> I would not infer that denial of the "lightning bolt" effect constitutes an effective or real burden on the plaintiff's ability to promote her message to members of the Australian public, and for the Australian public to have the capacity to consume fully that message, especially given the very many different (and unprohibited) means of such promotion that exist in the 21st century. Nor do any of the agreed facts set out in the special case support a contrary conclusion. The will of the Australian people, as expressed by Parliament, should not be cast aside by merely nugacious things.

137 Finally, whilst the references in ss 7 and 24 of the *Constitution* to the "people" are not limited to those entitled to vote in a federal election,<sup>171</sup> it certainly does not include aliens who have been denied lawful entry into Australia. The plaintiff has never been a member of the "people" of Australia. At the very least, whilst remaining out of Australia, she has no right to invoke the protection afforded by the implied freedom or to use it as a means of entry. It simply does not apply to her.<sup>172</sup>

138 For these reasons, s 501(6)(d)(iv) imposes no *direct* burden on the implied freedom of political communication.

**Proposition three: the "people" have no liberty or right to listen – *in person in Australia* – to an alien who has not been permitted to enter Australia**

139 Proposition three is concerned with whether s 501(6)(d)(iv) imposes a burden on the doctrine of the implied freedom which is *indirect*; that is, does it impose a burden on the ability of the "people" of Australia to receive the plaintiff's political communications?

140 That doctrine is plainly concerned with laws that seek to impose an effective burden on doing something; that something is communication by a person to

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**170** (2014) 254 CLR 508 at 548 [33].

**171** See, for example, *Unions NSW v New South Wales* (2013) 252 CLR 530 at 580 [144].

**172** By way of analogy, the Supreme Court of the United States has held that the protection of the First Amendment of the *United States Constitution* applies to "all people within [the United States'] borders" and is engaged "once an alien lawfully enters and resides in this country": see *Bridges v Wixon* (1945) 326 US 135 at 161; *Kwong Hai Chew v Colding* (1953) 344 US 590 at 596-597 fn 5.

another, or to a group of individuals, or to the world. As Gageler J observed in *Tajjour*:<sup>173</sup>

"Within the scope of that freedom is not simply communication on governmental or political matter *to* electors (allowing for each individually to make an informed electoral choice) but communication on governmental or political matter *between* electors (allowing for those electors collectively to communicate with other electors and with government)."

141 The implied freedom protects any form of communication. As Brennan CJ observed in *Levy*, "actions as well as words can communicate ideas".<sup>174</sup> But the implied freedom is directed at laws which effectively prevent or impair a person from a lawfully supported act of communication.

142 In contrast, no decided authority of this Court has condemned a law because of some perceived burden on a person or persons from listening to or otherwise consuming political communication. That is unsurprising. The human capacity to hear sound cannot be undone by any law. There is thus no pre-existing liberty or right, conferred by the common law or by statute, to listen to political communication. If such a communication is in fact made to a person, or group of people, who can hear, the law has no capacity to burden or impede its inexorable auditory receipt. What the law can burden or impair is the making of the communication, or a person taking steps to receive it.

143 Here, it is said, s 501(6)(d)(iv), in combination with s 501(3)(a), does precisely that: it stops Australians from listening to the plaintiff's messages. But that expresses the burden too broadly. For the reasons expressed above, s 501 does not prevent Australians from receiving material from the plaintiff, save in only one instance. The one instance is that they cannot hear from the plaintiff *in person in this country*. In that respect they are – but only in part – denied the so-called "lightning bolt" effect. That is only a partial denial because, naturally, Australians can travel freely to the United States,<sup>175</sup> or any other country that will permit the plaintiff entry – and then enjoy the "lightning bolt" effect in full. If it mattered, I would not consider the cost of travel in the 21st century as necessarily being in itself a practical burden on the implied freedom.

144 Does the common law or statute confer upon the people of Australia a liberty or right to hear *in person* from an alien such as the plaintiff *in this country*? Does s 501(6)(d)(iv) burden that liberty or right because it gives the Minister a

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**173** (2014) 254 CLR 508 at 577 [141] (emphasis in original).

**174** (1997) 189 CLR 579 at 594.

**175** Subject to the grant of a visa pursuant to the United States' domestic law.



power to refuse the plaintiff the grant of a visa? The answer to the first question is "no". And it is so for the same reasons as those given in respect of proposition two. No citizen enjoys the liberty of permitting any alien to enter this country, whether for the purposes of furthering political communication, or, indeed, for any purpose. No citizen can defy the Migration Act. No citizen can insist that he or she consume in Australia political messages personally from an alien who has no lawful right of entry to this country. And in any event, no citizen is a party to this proceeding.<sup>176</sup>

145 For these reasons, s 501(6)(d)(iv) imposes no *indirect* burden on the implied freedom of political communication.

**Proposition four: the decision in *Mulholland* is dispositive and cannot be distinguished**

*The principle in Mulholland*

146 The decision in *Mulholland*<sup>177</sup> concerned the validity of provisions in an Act which, like the Migration Act, regulated conduct – namely the *Commonwealth Electoral Act 1918* (Cth) ("the Electoral Act"). And like the Migration Act, the Electoral Act contains a great number of complex rules; rules which are subject, from time to time, to amendment by Parliament. No party suggested that *Mulholland* should be overruled.

147 In *Mulholland*, the impugned laws required a political party to have at least 500 members in order to be eligible to be registered as a political party under the Electoral Act ("the 500 rule").<sup>178</sup> The scheme for registration had been introduced in 1983, and later amended in 2000 and 2001. Registration conferred certain benefits, such as having a candidate's party affiliation appear on a ballot paper. The appellant, Mr Mulholland, was the registered officer of the Democratic Labor Party ("the DLP"). That party did not have 500 members. He challenged the validity of the 500 rule on the ground that it infringed the implied freedom of political communication. A plurality of five Justices of this Court – being McHugh, Gummow, Hayne, Callinan and Heydon JJ – held that the 500 rule placed no burden on the implied freedom.

148 McHugh J decided that because the DLP had no right to make communications on political matters on a ballot paper other than what the Electoral

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<sup>176</sup> Save for the Minister for Home Affairs himself, who as first defendant in this proceeding opposed the plaintiff's contentions concerning the implied freedom.

<sup>177</sup> (2004) 220 CLR 181.

<sup>178</sup> There was also a challenge to the "no overlap rule" under s 126(2A) of the Electoral Act.

Act permitted, the 500 rule could not impose a relevant burden. His Honour referred to his judgment in *Levy* and re-affirmed that the burden "must be on a right or privilege to communicate under the common law or under a statute that the plaintiff already enjoys".<sup>179</sup> McHugh J reasoned:<sup>180</sup>

"The short answer to the claim that the challenged provisions burden political communications by the DLP to electors is that the restrictions are the conditions of the entitlement to have a party's name placed on the ballot-paper. The restrictions do not burden rights of communication on political and government matters that exist independently of the entitlement. Any political communication that is involved in the delivery and lodging of a ballot-paper results solely from the Commission's statutory obligation to hold elections and deliver ballot-papers in the prescribed form, and from the rights of parties and candidates to have their identities marked on the ballot-paper."

149 Gummow and Hayne JJ were of the same view. Mr Mulholland's case faced, they reasoned, "a significant threshold obstacle".<sup>181</sup> That obstacle was that Mr Mulholland enjoyed no freedom conferred by law to have the name of the DLP appear on the ballot paper.<sup>182</sup> In this respect, Gummow and Hayne JJ referenced with approval McHugh J's judgment in *Levy*.<sup>183</sup>

150 Callinan J also agreed that the 500 rule imposed no burden on the implied freedom of political communication. The rights created by the Electoral Act were "entirely statutory" and Mr Mulholland had no "relevant rights other than such rights as may be conferred on him by [that] Act".<sup>184</sup> His Honour made reference to *Levy* and said:<sup>185</sup>

"As the appellant has no relevant *right* to the imposition of an obligation upon another, to communicate a particular matter, he has no right which is capable of being burdened. The appellant is seeking a privilege, not to

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**179** (2004) 220 CLR 181 at 222 [102] (footnote omitted), citing *Levy* (1997) 189 CLR 579 at 622, 625-626.

**180** (2004) 220 CLR 181 at 223 [105].

**181** (2004) 220 CLR 181 at 247 [186].

**182** (2004) 220 CLR 181 at 247 [186]-[187], 249 [192].

**183** (2004) 220 CLR 181 at 246 [184], citing *Levy* (1997) 189 CLR 579 at 622, 625-626.

**184** (2004) 220 CLR 181 at 298 [337].

**185** (2004) 220 CLR 181 at 298 [337] (emphasis in original; footnote omitted).

vindicate or avail himself of a right. He can communicate his affiliation with the DLP as a candidate in any way and at any time that he wishes. What he cannot do is compel the respondent to do so in a way which would effectively discriminate in his favour, and would be tantamount to treatment of him as having a relevant *right*."

151 Finally, Heydon J also applied McHugh J's reasons in *Levy* and thus found that the 500 rule imposed no burden on the implied freedom. His Honour said:<sup>186</sup>

"[T]here is no interference with any implied freedom of political communication in these circumstances because it is necessary that there be some relevant 'right or privilege ... under the general law' to be interfered with. In the absence of legislation permitting it, there is no right in any political party or candidate to have party affiliation indicated on the ballot paper. Indeed, the appellant conceded that a legislative prohibition on the appearance of any party affiliation on the ballot paper would not contravene the implied freedom."

152 As already mentioned, the principle that there can be no burden on any implied freedom of political communication unless there be some relevant right or privilege or liberty conferred under the general law which is then impaired is the settled law of this Court. As mentioned above, that principle was expressly re-affirmed in *Ruddick* and more recently in *Babet*. There is no logical basis for confining that principle to cases concerning the Electoral Act. After all, the principle is derived from *Levy*, which concerned regulations about duck hunting in Victoria.

153 For the reasons given above, neither the plaintiff, nor, if relevant, the people of Australia, enjoyed any pre-existing right, privilege or liberty that allowed for the plaintiff to enter Australia. Any such right of entry was only conferred by the Migration Act – pursuant to which s 501 is a fundamental part of how entry into this country is to be regulated. It follows that the Minister's decision to refuse the plaintiff a visa, by an application of s 501(6)(d)(iv), imposed no relevant burden. That conclusion is mandated by *Mulholland*.

154 For the foregoing reasons, any attempt now to read down, confine, or cast aside *Mulholland* is doctrinally misconceived. That is not to deny that it is open to a Justice of this Court to criticise *Mulholland*. Judges do not exist within a gulag where critical thought is banned or censored. Rather, the duty of a judge is to criticise doctrine where it is wrong, but nonetheless to apply it faithfully when it is binding precedent. In that respect, I otherwise expressly endorse the observation

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186 (2004) 220 CLR 181 at 303 [354] (footnote omitted).

of Edelman J that "[d]ebate about the existence and boundaries of the implicature recognised in *Lange*" remains important.<sup>187</sup>

*The plaintiff's attempt to distinguish Mulholland*

155 The plaintiff sought to distinguish the principle settled in *Mulholland* in two ways. Neither is sustainable. The first basis relied upon the proposition that the plaintiff satisfied all of the other legal requirements for the grant of her visa, but for s 501(6)(d)(iv). This was said to be the pre-existing right or privilege which s 501(6)(d)(iv) then effectively burdened. With respect, no such right existed. That is so for two reasons.

156 First, the proposition fails on the agreed facts of the special case. Those facts record the disagreement of the parties as to whether the plaintiff had satisfied the requirements of public interest criterion 4001 as mandated by cl 408.216(1) of Sch 2 to the *Migration Regulations 1994* (Cth) as well as the character test in s 501 of the Migration Act. The plaintiff contends that she did satisfy these requirements; the defendants say she did not. As such, on the case before this Court, no right of entry, with or without s 501(6)(d)(iv), has ever existed.

157 Second, and in any event, in order for the plaintiff to be entitled to a visa she had to satisfy a number of conditions; they *all* needed to be made out. In that respect, the power to issue a visa reposed in the Minister by s 65 of the Migration Act is expressly bound up with the power of refusal conferred by s 501(3)(a), which in turn is informed by the definition of the "character test" found in s 501(6). Thus, pursuant to s 65(1)(a) the Minister cannot issue a visa if its grant is "prevented" by, amongst other provisions, s 501 of the Act. Here the Minister was not satisfied that the plaintiff satisfied the character test. As a result, the suggested right or privilege never existed.

158 In that respect, there was debate about whether a *pre-existing* right or privilege can only ever exist if it is conferred by a statute different from that containing the impugned law (or inferentially by the common law). The plaintiff accepted that where the impugned provision is the very provision which confers the right or privilege said to be burdened, the *Mulholland* principle applies. She also accepted that, where the impugned provision is inseverable from the provision which confers the right or privilege, the principle also applies. But not otherwise. Here it was said that s 501(6)(d)(iv) is severable from the Migration Act.

159 With respect, the distinctions sought to be drawn are somewhat arid and unreal. The question to be asked is simply: without the impugned provision, would a person or people enjoy a right or privilege conferred on them by the law, which is impaired or denied by that provision? In *Levy*, the law conferred no right to

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187 Reasons of Edelman J at [82].

trespass. In *Mulholland*, the law conferred no right to have party affiliation appear on the ballot paper. Here, for the reasons given above, the Migration Act generally confers no right on an alien of entry to Australia, and specifically conferred no such right on the plaintiff.

160 But even if the plaintiff's expression of the principle from *Mulholland* be correct, again it avails her not. That is because one cannot simply sever s 501(6)(d)(iv) from the power to issue visas conferred by s 65. It is a basal requirement for the grant of a visa that the Minister is satisfied that s 501 does not prevent its issue. In that respect, s 501(6)(d)(iv) is entirely analogous with the 500 rule considered in *Mulholland*, in that it forms part of the regulation by the Migration Act of which aliens may enter Australia and when they may do so. It is the Migration Act itself, and nothing else, which gives an alien the liberty of such entry. Conjuring up a comparison between a world with and then without s 501(6)(d)(iv) is thus of no assistance. A world without s 501(6)(d)(iv) is simply a fictitious artifice.

161 The second basis for distinguishing *Mulholland* was said to be the existence of a burden on political communication that would have taken place in Australia, amongst Australians, but for the refusal of the plaintiff's visa request. It was said that these communications would have taken place at in-person gatherings had the plaintiff been permitted entry to this country, and would not now take place in her absence. With respect, given the very many ways the plaintiff was and is able to communicate with Australians without the need to be physically present in this country, that suggested burden is but speculation. It is not supported by any fact in the agreed special case.

### **Disposition**

162 I agree with the answers to the questions of law posed by the special case given by Gageler CJ, Gordon and Beech-Jones JJ.

GLEESON J.

**Introduction**

163 Ms Farmer, "the new face of black conservatism" and an "outspoken and fearless American conservative social commentator, author, activist, and YouTube sensation", planned to undertake a speaking tour in Australia in November 2024. Being a non-citizen, Ms Farmer required a visa to enter Australia.<sup>188</sup> She applied for a Temporary Activity (Class GG) visa ("the visa"), which was refused pursuant to s 501(3) of the *Migration Act 1958* (Cth).

164 I write separately to explain why, in my view, the exclusion of a non-citizen from Australia by operation of the "character test" in s 501(6)(d)(iv) of the *Migration Act* does not effectively burden the implied freedom of political communication. In short, the asserted burden would: (1) extend the implied freedom beyond its constitutional purpose; (2) be inconsistent with the absence of a constitutional right to engage in political communication; (3) relate to no existing right, freedom or immunity; and (4) unjustifiably attribute the character of an "effective burden" upon the implied freedom to incidental and remote consequences of s 501(6)(d)(iv). As to the last matter, the special case does not adequately demonstrate how s 501(6)(d)(iv) might effectively limit political communication between a non-citizen and members of the Australian community, so as to justify a conclusion that s 501(6)(d)(iv) effectively burdens the implied freedom.

165 Except as stated below, I agree with the reasons of Gageler CJ, Gordon and Beech-Jones JJ.

**The relevant statutory framework**

166 Since 2 April 1984, the Commonwealth Parliament has relied on the aliens power in s 51(xix) of the *Constitution* to sustain the *Migration Act*.<sup>189</sup> The "settled understanding" of the aliens power is that it gives the Commonwealth Parliament power to "determine who is and who is not to have the legal status of an alien and power to attach consequences to that status".<sup>190</sup> Consistently with that understanding, the *Migration Act* provides for a system of visas permitting non-citizens to enter or remain in Australia.

167 Subject to presently immaterial exceptions, by s 65(1), after considering a valid application for a visa, the Minister is "to grant the visa" unless barred from

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188 *Migration Act 1958* (Cth), s 29(1).

189 *Chetcuti v The Commonwealth* (2021) 272 CLR 609 at 621 [11].

190 *Chetcuti v The Commonwealth* (2021) 272 CLR 609 at 622 [12].

doing so by s 501 of the *Migration Act*. Section 501(3) of the *Migration Act* confers a discretionary power on the Minister to refuse to grant a visa if two conditions exist. The first is that the Minister reasonably suspects that a person does not pass the "character test". The second is that the Minister is satisfied that the refusal of the visa is in the national interest. Relevantly for this case, by s 501(6)(d)(iv), a person will not pass the character test if "in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would ... incite discord in the Australian community or in a segment of that community". In short, s 501(6)(d)(iv), when read with s 65(1) and s 501(3) of the *Migration Act*, operates as a legislative roadblock to obtaining a visa to enter Australia if the visa applicant is judged by the Minister to pose a risk of inciting "discord".

168 For the reasons that Gageler CJ, Gordon and Beech-Jones JJ give, I agree with their interpretation of the words "incite discord in the Australian community or in a segment of that community" in s 501(6)(d)(iv). The primary purpose of s 501 of the *Migration Act* is the protection of the Australian community.<sup>191</sup> The purpose of protecting the Australian community is not advanced by preventing a risk of inciting discord that is harmless or is harmful only to a trivial extent. The risk of inciting discord concerns the possible adverse impact of a person's conduct upon the Australian community (or a segment of that community), which might include (for example) destruction of property or divisiveness apart from violence, such as acts of exclusion, denigration, segregation or boycotts, or other conduct that engenders fear of such harm in the community or in a segment of the community.

169 The legislative history assists to explain why the provision is not engaged by less serious conduct which is apt merely to cause displeasure, discomfort or upset to members of the Australian community. The catalyst for the original introduction of the character test in s 180A of the *Migration Act*<sup>192</sup> (which was renumbered as s 501<sup>193</sup> and ultimately reenacted<sup>194</sup>), which conferred a power on the Minister to refuse a visa or entry permit where the Minister was satisfied that a person would "incite discord in the Australian community or in a segment" thereof, was a successful challenge to the decision to exclude from Australia members of the Hells Angels Motorcycle Club (who were non-citizens) on the

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191 *ENT19 v Minister for Home Affairs* (2023) 278 CLR 75 at 99 [69].

192 *Migration (Offences and Undesirable Persons) Amendment Act 1992* (Cth).

193 *Migration Legislation Amendment Act 1994* (Cth), s 83.

194 *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth).

basis of "public interest" considerations.<sup>195</sup> Section 180A was therefore enacted to "enable[] the Minister to exclude from Australia persons of bad character and other undesirable persons".<sup>196</sup>

170 In the Minister's Second Reading Speech the Hon Gerard Hand MP said that "[t]he power is intended to be exercised in a manner consistent with well-accepted Australian values".<sup>197</sup> Dr Andrew Theophanous MP, the Member for Calwell and a member of the governing party at the time, further identified the focus of s 180A as follows:<sup>198</sup>

"The Minister has put forward a Bill which will give the Minister the power to exclude certain people who have committed offences or whom for several reasons it is undesirable to have in Australia. The kind of person we are thinking about is someone who specialises in preaching messages of hatred and racial tension, someone who wants to promulgate extreme views about violence, or someone who has a criminal record ... [T]his power is not intended to be exercised against people for political motives. It is intended to be exercised in the sorts of cases that I mentioned – for example, extremists, violent people and people preaching hatred or violence. It is not intended to be used against people who have a political philosophy different from that of the Government or the Opposition or who may have different views on industrial relations or industrial democracy."

### **The Minister's decision**

171 The Minister for Home Affairs and Minister for Immigration and Multicultural Affairs, the Hon Tony Burke MP, suspected that Ms Farmer did not pass the character test because, if she was allowed to enter Australia, "there is a risk she would incite discord in the Australian community or a segment of the Australian community". He was also satisfied that it was in the national interest to refuse to grant Ms Farmer a visa. The Minister therefore refused to grant the visa to Ms Farmer.

172 In reaching that state of satisfaction, the Minister found that Ms Farmer had a history of making "extremist and inflammatory comments towards Muslim,

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195 *Hand v Hell's Angels Motorcycle Club Inc* (1991) 25 ALD 667.

196 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 December 1992 at 4121.

197 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 December 1992 at 4121.

198 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 December 1992 at 4160.



Black, Jewish and LGBTQIA+ communities" and that there was a risk that her "controversial views [would] amplify grievances among communities and lead to increased hostility and violent or radical action" if she were allowed into Australia to express those views. Although the Minister found that Ms Farmer had an existing ability to incite discord through her online presence, he concluded that Ms Farmer's physical presence in Australia would amplify that potential, including because her events "would attract onshore media attention, including main stream media and her shows would garner interest".

173 The Minister did not state what he understood to amount to "a risk that [a] person would ... incite discord in the Australian community", but the following aspects of the Minister's reasons shed light on how he assessed whether there was a relevant risk: (1) information collected by the Minister which the Minister found to "describe the causal link between individuals who promote and encourage right wing extremism via online platforms and how this supports greater intent and capacity to [undertake] violent acts"; (2) the Minister's observation that "inflammatory rhetoric can lead to increased hate crimes, radicalisation of individuals and heightened tensions in communities"; (3) the Minister's reference to the claim by the perpetrator of the lethal attacks on two mosques in 2019 in Christchurch, New Zealand, that he was most influenced to carry them out by Ms Farmer; and (4) the Minister's finding that there was a "risk that Ms Farmer's controversial views will amplify grievances among communities and lead to increased hostility and violent or radical action".

174 Read fairly and as a whole,<sup>199</sup> the Minister took the view, having regard to advice from Australian security agencies, that there is a risk that Ms Farmer would incite discord because her views may lead to an increase in physical violence, including acts causing death or physical injury, and extending to the generation of "controversy and hatred", manifested by "heightened tensions in communities" and "increased hostility" within the Australian community.

### **The scope of the implied freedom is limited by its constitutional purpose**

175 Constitutional implications, of which the implied freedom is perhaps the best-known Australian example, are only recognised where they are "logically or practically necessary for the preservation of the integrity of the constitutional structure".<sup>200</sup> In *Lange v Australian Broadcasting Corporation*, the identified need was for the protection of freedom of communication between "the people"

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**199** *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287, cited in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

**200** *Zurich Insurance Co Ltd v Koper* (2023) 277 CLR 164 at 175 [28]. See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566-567.

concerning governmental or political matters that enables "the people" to exercise a free and informed choice as electors.<sup>201</sup> When this Court declared that "each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia",<sup>202</sup> it had not had occasion to consider whether the text and structure of the *Constitution* makes it logically and practically necessary for political communications emanating from a non-citizen to be imported for the benefit of "the people" exercising a free and informed choice as electors.

176 In *Levy v Victoria*, McHugh J referred to the fact that the *Constitution* protects "the freedom of 'the people of the Commonwealth' (the members of the Australian community) to communicate with each other concerning those political and government matters that are relevant to the system of representative and responsible government provided for by the Constitution".<sup>203</sup> This Court later extended the coverage of protected communication as "between electors and legislators and the officers of the executive, and between electors themselves".<sup>204</sup>

177 Subsequently, in *Unions NSW v New South Wales* ("*Unions No 1*"), the plurality observed that the Court's declaration in *Lange* also implies that a free flow of communication between "all interested persons" is necessary for the maintenance of representative government.<sup>205</sup> Recognising that political communication is "not simply a two-way affair between electors and government or candidates", their Honours extended the conception of the protected communications to communications involving members of the community (including entities such as unions and political parties) "who are not electors but who are governed and are affected by decisions of government".<sup>206</sup>

178 In *Tajjour v New South Wales*, Keane J explained that "[t]he constitutional guarantee to the people of the Commonwealth of a free and informed choice as electors ensures free communication between them as equal participants in the

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201 (1997) 189 CLR 520 at 567.

202 (1997) 189 CLR 520 at 571.

203 (1997) 189 CLR 579 at 622. See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 139.

204 *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 556 [44].

205 (2013) 252 CLR 530 at 551 [27].

206 (2013) 252 CLR 530 at 551 [30].

exercise of political sovereignty".<sup>207</sup> His Honour had earlier said that "the primary consideration must be that the flow of political communication within the federation is required to be kept free in order to preserve the political sovereignty of the people of the Commonwealth".<sup>208</sup> In *Brown v Tasmania*, Gordon J also referred to the need for "a free flow of political communication within the federation" which must be "between electors and representatives and 'between all persons, groups and other bodies in the community'".<sup>209</sup> Most recently, in *Farm Transparency International Ltd v New South Wales*, Gageler J (with whom I relevantly agreed), in describing the "precept of *Lange*", referred to the scope of the protected communication as "to and between electors, and between electors and elected legislative and executive representatives".<sup>210</sup>

179 No doubt, non-citizens both within Australia and outside of Australia contribute information or ideas to debates within the Australian community that are capable of bearing on the formation of electoral choice. However, "[a]ny benefit to an alien from the implication must be indirect in the sense that it flows from the freedom or immunity of those who are citizens".<sup>211</sup> The implication extends to:<sup>212</sup>

"the broad national environment in which the individual citizen exists and in which representative government must operate. In the context of that broad national environment, the implication's confinement of the content of legislative power protects the freedom of communication and discussion of non-citizens, be they corporations or aliens, to the extent necessary to ensure that the freedom of citizens to engage in discussion and obtain information about political matters is preserved and protected."

### **The subject matter covered by the implied freedom**

180 In *Unions No 1*, the plurality affirmed that a wide view is to be taken of the subject matter of communications protected by the implied freedom. That view was said to be justified by the "complex interrelationship between levels of government, issues common to State and federal government and the levels at

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<sup>207</sup> (2014) 254 CLR 508 at 593 [197], referring to *Unions NSW v New South Wales* (2013) 252 CLR 530 at 578 [135].

<sup>208</sup> *Unions NSW v New South Wales* (2013) 252 CLR 530 at 578 [135].

<sup>209</sup> (2017) 261 CLR 328 at 430 [312].

<sup>210</sup> (2022) 277 CLR 537 at 564 [75].

<sup>211</sup> *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 336.

<sup>212</sup> *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 336.

which political parties operate".<sup>213</sup> Their Honours affirmed that "statements made by electors or candidates or those working for a candidate, during an election, to electors in a State electorate, concerning the record and suitability of a candidate for election to a State Parliament ... are at the heart of the freedom of communication protected by the *Constitution*".<sup>214</sup>

181 In *Coleman v Power*, it was accepted that a man distributing pamphlets containing charges of police corruption was engaging in political communication.<sup>215</sup> In *Monis v The Queen*, Hayne J rejected a suggested distinction between communications "properly" the subject of the implied freedom and personal attacks made upon the deceased, who was a soldier killed on active service in Afghanistan, saying that the whole of each communication was, in form and substance, a political communication about whether Australian forces should be engaged in Afghanistan.<sup>216</sup> In *Clubb v Edwards*, Kiefel CJ, Bell and Keane JJ proceeded on the basis that communications about whether governments should encourage or discourage terminations of pregnancy and whether laws should be changed to restrict or facilitate terminations were political, in contrast to communications that were designed to persuade a recipient against having a termination as a matter for the individual being addressed.<sup>217</sup> More recently, in *Farm Transparency*, discussion of animal welfare was identified by Kiefel CJ and Keane J as a "legitimate matter of governmental and political concern and a matter in respect of which persons may seek to influence government" so as to constitute communication for the purposes of the implied freedom.<sup>218</sup>

182 Thus, the subject matter covered by the implied freedom is not confined to matters of demonstrated present relevance to the laws, policies and operation of the Commonwealth Parliament. It may extend to matters of political controversy or social importance in Australia, including matters of international political or social controversy that may invite voters to think about the government of Australia in a way that could affect their electoral choices.<sup>219</sup> Whether conduct that poses a risk of inciting discord in the Australian community or a segment of it

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**213** (2013) 252 CLR 530 at 550 [25].

**214** (2013) 252 CLR 530 at 550 [25], citing *Roberts v Bass* (2002) 212 CLR 1 at 29 [73].

**215** (2004) 220 CLR 1 at 31 [28]-[31], 33 [36], 64 [147], 78 [197].

**216** (2013) 249 CLR 92 at 177 [229].

**217** (2019) 267 CLR 171 at 191 [31], 194 [42], [43].

**218** (2022) 277 CLR 537 at 551-552 [28] (footnote omitted).

**219** *Brown v Members of the Classification Review Board of the Office of Film & Literature Classification* (1998) 82 FCR 225 at 238-239.

within the meaning of s 501(6)(d)(iv) may comprise or include political communication will be a question of fact in an individual case.

183 Ms Farmer sought to argue that s 501(6)(d)(iv) has the practical effect of depriving members of the Australian community of the opportunity to hear from her on matters of political or government interest. The facts were sparse as to that practical effect. Ms Farmer was "invited" by a communications and marketing firm to be the main speaker at the "Candace Owens Live Events" across Australia. The annexures to the special case suggest that, if permitted to enter Australia, Ms Farmer wished to discuss matters of broad political relevance such as Islam, Israel and the Jewish peoples, and people who identify as LGBTQIA+. There are no facts agreed by the parties which provide any gauge of the interest of members of the Australian body politic who may wish to attend to hear Ms Farmer speak.

184 It cannot be assumed that discussion about the topics upon which Ms Farmer proposed to speak will necessarily involve political communication of the relevant kind.<sup>220</sup> For example, such discussion may concern personal identity or international affairs or religious dogma in a way that is not capable of bearing on electoral choice. Accepting the breadth of the subject matter covered by the implied freedom, the special case did not demonstrate that Ms Farmer's intended discussion about matters of potential political relevance would involve or generate political communication in the relevant sense.

### **The implied freedom only protects existing rights, freedoms and immunities**

185 The constitutionally implied freedom of political communication is not a personal right,<sup>221</sup> and does not create "an affirmative right to engage in political communication".<sup>222</sup> It is a "freedom from governmental action" as distinct from "a right to require others to provide a means of communication".<sup>223</sup> "The implication is negative in nature: it invalidates laws and consequently creates an area of

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**220** cf *Clubb v Edwards* (2019) 267 CLR 171 at 258 [252].

**221** See, eg, *Brown v Tasmania* (2017) 261 CLR 328 at 360 [90], 384 [185], 409-410 [262], 430 [313], 503-504 [559].

**222** *Brown v Tasmania* (2017) 261 CLR 328 at 384 [185]. See also *Unions NSW v New South Wales* (2013) 252 CLR 530 at 551 [30], 554 [36]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 569 [104], 593-594 [198]; *McCloy v New South Wales* (2015) 257 CLR 178 at 202-203 [30].

**223** *McClure v Australian Electoral Commission* (1999) 73 ALJR 1086 at 1090 [28]; 163 ALR 734 at 740-741.

immunity from legal control".<sup>224</sup> The negative aspect of the implication was emphasised in the following passage of *Lange*:<sup>225</sup>

"[A]lthough it is true that the requirement of freedom of communication is a consequence of the Constitution's system of representative and responsible government, it is the requirement and not a right of communication that is to be found in the Constitution. Unlike the First Amendment to the United States Constitution, which has been interpreted to confer private rights, our Constitution contains no express right of freedom of communication or expression. Within our legal system, communications are free only to the extent that they are left unburdened by laws that comply with the Constitution."

186 Earlier, in *Australian Capital Television Pty Ltd v The Commonwealth*, Mason CJ referred to the choice made by the framers of the *Constitution* not to incorporate comprehensive guarantees of individual rights, accepting "that the citizen's rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy".<sup>226</sup>

187 Recognising that the *Constitution* does not confer a right of free speech, the implied freedom has been conceived of as an "immunity from legal regulation created ... by the Constitution"<sup>227</sup> and a freedom "to act without legal control".<sup>228</sup> Deane J in *Theophanous v Herald & Weekly Times Ltd* explained that, by limiting or confining legislative power, the implied freedom "gives rise to a pro tanto immunity on the part of the citizen from being adversely affected by" impugned laws.<sup>229</sup> In other words, the implied freedom of political communication is "the area of immunity which cannot be infringed by a law of the Commonwealth, a law of a State or a law of those Territories whose residents are entitled to exercise the federal franchise".<sup>230</sup> The *Constitution* "gives immunity from the operation of laws

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**224** *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560, citing *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 327.

**225** (1997) 189 CLR 520 at 567.

**226** (1992) 177 CLR 106 at 136.

**227** *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 146.

**228** *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 148.

**229** (1994) 182 CLR 104 at 168, cited in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560.

**230** *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566.

that inhibit a right or privilege to communicate political and government matters".<sup>231</sup>

188 The implied freedom does not require the legislature to pass laws to improve or maximise opportunities for political communication, or to provide access to information. As Deane and Toohey JJ put it in *Nationwide News Pty Ltd v Wills*, "[t]he implication is not, of course, that the people of the Commonwealth will have free access to all the means of communication any more than is s 92's express guarantee of freedom of interstate trade, commerce and intercourse a guarantee of free transportation. It is an implication of freedom from legislative prohibition and burdensome interference."<sup>232</sup> The implied freedom is not a "freedom to communicate. It is a freedom from laws that effectively prevent" certain political communications.<sup>233</sup>

189 This conception of the implied freedom was determinative for five members of the Court in *Mulholland v Australian Electoral Commission*<sup>234</sup> and for the majority in *Ruddick v The Commonwealth*,<sup>235</sup> both cases concerning electoral laws. Their Honours endorsed the proposition, first articulated by McHugh J in *Levy*,<sup>236</sup> that the qualified immunity afforded by the implied freedom concerns the operation of laws that inhibit a right or privilege to communicate governmental or political matters relevant to the system of representative and responsible government that "exist under the general law".<sup>237</sup> Finding that protesters against duck shooting had no right to enter the hunting area in which their protest was conducted, McHugh J considered that it was the lack of a pre-existing legal right to entry and not the impugned law itself that "destroyed" their opportunity for political protest.<sup>238</sup>

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231 *Levy v Victoria* (1997) 189 CLR 579 at 622.

232 (1992) 177 CLR 1 at 76.

233 *Levy v Victoria* (1997) 189 CLR 579 at 622 (emphasis in original).

234 (2004) 220 CLR 181.

235 (2022) 275 CLR 333.

236 (1997) 189 CLR 579 at 622.

237 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 224 [107], 246 [184], 298 [337], 303 [354]; *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 391-392 [155]-[156].

238 *Levy v Victoria* (1997) 189 CLR 579 at 626.

190 In *Mulholland*, McHugh J reiterated his view that "[p]roof of a burden on the implied constitutional freedom requires proof that the challenged law burdens a freedom that exists independently of that law".<sup>239</sup> Gummow and Hayne JJ adopted McHugh J's reasoning in *Mulholland* on this point, and rejected the possibility of a freedom "which descends deus ex machina"<sup>240</sup> and confirmed the necessity to identify the existence and nature of the "freedom" said to be burdened by the impugned law.<sup>241</sup> Callinan J considered that the appellant had to identify a relevant right to communicate a particular matter, and concluded that he had no right which was capable of being burdened.<sup>242</sup> Heydon J, also citing McHugh J in *Levy*, stated that there was no burden because there was no "relevant 'right or privilege ... under the general law' to be interfered with".<sup>243</sup> Heydon J observed that "[a]ll opportunities for communication that existed before the impugned provisions were enacted continue to exist".<sup>244</sup>

191 In *Brown*, Kiefel CJ, Bell and Keane JJ accepted that it was logical "to approach the burden which a statute has on the freedom by reference to what protesters could do were it not for the statute".<sup>245</sup> In the same case, Gageler J identified the relevant inquiry as involving a comparison between "the practical ability of a person or persons to engage in political communication with the law; and the practical ability of that same person or those same persons to engage in political communication without the law".<sup>246</sup> His Honour cautioned against any suggestion that the implied freedom protects only political communications in which persons have some pre-existing legally enforceable right to engage.<sup>247</sup>

192 It has been observed that the classification of the implied freedom as "negative" rather than "positive" is consistent with both liberal philosophical

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**239** (2004) 220 CLR 181 at 223 [107].

**240** (2004) 220 CLR 181 at 247 [187].

**241** (2004) 220 CLR 181 at 249 [192].

**242** (2004) 220 CLR 181 at 298 [337].

**243** (2004) 220 CLR 181 at 303 [354] (footnote omitted).

**244** (2004) 220 CLR 181 at 305 [356].

**245** (2017) 261 CLR 328 at 365 [109].

**246** (2017) 261 CLR 328 at 383 [181].

**247** (2017) 261 CLR 328 at 384 [186].



tradition and aspects of the common law.<sup>248</sup> At common law, individual freedom of speech has historically been understood as a residual liberty so that, subject to the principle of legality, it is vulnerable to impingement by legislative or executive action.<sup>249</sup> In that way, the common law freedom encompasses but is not confined to legal rights for which a remedy is available in the event of infringement.<sup>250</sup>

### The nature of an "effective burden"

193 The "legacy of *Lange*" is that the determination of whether a law infringes the implied freedom falls to be determined "within a standardised analytical framework".<sup>251</sup> The first step in that framework is to ask whether the law, in its legal or practical operation, "effectively burdens" communication on governmental or political matters.

194 When this Court speaks of a legislative provision placing an "effective burden" on such matters, it means "nothing more complicated than that the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications".<sup>252</sup> However, the implied freedom is not concerned to protect laws having an "insubstantial" or "adventitious" effect on political communications.<sup>253</sup> "In all but exceptional cases, a law will not burden such communications unless, by its operation or practical effect, it directly and not remotely restricts or limits the content of those communications or the time, place, manner or conditions of their occurrence."<sup>254</sup>

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248 Stone, "Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication" (2001) 25 *Melbourne University Law Review* 374 at 400-401.

249 Meagher, "Is There a Common Law 'Right' to Freedom of Speech?" (2019) 43 *Melbourne University Law Review* 269 at 270.

250 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 48.

251 *Tajjour v New South Wales* (2014) 254 CLR 508 at 578 [144].

252 *Monis v The Queen* (2013) 249 CLR 92 at 142 [108]. See also *Babet v The Commonwealth* (2025) 99 ALJR 883 at 928 [201]-[202], 932 [222]; 423 ALR 83 at 138, 143; *Ravbar v The Commonwealth* (2025) 99 ALJR 1000 at 1017-1018 [32]; 423 ALR 241 at 256.

253 *Tajjour v New South Wales* (2014) 254 CLR 508 at 579 [146].

254 *Coleman v Power* (2004) 220 CLR 1 at 49 [91]. See also *Wotton v Queensland* (2012) 246 CLR 1 at 19 [42]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 579 [146].

195 Thus, for example, the burden in issue in *Lange* was the effect of the common law of defamation of limiting the making or the content of political communications by exposing the maker to civil liability;<sup>255</sup> and in *Levy*, the relevant burden was the effect of the law in precluding the plaintiff from making his political protest within the "permitted hunting area".<sup>256</sup> In *Wotton v Queensland*, the relevant burdens comprised an obligation to seek and obtain approval to interview a parolee outside a corrective services facility, and a requirement for the observance of conditions by a parolee, where there was a condition that the parolee not attend public meetings without prior approval.<sup>257</sup>

196 It has been accepted that a provision which has an indirect or incidental effect upon communication about matters of government or politics is sufficient to amount to an "effective burden" on the implied freedom.<sup>258</sup> In that regard, the existence of a burden is not negated by the narrowness or perceived unimportance of the category of political communication that is affected by the impugned law.<sup>259</sup>

197 *Lange*, *Levy*, *Wotton* and *Monis* illustrate between them that both direct and indirect restrictions on speech concerning governmental or political matters may burden the implied freedom. The law of defamation considered in *Lange* operates directly on communications generally, which may – and in that case did – include political communication. The operation of the law in *Levy* did not directly prohibit or limit communication but had that indirect effect by exposing protesters to sanction for their presence in the permitted hunting area. The laws in *Wotton* operated upon Mr Wotton's general freedom to participate in communications in interviews and at public meetings, at which he may have wished to discuss matters relating to Aboriginal and Indigenous affairs. In *Monis*, the relevant laws incidentally burdened the implied freedom by, in simple terms, prohibiting communications involving the use of a postal service in a way that reasonable persons would regard as being offensive.

### **Section 501(6)(d)(iv) does not burden the implied freedom**

198 The effect of s 501(6)(d)(iv) of the *Migration Act* is different from laws of the kind that were in issue in *Lange*, *Levy*, *Wotton* and *Monis*. It does not impose

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255 *Monis v The Queen* (2013) 249 CLR 92 at 143 [110].

256 *Monis v The Queen* (2013) 249 CLR 92 at 143 [111].

257 (2012) 246 CLR 1 at 15 [28].

258 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40], citing *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169.

259 *Monis v The Queen* (2013) 249 CLR 92 at 143 [113].

civil liability for speech. It does not make it an offence to speak in a specified area. It does not impose conditions upon a particular means of speech. Nor does it prohibit communications having certain characteristics. Section 501(6)(d)(iv) does not in its terms operate to restrict or limit the content of political communications or the time, place, manner or conditions of their occurrence. Nor does it operate to prohibit or limit political communications by or to any member of the Australian community. As a roadblock to the grant of a visa, s 501(6)(d)(iv) can be contrasted with the law in *Wotton* that permitted the imposition of conditions upon attending public meetings, which had the effect of burdening political communication. In contrast, the grant of a visa is not the grant of permission to engage in political speech: it is the grant of permission to enter and remain in Australia.

199       Section 501(6)(d)(iv) of the *Migration Act* does not have the legal or practical effect of burdening a pre-existing general law right, freedom or privilege. It does not operate as a "legal control" upon any political communications that an Australian citizen could engage in but for that statutory provision. Indeed, s 501(6)(d)(iv) has no independent legal effect: it does no more than define circumstances in which a person will not meet the character test such that, if other criteria are satisfied, the Minister may refuse to grant them a visa.

200       If the relevant question is, as suggested by Kiefel CJ, Bell and Keane JJ in *Brown*, what members of the Australian community, interested in Ms Farmer's views on the above subjects, could do were it not for s 501(6)(d)(iv), the answer is "nothing". No member of the Australian community has a right to compel the entry of a non-citizen into Australia without a visa. That would be directly contrary to the terms of the *Migration Act*. In any event, the practical possibility that political communications are restricted or limited by s 501(6)(d)(iv) depends upon the additional contingencies that, apart from that provision, the Minister would be satisfied that refusal is in the national interest; and despite the Minister's state of mind, the affected non-citizen would nevertheless procure a visa, would enter Australia in accordance with that visa and thereafter would engage in political communications in Australia with one or more Australians. The Court cannot be satisfied of any of those matters.

201       In substance, Ms Farmer seeks to extend the implied freedom to incorporate a right of Australians to access information from outside Australia, through restricting the scope of the power to make laws about visas. That extension is not supported by the text or structure of the *Constitution*, or by the identified constitutional purpose of the implied freedom.

202       Finally, the facts in this case did not demonstrate that members of the Australian community would be deprived of any information or communication if they did not have access to Ms Farmer's ideas through her presence in Australia for face-to-face debate, discussion and questioning. It is notorious that political engagement increasingly occurs through social media, as demonstrated by Ms Farmer's identity as a "YouTube sensation". Section 501(6)(d)(iv) does not in

any way prevent a person in Ms Farmer's situation from engaging in political communications with members of the Australian community, except on Australian soil. It is far from obvious that Ms Farmer, or anyone in her situation, must be physically present in Australia to add anything to political communications in Australia. In the absence of evidence, or agreed facts, it is not obvious that the opportunity to hear Ms Farmer speak in Australia (the so-called "lightning bolt" effect) could add anything to political communication in Australia so that, by leading to the denial of her visa application, s 501(6)(d)(iv) effectively burdened the implied freedom of communication on governmental or political matters.

### **Conclusion**

203           Because Ms Farmer has not succeeded in showing that s 501(6)(d)(iv) places an effective burden on the implied freedom of political communication, it is unnecessary to examine whether any such burden is justified.

204           I agree with the answers to the questions of law posed by the special case given by Gageler CJ, Gordon and Beech-Jones JJ.

JAGOT J.

### Issues to be decided

205 Section 501(6)(d)(iv) of the *Migration Act 1958* (Cth) provides that for the purposes of s 501 of that Act "a person does not pass the character test" if "in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would: ... incite discord in the Australian community or in a segment of that community". Under s 501(3) of that Act, the relevant Minister may (a) refuse to grant a visa to a person or (b) cancel a visa that has been granted to a person if "(c) the Minister reasonably suspects that the person does not pass the character test; and (d) the Minister is satisfied that the refusal or cancellation is in the national interest".

206 The plaintiff, a resident of the United States, arranged to undertake a speaking tour to Australia in which the plaintiff would speak about political matters at events around Australia. She applied for a Temporary Activity (Class GG) visa under s 45 of the *Migration Act*. The Minister for Home Affairs refused to grant the visa in accordance with s 501(3)(a). The Minister reasonably suspected that the plaintiff did not pass the "character test" because the Minister concluded that if permitted to enter Australia, "there is a risk [the plaintiff] would incite discord in the Australian community or a segment of the Australian community".

207 By an amended application for a constitutional or other writ the plaintiff sought a declaration that s 501(6)(d)(iv) of the *Migration Act* is invalid, certiorari to quash the decision of the Minister refusing to grant the plaintiff a Temporary Activity (Class GG) visa under s 501(3)(a) of that Act, and mandamus requiring the Minister to grant the plaintiff such a visa or requiring the Minister to remake the decision in respect of the visa according to law.

208 The special case subsequently agreed between the parties identifies that the declaration sought is based on the plaintiff's contention that s 501(6)(d)(iv) is invalid because it unjustifiably burdens the freedom of political communication protected by implication into the *Constitution*.<sup>260</sup> The order for certiorari sought is based on the plaintiff's contention that in making the decision to refuse the visa application the Minister misconstrued s 501(6)(d)(iv). The first order for mandamus is sought on the basis that, as the decision to grant or refuse a visa application is commanded by s 65(1) of the *Migration Act*, the Minister must grant the visa if either of the plaintiff's contentions are accepted. The second order for

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260 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 135, see also at 138-140; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 47-49; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-560.

mandamus is sought on the alternative basis that the plaintiff may not yet have satisfied all requirements compelling the grant of the visa.

209 These reasons for judgment explain that while s 501(6)(d)(iv) burdens the freedom of political communication protected by the implication into the *Constitution*, the provision, properly construed, does so for an end, object or purpose that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and in a manner and to an extent reasonably appropriate and adapted to achieving that legitimate end, object or purpose.<sup>261</sup> Accordingly, s 501(6)(d)(iv) does not trespass into the zone of immunity from legislative interference which the implication of the freedom of political communication into the *Constitution* creates. As will also be explained, in making the decision to refuse the plaintiff's visa application, the Minister did not materially misconstrue s 501(6)(d)(iv) so as to vitiate the Minister's decision. The plaintiff therefore cannot obtain the relief sought and the substantive questions of law the parties posed in the special case are to be answered in these terms:

- (1) Is s 501(6)(d)(iv) of the *Migration Act 1958* (Cth) invalid because it unjustifiably burdens the implied freedom of political communication?

Answer: *No*.

- (2) If the answer to question 1 is "no", is the decision of the Minister to refuse to grant the plaintiff the Temporary Activity (Class GG) visa invalid on the ground that the Minister adopted an incorrect construction of s 501(6)(d)(iv)?

Answer: *No*.

### Statutory provisions

210 Section 42(1) of the *Migration Act* provides that, subject to immaterial exceptions, a non-citizen must not travel to Australia without a visa that is in effect. By s 45(1) a non-citizen who wants a visa must apply for a visa of a particular class. Section 65(1) provides that, subject to immaterial exceptions, after considering a valid application for a visa, the Minister:

- "(a) if satisfied that:
  - (i) the health criteria for it (if any) have been satisfied; and

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<sup>261</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562.

73.

- (ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and
- (iii) the grant of the visa is not prevented by section ... 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and
- (iv) any amount of visa application charge payable in relation to the application has been paid;

is to grant the visa; or

- (b) if not so satisfied, is to refuse to grant the visa."

211

Section 501 includes provisions as follows:

- "(1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

...

- (3) The Minister may:

- (a) refuse to grant a visa to a person; or
- (b) cancel a visa that has been granted to a person;

if:

- (c) the Minister reasonably suspects that the person does not pass the character test; and
- (d) the Minister is satisfied that the refusal or cancellation is in the national interest.

...

- (4) The power under subsection (3) may only be exercised by the Minister personally.

...

- (6) For the purposes of this section, a person does not pass the *character test* if:

- (a) the person has a substantial criminal record (as defined by subsection (7)); or

...

- (c) having regard to either or both of the following:
  - (i) the person's past and present criminal conduct;
  - (ii) the person's past and present general conduct;
 the person is not of good character; or
- (d) in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would:
  - (i) engage in criminal conduct in Australia; or
  - (ii) harass, molest, intimidate or stalk another person in Australia; or
  - (iii) vilify a segment of the Australian community; or
  - (iv) incite discord in the Australian community or in a segment of that community; or
  - (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way; or

...

- (g) the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*); or
- (h) an Interpol notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.

Otherwise, the person passes the *character test*."

### Construing s 501(6)(d)(iv)

212 The parties proposed competing meanings of s 501(6)(d)(iv). The plaintiff's proposed meaning is that the provision is engaged if, in the event the person were



allowed to enter Australia, there is a risk that the person would incite (meaning cause) discord (meaning disagreement and debate) in the Australian community or in a segment of that community. The defendants' proposed meaning is that the provision is engaged if, in the event the person were allowed to enter Australia, there is a risk that the person would incite (meaning urge or stir up) discord (meaning strife or dissension involving harm) in the Australian community or in a segment of that community and, in that way, represents a danger to the community or a segment of it.

213 The plaintiff's principal arguments in support of the plaintiff's proposed construction are: the breadth of meaning of the words "incite" and "discord"; the need to give s 501(6)(d)(iv) work to do separate from s 501(6)(d)(v), which refers to "a danger to the Australian community or to a segment of that community"; the contention that s 501(6)(d)(iv) does not involve any concept of harm to the Australian community or a segment of it unless words are read into the provision, which is contrary to interpretative principles; and the extrinsic material in respect of a predecessor provision.<sup>262</sup>

214 The plaintiff's arguments do not support the plaintiff's construction of s 501(6)(d)(iv). Section 501(6) explains when a person does not pass the character test for the purpose of s 501, enabling the refusal or the cancellation of a visa by the Minister personally exercising powers under that provision. These two aspects of the context, that the subject-matter is the refusal or the cancellation of a visa permitting a person to be in Australia and that the power is exercisable only by the Minister personally, indicate that s 501 is not concerned with trivial aspects or trivial effects of what the legislation refers to as a person's "character".

215 This indication is reinforced by the matters which s 501(6) specifies as definitive of a person's so-called character. They are: (a) a substantial criminal record (as defined by s 501(7)); (aa) being convicted of an offence that was committed while in, while escaping from or after escaping from immigration detention; (ab) being convicted of the offence of escaping from immigration detention; (b) being reasonably suspected of being or having been a member or associate of a person, group or organisation involved in criminal conduct; (ba) being reasonably suspected of involvement in people smuggling offences, an offence of trafficking in persons, or the crime of genocide or other crimes of international concern; (c) past and present criminal and general conduct; (d) a risk that the person would: (i) engage in criminal conduct in Australia; (ii) harass, molest, intimidate or stalk another person in Australia; (iii) vilify a segment of the Australian community; (iv) incite discord in the Australian community or in a

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**262** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 December 1992 at 4121-4126; Australia, House of Representatives, *Migration (Offences and Undesirable Persons) Amendment Bill 1992*, Explanatory Memorandum.

segment of that community; or (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way; (e) conviction or discharge without conviction for sexually based offences involving a child; (f) being charged with or indicted for genocide, a crime against humanity, a war crime, a crime involving torture or slavery, or a crime otherwise of serious international concern; (g) being assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security within the meaning of ASIO's enabling legislation; or (h) being subject to an in-force Interpol notice from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community.

216 In short, the entire context of the provision is concerned with potential material harm to the Australian community or a segment of it, reflecting the understandable view that it is one thing for the Australian community or segments of it to be subject to such risks of harm from their fellow citizens and residents, and another thing to be subject to such risks of harm from a person who has no right to be in Australia other than by specific grant of a visa.

217 Section 501(6), in specifying the character test, refers to types of objectively serious crimes, immigration crimes, and four kinds of risk. The four kinds of risk are: in s 501(6)(g), a direct or indirect risk to security as assessed by ASIO within the meaning of s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth); in s 501(6)(h), being subject to an Interpol notice from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community; in s 501(6)(d)(iv), a risk that the person would incite discord in the Australian community or in a segment of that community; and in s 501(6)(d)(v), a risk that the person would represent a danger to the Australian community or to a segment of that community in any way. As the ordinary meaning of "danger" itself involves the concept of "risk", it is apparent that s 501(6)(d)(v) is the most general and expansive provision in s 501(6) because it is concerned with a risk that the alien would represent a risk of harm (including of a non-physical kind) to the Australian community (or a segment of it).

218 This context indicates that "incite" and "discord" in s 501(6)(d)(iv) are not to be given their broadest possible and decontextualised meaning. The Explanatory Memorandum for the predecessor provision, in saying that the "ordinary meaning of the words is imported and there is no intention to limit their ordinary usage",<sup>263</sup> should be taken to recognise that the words "incite" and "discord" in

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263 Australia, House of Representatives, *Migration (Offences and Undesirable Persons) Amendment Bill 1992*, Explanatory Memorandum at 4 [16].

s 501(6)(d)(iv) (and "danger" in s 501(6)(d)(v)) have an ordinary meaning which excludes the most benign possible meaning of each word taken in isolation.

219 Similarly, the Second Reading Speech for the predecessor provision, in referring to that provision as "aimed at those persons who may regard entry to this country as a means to attack [Australian] values",<sup>264</sup> does not indicate that the predecessor provision was intended to be engaged by causing mere disagreement and debate in the Australian community by reasoned argument. In the Second Reading Speech the Minister referred to "well-accepted Australian values" and said that the provisions "would not be used to breach established standards of industrial democracy". Whatever the Minister had precisely in mind, it is clear enough that the target of the predecessor provision was not mere debate and disagreement but the kind of weaponisation of words and ideas involved in vilification of people or groups and the fomenting of social discord.

220 Accordingly, in isolation "a risk" might be construed to mean any possible chance no matter how trivial or inconsequential. Read in context, however, the required risk is not any chance that an effect or thing "could" or "might" be so. The relevant risk is a material chance that an effect or thing "would" be so. For there to be a risk that a person "would" do or be one of the specified things, there must be existing facts, matters or circumstances from which a reasonable inference can be drawn that there is a material chance or prospect that the person would do or be one of the specified things. Section 501(6), in referring to "a risk that the person would ...", is not satisfied by speculation that there is a mere chance a person could or might do or be one of the specified things.

221 Further, in isolation, "incite" may mean no more than unintentionally cause or "animate, instigate, stimulate" but, in the context of s 501(6)(d), its ordinary meaning is to "urge" or "stir up"<sup>265</sup> the specified circumstance whether the person intended that circumstance to result or not. In isolation, "discord in the Australian community or in a segment of that community" may mean no more than "disharmony or disagreement between people" but, in the context of the provision, its ordinary meaning is "dissension" or "strife" involving the creation or exacerbation of material antagonism or enmity not merely between individuals but within or between segments of the Australian community, thereby resulting in material harm to the Australian community or a segment of that community.<sup>266</sup> So understood, construing s 501(6)(d)(iv) as involving a material risk of material harm is not to read words into the provision which do not appear, but to read the

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**264** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 December 1992 at 4121.

**265** *Oxford English Dictionary Online*, "incite", sense a, September 2023.

**266** *Oxford English Dictionary Online*, "discord", sense 1a, March 2025.

provision in context in accordance with the ordinary meaning of the words used. It follows from this that s 501(6)(d)(iv) is not engaged merely because there is a chance that a person would stimulate debate and disagreement within any part of the Australian community. That is not the ordinary meaning of the provision construed in context.

222 Contrary to the submissions for the plaintiff, this construction of s 501(6)(d)(iv) does not negate the operation of s 501(6)(d)(v). Rather, it enables s 501(6)(d)(v) to have its general and expansive effect in an appropriate case. That there may be overlap between the scope of s 501(6)(d)(i)-(v) may be accepted. The Explanatory Memorandum, in referring to "or *otherwise* represent a danger to",<sup>267</sup> effectively recognises that s 501(6)(d)(v) is a more general and expansive provision than s 501(6)(d)(iv). This is reinforced by the fact that the statutory criterion which s 501(6)(d)(v) constitutes is "in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would: ... represent a danger to the Australian community or to a segment of that community ... in any ... way". Because "danger" ordinarily encompasses the concept of a risk of harm, hurt or injury, s 501(6)(d)(v), unlike the other provisions, is potentially engaged by a material risk of danger (meaning harm) to the Australian community or to a segment of that community in any way. The expansive character of s 501(6)(d)(v) is also indicated by the example given of "danger" to the Australian community or to a segment of it by the person becoming "involved in activities that are disruptive to" the community or a segment of it. Contrary again to the submissions for the plaintiff, the word "disruptive" in s 501(6)(d)(v) does not mean that "discord" in s 501(6)(d)(iv) includes mere disruption. The text and structure of the provisions indicates to the contrary – that s 501(6)(d)(iv) involves a more specific and higher threshold than that in s 501(6)(d)(v).

223 None of this means that s 501(6)(d)(iv), so construed, makes s 501(6)(d)(v) redundant. It does mean, however, that the Solicitor-General's proposed construction of s 501(6)(d)(iv) goes too far. The Solicitor-General's proposed construction conflates s 501(6)(d)(v) with s 501(6)(d)(iv) and does not recognise that creating or exacerbating discord, properly construed, automatically involves harm to the Australian community or a segment of it. That is, the fact of a risk of inciting discord (once construed properly) has within it a sufficiently material risk of harm. No further harm, separate from the fact of the risk of inciting of discord, need be found. That, however, is immaterial to the outcome in this case.

224 For these reasons, s 501(6)(d)(iv) does not apply to a person whose entry into or presence in Australia would merely cause anticipated debate, disagreement or argument in a part of the Australian community.

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267 Australia, House of Representatives, *Migration (Offences and Undesirable Persons) Amendment Bill 1992*, Explanatory Memorandum at 4 [16] (emphasis added).

### The constitutional implication

225 The implication into the *Constitution* of a freedom of political communication was entrenched by the unanimous decision of seven members of this Court in *Lange v Australian Broadcasting Corporation*.<sup>268</sup> Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ, in joint reasons, held that "[f]reedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates",<sup>269</sup> so that, by implication from ss 7 and 24 and other related provisions of the *Constitution*,<sup>270</sup> legislative and executive powers do not extend to "curtailment of the protected freedom".<sup>271</sup>

226 Their Honours also agreed in *Lange* that the protected freedom "confers no rights on individuals and, to the extent that the freedom rests upon implication, that implication defines the nature and extent of the freedom",<sup>272</sup> adopting an earlier statement of Brennan J that the "implication is negative in nature: it invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control".<sup>273</sup> They agreed that if "the freedom is to effectively serve the purpose of ss 7 and 24 and related sections, it cannot be confined to the election period" as, if so confined, "the electors would be deprived of the greater part of the information necessary to make an effective choice at the election".<sup>274</sup> They agreed that "the freedom of communication which the Constitution protects is not absolute" and is "limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution".<sup>275</sup> They agreed that a law would not be invalid by operation of the

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268 (1997) 189 CLR 520.

269 (1997) 189 CLR 520 at 559.

270 *Constitution*, s 7 ("The Senate shall be composed of senators for each State, directly chosen by the people of the State ..."); s 24 ("The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth ..."). See also *Constitution*, ss 6, 49, 62, 64, 83 and 128.

271 (1997) 189 CLR 520 at 560.

272 (1997) 189 CLR 520 at 560.

273 (1997) 189 CLR 520 at 560, quoting *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 327.

274 (1997) 189 CLR 520 at 561.

275 (1997) 189 CLR 520 at 561.

freedom if it satisfied two conditions.<sup>276</sup> They agreed that the first condition is "that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government".<sup>277</sup> They acknowledged that the second condition had been expressed in different terms but agreed on expressing the second condition as "that the law is reasonably appropriate and adapted to achieving that legitimate object or end".<sup>278</sup>

227 It is also not in doubt that the protected freedom is of the entire process involved in "communication", irrespective of how the communication might be achieved. In *Levy v Victoria*,<sup>279</sup> Brennan CJ described the constitutional implication as potentially applicable "whatever be the form of communication",<sup>280</sup> Toohey and Gummow JJ said that "the constitutional freedom is not confined to verbal activity ... it may extend to conduct where that conduct is a means of communicating a message within the scope of the freedom",<sup>281</sup> McHugh J said that "any form of expressive conduct is capable of communicating a political or government message to those who witness it",<sup>282</sup> and Kirby J said that "the constitutionally protected freedom of communication on political and governmental matters in Australia extends to non-verbal conduct as well as to things said and written".<sup>283</sup>

228 Further, and as Gleeson CJ stated in *Mulholland v Australian Electoral Commission*,<sup>284</sup> "[w]hen this Court declares legislation to be beyond power, or to infringe some freedom required by the Constitution to be respected, it applies an external standard. Individual judgments as to the application of that standard may differ, but differences of judicial opinion about the application of a constitutional standard do not imply that the Constitution means what judges want it to mean, or

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276 (1997) 189 CLR 520 at 561.

277 (1997) 189 CLR 520 at 562.

278 (1997) 189 CLR 520 at 562.

279 (1997) 189 CLR 579.

280 (1997) 189 CLR 579 at 594.

281 (1997) 189 CLR 579 at 613.

282 (1997) 189 CLR 579 at 623.

283 (1997) 189 CLR 579 at 641.

284 (2004) 220 CLR 181.

that the Constitution says what judges would prefer it to say."<sup>285</sup> As his Honour put it, "[i]dentification of the end served by a law, and deciding its compatibility with a system of representative government, is a familiar kind of judicial function" and "[f]or a court to describe a law as reasonably appropriate and adapted to a legitimate end is to use a formula which is intended, among other things, to express the limits between legitimate judicial scrutiny, and illegitimate judicial encroachment upon an area of legislative power",<sup>286</sup> having a "long history of application in many aspects of Australian jurisprudence".<sup>287</sup>

229 Gleeson CJ made these statements in the context of a case in which his Honour's reasons for concluding that the impugned law was valid represented a minority view. Gleeson CJ, in common with Kirby J, considered that the impugned legislation, limiting the entitlement to registration of political parties to parties with at least 500 members in circumstances where, amongst other things, the recording of party affiliation on ballot papers depended on registration, burdened political communications but did so for a legitimate end and in a manner and to an extent that was reasonably appropriate and adapted to that legitimate end.<sup>288</sup>

230 In contrast, McHugh J, while accepting that "the ballot-paper is a communication on political and government matters",<sup>289</sup> considered that the restrictions imposed by the impugned legislation were "the conditions of the [statutory] entitlement to have a party's name placed on the ballot-paper" and did not "exist independently of [that] entitlement".<sup>290</sup> As McHugh J put it, "[p]roof of a burden on the implied constitutional freedom requires proof that the challenged law burdens a freedom that exists independently of that law".<sup>291</sup> Gummow and Hayne JJ considered that the starting point involved asking "whose freedom?" and "freedom from what?".<sup>292</sup> Their Honours considered that, as there was no freedom or right of the appellant as a candidate for a political party to have the recording of his party affiliation on ballot papers apart from that provided by the impugned

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**285** (2004) 220 CLR 181 at 197 [32].

**286** (2004) 220 CLR 181 at 197 [33].

**287** (2004) 220 CLR 181 at 200 [39].

**288** (2004) 220 CLR 181 at 201 [42], 265 [246], 268-269 [256], 270 [261].

**289** (2004) 220 CLR 181 at 219 [94].

**290** (2004) 220 CLR 181 at 223 [105].

**291** (2004) 220 CLR 181 at 223 [107].

**292** (2004) 220 CLR 181 at 246 [183].

legislation, there was no curtailment of any such freedom.<sup>293</sup> Callinan J also concluded that as the "appellant has no relevant *right* to the imposition of an obligation upon another, to communicate a particular matter, he has no right which is capable of being burdened".<sup>294</sup> Heydon J similarly said that before there can be any interference with freedom of political communication it is "necessary that there be some relevant 'right or privilege ... under the general law' to be interfered with". It followed that "to legislate for a mixture of permissions and prohibitions, so as to permit the party affiliations of some candidates but not others to appear on the ballot paper, cannot interfere with the implied freedom".<sup>295</sup>

231 In *Ruddick v The Commonwealth*,<sup>296</sup> Gordon, Edelman and Gleeson JJ, with whom Steward J agreed, held that legislative amendments preventing a later formed political party's registered name or logo from containing a word in the name or abbreviation of an earlier registered political party did not burden freedom of political communication. Gordon, Edelman and Gleeson JJ considered that the challenge to validity of the amendments failed at the "threshold stage" of establishing a burden on freedom of political communication because, in the context of the whole statute, the amendments were likely to improve rather than impair the quality of such communication.<sup>297</sup> The material before the Court on which this evaluation was made included that the word "Liberal" in the name of the political party "Liberal Democrats" had created voter confusion as to whether candidates of the "Liberal Democrats" were candidates for the "Liberals" (the pre-existing registered political party).<sup>298</sup> Their Honours also approved earlier statements that the freedom protected by the constitutional implication was the freedom to do what would otherwise be lawful<sup>299</sup> and considered that a "further reason" the challenge to validity failed was that the circumstances of the case were indistinguishable from those in *Mulholland*.<sup>300</sup>

232 In contrast, Kiefel CJ and Keane J, in the minority with Gageler J, concluded that the legislative amendments were invalid. Kiefel CJ and Keane J

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**293** (2004) 220 CLR 181 at 247-249 [186]-[192].

**294** (2004) 220 CLR 181 at 298 [337] (emphasis in original).

**295** (2004) 220 CLR 181 at 303-304 [354] (footnotes omitted).

**296** (2022) 275 CLR 333.

**297** (2022) 275 CLR 333 at 394 [161]-[162].

**298** (2022) 275 CLR 333 at 386 [140], 394 [162].

**299** (2022) 275 CLR 333 at 391-392 [155]-[156].

**300** (2022) 275 CLR 333 at 396 [171].



reasoned that, as the legislation already effectively dealt with the risk of voter confusion, the amendments operated to prevent a candidate from communicating their party affiliation to electors.<sup>301</sup> In common with Gageler J, their Honours considered that *Mulholland* could not and did not determine the question in *Ruddick*.<sup>302</sup>

233 Gageler J considered *Mulholland* to be "best understood as a case in which both conditions expounded in *Lange* for compatibility with ss 7 and 24 of the *Constitution*, both in their core operation and in the context of the implied freedom of political communication, were readily found to be satisfied".<sup>303</sup> His Honour considered that the overlapping reasons of McHugh J, Gummow and Hayne JJ, Callinan J, and Heydon J in *Mulholland* responded to the appellant's argument in that case that the legal operation of the amendments burdened the protected freedom because they excluded from the ballot paper reference to the affiliation of a candidate with the excluded political party, and that the argument was rejected because the proposed burden depended on a non-existent "liberty to communicate that existed independently of executive action" (meaning the actions of the Australian Electoral Commission in accordance with the applicable legislation in respect of ballot papers).<sup>304</sup> On this basis, there remained scope for "political communication to be burdened, and the implied freedom thereby to be engaged, to the extent that exclusion from a ballot paper of reference to the party affiliation of a candidate can be found to impose a practical impediment to communication of information relevant to electoral choice in the exercise of the liberty of communication which exists at common law".<sup>305</sup>

234 No ultimate resolution of these strands of thought is demanded by the present case. The plaintiff did not challenge *Mulholland*. The Solicitor-General of the Commonwealth contended that the plaintiff's attempt to establish a burden by establishing that she has a "right" to a visa, when no such right exists, was foreclosed by *Mulholland* and *Ruddick*. No such right exists because, as the Solicitor-General put it, no person can require an alien to be granted a visa permitting the alien to enter Australia whether to engage in political discussions in

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301 (2022) 275 CLR 333 at 343 [3].

302 (2022) 275 CLR 333 at 349 [22].

303 (2022) 275 CLR 333 at 366 [73].

304 (2022) 275 CLR 333 at 366-367 [75].

305 (2022) 275 CLR 333 at 367 [78].

Australia or otherwise.<sup>306</sup> So expressed, the Solicitor-General's proposition is unquestionable. It is also, however, incomplete.

235 First, that the "power to exclude ... even a friendly alien is recognized by international law as an incident of sovereignty over territory"<sup>307</sup> is in no doubt. It does not follow from this fundamental principle of international law that freedom of political communication, protected by the constitutional implication, is incapable of being burdened by legislative or executive action in respect of the exercise of that sovereign power to exclude an alien. Neither the fundamental principle nor any aspect of the majority reasoning in *Mulholland* or *Ruddick* gives rise to such an incapacity.

236 The *Constitution* gives effect to the fundamental principle of international law by providing, in s 51(xix), that the Commonwealth Parliament "shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ... aliens". The implication into the *Constitution* of a freedom of political communication means that the legislative powers in s 51(xix), and the associated executive powers under s 61, operate "subject to this Constitution", including the constraint on legislative power effected by the implied freedom.

237 One consequence of the fundamental principle of international law that a sovereign nation may exclude all aliens is that a sovereign nation can also permit entry by an alien into its sovereign territory subject to "what conditions it pleases".<sup>308</sup> Yet once an alien is within Australia, an equally fundamental principle of the common law is engaged – that such an alien "enjoys the protection of our law", albeit that the status of an alien makes that person vulnerable to deportation and powers ancillary to the purpose of visa determination and deportation.<sup>309</sup> It

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306 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 273 CLR 21 at 42 [30], citing, amongst other cases, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 10, 29, 44-45, 64-65; *CZA19 v The Commonwealth* (2025) 99 ALJR 650 at 660 [41]; 422 ALR 133 at 144, quoting *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 14 [26].

307 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 29.

308 *Attorney-General for Canada v Cain* [1906] AC 542 at 546, quoted in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 30.

309 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 29, 30; *NZYQ v Minister for Immigration, Citizenship and*

follows from this that if an alien were to be granted a visa to enter Australia subject to a condition that the alien was not to engage in political communications while in Australia, the majority reasoning in *Mulholland* and *Ruddick* would not preclude the alien or another person with standing to do so challenging the validity of the condition. Although the alien would have no right to be in Australia other than by reason of the visa which includes the condition, the constitutional implication, in protecting freedom of political communication, attaches to the entirety of the concept of "communication" as an exchange of information involving both expression and reception. The alien present in Australia under a visa subject to the condition has no right to be so present other than by reason of the visa, but the condition would practically restrict the capacity of every other person in Australia to engage in otherwise lawful political communications with the alien. It would be no answer to the restriction on that practical capacity that the condition of the visa applying to the alien is part of the permission granted to the alien to enter Australia.

238       Second, and relatedly, it is apparent therefore that conceiving of the protected freedom as attaching only to a person's specific right or liberty in law to express a political idea in a particular circumstance or by a particular means said to be burdened by an impugned law overlooks that, for people in Australia, the legal operation of the impugned law may effect a broader practical restriction on their capacity to engage in political communications (by receipt of a communication as well as its expression) by all such means as otherwise might be lawfully available to them. This is such a case.

239       Returning then to *Mulholland* and *Ruddick*, in the former case the argument focused on an asserted right of the appellant as a candidate for election to communicate his political party affiliation to voters by it appearing on the ballot paper. Five members of the Court reasoned that no such right existed apart from the registration provisions of the legislation by which the content of the ballot paper was regulated. In the latter case, the principal reasoning of the majority, to the effect that the legislative amendments would be likely to enhance the quality of political communications, both recognised "communication" as an exchange involving expression (by the name of the party being on the ballot paper) and reception (by voters seeing the ballot paper) and engaged with the practical effect of the impugned law. Accordingly, the majority's principal conclusion – that there was no burden on the communication conceived of as an entire process of exchange – did not depend on any asserted right of the plaintiff in that case to have his party's name appear on the ballot paper, but rather the practical effect of the impugned law on the entirety of the communication affected by the impugned law. The "further reason" the majority gave for rejecting the challenge in *Ruddick*, that

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*Multicultural Affairs* (2023) 280 CLR 137 at 154-155 [31], 158-159 [46], 162 [55]; *CZA19 v The Commonwealth* (2025) 99 ALJR 650 at 660-661 [38]-[45]; 422 ALR 133 at 143-145.

*Mulholland* was indistinguishable, in contrast, focused on that asserted right of expression.<sup>310</sup>

240 To return now to the present case, the plaintiff has not been granted a visa subject to a condition preventing the plaintiff from engaging in political communication while in Australia. The plaintiff has been refused a visa on grounds including that the Minister reasonably suspected that the plaintiff did not pass the character test because of the risk that, if permitted to enter Australia, she would incite discord in the Australian community or a segment of it given her stated intention of engaging in communication of her "bold and unfiltered perspectives" while in Australia. Conceptualising the challenge to the validity of s 501(6)(d)(iv) of the *Migration Act* in terms only of an asserted right of the plaintiff as an alien to enter Australia to engage in political communications, the case is indistinguishable from *Mulholland*. Conceptualising the challenge to validity in terms of persons in Australia, there is a manifest practical burden that s 501(6)(d)(iv) imposes on their capacity to receive the plaintiff's political communications by the mode of in-person communications and, thereby, to engage in such communications with both the plaintiff and others who would attend her speaking events. That the plaintiff, being an alien, has no right to enter Australia for that or any other purpose is not to the point. Nor is it to the point that no person in Australia has a right to require the presence of the plaintiff in Australia for that or any other purpose. The point is that the implied freedom of political communication, involving, as it does, the whole process of communication, necessarily has within its scope both the expression and reception of ideas via the complete range of media by which political communication is achieved. Contrary to the plaintiff's submissions, this conclusion does not depend on s 501(6)(d)(iv) being severable from the provisions of the *Migration Act* which the plaintiff contends would otherwise operate to require her to be granted the visa for which she applied.

241 The Solicitor-General submitted that, in any event, it did not follow that s 501(6)(d)(iv) was invalid, because as a definitional provision s 501(6)(d)(iv) has no effect unless and until the power in s 501(3) (to refuse to grant or to cancel a visa) is exercised; before exercise, s 501(6)(d)(iv) imposes no burden on the protected freedom. Putting it another way, the argument is that the legislation itself does not burden the protected freedom. Only an exercise of executive power by the Minister under s 501(3), in accordance with s 501(6)(d)(iv), can burden the protected freedom. Moreover, some exercises of executive power relying on s 501(6)(d)(iv) may involve no such burden or only a burden which is justified. Therefore, s 3A of the *Migration Act* would apply. By s 3A, unless there is a contrary intention, if a provision of the *Migration Act* would have an invalid application but also has at least one valid application "it is the Parliament's

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310 (2022) 275 CLR 333 at 396 [171].

intention that the provision is not to have the invalid application, but is to have every valid application".

242 The potential operation of s 3A depends, therefore, on s 501(6)(d)(iv) having an invalid application. To that question, I now turn.

### **Applying the test for constitutional validity**

243 The impugned law imposing a practical burden on the freedom of political communication, the two-part test in *Lange* must be applied. That is: (1) is the object of the law compatible with the maintenance of the constitutionally prescribed system of representative and responsible government; and (2) is the law reasonably appropriate and adapted to achieving that legitimate object or end?<sup>311</sup>

#### *End, object or purpose*

244 The plaintiff contended that the purpose of s 501(6)(d)(iv) is 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. The defendants contended that the purpose of s 501(6)(d)(iv) is to protect the Australian community from non-citizens whose presence in Australia would represent a danger to that community because of the risk that they would rouse, stimulate, urge, spur on or stir up strife, dispute, disharmony or dissension within the Australian community of a kind that involves harm to that community (or a segment thereof). The plaintiff contended that either purpose is incompatible with the maintenance of the constitutionally prescribed system of representative and responsible government. The defendants contended that both purposes are compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

245 Based on the proper construction of s 501(6)(d)(iv) it cannot be said that the end, object or purpose of the provision is 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. That suggested purpose misses the target altogether. The end, object or purpose of the provision is to protect the Australian community (or a segment of it) from an alien's presence in Australia having a material risk of inciting (meaning urging or stirring up) discord (meaning strife or dissension involving the creation or exacerbation of material antagonism or enmity within or between segments of the Australian community), thereby resulting in material harm to the Australian community or a segment of that community, whether the alien intended to have that effect on the community (or segment thereof) or not.

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311 (1997) 189 CLR 520 at 561-562.

246 So understood, the end, object or purpose of the provision is manifestly compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. The purpose of such protection is not to prevent or restrict political communications. The constitutionally prescribed system of representative and responsible government extends to the protection of people in Australia and groups of such people from a material risk of this kind of harm. If such a risk eventuates and is left unchecked, the resulting harm itself would be potentially incompatible with the continuation of Australia's form of constitutionally protected representative and responsible government.

*Reasonably appropriate and adapted*

247 Properly construed, s 501(6)(d)(iv) is reasonably appropriate and adapted to the legislative purpose of protection of the Australian community and segments of that community from the effect of an alien's presence in Australia involving a material risk of material harm by the inciting of discord in the Australian community or a segment of it, the inciting of discord meaning the creation or exacerbation of material antagonism or enmity within or between segments of the Australian community.

248 First, the purpose of the law is not to deny or restrict political communication, albeit that such denial or restriction may be a consequence or incident of the operation of the law in a particular case.

249 Second, the legislation is indifferent to the content of any political communication other than by reference to its effect of harm by creating or exacerbating material antagonisms or enmities between a material number of people in the Australian community or a segment of it. The plaintiff's contention that s 501(6)(d)(iv) is more likely to be used to exclude those who are apprehended by the Minister to have expressed, or be likely to express, "non-mainstream" political ideas is mere assertion. Section 501(6)(d)(iv) does not attach to "mainstream" or "non-mainstream political ideas". It attaches to the risk of effects.

250 The legislation is therefore properly seen to be content neutral, concerned not with the communication of any specific idea or class of ideas, political or otherwise, but only with the objective consequences of the presence of the person in Australia being the risk of harm of the required kind. These features of the provision, if anything, tend to enhance rather than undermine the form of representative and responsible government which the *Constitution* entrenches. In such a case, it should be recognised that the implied freedom of political communication enables a genuine "margin of choice" by which the Commonwealth Parliament can achieve its legitimate ends or objects.<sup>312</sup>

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312 *Coleman v Power* (2004) 220 CLR 1 at 52-53 [100].

251 Third, the burden is on one mode of communication only (in-person) and  
not any other available mode of communication.

252 Fourth, such alternative modes of communication, in contemporary  
circumstances, are commonly known to be available, practical and convenient.  
While these alternative modes of communication, and their availability,  
practicality and convenience, do not transform the denial of the in-person mode of  
communication into a non-burden on the protected freedom, they significantly  
confine the nature and extent of the burden. Contrary to the arguments for the  
plaintiff, it cannot be said that the burden is substantial, direct and discriminatory.  
Rather, the burden is minor, incidental, consequential, and non-discriminatory in  
circumstances where there is an obvious and, indeed, compelling, rational  
connection between the provision (enabling denial of a visa in the specified  
circumstances) and its purpose.

253 The mere capacity to identify a legislative alternative potentially imposing  
any lesser burden on the protected freedom should not suffice to invalidate such a  
legislative provision, particularly if the legislative alternative is, in truth, simply a  
less effective means to secure an objective which is compatible with and capable  
of protecting the functioning of representative and responsible government in  
Australia.<sup>313</sup>

254 The plaintiff's identification of s 501(6)(d)(v) alone as a legislative  
alternative depends on the plaintiff's construction of s 501(6)(d)(iv) being  
accepted. Once it is recognised that s 501(6)(d)(iv) is a narrower and more specific  
provision than s 501(6)(d)(v), and includes a component of a risk of harm to the  
Australian community or a segment of it from the anticipated dissension or strife,  
it cannot be said that s 501(6)(d)(v) would have a less burdensome effect on the  
protected freedom than s 501(6)(d)(iv).

255 The plaintiff also proposed a predecessor provision to s 501(6)(d)(iv), the  
former s 180A(1)(b)(iii) of the *Migration Act*, as a legislative alternative having a  
less burdensome effect on the protected freedom than s 501(6)(d)(iv).  
Section 180A(1)(b)(iii) enabled the Minister to refuse to grant or to cancel a visa  
if "the Minister is satisfied that, if the person were allowed to enter or to remain in  
Australia, the person would: ... incite discord in the Australian community or in a  
segment of that community". It will be apparent that the difference between the  
provisions is that the preamble to s 501(6)(d)(iv) refers to a "risk that the person

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**313** *Coleman v Power* (2004) 220 CLR 1 at 31 [30]-[31], quoting *Levy v Victoria* (1997) 189 CLR 579 at 619. See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40]; *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95]-[99].

would" whereas the preamble to former s 180A(1)(b)(iii) refers to "the person would".

256 Read in isolation, former s 180A(1)(b)(iii) would have a less burdensome effect on the protected freedom than s 501(6)(d)(iv) has because the former provision imposes a more onerous standard (the person would) than the latter provision (a risk that the person would). Former s 180A(1)(b)(iii), however, cannot be isolated from its context. Former s 180A(1)(b)(iii) operated in conjunction with former s 180A(1)(b)(iv), which enabled the Minister to refuse to grant or to cancel a visa if "the Minister is satisfied that, if the person were allowed to enter or to remain in Australia, the person would: ... represent a danger to the Australian community or to a segment of that community, whether by way of ... or in any other way". Consistently with s 501(6)(d)(v), former s 180A(1)(b)(iv) was a more general and expansive provision than former s 180A(1)(b)(iii) because it applied if the person would represent a danger to the Australian community or to a segment of that community in any way. As discussed, "danger" in this context involves the concept of "risk" of harm and is not confined to physical harm. It follows that to propose the former s 180A(1)(b)(iii) as a legislative alternative to s 501(6)(d)(iv), as if former s 180A(1)(b)(iv) and s 501(6)(d)(v) did not also exist, is nothing more than an artificial exercise.

257 Moreover, the legislative object of both sets of provisions, to protect the Australian community from the risk of a certain kind of harm, could not be effectively achieved if the legislation did not enable the Minister to refuse to grant or to cancel a visa based on a state of satisfaction of material risk of that harm occurring, rather than a state of satisfaction that such harm would occur. If the provisions are each considered in isolation (which they should not be), the plaintiff has identified no more than an alternative and less burdensome means of achieving a lesser legislative objective or an alternative, less burdensome and less effective means of achieving the same legislative objective.

258 Either way, given that the impugned provision is not directed to the restriction of political communications, is content neutral, has an incidental and consequential effect on one mode of political communication only (in-person communications), and leaves entirely unaffected all other modes of political communication when such modes are known to be available, practical and convenient, s 501(6)(d)(iv) is reasonably necessary to achieve its objective. It is undoubtedly within the available margins of legislative choice which the concept of "reasonable necessity" leaves open, recognising that, in this context, "necessary" does not mean "essential" or "unavoidable".<sup>314</sup> But this is far from saying, as the plaintiff would have it, that the reality of s 501(6)(d)(iv) is that the Minister can apply the provision "to curb political communication that has no real risk of

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**314** *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 199-200 [39].



causing the requisite states, but is simply political communication that enough of the public will not like". The provision is not engaged by any such circumstance. The threshold of "risk" does not bring the urging of any kind of discourse about any issue within the provision merely because it can be said possibly to cause debate or disagreement.

259 According to the plaintiff, a further vice of the provision is that "the uncontrollable reaction of others can and does cause a person to fail the character test" in that, if those in Australia with opposing views to that of the person applying for the visa threaten to react sufficiently strongly, the Minister can refuse to grant the visa "irrespective of the steps taken by the person to encourage civility and respectful disagreement". If that be a vice, it is not one involving any greater burden on the freedom of political communication than would otherwise be the case.

260 On this basis, it also cannot be accepted, as the plaintiff would have it, that the benefit which s 501(6)(d)(iv) achieves is outweighed, let alone materially or manifestly outweighed, by the burden on the freedom of political communication which the provision imposes.<sup>315</sup>

261 For these reasons, it cannot be concluded that, properly construed, s 501(6)(d)(iv) has any invalid application. Accordingly, s 3A of the *Migration Act* is not engaged. The provision is valid in all its potential applications.

### **The Minister's decision**

262 The plaintiff contended, in the alternative, that the Minister's decision to refuse to grant her the visa miscarried because, assuming the plaintiff's construction of s 501(6)(d)(iv) is rejected, the Minister did not apply the provision on the basis that "discord" required anything more than the plaintiff's presence in Australia causing mere controversy, debate or disagreement.

263 In deciding to refuse to grant the plaintiff the visa for which she had applied based on ss 501(3)(a) and 501(6)(d)(iv), the Minister recorded that the plaintiff proposed to undertake her speaking tour in Australia by sharing her "bold and unfiltered perspectives" where, amongst other things, she: (a) had a profile as a political commentator, author and activist known for her "controversial and conspiratorial views", having been the subject of significant media reporting for her comments relating to the Black Lives Matter movement, the Israel-Hamas conflict, anti-Semitism, Islamophobia, and the LGBTQIA+ community; (b) had been criticised for minimisation of the Holocaust including in communications apparently relativising the "evil" represented by Adolf Hitler and the Nazis, indicating that the westward movement of ethnic Germans from eastern Europe in

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**315** *Comcare v Banerji* (2019) 267 CLR 373 at 402 [38].

the face of the advance of the Soviet Army in 1945 was a greater evil by "ethnic cleansing" than the Nazi murder of six million Jews, and dismissing as absurd Dr Josef Mengele's torture and murder of Jews by performing purported medical experiments on them; (c) had said that Europe would be a "Muslim continent within decades" and that "we" (the United States) would be "forced to save you" (Europe) from Muslims; (d) had been quoted by the perpetrator of the murder and injury of Muslims in Christchurch as his greatest influence; (e) said that "Muslims started slavery"; (f) had been suspended by YouTube as YouTube considered that three videos she posted contravened its hate speech policies; and (g) had reportedly been suspended by YouTube as YouTube considered she had promoted hatred of the LGBTQIA+ community.

264 The Minister referred to information from ASIO and the Australian Federal Police about the increased threat in Australia posed by "right-wing extremism" and information that "[h]ate speech leads to political violence if you allow it to escalate". The Minister described this information as credible, well-evidenced and consistent. On this basis, the Minister expressed satisfaction that "persons who espouse ideologically motivated extremist views ... pose a risk of inciting discord in the Australian community", saying the evidence was clear that "inflammatory rhetoric can lead to increased hate crimes, radicalisation of individuals and heightened tensions in communities". The Minister also found that the plaintiff's commentary was "extremist and inflammatory ... towards Muslim, Black, Jewish and LGBTQIA+ communities" and such commentary "generate[s] controversy and hatred". The Minister found that the plaintiff "spread misinformation" which leads to "fostering division and fear in communities". As such, the Minister found a risk that the plaintiff's controversial views would "amplify grievances among communities and lead to increased hostility and violent or radical action", involving the "potential to galvanise discord" by the plaintiff's presence, as the "normalisation of controversial rhetoric that dehumanises and targets specific communities has the propensity to galvanise individuals and incite discord in the community".

265 The plaintiff's submission that the Minister, by these reasons, misconstrued "discord" as meaning mere "disagreement" or "debate" is untenable. It was not necessary for the Minister to say that "discord" means dissension or strife involving antagonism or enmity between people in the Australian community or a segment of that community such as to involve a material risk of harm to the Australian community or a segment of it. The Minister did not refuse to grant the plaintiff a visa merely because she had expressed "controversial" views which engendered debate and disagreement. The Minister refused to grant the plaintiff a visa because the Minister was satisfied that: (a) the plaintiff had frequently espoused extremist and inflammatory views dehumanising and targeting and capable of generating hatred towards and fear within several groups within the Australian community; and (b) the plaintiff's presence in Australia for her speaking tour where she intended to share her "bold and unfiltered perspectives" would enable the plaintiff to espouse these views in person across Australia thereby

amplifying existing grievances within the Australian community, galvanising radicalisation of individuals, and fomenting increased hostility and violent or radical action including increased hate crimes. The Minister therefore did not omit to find that the risk of discord would cause harm. Nor did the Minister omit to identify the harm or who would suffer from it. The Minister's reasons also expose that the threshold of the risk and the potential harm being material was satisfied. That the Minister did not find that the plaintiff intended she cause such harm to the Australian community as a whole and groups within it who had previously been targeted by the plaintiff is immaterial. The Minister was right to focus instead on the effect of the plaintiff's presence in Australia and not her subjective intentions.

266 For these reasons, the Minister's reasons disclose no misconstruction of s 501(6)(d)(iv) but, rather, confirm that the requirements of the provision were satisfied in this case. The plaintiff's challenge to the validity of the Minister's decision must be rejected.

### **Conclusions and orders**

267 Given the negative answers to each of the substantive questions of law posed in the special case, the plaintiff is not entitled to any relief. The plaintiff should pay the defendants' costs of the special case.