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Federal Court of Australia
District Registry: New South Wales
Division: General

No. NSD372 of 2023

MEHREEN FARUQI
Applicant

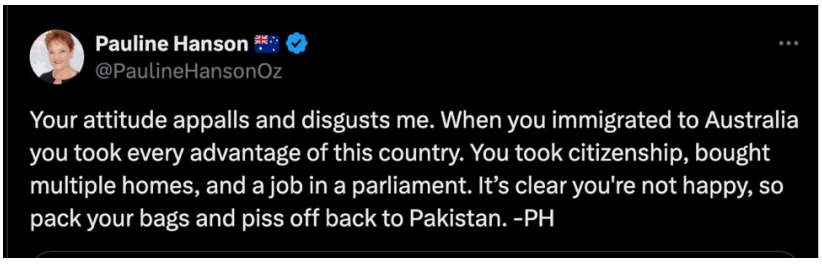
PAULINE HANSON
Respondent

APPLICANT'S OUTLINE OF SUBMISSIONS

A. OVERVIEW

1. At 11.51am on 9 September 2022, the Applicant tweeted:

2. At 4.05pm the same day, the Respondent replied (**the Tweet**):



3. The Tweet was likely to offend, insult, humiliate or intimidate the Applicant and other people who share one or more of her characteristics. The words "pack your bags and piss off back to Pakistan" told the Applicant that she was not welcome in Australia and should leave, and

they implied that she is less worthy of the advantages of living in Australia because she migrated here.

4. But they said more than that. They were the quintessential 'dog whistle'. They were just another way of saying 'go back to where you came from' or 'you flew here I grew here' with all the history and hurt and harm that such words evoke.

5. That the words were said "because of" the race, colour or national or ethnic origin of the Applicant is obvious. You would not be told to "pack your bags and piss off back to Pakistan" unless your national origin was Pakistani. Indeed, the Respondent's own evidence is that she made that specific comment because the Applicant is from Pakistan. Further, the Respondent has a provable and public tendency to be racist and to say racist things making it more likely that the Tweet was published for reasons related particularly to the Applicant's status as a person of Asian origin, a Muslim and a woman of colour.

B. LEGISLATIVE HISTORY AND INTERPRETATION

6. These submissions address both the breach of s 18C of the *Racial Discrimination Act 1975* (Cth) (**RDA**) alleged in this case and its constitutional validity. They start by walking through the history and interpretation of the legislation.

7. The legislative background to the RDA is explained at length in ***Toben*** *v Jones* (2003) 129 FCR 515 and ***Eatock*** *v Bolt* (2011) 197 FCR 261.

8. The RDA was enacted in 1975 to give effect to Australia's obligations under the International Convention on the Elimination of all Forms of Racial Discrimination (**CERD**): RDA preamble; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168. The aim of CERD was to eliminate racial discrimination in all its forms: *Toben* at [136] (Allsop J). In furtherance of that aim, CERD imposed several obligations on States Parties, including: (i) an obligation to take measures to prohibit racial discrimination (Art 2); (ii) an obligation to adopt immediate and positive measures designed to eradicate all incitement to acts of racial hatred and discrimination (Art 4); and (iii) an obligation to adopt measures with a view to combating prejudices which lead to racial discrimination and to promote tolerance, particularly in the fields of teaching, education, culture and information (Art 7).

9. Article 4(a) obliged States Parties to criminalise "dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin". Clause 28 of the *Racial Discrimination Bill* purported to give effect to Art 4(a), but that clause was removed before the Bill was passed.

10. Throughout the 1980s and 1990s, State and Territory legislatures sought to remedy the omission of the federal legislature by enacting laws directed at what was then described as "racial vilification" or "racial victimisation": see, eg, *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW); *Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Act 1990* (WA). Reports were published recommending that the federal government enhance the protections provided by the RDA: see, Human Rights and Equal Opportunity Commission, *National Inquiry into Racist Violence* (1991) (**CB3163-3736**); Royal Commission into Aboriginal Deaths in Custody (1991) (**CB3737-3765**); Australian Law Reform Commission, *Report into Multiculturalism and the Law* (1992) (**CB3766-3802**). Amidst these developments, in 1994, the federal government introduced the *Racial Hatred Bill 1994*. This Bill contained both criminal and civil provisions designed to combat racial abuse. According to the Outline to its Explanatory Memorandum (**CB3815**):

> the Bill closes a gap in the legal protection available to the victims of extreme racist behaviour. …
>
> The Bill is intended to strengthen and support the significant degree of social cohesion demonstrated by the Australian community at large. The Bill is based on the principle that no person in Australia need live in fear because of his or her race, colour, or national or ethnic origin.
>
> The High Court has recently established an implied guarantee of free speech inherent in the democratic process enshrined in our Constitution. But the High Court has also made it clear that there are limits to this guarantee. There is no unrestricted right to say or publish anything regardless of the harm that can be caused. A whole range of laws protect people's rights by prohibiting some forms of publication or comment, such as child pornography and censorship laws, criminal laws about counselling others to commit a crime, and Trade Practices prohibitions on misleading and false advertising or representations. …
>
> The Bill is not intended to limit public debate about issues that are in the public interest. It is not intended to prohibit people from having and expressing ideas. The Bill does not apply to statements made during a private conversation or within the confines of a private home. …
>
> The Bill maintains a balance between the right to free speech and the protection of individuals and groups from harassment and fear because of their race, colour or national or ethnic origin. The Bill is intended to prevent people from seriously undermining tolerance within society by inciting racial hatred or threatening violence against individuals or groups because of their race, colour or national or ethnic origin.

11. The criminal provisions in the Bill were rejected by the Senate, but the civil provisions were enacted: *Racial Hatred Act 1995* (Cth) (**RHA**). The RHA inserted Pt IIA into the RDA. Pt IIA relevantly provides:

PART IIA—PROHIBITION OF OFFENSIVE BEHAVIOUR BASED ON RACIAL HATRED

18B Reason for doing an act

If:

(a) an act is done for 2 or more reasons; and

(b) one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act);

then, for the purposes of this Part, the act is taken to be done because of the person's race, colour or national or ethnic origin.

18C Offensive behaviour because of race, colour or national or ethnic origin

(1) It is unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Note: Subsection (1) makes certain acts unlawful. Section 46P of the Australian Human Rights Commission Act 1986 allows people to make complaints to the Australian Human Rights Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

(a) causes words, sounds, images or writing to be communicated to the public; or

(b) is done in a public place; or

(c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

public place includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

18D Exemptions

Section 18C does not render unlawful anything said or done reasonably and in good faith:

(a) in the performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

12. Sections 18B–D were enacted to give full effect to Australia's obligations under CERD and the International Covenant on Civil and Political Rights (**ICCPR**), especially Art 20(a): *Toben* at [19] (Carr J).

13. Sections 18B–D have been judicially considered many times. Their meaning is well settled. They form parts of a "cohesive whole", prohibiting acts:

> which reasonably cause[] offence etc (see par 18C(1)(a)) to a person or persons in circumstances where one of the reasons (see s 18B as to more than one reason) for the act in question [is] the race etc (see par 18C(1)(b)) of the person or persons reasonably likely to be offended and where the act [is] not justifiable as a form of expression contemplated by s 18D. (*Toben* at [128] (Allsop J); see also *Eatock* at [193] (Bromberg J))

14. Section 18D is important. It shows that the cohesive scheme is advertent to the interests of free speech and contains substantial "exemptions" to accommodate them: ***Creek*** *v Cairns Post Pty Ltd* (2001) 112 FCR 352 at [32] (Kiefel J); ***Bropho*** *v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at [3] and [62] (French J); *Eatock* at [210] (Bromberg J). In this way, ss 18B–D differ starkly from the provisions impugned in ***Nationwide*** *News Pty Ltd v Wills* (1992) 177 CLR 1, ***Coleman*** *v Power* (2004) 220 CLR 1 and ***Monis*** *v The Queen* (2013) 249 CLR 92. Those cases involved offences that prohibited objectionable speech *per se*. Sections 18B–D do not do that. To the contrary, they expressly preserve the freedom to undertake racially offensive public acts reasonably and in good faith. The inclusion in the legislative scheme of s 18D ensures that the reach of s 18C is confined.

15. For an act to qualify as offensive or insulting for the purposes of s 18C(1)(a), it must have "profound and serious effects, not to be likened to mere slights": *Bropho* at [70] (French J); cf ***Clubb*** *v Edwards* (2019) 267 CLR 171, involving an unsuccessful challenge to a law proscribing conduct "reasonably likely to cause distress or anxiety". For an act to have been done "because of" a relevant attribute, it suffices that it be "a factor" in the respondent's decision to act: *Creek* at [28] (Kiefel J); *Toben* at [37] (Carr J), [62] (Kiefel J), [152] (Allsop J). The onus rests with the Respondent to prove an exemption in s 18D: *Toben* at [41] (Carr J).

C. THE RESPONDENT BREACHED SECTION 18C

16. For the Applicant to succeed in her claim, she must prove that:

a. The Tweet occurred otherwise than in private (that is, in public);

b. It was reasonably likely that the impugned tweet would offend, insult, humiliate or intimidate her or a group people; and

c. The Tweet was written and broadcast by the Respondent including because of the race, colour or national or ethnic origin of the Applicant or of the members of the group.

17. The Tweet was public. This issue is not in dispute (Concise Statement, [9]; Concise Response, [9] (**CB25; CB31)**).

(a) The Tweet was reasonably likely to offend, insult, humiliate or intimidate the Applicant or members of a group

18. Section 18C sets an objective test. As Drummond J said in ***Hagan*** *v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 at [15]:

> The question so far as s 18C(1)(a) is concerned is not: how did the act affect the particular complainant? But rather would the act, in all the circumstances in which it was done, be likely to offend, insult, humiliate or intimidate a person or a group of people of a particular racial, national or ethnic group?

19. However, as Bromberg J explained in *Eatock* at [241], an individual's subjective reaction can help to decide whether the objective test has been met:

> Proof of actual offence for a particular person or group is neither required nor determinative, although evidence of subjective reaction is relevant to whether offence was reasonably likely: *Scully* at [99]-[101] (Hely J); *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 at [28] (Drummond J) and *McGlade* at [44]-[45] (Carr J).

20. The answer to the question posed by Drummond J is 'yes':

a. The words used would, as a matter of human experience, be reasonably likely to have those effects;

b. Expert evidence called by the Applicant explains the significance and history of the words used and why they are particularly offensive, insulting, humiliating or intimidating;

c. The words are more likely to be offensive, insulting, humiliating or intimidating because of who said them—Senator Hanson, a person with a major public profile and a tendency to be racist and to say racist things;

d. The Applicant as the target of the tweet, experienced those responses; and

e. Other people who share one or more of the Applicant's characteristics also experienced those responses.

21. Before turning to those factors, something should be said of the "group" aspect of section 18C(1) and the way in which such a group is relevant under s 18C. The impugned tweet targeted a particular person. But it did so by using words that resonate well beyond the Applicant, and were reasonably likely to offend, insult, humiliate or intimidate people other than her alone. Most obviously that would be people who have migrated to Australia or people who are born in Australia of migrant background. However, given the characteristics of the person targeted by the Tweet, it includes, Muslims, people of colour, people who have experienced racism, and people who have been told to "go back to where you came from" (or variations of that phrase) due to their race, colour or national or ethnic origin.

22. The Respondent told the Applicant to "pack your bags and piss off back to Pakistan". While the phrase "piss off" can be used in a jovial way, it was not so used here. Here, it was used in its commanding and derogatory form. Similarly, the phrase "pack your bags" was used in the Tweet with a commanding and demeaning connotation. It recalls a master ending the employment of a servant or a child being sent home from school. And the thing that the Respondent commanded be done —packaged in derogatory and demeaning language—is to "go back to Pakistan". That command is related directly to the Applicant's history of having "immigrated" to Australia.

23. To tell the Applicant to "pack your bags and piss off back to Pakistan" was to tell her that, as a migrant, she held a lesser status than those who were born in Australia. Someone born in Australia has, of course, nowhere to "piss off back to". The words demean and degrade. They eloquently make the migrant a lesser person; someone who must be grateful in a way that other Australians apparently need not be for the benefits and privileges of Australian citizenship.

24. The words cannot be separated from the person who tweeted them or from the person who they targeted. The person who tweeted them is an Australian Senator. She has been so for many years. She is someone who, as the evidence shows, has said things that dehumanise and devalue migrants—especially Asians, people of colour and Muslims—for decades. The

act of publishing the Tweet was more hostile, more impactful, and more likely to intimidate because it was done by the Respondent than by almost anyone else.

25. The person targeted by the Tweet is also an Australian Senator. But the phrase "pack your bags and piss off back to Pakistan" did not target her status as a Senator or her politics. Rather, it directly targeted her national origin, her race and, by implication, her religion and her skin colour.

26. Professor Jennifer Wingard explains that "Piss off back to Pakistan" is palimpsestic of the phrase "go back to where you came from": (***Wingard*** at [16] (**CB1746**)), which has stood in for anti-immigration sentiment in Western countries since nation-states began limiting immigration: *Wingard* at [6] (**CB1744**). She says:

> "Go back to where you came from" is a phrase that carries with it historical anti-immigrant and nativist beliefs. It is so ubiquitous across history, it merely needs to be uttered and people understand that the recipient is being flagged as not belonging, either because there is no room and/or resources for them or because their beliefs do not align with those of the receiving country's citizens.

27. In that context, Professor Wingard is right to describe what the words the Respondent chose to use achieve in this way:

> Senator Hanson shifts Senator Faruqi's history from one of a lawful non-citizen who has been granted Australian citizenship to that of an unlawful citizen by not only telling her to "piss off back to Pakistan" but by pointing out how her comments on the death of Queen Elizabeth II make her an ungrateful immigrant, rather than an acceptable one. Senator Hanson's tweet implies that Senator Faruqi was "gifted" Australian citizenship, has enjoyed all the nation state has had to offer, but now Senator Faruqi is ungrateful and therefore should "go back to where she came from": *Wingard* at [15] (**CB1745-1746**)

28. Further,

> it is the embedded racism of the fantasy of the white nation that makes statements like "go back to where you came from" so dangerous for immigrants and citizens of color. Far-right conservatives often claim that they "don't see race" to use benevolent multicultural tropes to defend their (unexamined) racial biases. In fact, Senator Hanson has used the phrase "I don't care if you are black, white or brindle" several times in public fora and in interviews on Sky News. Yet, her softened version is almost more offensive because she includes a type of animal coat coloring as a racial distinction…
>
> …Senator Hanson may not have meant to imply that racialized people are animals, but again, language is not neutral. When it comes to statements drawing parallels between racial categories and animals, there is a long history with which those who hear that statement can make a connection. Again, these phrases are palimpsestic and carry national and social histories even when those histories are not explicitly uttered: *Wingard* at [23]-[24] (**CB1747**)

29. The Applicant was herself offended, insulted, humiliated and intimidated by the Tweet: Senator Faruqi Affidavit affirmed 3 October 2023 at [96]-[103] (**CB62-63**). Unless that response was unreasonable, then it is powerful evidence of the effects that posting the Tweet would reasonably have. (for evidentiary references, see Annexure A to these submissions)

30. The Applicant's position as a Senator in the Australian Parliament does not inoculate her against the severe, harmful effects of racism, racial hatred, discrimination and bullying.

31. The Applicant was and is **offended** and **insulted** by the obvious implication in the Respondent's Tweet that, as a Pakistani-born, Muslim, migrant woman of colour, she is less entitled than other Australian citizens to live in Australia and enjoy the benefits and opportunities afforded by her Australian citizenship, and less entitled than other Australians to participate in public debate.

32. The Applicant was and is **humiliated** at the suggestion that she does not belong in, and should withdraw from, public debate in Australia and that she does not belong in, and should remove herself from Australia (her only country of citizenship), if her views on politics or current affairs are not palatable to Senator Hanson.

33. The Applicant was and is **intimidated** both by the incitement to racial hatred and manifest racial hatred that is expressed by the phrase 'go back to where you came from', and variations of the phrase.

34. The Applicant is familiar with the palimpsestic history of the phrase 'go back to where you came from' and its deployment as a form of racial violence. As a result of her understanding and experience of the phrase, she was intimidated by the phrase used by the Respondent in the context.

35. Consequences of the impugned tweet on the Applicant have ranged in severity. She was subjected to a sudden and significant increase in hateful email, phone calls and social media traffic in the immediate aftermath of the impugned tweet. A significant proportion of these communications referred directly to the Tweet, and/or have endorsed her views or repeated the invitation to go back to where the Applicant came from.

36. The Applicant received a credible death threat that directly referred to the Tweet (**CB110**). It noted the street address of the Applicant's electoral office with a threat to "slit [her] fucking throat". Australian Federal Police investigated and identified the person who made the threat. That a tweet like the one the Respondent published resulted in such a reaction from others is powerful evidence that her act was reasonably likely to intimidate. Speech of this kind begets more speech of this kind and begets more extreme action—just as it did here.

37. Other people were also reasonably likely to be offended, insulted, humiliated and intimidated by the Tweet to differing degrees depending on their lived experience of racism and discrimination.

38. Nine members of the community have explained what the Tweet did to them in the context of the broader impact of racism on their lives (**CB111-206**). Their subjective reaction supports the proposition that offence, insult, humiliation, or intimidation were reasonably likely consequences of the Tweet.

39. As well as being offended, insulted, humiliated, and/or intimidated by the Tweet, the subjective reactions of the deponents included: feeling embarrassed to be a person of colour, not accepted, not belonging in Australia, feeling uncomfortable with attributes like their skin colour, accent and heritage, feeling not important or deserving of opportunities compared to others, shame, threatened, physically unsafe, anxious, overwhelmed, re-traumatised, fearful, sad, desperate, angry, shocked, depressed, hypervigilant, scared and hopeless (for evidentiary references, see Annexure A to these submissions).

40. All of these are reasonable reactions. They powerfully show the impact that this action (of publication at large) by this person (an Australian Senator, leader of a political party and longstanding sayer of racist things), of these words (a form of 'go back to where you came from'), has. The reasonableness of these responses is supported by the evidence of Paradies at [13] – [14] (**CB209**) and Reynolds at [19], [21], and [23] – [24] (**CB1717-1718**).

(b) The Tweet was posted *because of* the race, colour or national or ethnic origin of the other person or some or all of the people in the group

41. The Applicant contends that the act was done because of at least one of her race, colour or national or ethnic origin (**the attributes**). Section 18B of the RDA provides that race, colour or national or ethnic origin need not be the only or even the dominant or a substantial reason for the impugned act.

42. The phrase *"*pack your bags and piss off back to Pakistan*"* is a self-evident, direct and unequivocal reference to the **national origin** of the Applicant. It is put beyond doubt by the earlier words *"*when you immigrated to Australia you took advantage of…*"*.But for the Applicant's origin as a citizen of Pakistan, and her identity as a Pakistani-born Australian, the comment would not have been made. The message makes no sense unless it was "because of" the Applicant's national origin.

43. As noted earlier, the act of publishing the Tweet cannot be divorced from the person who wrote it and the person who it targeted.

44. In assessing why the Tweet was published it is necessary to ask what reasons *Senator Hanson* had for publishing those words. The Applicant is not just from another country. She is from an Asian country, is a Muslim, and is a person of colour. Those attributes are precisely the kind that the Respondent has targeted in a derogatory way for decades.

45. The obvious issue this raises is whether being a Muslim is captured by '**race and ethnic origin**'. The Explanatory Memorandum to the *Racial Hatred Bill 1994* explained that the terms 'race and ethnic origin' are to be read complementarily and are intended to be given a broad meaning: at 2. Specifically, 'ethnic origin' was intended to be interpreted as set out in ***King-Ansell** v Police* [1979] 2 NZLR 531 and ***Mandla** v Dowell Lee* [1983] 2 AC 548 (HL) per Lord Fraser of Tullybelton because such an interpretation:

> would provide the broadest basis for protection of peoples such as Sikhs, Jews and Muslims. The term "race" would include ideas of ethnicity so ensuring that many people of, for example, Jewish origin would be covered. While that term connotes the idea of a common descent, it is not necessarily limited to one nationality **and would therefore extend also to other groups of people such as Muslims**. (emphasis added)

46. In *Commonwealth v Tasmania* (1983) 158 CLR 1 at 244, speaking of the expression "people of any race" in s 51(xxvi) of the Constitution, Brennan J said:

> As the people of a group identify themselves and are identified by others as a race by reference to their common history, religion, spiritual beliefs or culture as well as by reference to their biological origins and physical similarities, an indication is given of the scope and purpose of the power granted by par. (xxvi). The kinds of benefits that laws might properly confer upon people as members of a race are benefits which tend to protect or foster their common intangible heritage or their common sense of identity. Their genetic inheritance is fixed at birth; the historic, religious, spiritual and cultural heritage are acquired and are susceptible to influences for which a law may provide. The advancement of the people of any race in any of these aspects of their group life falls within the power.

47. At 573–574, Justice Deane held that the expression had a "wide and non-technical meaning", relying on *King-Ansell* and *Mandla*.

48. The Applicant contends that (at least) *a* reason for the Tweet being published was because she is not just a migrant but is a Muslim migrant, a person of colour and from an Asian country. That is, she is someone who does not fit the Respondent's views of what it means to be a 'proper' Australian.

49. Here, the Respondent's tendency to racism and to white supremacist views becomes relevant.

50. The Respondent's anti-migrant advocacy has been public, consistent and decades-long, as demonstrated in the body of tendency evidence led by the Applicant in this case. She has made countless derogatory comments over many years about Asian and Muslim people (both groups to which the Applicant belongs) and people of other races and ethno-religious origins. She has said "I do not want Australia to become Asianised": *Tendency Notice item 6 (Annexure F): the Respondent's '60 Minutes' appearance on or about 15 September 2016* (**CB1863**).

51. The Respondent demonstrates a long-held tendency to believe that 'Australians' can be identified by what they look like and/or how they sound. Those who look 'Asian' or speak with an accent are routinely distinguished by her from 'Australians'. For example, perhaps even subconsciously, she draws the distinction between "Australians" and "people of other ethnic races":

> Prior to my election in 1996 I called for equality for all Australians and I'm sick of hearing the inequalities in our system. It happens in our judicial system. They seem to get lenience because they're

> of a black or of a different colour. They're not white. And people of Australia are fed up with it. You know we're supposed to be tolerant of other ethnic races that come to our country but they're not tolerant of the Australians in our society: *Tendency Notice item 74 (Annexure BR at 2:51/7:55): Statement made by Senator Hanson on 'Paul Murray Live', Sky News, on or about 17 October 2018* **(CB2022)**.

52. In addition, the Respondent demonstrates a tendency to minimise the harm done by discrimination against and the marginalisation of people of colour, claiming that there is a scourge of racism against white people. On 17 October 2018, she appeared on the Today Show and repeated words she had said in Parliament, where she moved a motion that "It's OK to be white". On 'Today', she said:

> Let's take it word for word what I said, is that the deplorable anti…. Rise of racism…and um you know racism towards um the Whites and um… white society plus it's also about protecting Western civilization, and it's OK to be White. If I'd got up and said on the floor of Parliament "It's ok to be Black" wouldn't be one word about it from absolutely no-one: *Tendency Notice item 75 (Annexure BS): Statement made by Hanson in an interview with Karl Stefanovic on 'Today', Nine Network, on or about 17 October 2018* (**CB2023**).

53. The 1997 book, *The Truth*, published in the Respondent's name, spoke about 'protecting' Australia from influxes of people of colour (including Asians). It also spoke of "the internationalist elite of The New World Order" that was plotting the destruction of Anglo-Saxon Australia through "immigrationism, multiculturalism, Asianisation and Aboriginalism": *Tendency Notice item 7(i) (Annexure G): 'The Truth', published 11 April 1997* (**CB1864-1873**).

54. It is beyond doubt that—in addition to the Applicant's status as a migrant—at least one of the reasons that the Respondent targeted her was because she is Muslim, Asian, and brown.

D. THE RESPONDENT'S ACTION DOES NOT FALL WITHIN SECTION 18D

55. The Respondent submits that she falls within the scope of s 18D on the ground that the Tweet was done reasonably and in good faith and was a fair comment on a matter of public interest and reflected her genuine belief. She bears the burden of proving that she falls within s 18D.

56. A person:

> will act in good faith if he or she is subjectively honest, and objectively viewed, has taken a conscientious approach to advancing the exercising of that freedom in a way that is designed to minimise the offence or insult, humiliation or intimidation suffered by people affected by it. [And a person who acts] carelessly disregarding or wilfully blind to its effect upon people who will be hurt by it or in such a way as to

enhance that hurt may be found not to have been acting in good faith. (Bropho at [102] (French J), [141]-[144] (Lee J); see also Toben at [44] (Carr J))

57. This question will be dealt with in reply once the Respondent's position has been fully articulated. For present purposes it is sufficient to notice that the words "pack your bags and piss of back to Pakistan" are far removed from the descriptors "fair comment", "reasonably" or "in good faith".

E. SECTIONS 18C AND 18D ARE VALID

58. The Respondent contends that ss 18C and 18D are invalid wholly or in part on two grounds: (i) they are unsupported by a head of legislative power (Amended Notice of a Constitutional matter under section 78B of the *Judiciary Act 1903* (**Amended 78B Notice**), [5] (**CB47**)); and (ii) they infringe the implied freedom of political communication (Concise Response [39] (**CB34**); Amended 78B Notice, [6] (**CB47**)).

(a) Sections 18C and 18D are valid exercises of the external affairs power

59. The Respondent's contention that ss 18C and 18D are unsupported by a head of legislative power is foreclosed by authority. The contention was advanced and unanimously rejected in *Toben*. At [21], Carr J held that "the provisions of Pt IIA are constitutionally valid as an exercise of the external affairs power." In reaching that conclusion, his Honour observed:

> [19] … In my view, the Convention can be seen to be directed not only at acts of racial discrimination and hatred, but also to deterring public expressions of offensive racial prejudice which might lead to acts of racial hatred and discrimination.
>
> [20] In my opinion it is clearly consistent with the provisions of [CERD] and the ICCPR that a State Party should legislate to "nip in the bud" the doing of offensive, insulting, humiliating or intimidating public acts which are done because of race, colour or national or ethnic origin before such acts can grow into incitement or promotion of racial hatred or discrimination.

60. Justice Kiefel agreed with Carr J at [50]. Allsop J also agreed with Carr J at [79] but gave separate reasons. At [144], his Honour observed that ss 18C and 18D "are reasonably capable of being considered as appropriate and adapted to implement the obligations … assumed by Australia under the [International Convention on the Elimination of All Forms of Racial Discrimination]". For this reason, as well as others, his Honour held that the sections were valid.

61. This Court is bound to apply *Toben* regardless of this Court's view of its correctness: *Warramunda Village Inc v Pryde* (2002) 116 FCR 58 at [84]-[85] (Finkelstein J); see also *R v XY* (2013) 84 NSWLR 363 at [30] (Basten JA; Hoeben CJ at CL and Simpson J) and the cases there cited.

(b) Sections 18C and 18D do not infringe the implied freedom

62. The Respondent's contention that ss 18C and 18D infringe the implied freedom depends on three propositions: (i) ss 18C and 18D burden the implied freedom; (ii) ss 18C and 18D do not serve a legitimate end; and (iii) ss 18C and 18D are not proportionate to the pursuit of such an end. None of these propositions is established because: (i) ss 18C and 18D do not burden the implied freedom (but enhance it); (ii) ss 18C and 18D do serve a legitimate end, ie, to secure the dignity of persons protected by s 18C(1)(b) and to promote equal of opportunity for them to participate in public life; (iii) ss 18C and 18D are proportionate to the pursuit of those ends.

(i) Sections 18C and 18D do not burden the implied freedom

63. Whether ss 18C and 18D burden the implied freedom is a "threshold issue" for the Respondent to overcome: ***Ruddick*** *v The Commonwealth* (2022) 275 CLR 333 at [161] (Gordon, Edelman and Gleeson JJ), [174] (Steward J). The Respondent fails at the threshold because ss 18C and 18D do not impose "a legal or practical impediment to the receipt by electors of information capable of bearing on the making of an informed electoral choice": *Ruddick* at [28] (Gageler J); ***Lange*** *v Australian Broadcast Corporation* (1997) 189 CLR 520 at 560-562 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

64. The relevant question is not whether ss 18C and 18D restrict political communication *per se*, but whether they impede electors from making an informed electoral choice. Section 18C and 18D do not do so because racially offensive public acts, committed unreasonably or in bad faith, do not facilitate the making of an informed electoral choice: see, PA Keane, 'Sticks and stones may break my bones, but names will never hurt me' (2011) 2 *Northern Territory Law Journal* 77 at 83–87 (**Sticks and Stones**).

65. Racially offensive public acts, committed unreasonably or in bad faith, serve positively to undermine the making of an informed electoral choice because they serve to discourage people bearing the attributes protected by s 18C(1)(b) from participating in public debate. Their exclusion from the public square is apt to deny electors access to information capable of bearing on their electoral choices (eg, information about the lived experiences and opinions of persons bearing the attributes protected by s 18C(1)(b)) thereby compromising the electoral choices that electors are called upon to make.

66. By deterring conduct apt to deprive electors of information capable of bearing on their electoral choices, ss 18C and 18D "do not detract from the freedom [but] enhance it": *Coleman* at [97] (McHugh J); see also *Sunol v Collier (No 2)* (2012) 260 FLR 414 at [86] (Basten JA); *Catch the Fire Ministries Inc v Islamic Council Inc* (2006) 15 VR 207 at [113] (Nettle JA), [119] (Ashley JA), [208] (Neave JA). To adapt the language used by Gordon, Edelman and Gleeson JJ in *Ruddick* at [162], ss 18C and 18D serve "to improve the clarity, and hence the quality, of electoral choice and communication on government and political matters". Far from stultifying political communication, they help to create conditions under which it may flourish and, thereby, "improve the sum of useful public knowledge" (Sticks and Stones at 86) that the people of the Commonwealth may draw upon when deciding whom to vote for.

67. If it is accepted that ss 18C and 18D do not burden the implied freedom, it is unnecessary to decide whether they serve a legitimate purpose, and, if so, whether they do so proportionately. But, if those questions are reached, it is submitted that each should be answered affirmatively.

(ii) Sections 18C and 18D serve a legitimate end

68. The "purpose of a law is what the law is designed to achieve in fact": ***McCloy** v NSW* (2015) 257 CLR 178 at [132] (Gageler J); see also *Clubb* at [257] (Nettle J). A purpose is legitimate if it is "compatible with the maintenance of the constitutionally prescribed system of representative government": *Lange* at 561-562.

69. The immediate purpose of ss 18C and 18D is to protect people from racially abusive public acts, committed unreasonably and in bad faith. This immediate purpose serves at least two overall purposes, namely:

a. to vindicate the legitimate claims of persons bearing the attributes protected by s 18C(1)(b) to live with dignity, free from unwanted or offensive communication; and

b. to promote equality of opportunity of such persons to participate in public life.

70. The first overall purpose—particularly the legitimate claims of persons to live with dignity—has long been recognised as legitimate: *Nationwide* at 77 (Deane and Toohey JJ); *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169 (Deane and Toohey JJ) (***ACTV***); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 178-179 (Deane J); *Monis* at [247] (Heydon); *Clubb* at [60] (Kiefel CJ, Bell and Keane JJ), [196] (Gageler J), [258] (Nettle J).

71. The second overall purpose is of a piece with the promotion of "equality of opportunity to participate in the exercise of political sovereignty", which has also long been recognised as legitimate: *ACTV* at 136 (Mason CJ); *Unions NSW v New South Wales* (2013) 252 CLR 530 [136] (Keane J); *Tajjour v New South Wales* (2014) 254 CLR 508 at [197]; *McCloy* at [45] (French CJ, Kiefel, Bell and Keane JJ).

72. Thus, the overall purposes which ss 18C and 18D serve are legitimate. At the very least, it cannot be said (as the Respondent must) that their pursuit is inimical to the maintenance of the constitutionally prescribed system of representative government. Their pursuit is plainly compatible with it.

(iii) Sections 18C and 18D are reasonably appropriate and adapted to the identified end

73. A law will be reasonably appropriate and adapted to a legitimate end if it "pursues that end in a manner which is consistent with the preservation of the integrity of the system of representative and responsible government": *McCloy* at [131] (Gageler J). Whether a law pursues its end(s) in that manner may be judged by asking (i) whether there is a rational connection between the end and the legal means chosen to pursue it; (ii) whether there is no obvious compelling alternative means of pursuing the same end which has a less restrictive

effect on the implied freedom; and (iii) whether the law is adequate in its balance, ie, whether the burden on the freedom is justified by the importance of the end which the chosen means seeks to pursue: *McCloy* at [2] (French CJ, Kiefel, Bell and Keane JJ); see also *Brown v Tasmania* (2017) 261 CLR 328 at [104] (Kiefel CJ, Bell and Keane JJ); *Clubb* at [266] (Nettle J).

74. Rational connection. There is a rational connection between seeking to uphold the dignity of people protected by s 18C(1)(b) or to promote equal opportunity for them to participate in public life and a law which prohibits them from being subject to racially offensive public acts, committed unreasonably or in bad faith.

75. Alternative means. In judging whether the overall ends which ss 18C and 18D pursue could have been pursued in a way that is less burdensome to the implied freedom, it is important to re-emphasise that (i) s 18C only prohibits racially offensive public acts that have "profound and serious effects, not to be likened to mere slights" (*Bropho* at [70]) and (ii) ss 18C and 18D do not prohibit such acts *per se*, but only prohibit them to the extent that they are undertaken unreasonably or in bad faith.

76. There is no obvious compelling alternative means of pursuing the ends which ss 18C and 18D strive to attain that have a less restrictive effect on the implied freedom. Sections 18C and 18D are already specifically tailored to give maximum scope to the implied freedom while pursuing their identified ends. It is not possible to give greater scope to the implied freedom—eg, by allowing for unreasonable or bad faith instances of racially offensive public acts—without compromising achievement of the ends that they have.

77. Adequate in its balance. Determining whether a law is adequate in its balance involves comparing the nature and extent of the law's burden on the implied freedom against the importance of the end which the law seeks to pursue: *Clubb* at [6] (Kiefel CJ, Bell and Keane JJ). The balance is not weighed to a nicety, rather:

> [A]n impugned law that otherwise presents as suitable and necessary for the achievement of a legitimate purpose consistent with the system of representative and responsible government mandated by the Constitution should not be regarded as inadequate in its balance unless it so burdens the implied freedom of political communication as to present as grossly disproportionate to or as otherwise going far beyond what can reasonably be conceived of as justified in the pursuit of that legitimate purpose. (Clubb at [292] (Nettle J), see also [497], [501] (Edelman J))

78. The extent of the burden in this case (if any, cf [63]-[67] above) is slight. All that is prohibited is racially offensive public acts done unreasonably or in bad faith. That leaves expansive space for political communication—including racially offensive political communication—to flow freely. By contrast, the ends which ss 18C and 18D seek to pursue are compelling. The right to dignity is the "most central of all human rights": *Clubb* at [51] (Kiefel CJ, Bell and Keane JJ), citing Aharon Barak, *The Judge in a Democracy* (2006) at 85. "A law calculated to maintain the dignity of members of the sovereign people … is more readily justified in terms of the third step of the *McCloy* test than might otherwise be the case": *Clubb* at [99]. And the same may be said of a law that seeks to promote equality of opportunity for persons to participate in public debate. There is no gross or manifest lack of balance between the effect of ss 18C and 18D on the implied freedom and the importance of the ends that they have in view. The sections are adequate in their balance.

F. CONCLUSION

79. For the foregoing reasons, the Court would comfortably find that the elements of s 18C are made out and that there is no defence available to the Respondent under s 18D.

80. Part IIA of the RDA is entirely compatible with and indeed protective of the implied freedom of political communication. Further, it was validly legislated pursuant to s 51(xxix) of the Constitution.

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ANNEXURE A – EVIDENTIARY REFERENCES

Senator Faruqi's Affidavits 3 October 2023 (CB49-66) and 8 March 2024 (CB2083-2097):

- Offence/insult: [52], [57]-[65], [69], [78], [84], [89], [91], [96]-[99], [103]-[105], [108]-[109].
- Humiliation: [52], [57]-[64], [76], [78], [81], [84], [89], [91], [101]-[102], [110]-[115], [122].
- Intimidation: [54], [57]-[58], [63], [70], [78], [81], [83]-[84], [89], [91], [116]-[123].
- Receipt of hateful email, phone calls and social media traffic in immediate aftermath: 3 October 2023 affidavit at [55]; 8 March 2024 affidavit at [7]-[10], [13]-[19].

- Death threat: [119], [123].

Members of the relevant group (affidavit deponents) – responses to the tweet (CB111-199):
- Offence: Cherian at [15(a)]; Levy [18(a)]; Hasan [16(a)]; Ashraf [17(a)]; Mandivengerei [18(a)(i)]; Kattel [17]; Ali [22(a)].
- Insult: Cherian [15(c)]; Levy [18(b)]; Hasan [16(b)]; Ashraf [17(b)]; Mandivengerei [18(a)(i)]; Sri [22], [23]; Ali [22(b)].
- Humiliation: Cherian [15(b)]; Levy [18(c)]; Hasan [16(c)]; Moolla [20(a)], [20(d)]; Ashraf [17(b)]; Sri [21(a)]; Ali [22(c)].
- Intimidation: Levy [18(d)]; Hasan [16(d)]; Moolla [20(b)], [20(c)]; Ashraf [17(c)]; Mandivengerei [18(b)]; Sri [21(b)]; Ali [22(d)].

Members of the relevant group (affidavit deponents) – subjective reactions (CB111-199):
- Feeling embarrassed to be a person of colour: Cherian [15(b)].
- Not accepted: Cherian [15(c)]; Ashraf [17(b)]; Kattel [23]; Sri [21(a)], [28(b)].
- Not belonging in Australia: Cherian [20]; Levy [20]; Hasan [16(a)], [16(c)], [25(a)]; Moolla [19], [27(c)], [31(c)], [31(d)]; Ashraf [17(b)]; Mandivengerei [15]; Kattel [17], [18(b)], [19], [24]; Sri [21(a)], [31], [33(d)]; Ali [24].
- Feeling uncomfortable with attributes: Cherian [20]; Kattel [23], [24], [25]; Sri [28].
- Not important or deserving of opportunities compared to others: Cherian [20]; Ashraf [17(c)], [20(a)]; Sri [28], [31].
- Feeling shame: Cherian [27]; Sri [24(a)].
- Threatened: Levy [15].
- Physically unsafe: Levy [18(d)(iv)]; Moolla [20(c)], [31(a)]; Ashraf [19]; Mandivengerei [18(b)(iii)]; Ali [22(d)(ii)], [24], [25].
- Anxious: Levy [21]-[22], [25]; Hasan [25(e)]; Moolla [28(b)(ii)], [31(b)]; Ashraf [21(c)]; Kattel [26]; Sri [32].
- Overwhelmed: Levy [25].
- Re-traumatised: Hasan [16(b)]; Moolla [27(d)], [28(b)(ii)], [31(b)]; Mandivengerei [25(b)]; Kattel [17(d)]; Ali [22(a)(ii)], [22(c)].
- Fearful: Hasan [16(d)(i)]; Moolla [27(a)]; Sri [32].
- Sad, desperate: Hasan [17].
- Angry: Hasan [17]; Moolla [27(a)]; Mandivengerei [19]; Kattel [17(d)].
- Shocked: Hasan [20], Moolla [29]; Ashraf [19].
- Depressed: Hasan [25(a)]; Moolla [31(b)]; Mandivengerei [33], [36(b)]; Kattel [26]; Sri [33(b)].
- Hypervigilant: Hasan [25(c)]; Mandivengerei [36(d)]; Ali [29(c)].
- Scared: Moolla [20(b)], [22(a)], [23], [25], [29], [31(a)], [31(b)]; Mandivengerei [36(a)]; Sri [21(b)], [33(a)]; Ali [22(d)(ii)], [24], [29(a)].
- Hopeless: Moolla [20(d)], [31(c)]; Mandivengerei [25(a)], [36(c)]; Ali [22(d)(ii)].
- Intimidated: Moolla [31(a)]; Mandivengerei [36(a)]; Sri [33(a)]; Ali [22(d)(ii)], [29(a)].

Senator Hanson's Affidavit (CB2074-2082)
- That the Respondent posted the Tweet because the Applicant is from Pakistan; [32(c)].