

THE IRONIC AFTERMATH OF *EATOCK v BOLT*\*

ADRIENNE STONE†

*This article reviews the decision of the Federal Court in Eatock v Bolt and then turns to its aftermath — the campaign to amend the Racial Discrimination Act 1975 (Cth). The campaign to amend s 18C, like any public debate of a complex legal issue, was at times unsatisfactory. However, in this article it is argued that there were deeper flaws in the campaign against s 18C that undermined the very commitment to freedom of speech on which the campaign was based.*

CONTENTS

I	Introduction.....	927
II	The Case: Sections 18C and 18D of the <i>Racial Discrimination Act</i> .....	928
	A Competing Narratives .....	929
	B The Target of the Offence .....	930
	C Offend, Insult, Humiliate or Intimidate.....	931
	D Racial Slur.....	932
	E The Defences.....	933
	F Eatock v Bolt: A Summary.....	936
III	The Ironic Aftermath of <i>Eatock v Bolt</i> .....	936
	A Expressive Remedies.....	938
	B Selectivity.....	941
IV	Concluding Remarks .....	942

\* (2011) 197 FCR 261.

† BA, LLB (UNSW), LLM, JSD (Columbia); Professor, Melbourne Law School, The University of Melbourne; Director, Centre for Comparative Constitutional Studies, The University of Melbourne. A version of this paper was first presented at the Zelman Cowen Conference, held at Melbourne Law School, on 27 March 2014. The selection of this topic reflected Sir Zelman's long standing interest in freedom of speech. Thanks are due to Alexandra Harrison-Ichlov for editorial and research assistance.

## I INTRODUCTION

The last two years have seen an unusually vigorous public debate about freedom of speech, triggered by a successful action against columnist Andrew Bolt and the publisher of the *Herald Sun* (the respondents) under s 18C of the *Racial Discrimination Act 1975* (Cth) ('RDA').<sup>1</sup> The finding produced an immediate outcry<sup>2</sup> and a pledge by the Opposition to amend or repeal the law.<sup>3</sup> The debate intensified after the 2013 federal election when the new government proposed to make good on its promise, a debate that continued until the government abandoned its plan in 2014.<sup>4</sup>

This article will reflect on the Federal Court's decision in *Eatock v Bolt*<sup>5</sup> and the subsequent debate. Rather than re-agitate the well-worn debate about whether the restrictions imposed by s 18C are consistent with freedom of expression, this article will outline the decision with careful attention to the true basis for the decision against the respondents. In this light, I analyse the subsequent public debate with special reference to the way that the campaign against s 18C mischaracterised the decision in *Eatock v Bolt* and its effect.<sup>6</sup> While it is not surprising that the public debate did not adequately reflect the detail of the legislation or the nuances of the judicial reasoning, in my view the public debate displayed some unusually serious inadequacies. Indeed, I will argue that some participants in the debate — especially those seeking to amend or repeal s 18C — often mischaracterised the provision, and the interpretation given to it in *Eatock v Bolt*, to the point that they overlooked or

<sup>1</sup> *Eatock v Bolt* (2011) 197 FCR 261.

<sup>2</sup> Miranda Devine, 'Bolt Case Has Ominous Echo', *Herald Sun* (Melbourne), 30 September 2011, 40; Jonathan Holmes, 'Bolt, Bromberg and a Profoundly Disturbing Judgment', *ABC News* (online), 30 September 2011 <<http://www.abc.net.au/news/2011-09-29/holmes-bolt-bromberg-and-a-profoundly-disturbing-judgment/3038156>>.

<sup>3</sup> George Brandis, 'Section 18C Has No Place in a Society That Values Freedom of Expression', *The Australian* (Sydney), 30 September 2011, 12. Brandis was then Shadow Attorney-General.

<sup>4</sup> Although the public debate was briefly resurrected after the attacks on *Charlie Hebdo* magazine in Paris. See the commentary by the Institute for Public Affairs' Simon Breheny: Simon Breheny, 'Charlie Hebdo Shows Why Section 18C Must Go' (Media Release, 13 January 2015) <<http://freedomwatch.ipa.org.au/2015/01/3183/>>.

<sup>5</sup> (2011) 197 FCR 261.

<sup>6</sup> For a more wideranging analysis of the public debate that ensued, see Katharine Gelber and Luke McNamara, 'Freedom of Speech and Racial Vilification in Australia: "The Bolt Case" in Public Discourse' (2013) 48 *Australian Journal of Political Science* 470.

even contradicted important free speech values, which were the purported motivation for criticism of s 18C itself.<sup>7</sup>

## II THE CASE: SECTIONS 18C AND 18D OF THE RACIAL DISCRIMINATION ACT

In *Eatock v Bolt*, an action was brought against Andrew Bolt and The Herald and Weekly Times Pty Ltd ('Herald and Weekly Times'), concerning a series of articles published in print and online by Melbourne newspaper the *Herald Sun* during 2009.<sup>8</sup> The articles targeted prominent light-skinned Aboriginal people and criticised their decision to identify as Aboriginal, given their mixed heritage.<sup>9</sup> The tone of the articles was highly critical, sarcastic and insulting.

Pat Eatock, one of the people criticised in the articles, was the applicant in this action. Eight other people who were also featured in the articles gave evidence during the course of the hearing, though they were not formally parties to the proceedings.<sup>10</sup> (These nine people will be referred to as the 'complainants'.) The action was brought under s 18C of the *RDA*, which makes it unlawful to engage in a public act that 'is reasonably likely, in all the circumstances to offend, insult, humiliate or intimidate another person'<sup>11</sup> where that act is done 'because of the race, colour or national or ethnic origin of the other person'.<sup>12</sup> Section 18D provides a series of defences for anything said or done 'reasonably and in good faith' in three circumstances: the 'performance, exhibition or distribution of an artistic work';<sup>13</sup> in the course of debate 'made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest';<sup>14</sup> and when making 'fair and accurate' reports of,<sup>15</sup> or 'a fair comment on',<sup>16</sup> a matter of public interest.

<sup>7</sup> Section 18C and the decision in *Eatock v Bolt* were also defended in public debate: see Gelber and McNamara, above n 6, 476.

<sup>8</sup> (2011) 197 FCR 261.

<sup>9</sup> *Ibid* 277–8 [37], 279–80 [47], 281 [50] (Bromberg J).

<sup>10</sup> *Ibid* 331 [300].

<sup>11</sup> *RDA* s 18C(1)(a).

<sup>12</sup> *Ibid* s 18C(1)(b).

<sup>13</sup> *Ibid* s 18D(a).

<sup>14</sup> *Ibid* s 18D(b).

<sup>15</sup> *Ibid* s 18D(c)(i).

<sup>16</sup> *Ibid* s 18D(c)(ii).

The case came before Bromberg J in the Federal Court and, notoriously, Andrew Bolt and the publisher of the *Herald Sun* were found to have breached s 18C of the *RDA*. The reasons for this decision, however, were often lost during the subsequent public debate and a careful review of them is therefore in order.

### *A Competing Narratives*

Bromberg J's first task was to identify the imputations (or messages) conveyed by the articles. In doing so, he was faced with competing understandings of the meaning of the articles advanced by each of the parties. The respondents sought to characterise the articles as making a good faith (if robust) contribution to the discussion of an important public issue. Namely, the respondents submitted that the articles referred to an undesirable social 'trend'<sup>17</sup> by which persons of mixed heritage identified as exclusively Aboriginal and thereby gained access to benefits, some of which were publicly, or partially publicly, funded. It was claimed that this argument involved no disparagement of Aboriginal people. On the contrary, it was said, the argument was directed towards achieving a less racially divided society.

To this end, the respondents pointed to Bolt's explicit disavowal of an intent to disparage the complainants:

I'm not saying any of those I've named chose to be Aboriginal for anything but the most heartfelt and honest of reasons. I certainly don't accuse them of opportunism, even if full-blood Aborigines may wonder how such fair people can claim to be one of them and in some cases take black jobs.<sup>18</sup>

In addition, the respondents offered a positive account of Bolt's motives: it was claimed that his intention was to draw attention to a 'discernible trend ... whereby persons of mixed genealogy, where that genealogy includes Aboriginality, identify as Aboriginal persons'; a trend that undesirably emphasised racial differences, rather than 'common humanity'.<sup>19</sup>

The complainants saw the matter quite differently. In their view, the articles accused the complainants of making deliberate choices to identify as Aboriginal for personal gain. In addition, the complainants regarded the criticism of their identification as Aboriginal as an offensive attack on the

<sup>17</sup> *Eatock v Bolt* (2011) 197 FCR 261, 274 [23].

<sup>18</sup> *Ibid* 277 [35].

<sup>19</sup> *Ibid* 274 [23], 344 [360].

genuineness of their Aboriginal identity and the Aboriginal identity of other Aboriginal people with light skin.<sup>20</sup>

Bromberg J's findings aligned closely with the complainants' line of argument. He concluded that, taken together, the articles conveyed the message that there was a group of fair-skinned people 'with essentially European ancestry but with some Aboriginal descent', exemplified by the subjects of the articles, 'who are not sufficiently Aboriginal to be genuinely identifying as Aboriginal persons but who, motivated by career opportunities available to Aboriginal people or by political activism, have chosen to identify as Aboriginal'.<sup>21</sup> The second article in particular carried the imputation that 'opportunities which should have been conferred on genuine Aboriginal persons have instead been taken by people like those exemplified'.<sup>22</sup> More generally, his Honour found that the articles carried the imputation that '[f]air skin colour indicates a person who is unlikely to be sufficiently Aboriginal to be genuinely identifying as an Aboriginal person'.<sup>23</sup>

As for the disclaimer, it was, Bromberg J held, 'an exculpatory device',<sup>24</sup> if not actually insincere. When read in the context of the articles as a whole, it would be understood by the reader to be 'merely formal' and not intended to detract from the thrust of the rest of the article.<sup>25</sup>

### B *The Target of the Offence*

This characterisation of the articles laid the foundation for the finding that s 18C had been breached. Critical to this finding was Bromberg J's characterisation of the 'person' or 'group' whose reaction is to be assessed for the purposes of s 18C. The respondents argued that determining whether material was 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate'<sup>26</sup> for the purposes of s 18C required an 'objective assessment of community standards'.<sup>27</sup> But, for three reasons, Bromberg J found that s 18C required an assessment of the 'reasonable representative' of the group that was subject to the communication forming the substance of the complaint. Most

<sup>20</sup> Ibid 270 [3].

<sup>21</sup> Ibid 277 [37].

<sup>22</sup> Ibid 282 [55].

<sup>23</sup> Ibid 277–8 [37].

<sup>24</sup> Ibid 277 [36].

<sup>25</sup> Ibid.

<sup>26</sup> RDA s 18C(1)(a).

<sup>27</sup> *Eatock v Bolt* (2011) 197 FCR 261, 321 [253].

fundamentally, his Honour held that a ‘reasonable person’ test gives proper effect to the purpose of s 18C.<sup>28</sup> The aim of the *RDA* is to provide a remedy when members of racial groups experience insult, offence, humiliation or intimidation. The remedy can only be effective if it takes account of ‘the values, standards and other circumstances’ of the persons or group to whom such acts are directed, because these circumstances would ‘bear upon [their] likely reaction’.<sup>29</sup> This finding, his Honour held, was reinforced by the words in s 18C. The words ‘in all the circumstances’ required that ‘the social, cultural, historical and other circumstances attending the person or the people in the group be considered when assessing whether offence was reasonably likely’.<sup>30</sup> Finally, Bromberg J held that to import a general community standard into this assessment ‘runs a risk of reinforcing the prevailing level of prejudice’, and is thereby contrary to the purposes of the *RDA*.<sup>31</sup>

The test, as expounded by Bromberg J, has objective and subjective elements. It is subjective in the sense that it considers the actual ‘values, standards and circumstances’ of the target group;<sup>32</sup> it is objective in the sense that it considers the likely reactions of a *reasonable* member of that group, rather than the actual response of the particular targets.

### *C Offend, Insult, Humiliate or Intimidate*

Having identified the test for the application of s 18C, Bromberg J turned to the particular claim in this case. The claim under s 18C was for offence to a group,<sup>33</sup> being ‘fair skinned Aboriginal persons who, by a combination of descent, self-identification and communal recognition are, and are recognised as, Aboriginal persons’.<sup>34</sup>

Bromberg J’s finding on this matter constitutes the heart of the judgment. He devoted a considerable portion of his reasoning to identifying the characteristics of the reasonable member of such a group. Among other characteristics, he concluded that such a person typically ‘will be sensitive to suggestions

<sup>28</sup> Ibid 320–1 [250]–[251].

<sup>29</sup> Ibid 321 [253].

<sup>30</sup> Ibid 322 [257].

<sup>31</sup> Ibid 321 [253].

<sup>32</sup> Ibid.

<sup>33</sup> Ibid 325 [270]. Bromberg J rejected the argument that the statement of claim also made a claim of personal offence suffered by Pat Eatock and the other eight witnesses the subject of the articles.

<sup>34</sup> Ibid 326 [273].

that she is not Aboriginal or not sufficiently Aboriginal to be identifying as such, particularly when made by non-Aboriginal people'; 'will have, because of her appearance, experienced challenges to her identity as an Aboriginal person and has or does feel vulnerability as a result'; and 'will have strong feelings of solidarity with other Aboriginal people who, like her, have pale skin and are exposed to challenges to their identity by reason of their appearance'.<sup>35</sup>

In light of these characteristics, Bromberg J concluded that the articles would carry a stronger meaning for members of this group than for other members of the community. Members of this group, especially those who are young or 'otherwise vulnerable in relation to challenges to [their] Aboriginal identity'<sup>36</sup> would also understand that the articles were speaking 'indirectly of [them]'.<sup>37</sup> As a result, members of this group 'may now think twice about asserting [their] Aboriginal identity in public generally or in particular public settings'.<sup>38</sup>

#### D Racial Slur

The last step in Bromberg J's reasoning under s 18C required him to consider whether these comments were made 'because of' the race of the people about whom they were made.<sup>39</sup> Bromberg J found that Bolt was motivated to make his comments by the Aboriginal race of his subjects and, moreover, that the comments amounted to a racial slur that would undermine the racial tolerance that was the objective of the *RDA*:

Disparagement directed at the legitimacy of racial or religious identification of a group of people is a common cause for racial or religious tension. A slur upon the racial legitimacy of a group of people is just as, if not more, destructive of

<sup>35</sup> Ibid 328 [282].

<sup>36</sup> Ibid 330 [296].

<sup>37</sup> Ibid 329 [287].

<sup>38</sup> Ibid 330 [296]. Because Bromberg J did not recognise a claim made for offence, insult, humiliation and intimidation of the narrower group consisting of Ms Eatock and the eight witnesses, it was not strictly necessary for him to decide what effect the articles would have on that group. Nonetheless, in case that finding were overturned on appeal, he dealt with the issue of offence to that group, finding that the complainants (Ms Eatock and the eight witnesses) were likely to have been insulted, offended and humiliated but, by reason of their public prominence, were likely to be 'mature aged and experienced in Aboriginal issues, and thus likely to be resilient': at 331 [302]. For this reason, Bromberg J found that it was not reasonably likely that the complainants would have been intimidated.

<sup>39</sup> Ibid 332 [307], 333 [309].

racial tolerance than a slur directed at the real or imagined practices or traits of those people.<sup>40</sup>

### E *The Defences*

The finding that the respondents breached s 18C was only half of the story. Because the respondents claimed that Mr Bolt was engaging in good faith public discussion of an undesirable social trend, the question of the s 18D defences obviously arose. Specifically, the respondents relied upon s 18D(c)(ii) of the *RDA*, which operates in relation to ‘anything said or done ... in making or publishing ... 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’. Like all s 18D defences, the ‘fair comment’ defence requires that the respondent has acted ‘reasonably and in good faith’ and it was on this ground that the defence failed.

Bromberg J’s decision with respect to the availability of the defence was comprised of three key elements: First, he held that the respondents bore the onus of establishing reasonableness and good faith.<sup>41</sup> Second, he held that reasonableness and good faith have both an objective and a subjective element. That is, he held that ‘reasonableness’ and ‘good faith’ are in part determined by having regard to the subjective (or actual) motive of the person who spoke or published the offending words, but also require an assessment of whether the person doing these acts acted with ‘prudence, caution and diligence’<sup>42</sup> and took appropriate care to avoid the harmful consequences. Finally Bromberg J held that s 18D(c)(ii), the particular subsection on which the respondents relied, imported the requirements of the common law ‘fair comment’ defence.<sup>43</sup> That means that the defence applies only to ‘comment’ rather than the statement of facts. Further, so that the comment must be recognisable as such, the facts on which the comment is based must be stated,

<sup>40</sup> Ibid 338 [335].

<sup>41</sup> Ibid 338–9 [336]–[339].

<sup>42</sup> Ibid 341 [345], quoting *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, 143 [144] (Lee J). The parties accepted that ‘by using the phrase “fair comment” in s 18D(c)(ii), Parliament intended to invoke the requirements of the common law defamation defence of fair comment’: *Eatock v Bolt* (2011) 197 FCR 261, 343 [358].

<sup>43</sup> See *Eatock v Bolt* (2011) 197 FCR 261, 342 [353], where his Honour describes the scope of fair comment at common law.



referred to or notorious and those facts must be true or protected by privilege.<sup>44</sup>

Bromberg J explains the rationale for these requirements thus:

If the reader is given sufficient material to understand the basis for the comment, the reader can evaluate it. If the comment is wrongheaded, reasonable people will be able to recognise it for what it is. That capacity, together with the requirement for true facts and honesty, are the fundamental safeguards against abuse.<sup>45</sup>

The requirement that comment be based on facts, and that these facts are true and expressly stated or well-known, was a major hurdle for the respondents. To begin with, there were significant misstatements of fact: the articles stated or implied that the complainants criticised ‘chose to identify as Aboriginal’<sup>46</sup> and that they did so to gain career advancement and for purposes of political activism.<sup>47</sup> Many of these facts were ‘substantially proven to be untrue’.<sup>48</sup> In particular, the claim that the complainants ‘chose’ to identify as Aboriginal, was contradicted by evidence — unchallenged by the respondents — that all the complainants had identified as Aboriginal since childhood.<sup>49</sup> Other matters — such as the nature of the benefits purportedly obtained by the complainants — were exaggerated,<sup>50</sup> and some comment was offered without any accompanying statement of fact.<sup>51</sup> Bromberg J concluded that these deficiencies constituted ‘a significant distortion of the facts upon which a

<sup>44</sup> Ibid 343 [355]–[357].

<sup>45</sup> Ibid 343 [356].

<sup>46</sup> Ibid 348 [378]; see generally at 346–8 [374]–[378].

<sup>47</sup> Ibid 348 [379]. These statements were accepted by Bromberg J as statements of fact rather than, as the respondents claimed, comment: at 349 [384]. They were made in ‘definitive terms’ and not presented as deductions from other facts: at 348 [377].

<sup>48</sup> Ibid 348 [378].

<sup>49</sup> Ibid 351 [392]. Bromberg J stated:

As I have found, each of the nine complainants who gave evidence have either always identified as Aboriginal or have done so since their childhood. They all had a cultural upbringing which raised them to identify as Aboriginal. The fact that this is not disclosed to the reader of the Newspaper Articles in any meaningful way creates a distorted view of the circumstance in which the complainants exemplified in those articles identify as Aboriginal.

<sup>50</sup> Ibid 348–9 [381].

<sup>51</sup> Ibid 349 [383]. The facts on which Bolt’s comment that Bindi Cole chose to identify as Aboriginal to gain access to ‘political and career clout’ was based were neither stated, referred to nor notorious.

central part of the offensive imputations were based'.<sup>52</sup> As a consequence, the articles were not a fair comment and the defence in s 18D(c)(ii) was not available.

The factual inaccuracies were explicitly referred to as the principal basis for the failure of the s 18D(c)(ii) defence. But there were other matters that 'reinforced' this decision.<sup>53</sup> First, there were some matters of omission. For instance, Bolt either failed to mention or inaccurately described the cultural connection that the complainants had with Aboriginal culture. The misleading impression created by these omissions was amplified by Bolt's description of the complainants' connections with non-Aboriginal culture. For instance, he reported that some complainants had been raised by a non-Aboriginal parent without noting the presence of an Aboriginal parent or close relative in their lives.<sup>54</sup>

The failure to provide a sufficient factual foundation for the commentary offered was clearly the principal basis of Bromberg J's decision. However, his Honour also held that there was a failure to act reasonably and in good faith, stating: '[e]ven if I had been satisfied that the s 18C conduct was capable of being fair comment, I would not have been satisfied that it was said or done by Mr Bolt reasonably and in good faith'.<sup>55</sup> This finding depended on two matters. First, Bromberg J referred to the mocking and derisive tone of the articles and the gratuitous nature of some insults, such as the focus on skin colour and, in one case, on the complainant's homosexuality.<sup>56</sup> While his Honour accepted that offensive speech may sometimes be worthy of protection,<sup>57</sup> in the context of s 18C he accepted that '[t]he language utilised should have a legitimate purpose in the communication of a point of view and not simply be directed to disparaging those to whom the offence has been

<sup>52</sup> Ibid 349 [384].

<sup>53</sup> Ibid 349 [385].

<sup>54</sup> For instance, he claimed that Professor Larissa Behrendt was raised by her white mother without noting that her mother was married to her Aboriginal father until she was 15 years old, and that Professor Behrendt's father was always part of her family, including after her parents' separation: *ibid* 292–3 [120]–[122]. See also his description of artist Bindi Cole's upbringing: at 353 [402].

<sup>55</sup> Ibid 358 [424].

<sup>56</sup> Ibid 354 [413].

<sup>57</sup> Ibid 354 [410]: 'freedom of expression is not merely a freedom to speak inoffensively'.

caused'.<sup>58</sup> In this case, the emphasis on these extraneous but insulting matters 'far exceeded'<sup>59</sup> what was necessary for Bolt to make his point:

The articles are replete with comments and derisive tone that have little or no legitimate forensic purpose to the argument propounded and in the context of the values which the *RDA* seeks to protect are not justified, including by an asserted need to amuse or entertain.<sup>60</sup>

In addition, there was the lack of care demonstrated by Bolt. This was evidenced by his failure to conduct research beyond basic online research, as well as his failure to contact the complainants. This meant that he had omitted facts and misdescribed matters where it would have been easy for him to obtain the truth.<sup>61</sup> This lack of care, together with the 'untruthful facts and distortion of the truth ... , the provocative and inflammatory language and the inclusion of gratuitous asides' led Bromberg J to conclude that 'Mr Bolt's conduct lacked objective good faith'.<sup>62</sup>

#### F *Eatock v Bolt: A Summary*

In summary, Bromberg J found that s 18C was satisfied because, accepting the complainants' characterisation of the articles, they attacked the complainants' identification as Aboriginal in a way that would offend, insult, humiliate and in some cases intimidate reasonable light-skinned Aboriginal people. Further, the defence of fair comment provided by s 18D(c)(ii) was unavailable because the commentary in the articles was not based on truth (rather, there was considerable misstatement of facts, omission, distortion and exaggeration) and, in addition, having regard to the articles' tone and the lack of care with which they were written and researched, the articles were not written 'reasonably and in good faith'.

### III THE IRONIC AFTERMATH OF *EATOCK v BOLT*

With this account of the decision in *Eatock v Bolt* in mind, I now turn to the public debate that followed. To anyone acquainted with the actual decision,

<sup>58</sup> Ibid 354 [411].

<sup>59</sup> Ibid 355 [414].

<sup>60</sup> Ibid 355–6 [415].

<sup>61</sup> Ibid 352 [398], 358 [425].

<sup>62</sup> Ibid 358 [425].

there were some frustrating features about the campaign that it inspired. For instance, it was frequently said, without qualification, that s 18C made it unlawful to 'offend or insult' a person on the grounds of their race,<sup>63</sup> an assertion that entirely overlooks s 18D. The defences in s 18D are extensive and they significantly qualify the operation of s 18C in a wide range of contexts that are important to public debate. Artists, academics, journalists, public commentators and anyone who can show 'a genuine purpose in the public interest'<sup>64</sup> can rely on s 18D.<sup>65</sup> So, contrary to what was frequently heard during this public debate, it *is* possible to engage in offensive, insulting, or even humiliating and intimidating speech on questions of race, provided the circumstances fall within these defences. Bromberg J was at pains to point out that

nothing in the orders I make should suggest that it is unlawful for a publication to deal with racial identification including challenging the genuineness of the identification of a group of people. I have not found Mr Bolt and [Herald and Weekly Times] to have contravened s 18C simply because the Newspaper Articles dealt with subject matter of that kind. I have found a contravention because of the manner in which that subject matter was dealt with.<sup>66</sup>

To some extent, deficiencies of this kind are to be expected. Superficial engagement with the technical detail of legislation and partisan overstatement of argument are inevitable in public debate, especially in the highly charged political atmosphere surrounding s 18C. My point in the remainder of this article is not simply to show that a highly charged political debate made a mess of legal niceties. Rather, I want to point to deeper flaws in the public debate that ascend to the level of irony, in the sense that the call to amend

<sup>63</sup> Most egregiously, it was sometimes stated that s 18C created a criminal offence. See, eg, the statements of liberal backbencher Alan Tudge: 'Is It a Crime to Offend Someone under the *Racial Discrimination Act*?', *Fact Check, ABC News* (online), 30 April 2014 <<http://www.abc.net.au/news/2014-04-30/alan-tudge-incorrect-on-racial-discrimination-act/5378960>>; David Kemp, 'Enemies of Free Speech' (2012) 64(1) *IPA Review* 30, 32.

<sup>64</sup> *RDA* s 18D(b).

<sup>65</sup> For an instance of successful reliance on s 18D, see *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, which arose out of a cartoon inspired by a controversy concerning the recovery of the remains of Western Australian Aboriginal leader Yagan from a cemetery in England. The cartoon appeared to suggest that some of the Aboriginal people involved were using the campaign to obtain publicly funded travel to England. The Full Federal Court held that the publication was protected by the s 18D(a) exemption for 'artistic works' published 'reasonably and in good faith'.

<sup>66</sup> *Eatock v Bolt* (2011) 197 FCR 261, 364–5 [461].

s 18C contradicted or undermined the very commitment to freedom of speech on which it was based.

These ironies arose in two ways. First, there was a lack of attention to the remedies awarded, and second, the campaign against s 18C was a highly selective defence of freedom of expression. I turn first to the question of remedies.

### A *Expressive Remedies*

In a short judgment following his initial finding, Bromberg J granted two remedies: the *Herald Sun* (published by the Herald and Weekly Times) was required to publish a 'corrective notice' as specified in the judgment, and Bolt and the Herald and Weekly Times were restrained from further publishing or republishing the offending articles.<sup>67</sup>

The remedies are notably insubstantial. They are considerably less onerous than damages, a fact which is especially notable given it seems entirely possible that Eatock could have successfully claimed damages in a defamation action.<sup>68</sup> The lenity of the remedy becomes even clearer in light of an additional order which allowed the *Herald Sun* to continue to make the offending newspaper articles available 'for historical or archival purposes', provided that the publication was accompanied by the required corrective notice.<sup>69</sup> The result of this latter order is that the offending articles remain available online.<sup>70</sup> The ready availability of the offending articles considerably weakens claims that Bolt has been silenced by the action, and more general claims that freedom of speech has been chilled. The ideas in his articles continue to be communicated to those who seek them out.

Indeed, this claim of silencing is at once made and disproved by Andrew Bolt himself. In his response to the decision, Bolt wrote 'Silencing Me Impedes Unity', a commentary in which he argues that his ideas have been

<sup>67</sup> *Eatock v Bolt* [No 2] (2011) 284 ALR 114.

<sup>68</sup> An action for defamation would have likely turned on the availability of a defence, such as the defence of fair comment. Given the similarity between the defence offered by s 18C and the common law defence of fair comment, it seems likely that Bolt and the Herald and Weekly Times would have failed to assert that defence as well.

<sup>69</sup> There was an additional, and standard, order that Bolt and the Herald and Weekly Times pay the applicant's costs: *ibid* 128.

<sup>70</sup> See, eg, Andrew Bolt, 'White Fellas in the Black', *Herald Sun* (online), 21 August 2009 <<http://www.heraldsun.com.au/news/opinion/white-fellas-in-the-black/story-e6frf1fo-1225764532947>>.

'banned' and yet goes on to repeat, at quite some length, his argument that Aboriginal people of mixed heritage should not claim Aboriginal identity.<sup>71</sup>

This irony deepens when one considers the common refrain amongst critics of s 18C (and the respondents in *Eatock v Bolt* in particular) that the complainants should have responded to the criticisms by defending themselves in public debate.<sup>72</sup> This suggestion taps into an important idea in the political theory of freedom of speech that the victims of harms caused by speech ought to 'speak back', and that the 'fitting remedy for evil counsels is good ones'.<sup>73</sup> The irony arises because, in effect, Bolt and the Herald and Weekly Times have themselves been subject to a certain kind of 'speaking back'.<sup>74</sup> They have not been required to apologise, to pay damages, or — crucially — to remove the material from the internet. The sum total in effect of the measure imposed on them is that the articles are *labelled* as having infringed the *RDA*.

In other words, the remedy imposed in *Eatock v Bolt* was predominantly *expressive* rather than *coercive*. It neither required compensation nor imposed any other sanction on the respondents. Rather, the state signals its disapproval of the message conveyed — labelling it as contrary to the *RDA* — but does not prevent its communication. The state's action is akin to the 'speaking back' that the respondents and their defenders encourage. Moreover, just as the respondents and their defenders encouraged the complainants in this case, if the respondents are troubled by being labelled in this way, they are, of course, able themselves to 'speak back'. Therefore, one way to understand the effect of *Eatock v Bolt* is that it makes a contribution to the public debate about racial identity (labelling the particular contribution of Bolt as discriminatory), but does not prevent Bolt's message from being heard.

<sup>71</sup> Andrew Bolt, 'Silencing Me Impedes Unity', *Herald Sun* (Melbourne), 29 September 2011, 36. This irony did not go unnoticed. Jeremy Sear commented that 'far from being "silenced", you could hardly walk past a newsagent without being made fully aware of [Bolt's views]': Jeremy Sear, 'Does This Look Like Being Silenced?' on Crikey, *Pure Poison* (29 September 2011) <<http://blogs.crikey.com.au/purepoison/2011/09/29/does-this-look-like-being-silenced/>>.

<sup>72</sup> There are some obvious objections to this idea: it assumes a capacity to speak back that may be unrealistic and it imposes greater burdens on certain segments of the population that are most likely to be subject to harmful speech. However, they are not my concern in this article.

<sup>73</sup> *Whitney v California*, 274 US 357, 375 (Brandeis J for Holmes and Brandeis JJ) (1927).

<sup>74</sup> For fuller accounts of the significance of the state speaking back against hateful speakers, see Katharine Gelber, *Speaking Back: The Free Speech versus Hate Speech Debate* (John Benjamins Publishing, 2002); Corey Brettschneider, *When the State Speaks, What Should It Say? How Democracies Can Protect Expression and Promote Equality* (Princeton University Press, 2012).

This argument will, no doubt, not satisfy those deeply committed to a strong libertarian vision of freedom of speech — in which the role of the state is to be minimised — and who will find even expressive remedies offensive to their underlying conception of liberty.<sup>75</sup> The state is an especially powerful ‘speaker’ and its intervention through expressive remedies might be cast as dangerously distorting.

However, libertarian conceptions of freedom of speech are themselves contested both in theory<sup>76</sup> and exceptional in practice.<sup>77</sup> So those campaigning to amend s 18C cannot simply claim to be defending freedom of speech against those who disregard it or prefer other values or interests. They are defending a particular, rather unusual, and strongly contested version of freedom of speech and they are doing so in the face of alternative conceptions that powerfully defended in theory<sup>78</sup> and widely adopted in practice.<sup>79</sup> By neglecting even to notice the expressive nature of the remedy, the opponents of the law have thus failed to see that it may advance, rather than chill, free speech values.

<sup>75</sup> It is notable that some prominent campaigners against s 18C held a clearly libertarian conception of freedom of expression. Human Rights Commissioner Tim Wilson, for instance, who describes himself as a classical liberal, is clearly committed to a conception of freedom that emphasises minimising the role of the state. For an analysis of Wilson’s approach to rights, see Catherine Renshaw, ‘What Is a ‘Classical Liberal’ Approach to Human Rights?’, *The Conversation* (online), 19 March 2014 <<http://theconversation.com/what-is-a-classical-liberal-approach-to-human-rights-24452>>.

<sup>76</sup> For conceptions of freedom of speech which accept that state regulation of speech can enhance public debate, see Cass R Sunstein, *Democracy and the Problem of Free Speech* (Free Press, 1995); Owen M Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Westview Press, 1996).

<sup>77</sup> The deep mistrust of government evident in First Amendment law is, in global perspective, exceptional: see Frederick Schauer, ‘The Exceptional First Amendment’ in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, 2005) 29.

<sup>78</sup> See above n 76.

<sup>79</sup> For instance, in his major comparative study of the First Amendment, Ronald Krotoszynski contrasts the distinctive American distrust of government with German law, in which dignity is the dominant value, Canadian law, with its emphasis on equality, and the Japanese acceptance of a conception of democratic government as a justification for its free speech law. In each case, the courts have accepted that regulation of freedom of expression may enhance the quality and fairness of public debate: Ronald J Krotoszynski Jr, *The First Amendment in Cross-Cultural Perspective: A Comparative Legal Analysis of Freedom of Speech* (New York University Press, 2006).

### B Selectivity

A second, and more troubling, feature of the campaign against s 18C was its selectivity. It was curious that only s 18C was subject to a campaign for repeal or amendment and other laws, which seemed to impose equal or even greater burdens on expression, seemed to escape the notice of the critics. If s 18C is offensive to free speech principles why, for instance, could the same not be said of the law of defamation?<sup>80</sup> Indeed, if anything, defamation law, under which onerous damages could be awarded, represents an even greater threat to freedom of speech.

Even more noticeable was the disregard for *Criminal Code Act 1995* (Cth) sch s 471.12, which creates an offence for using 'a postal or similar service' in a manner that 'reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive'.<sup>81</sup> The section has obvious parallels with s 18C in its application to 'offensive' acts, but it may have a potentially more significant imposition on freedom of expression. It creates a criminal offence, rather than a civil liability, and as it is not linked to any 'public interest' defences as in s 18D, the provision may apply to private communications. It also applies to all circumstances in which offence is caused, and not merely to offence caused on the grounds of race. Moreover, at the same time as the campaign to amend s 18C, there were two prominent convictions under s 471.12 which were upheld by the High Court.<sup>82</sup>

Some selectivity may be a necessary vice of many political campaigns. If politics is the art of the possible, selectivity may simply be a pragmatic response to political contingencies that make broader reform unlikely. Nonetheless, the selectivity in this case is particularly striking: s 18C is mischaracterised as a law that renders 'offensiveness' to be unlawful but s 471.12 does turn on 'offensiveness', is a criminal law and is not subject to defences like those in s 18D. Furthermore, like s 18C, s 471.12 had been successfully relied upon in a recent and high profile case. In 2013, the High

<sup>80</sup> A point made by some defenders of s 18C: see, eg, Jonathan Green, 'Surely Defamation Is the Real Threat to Free Speech', *ABC News* (online), 3 April 2014 <<http://www.abc.net.au/news/2014-04-03/green---defamation/5362868>>.

<sup>81</sup> There was some criticism of s 471.12 during this period but nothing approaching the campaign waged against s 18C. For one thoughtful critique, see Daniel Ward, 'Scepticism, Human Dignity and the Freedom to Offend' (2013) 29(3) *Policy* 15.

<sup>82</sup> *Monis v The Queen* (2013) 249 CLR 92. Note that the appeal turned on the 'offensiveness' limb of s 471.12. The High Court split 3:3 on whether s 471.12 was contrary to the implied freedom of political communication. Thus, the New South Wales Court of Criminal Appeal's decision upholding the conviction was not overturned: see *Judiciary Act 1903* (Cth) s 23.



Court narrowly upheld the convictions of Man Haron Monis and Amirah Droudis for the writing of offensive letters to the families of Australian soldiers killed in Afghanistan.<sup>83</sup>

In addition to the failure to attend to remedies, this selectivity is more than a regrettable, but understandable, reality of politics. It also risks contradicting the purported basis of the campaign against s 18C. The strongest arguments against the regulation of racially offensive speech by laws like s 18C lie in the potential for their misuse.<sup>84</sup> One common argument is that laws of this kind will inevitably be misused in pursuit of an unpopular speaker or, and perhaps even worse, to pursue a political agenda of the government's choosing.<sup>85</sup> In this respect, the argument against the regulation of racist hate speech constitutes an instance of a more general argument for freedom of speech that turns on distrust of government. According to this argument, freedom of speech is valued because it is the alternative to regulation of speech, which will always reflect the biases and self-interest of government. The irony of the campaign to amend s 18C is that it seeks to protect a powerful political ally of the government, whilst neglecting the freedom of speech of the reviled Man Haron Monis. True adherents of freedom of speech would not want the protection of that right to depend upon the popularity or acceptability of the speaker or his or her ideas.

#### IV CONCLUDING REMARKS

The campaign to amend s 18C failed and, given the troubling nature of the campaign against it, it is fortunate that it did so. That is not to say that s 18C is immune from criticism. Several lines of critique (and therefore opportunities for amendment) suggest themselves. To my mind, the strongest line of criticism that has been levelled at the judgment in *Eatock v Bolt* focuses on the way Bromberg J took account of the sarcastic and insulting tone of the articles. There is a venerable tradition in the political theory of freedom of speech that protects incivility as a necessary evil in the course of ensuring an

<sup>83</sup> *Monis v The Queen* (2013) 249 CLR 92.

<sup>84</sup> I examine arguments of this kind in Adrienne Stone, 'How to Think about the Problem of Hate Speech: Understanding a Comparative Debate' in Katharine Gelber and Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (Federation Press, 2007) 59.

<sup>85</sup> The distorting possibilities of hate speech laws are examined in James Weinstein, *Hate Speech, Pornography and the Radical Attack on Free Speech Doctrine* (Westview Press, 1999) 142–7.

open public debate,<sup>86</sup> and this line of thought has been recognised in the High Court of Australia (as Bromberg J notes).<sup>87</sup> Whether the arguments for the protection of incivility ought to prevail, given the kinds of harm that can be caused by offence and insults on the grounds of race — especially where they amount to humiliation and intimidation — is an open question.<sup>88</sup> But that is the debate we should have, and however it is resolved, it should not be decided in circumstances that seem to threaten the core values on which the right to freedom of expression depends.

<sup>86</sup> Dating at least to John Stuart Mill, *On Liberty* (Yale University Press, first published 1859, 2003 ed). See also the discussion by Ronald Dworkin, ‘Foreword’ in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press, 2009) v.

<sup>87</sup> For the approach of the High Court to ‘civility’, see Adrienne Stone, ‘“Insult, Emotion, Calumny and Invective”: Twenty Years of Freedom of Political Communication’ (2011) 30 *University of Queensland Law Journal* 79.

<sup>88</sup> Among a very large literature, see, eg, Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012); Weinstein, above n 85.