FEDERAL COURT OF AUSTRALIA

Eatock v Bolt [2011] FCA 1103

Citation:	Eatock v Bolt [2011] FCA 1103
Parties:	**PAT EATOCK v ANDREW BOLT and THE HERALD AND WEEKLY TIMES PTY LTD (ACN 004 113 937)**
File number:	VID 770 of 2010
Judge:	**BROMBERG J**
Date of judgment:	28 September 2011
Catchwords:	**HUMAN RIGHTS** – Part IIA *Racial Discrimination Act 1975* (Cth) – offensive conduct based on race – newspaper articles and online blog articles – principles for determining imputations conveyed by articles – conventional meaning of "Aboriginal" – whether Part IIA of the Racial Discrimination Act restricted to conduct based on racial hatred – objectives of Part IIA discussed – s 18C(1)(a) – whether articles were reasonably likely to offend, insult, humiliate or intimidate – whose reaction is to be assessed – relevance of community standards – "in all the circumstances" – "reasonably likely" – "offend, insult, humiliate or intimidate" – s 18C(1)(b) – whether articles written and published "because of" race, colour or ethnic origin – test for causal nexus discussed – "race, ethnic origin and colour" – whether Australian Aboriginal people are a race or are of common ethnic origin – s 18D exemption – burden of proof – "reasonably and in good faith" – s 18D(c)(ii) – requirements of fair comment defence – distinguishing between fact and comment discussed – s 18D(b) – meaning of "genuine purpose in the public interest" – contravention of s 18C found – Relief – declaration - whether apology should be ordered – whether prohibition of republication of articles should be ordered – whether removal of articles from online archive should be ordered. **PRACTICE AND PROCEDURE** – whether claims clearly raised by pleadings – whether claims "in the ring".
Legislation:	*Aboriginal Land Rights Act 1983* (NSW) *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) *Acts Interpretation Act 1901* (Cth) s 15AA

Australian Human Rights Commission Act 1986 (Cth)
Commonwealth of Australia Constitution Act (Cth) s 51(xxvi)
Competition and Consumer Act 2010 (Cth) s 18 of Schedule 2
Racial Discrimination Act 1975 (Cth) ss 18B, 18C, 18D, 18E
Race Relations Act 1976 (UK)
Race Relations Act 1971 (New Zealand)
Trade Practices Act 1974 (Cth) s 52

European Convention on Human Rights, Art 10
International Covenant on Civil and Political Rights, Art 19
International Convention on the Elimination of all Forms of Racial Discrimination Art 4, 5
United Nations Declaration of Human Rights, Art 19

Cases cited:

.au Domain v Domain Names (2004) 207 ALR 521
Amalgamated Television Services Pty Ltd v Marsden (1998) 43 NSWLR 158
Attorney General for the State of New South Wales v Winters [2007] NSWSC 1071
Attorney-General of the Commonwealth v Queensland (1990) 25 FCR 125
Austin v Mirror Newspapers Ltd (1985) 3 NSWLR 354
Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199
Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57
Australian Ocean Line Pty Ltd v Western Australia Newspapers (1985) 58 ALR 549
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Emergency Transport Technology Pty Ltd (2011) 277 ALR 388
Barclay v The Board of Bendigo Regional Institute of Technology and Further Education (2011) 191 FCR 212
Betfair Pty Ltd v Racing New South Wales & Anor (2010) 189 FCR 356
BHP Billiton v NCC (2007) 162 FCR 234
Bonnick v Morris [2003] 1 AC 300
Boughey v The Queen (1986) 161 CLR 10
Bropho v Human Rights and Equal Opportunity Commission (2004) 135 FCR 105
Budu v British Broadcasting Corporation (2010] EWHC 616 (QB)
Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592
Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304

Campomar Sociedad, Limitada v Nike International Ltd (2000) 202 CLR 45
Canada (Human Rights Commission) v Taylor [1990] 3 SCR 892
Catch the Fire Ministries Inc v Islamic Council of Victoria Inc (2006) 15 VR 207
Chakavarti v Advertiser Newspapers (1998) 193 CLR 519
Channel Seven Adelaide Pty Ltd v Manock (2007) 232 CLR 245
Cheng v Tse Wai Chun (2000) 3 HKCFAR 339
Coleman v Power (2004) 220 CLR 1
Commonwealth of Australia v Evans [2004] FCA 654
Commonwealth v Tasmania (1983) 158 CLR 1
Corunna v West Australian Newspapers Ltd (2001) EOC 93-146
Creek v Cairns Post Pty Ltd (2001) 112 FCR 352
Cunliffe v Commonwealth (1994) 182 CLR 272
Department of Agriculture and Rural Affairs v Binnie [1989] VR 836
Ellison v Brady 924 F.2d 872 (9th Cir. 1991)
Evans v The State of New South Wales (2008) 168 FCR 576
Flood v Times Newspapers Ltd [2010] EMLR 8
Gianni Versace SpA v Monte (2002) 119 FCR 349
Gibbs v Capewell (1995) 54 FCR 503
Global Sportsman Pty Ltd v Mirror Newspapers (1984) 2 FCR 82
Hagan v Trustees of the Toowoomba Sports Ground Trust [2000] FCA 1615
Hill v Church of Scientology of Toronto [1995] 2 S.C.R. 1130
Jones v Scully (2002) 120 FCR 243
Jones v Toben [2002] FCA 1150
King-Ansell v Police [1979] 2 NZLR 531
Lange v Australian Broadcasting Corporation (1997) 189 CLR 520
Langer v Commonwealth (1996) 186 CLR 302
Levy v State of Victoria & Ors (1997) 189 CLR 579
Lezam Pty Ltd v Seabridge Australia Pty Ltd (1992) 35 FCR 535
London Artists Limited v Littler [1969] 2 QB 375
Loutchansky v Times Newspapers Ltd (Nos 2-5) [2002] QB 783
Mabo v Queensland (No 2) (1992) 175 CLR 1
Mandla v Dowell Lee [1983] 2 AC 548
McGlade v Lightfoot (2002) 124 FCR 106
Miller v Wertheim [2002] FCAFC 156
Minister for Immigration and Citizenship v Haneef (2007) 163 FCR 414
Morgan v John Fairfax and Sons Limited (No 2) (1991) 23

NSWLR 374
National Exchange Pty Ltd v Australian Securities and Investments Commission [2004] FCAFC 90
Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191
Patmore v Independent Indigenous Advisory Committee (2002) 122 FCR 559
Pervan v North Queensland Newspaper Co. Limited (1993) 178 CLR 309
Peterson v Advertiser Newspapers (1995) 64 SASR 152
Purvis v State of New South Wales (Department of Education and Training) (2003) 217 CLR 92
R v Keegstra [1990] 3 S.C.R. 697
R (on the application of Gaunt) v Office of Communications (OFCOM) [2011] EWCA Civ 692
Re Bryning [1976] VR 100
Re Watson (No 2) [2001] TASSC 105
Reynolds v Times Newspapers Limited [2001] 2 AC 127
Shaw v Wolf (1997) 83 FCR 113
Silberberg v The Builders Collective of Australia (2007) 164 FCR 475
Stadnyk v Canada (Employment and Immigration Commission) (2000) 38 CHRR 290
Stephens v West Australian Newspapers Ltd (1994) 182 CLR 211
The Herald & Weekly Times Limited v Popovic (2003) 9 VR 1
The Herald & Weekly Times Pty Ltd v Buckley (2009) 21 VR 661
Theophanous v Herald & Weekly Times (1994) 182 CLR 104
Times Newspapers Limited (Nos 1 and 2) v United Kingdom [2009] EMLR 14
Toben v Jones (2003) 129 FCR 515
Vines v Djordjevitch (1955) 91 CLR 512

Australian Law Reform Commission Report No. 96, *Essentially Yours: The Protection of Human Genetic Information in Australia* (2003)
Allen TRS "The Common Law as Constitution: Fundamental Rights and First Principles" in *Courts of Final Jurisdiction: The Mason Court in Australia*, Saunders C (ed) (Federation Press, 1996)
Carmi G, "Dignity – The Enemy from Within: Theoretical and Comparative Analysis of Human Dignity As A Free Speech Justification" (2006-2007) 9 U. Pa. J. Const. L. 957
Chesterman M, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate, 2000)
De Plevitz L, and Croft L, "Aboriginality Under the Microscope: The Biological Descent Test in Australian

Law" (2003) 3(1) QUT Law and Justice Journal 1
Gardiner-Garden Dr J., "Defining Aboriginality in Australia", (2002-03) Department of the Parliamentary Library, Current Issue Brief No.10
Kleg M, *Hate Prejudice and Racism* (State University of New York Press, Albany, 1993)
Milo D, *Defamation and Freedom of Speech* (2008 Oxford University Press, Oxford,)
Milmo P and Rogers W (eds), *Gatley on Libel and Slander* (11th ed., Thomson Reuters, 2008)
Post R, "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74 California L.Rev 691
Waldron J, "Dignity and Defamation: the Visibility of Hate", (2009-2010) 123 Harv. L. Rev. 1596
Tsesis A, "Dignity and Speech: The Regulation of Hate Speech in a Democracy" (2009) 44 Wake Forest L.REV.497
Weinstein J "Extreme Speech, Public order, and Democracy: Lessons from The Masses" in Hare I and Weinstein J (eds), *Extreme Speech and Democracy* (Oxford University Press, 2009)

Date of hearing:	28-31 March 2011, 1, 4-6 April 2011
Place:	Melbourne
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	470
Counsel for the Applicant:	Mr R Merkel QC with Mr H Borenstein SC, Ms C Harris and Ms P Knowles
Solicitor for the Applicant:	Holding Redlich
Counsel for the Respondents:	Mr N Young QC with Dr M Collins
Solicitor for the Respondents:	Kelly Hazell Quill

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 770 of 2010**

BETWEEN:	**PAT EATOCK** **Applicant**
AND:	**ANDREW BOLT** **First Respondent**
	THE HERALD AND WEEKLY TIMES PTY LTD (ACN 004 113 937) **Second Respondent**

JUDGE:	**BROMBERG J**
DATE OF ORDER:	**28 SEPTEMBER 2011**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The parties are directed to confer with a view to agreeing on orders to give effect to the Court's reasons.

2. If there is agreement, the parties shall on or before 4:00pm on 5 October 2011, file a joint minute setting out the orders which they consider should be made.

3. In the absence of agreement or complete agreement, each party shall on or before 4:00pm on 5 October 2011 file and serve minutes of the orders the party contends should be made, together with short submissions on those matters which remain not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011

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JUDGE:	**BROMBERG J**
DATE:	**28 SEPTEMBER 2011**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

1 Ms Eatock has brought this proceeding on her own behalf and on behalf of people like her who have fairer, rather than darker, skin and who by a combination of descent, self-identification and communal recognition are, and are recognised as, Aboriginal persons.

2 Ms Eatock complains about two newspaper articles written by Mr Andrew Bolt and published by the Second Respondent ("HWT") in the *Herald Sun* newspaper and on that paper's online site. She also complains about two blog articles written by Mr Bolt and published by HWT on the *Herald Sun* website.

3 Broadly speaking, the nature of her complaint is that the articles conveyed offensive messages about her and people like her, by saying that they were not genuinely Aboriginal and were pretending to be Aboriginal so they could access benefits that are available to Aboriginal people. Ms Eatock wants the law to address this conduct. She wants declarations and injunctions and an apology from HWT. She calls in aid the *Racial Discrimination Act 1975* (Cth) ("the RDA"). She claims that by their conduct, Mr Bolt and HWT have contravened s 18C of the RDA.

4 In order to succeed in her claim, Ms Eatock needs to establish that:

- It was reasonably likely that she and the people like her (or some of them) were offended, insulted, humiliated or intimidated by the conduct; and
- That the conduct was done by Mr Bolt and HWT including because of the race, colour or ethnic origin of Ms Eatock or of the people like her.

5 Mr Bolt and HWT dispute that the messages Ms Eatock claims were conveyed by the articles, were in fact conveyed. They deny that any offence was reasonably likely to be caused and also that race, colour or ethnic origin had anything to do with Mr Bolt writing the articles or HWT publishing them. They also say that if Ms Eatock should establish those elements which she needs to satisfy the Court about, their conduct should not be rendered unlawful, because it should be exempted or excused. For that purpose, they rely on s 18D of the RDA.

6 Section 18D exempts from being unlawful, conduct which has been done reasonably and in good faith for particular specified purposes, including the making of a fair comment in a newspaper. It is a provision which, broadly speaking, seeks to balance the objectives of s 18C with the need to protect justifiable freedom of expression.

7 All of that raises interesting, difficult and important questions which I have sought to answer by considering:

- The Articles: [11]-[64];
- The Admitted Facts: [65]-[66];
- The Witness Evidence: [67]-[166];
- Aboriginal Identity: [167]-[190];
- Part IIA of the Racial Discrimination Act: [191]-[240];
- Were the Articles reasonably likely to offend?: [241]-[302];
- Were the Articles written and published because of race, colour or ethnic origin?: [303]-[335]; and
- Does the freedom of expression exemption apply?: [336]-[451].

8 For the reasons that follow, I have determined that some of the messages (what lawyers call "the imputations") which were conveyed by the two newspaper articles, were reasonably likely to offend, insult, humiliate or intimidate the people in question (or some of them), and that those articles were written or published by Mr Bolt and HWT including because of the race, colour or ethnic origin of those people. I have not been satisfied that the conduct is exempted from unlawfulness by s 18D. The reasons for that conclusion have to do with the manner in which the articles were written, including that they contained erroneous facts, distortions of the truth and inflammatory and provocative language and that as a result, the conduct of Mr Bolt and HWT is not justified in the manner required by s 18D of the RDA.

9 I have made no findings of contravention in relation to the two blog articles. Those articles were relied upon for additional claims which were raised by Ms Eatock very late in the trial of the proceeding. It would have been procedurally unfair to Mr Bolt and HWT to have permitted Ms Eatock to pursue those additional claims.

10 The relief to be granted by the Court is dealt with at the end of these reasons for judgment.

THE ARTICLES

11 HWT publishes the *Herald Sun* newspaper in print and online. The *Herald Sun* is a daily newspaper printed and published in Victoria and sold throughout Australia with a circulation of approximately 1.3 million readers. The *Herald Sun* is also published online on the *Herald Sun* website.

12 Mr Bolt is a journalist. He wrote each of the articles. At the time he did that and at the time that he gave evidence, he was an employee of HWT employed to write articles to be published by HWT in the *Herald Sun*. He writes a twice weekly column in the *Herald Sun* newspaper. Since 2005, Mr Bolt has also written articles and comments for a blog which is published by HWT on the *Herald Sun* website as the "Andrew Bolt Blog". Members of the public are able to post or upload comments onto the blog. The *Herald Sun's* website is one of the most popular news websites in Australia.

13 Mr Bolt wrote an article entitled *"It's so hip to be black"* ("the first article") which was published in print by HWT in the *Herald Sun* on 15 April 2009. A copy of that article (annotated with paragraph numbers) is annexed to these reasons for judgment as "1A". On or about 15 April 2009 and 16 April 2009, HWT also published the first article in the *Herald Sun* online under the title *"White is the new black"*. Mr Bolt also wrote a second article in the *Herald Sun* which is the subject of this proceeding. That article, entitled *"White fellas in the black"* ("the second article"), was published by HWT in the *Herald Sun* both in print and online on 21 August 2009. A copy of that article (annotated with paragraph numbers) is annexed to these reasons as "2A". Each of the articles was the subject of editorial oversight by an editor of the *Herald Sun*, whose function is to check articles and identify any changes that may be required. Each article was written by Mr Bolt for publication to the public through the *Herald Sun*. Each was published by HWT in the form submitted by Mr Bolt.

14 The headings and sub-headings in the first and second articles were written by an editor or sub-editor of the particular pages of the *Herald Sun* in which the articles were published and not by Mr Bolt. However, the change in the title of the first article when published online was a change made by Mr Bolt. The general purpose of such headings, as Mr Bolt explained, is to draw attention to the article and sum up some of its themes.

15 There are two blog articles which are also the subject of this proceeding. The first blog article was written by Mr Bolt and published by HWT on or about 20 March 2009 on the *Herald Sun* website. That article is entitled *"One of these women is Aboriginal"* ("the first blog article"). A second blog article was written by Mr Bolt and published by HWT on the *Herald Sun* website on or about 19 August 2009. That article was entitled *"Aboriginal man helped"* ("the second blog article"). Copies of both blog articles are annexed to these reasons as "1B" and "2B". I will refer to the two articles and the two blog articles collectively as "the Articles". Each blog article was written by Mr Bolt for publication to the public through the *Herald Sun* website. Each was published by HWT in the form submitted by Mr Bolt.

16 Ms Eatock relies upon the content of each of the articles as a whole, the ordinary and natural meaning of the words and phrases used therein. Ms Eatock identified imputations which she asserts were conveyed by the Articles. An imputation is a meaning conveyed by words utilised in a communication. The imputations identified are relied upon as the key general messages conveyed by the Articles read individually and when taken together.

17 In what follows, I will outline the content of each of the articles. I have annexed copies of the Articles so they can be read in their entirety and so that those parts I have extracted can be read in their context. I have sought to summarise and make particular reference to those parts of the Articles which I consider to be most germane to the matters I need to determine.

18 In undertaking that exercise and in relation to the first article and the second article ("the Newspaper Articles"), I have also made findings as to what, relevantly to the issues raised by this case, are the imputations which are conveyed by those articles to an ordinary and reasonable reader. I need not do that for the blog articles for reasons that will become apparent. There are other perspectives from which the Newspaper Articles and the imputations conveyed by them need to be considered. I deal with that later.

19 Before dealing with the Articles, I also need to explain the legal principles that have guided me in making the findings which I have made as to what imputations were conveyed by the Articles. The principles developed about imputations by the law of defamation have been adopted in at least two cases dealing with Part IIA of the RDA: *Jones v Scully* (2002) 120 FCR 243 at [125]-[126] (Hely J); and *Jones v Toben* [2002] FCA 1150 at [87] (Branson J). Both of those cases relied on a summary of the relevant principles found in *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 165-166 (Hunt CJ at CL with whom Mason P and Handley JA agreed). The principles there outlined may be summarised as follows:

- In deciding whether any particular imputation is capable of being conveyed, the question is whether it is reasonably so capable;
- Any strained or forced or utterly unreasonable interpretation must be rejected;
- The ordinary reasonable meaning of the matter complained of may be either the literal meaning of the published matter or what is implied by that matter, or what is inferred from it;
- The mode or manner of publication is a material matter in determining what imputation is capable of being conveyed. Thus, for example, the reader of a book is assumed to read it with more care than he or she would read a newspaper;

- The more sensational the article in a newspaper the less likely it is that the ordinary reasonable reader will have read it with a degree of analytical care which may otherwise have been given to a book and the less the degree of accuracy which would be expected from the reader;
- The ordinary reasonable reader of such an article is understandably prone to engage in a certain amount of loose thinking;
- There is a wide degree of latitude given to the capacity of the matter complained of to convey particular imputations where the words published are imprecise, ambiguous, loose, fanciful or unusual; and
- In determining what is reasonable in any case, a distinction must be drawn between what the ordinary reasonable reader, listener or viewer (drawing on his or her own knowledge and experience of human affairs) could understand from what the author has said and the conclusion which the reader, listener or viewer could reach by taking into account his or her own belief which has been excited by what was said. It is the former approach, not the latter, which must be taken.

20 Further, as Hunt CJ said of the ordinary or reasonable person at 165:

> The ordinary reasonable reader (or listener or viewer) is a person of fair average intelligence who is neither perverse, nor morbid or suspicious of mind, nor avid for scandal. That person does not live in an ivory tower but can and does read between the lines in the light of that person's general knowledge and experience of worldly affairs.
> (References omitted)

21 As both Hely J in *Scully* and Branson J in *Jones v Toben* identified, the principles summarised in *Marsden* were also applied in this Court by Tamberlin J in *Gianni Versace SpA v Monte* (2002) 119 FCR 349 at [144]-[146]. In that case at [145], Tamberlin J emphasised that the statement or matters complained of must not be looked at in isolation. The judge said:

> When considering whether an imputation is raised in the present case it is necessary to consider the cumulative effect of the references in the evidence as opposed to relying on selected passages in isolation.

22 Ms Eatock contends that, taken individually and together, the Articles convey the following imputations:

(a) the persons identified in the Articles and any other persons who like them have some Aboriginal descent and fairer rather than darker skins, were not genuinely Aboriginal and were not bona fide in claiming to be, and identifying as, Aboriginal persons;

(b) the persons described in (a) merely pretend to be Aboriginal persons so they can access the benefits that are only available to Aboriginal persons;

(c) the only genuine Aboriginal persons, and the only persons who may be treated as making a bona fide claim to be, and to identify as, Aboriginal persons are persons whose parents are both of Aboriginal descent and who have darker rather than fairer skin;

(d) under Bolt's criteria, persons having some Aboriginal descent but who are fairer rather than darker skinned are disqualified from, and cannot properly be regarded as, genuinely self-identifying as, and being, Aboriginal.

23 Mr Bolt and HWT deny that the Articles convey the imputations contended for by Ms Eatock. Mr Bolt's evidence was that he wrote each of the Articles in order to draw attention to what he believes to be a "discernible trend" in Australia, whereby persons of mixed genealogy, where that genealogy includes Aboriginality, identify as Aboriginal persons, where they could instead identify with another race or other races, or assert no racial identity at all. Mr Bolt said that he believed that this 'trend' was an undesirable social phenomenon, because it emphasises racial differences, rather than common humanity.

The First Article – "It's so hip to be black"

24 The first article describes a "whole new fashion" (1A-8) (or what Mr Bolt referred to as the 'trend') of which Mr Bolt is critical. The article asserts that the people who constitute the 'trend' have made a choice to identify as Aboriginal people. In my view, the article would, in summary, convey to the ordinary reasonable reader that Mr Bolt has three reasons for criticising the alleged choice made. The first two criticisms are related and challenge the legitimacy of the choice. First, the choice is criticised as not sufficiently justified by the ancestry and (to a lesser extent) by the cultural upbringing of each of the persons said to constitute the 'trend'. Secondly, the choice made is criticised by reference to the motivation for it. Thirdly, the choice is criticised for its social consequences because it emphasises racial differences, rather than common humanity.

25 The article is likely to have been understood as largely answering the question posed by its sub-heading which asks -

> Why are so many people eager to proclaim their Aboriginality, despite it being such a small part of their heritage?

26 The first article appears in a newspaper. It is likely to have been read only once by an ordinary reasonable reader. It is not an article which is likely to be read by the reader with analytical care. That is particularly so given the style in which it is written. The article's use of language and structure is highly suggestive and designed to excite. Its style is not careful, precise or exact. The style and structure invite supposition, rather than analytical conclusions. The language is not moderate or temperate but often strong and emphatic. There is a liberal use of sarcasm and mockery. Language of that kind has a heightened capacity to convey implications beyond the literal meaning of the words utilised. It is language which invites the reader to not only read the lines, but to also read between the lines.

27 The 'trend' which is critiqued is said to involve people in academia, the arts and in "professional activism" (1A-8). At the head of the article, the reader is asked to meet "the white face of a new black race – the political Aborigine" (1A-1). The reader is then introduced to sixteen people who are represented as exemplifying the 'trend'.

28 Each individual identified is dealt with separately, but because each is put forward as exemplifying the 'trend', there is a cumulative effect created by the article. The characteristics attributed to each individual will have been understood by the reader to contribute to developing a picture of the kind of individual that typifies the group of people said to constitute the 'trend'. There are also statements made generally about the group which serve to reinforce the article's core messages.

29 Examples of the first article's assertion that Ms Eatock and others have made a deliberate choice in identifying as an Aboriginal person include:

- "…eager to proclaim their aboriginality…" (all)(1A-sub-heading);
- "…but chose Aboriginal, insisting on a racial identity…She also chose, incidentally, the one identity open to her that has political and career clout" (Cole)(1A-3 & 1A-4);
- "And how popular a choice that now is" (all)(1A-5);
- "…she, too, has chosen to call herself Aboriginal…" (Sax)(1A-7);
- "…a whole new fashion….to identify as Aboriginal" (all)(1A-8);
- "…the choice to be Aboriginal can seem almost arbitrary…" (all)(1A-9);

- "She chose to be Aboriginal as well…" (Behrendt)(1A-15);
- "She, too, could identify…" (Heiss)(1A-19);
- "…her decision to identify as Aboriginal…" (Heiss)(1A-20);
- "I'm not saying any of those I've named chose to be Aboriginal for anything but the most heartfelt and honest of reasons…" (all)(1A-22);
- "…even if full-blood Aborigines may wonder how such fair people can claim to be one of them…"(all)(1A-22);
- "…this self-identification as Aboriginal strikes me as self-obsessed…" (all)(1A-23);
- "…Eatock only started to identify…" (Eatock)(1A-27);
- "…why does he not also identify…" (Scott)(1A-30).

30 The choice made by the people exemplified to identify as Aboriginal would have been understood by the reader as being challenged, mainly by reference to its lack of biological integrity. That choice is said to be "almost arbitrary…given how many of their ancestors are in fact Caucasian" (1A-9). In relation to each individual, the article draws attention to an asserted deficiency of Aboriginal ancestry. It argues that case by emphasising the non-Aboriginal ancestry or background of each person: "raised by her English – Jewish mother" (Cole) (1A-2); "father was Swiss" (Sax) (1A-6); "Culturally she's more European" (Sax) (1A-6); "mother…boringly English" (Winch) (1A-11); "as German as her father" (Behrendt) (1A-14); "father was Austrian" (Heiss) (1A-19); "Scottish mother" and "father's British relatives" (Eatock) (1A-26); "obvious European background" (Scott) (1A-30); "English father" (Clarke) (1A-31); "Irish father" (O'Donoghue) (1A-31); "clearly has more European than Aboriginal ancestry" (Mansell) (1A-31); "had a white father" (Dodson) (1A-32); "are Aboriginal because their Indian great-grandfather married a part-Aboriginal woman" (Wayne and Graham Atkinson) (1A-33).

31 Any Aboriginal ancestry or cultural upbringing of the individuals examined is, in most cases, not referred to and where it is, the reference tends to emphasise the asserted deficiency of an Aboriginal connection: "rarely saw her part-Aboriginal father" (Cole) (1A-3); "mother only part-Aboriginal" (Sax) (1A-6); "father has both Afghan and Aboriginal heritage" (Winch) (1A-11); "mother only part-Aboriginal" (Heiss) (1A-19).

32 Skin colour and other physical features are also utilised by the article and, for the reasonable reader, would serve to emphasise the asserted deficiency of Aboriginal ancestry of the individuals exemplified and the group as a whole. The group is referred to as: "the white face of a new black race" (1A-1); "fair Aborigines" (1A-9); and "fair people" (1A-22). Colour photographs of many of the individuals referred to in the article accompany the article. Each photograph shows a fair-skinned person. Extensive reference is made to the colour or other physical features of the individuals. That reference is usually juxtaposed with the chosen identity of the individual in a way that tends to suggest an oddity or absurdity (i.e. looks "white" but identifies as "black"). For example: "insisting on a racial identity you could not guess from her features" (Cole) (1A-3); "a white Koori" (Sax) (1A-5); "In looks, she's Swiss. But she too has chosen to call herself Aboriginal" (Sax) (1A-6 and 7); "despite her auburn hair and charmingly freckled face, she too, is an Aborigine" (Winch) (1A-10); "despite looking almost as German as her father. She chose to be Aboriginal" (Behrendt) (1A-14-15); demanding laws to give her "more rights as a white Aborigine than your own white dad" (Behrendt) (1A-17); "the first Aborigine to stand for Federal Parliament in the ACT, even though she looked as white as her Scottish mother" (Eatock) (1A-26); the first Aboriginal candidate in a winnable seat "despite looking as Aboriginal, or not, as Premier Anna Bligh" (Enoch) (1A-28); "calls himself a Noongar, despite conceding that the Aborigines who did not know him called him *wadjila* – a white" (Scott) (1A-29); insists he is Aboriginal "when he looks more like one of his West Indian ancestors" (Browning) (1A-36).

33 In my view, the article would be understood by the ordinary reasonable reader as asserting that the choices made by the people who constitute the 'trend' have particular motivations. The motivation of the individuals is either stated or suggested to be political or to facilitate career based opportunities. Their choice is described as "intensely political" (1A-9). The people who constitute the 'trend' are said to be "self-obsessed and driven more by politics than by any racial reality" (1A-23). The connection between the choice made and the opportunities which are said to arise are made in highly suggestive terms. Thus, Bindi Cole "incidentally" (1A-4) chose the "one identity open to her that has political and career clout" (1A-4). Annette Sax's choice "happily means" (1A-7) that she could be shortlisted for an award. Tara June Winch is said to have "written only one book…yet is already" (1A-10) an ambassador for the Australia Council's Indigenous Literacy Project. The choice made by Anita Heiss is described as "lucky, given how it's helped her career" (1A-20). The article states she has "won plumb jobs reserved for

Aborigines" (1A-21). Pat Eatock is said to have started to identify as Aboriginal because of an "awakening to far-Left causes" (1A-27) and "thrived as an Aboriginal bureaucrat, activist and academic" (1A-28).

34 There is a further basis upon which the choice said to have been made by the individuals would be understood to be criticised. The choice made is said to be divisive and racist. The assertion is that each of the individuals could have chosen to identify with other aspects of their heritage, or not have identified at all with any heritage, and that by identifying with their Aboriginal heritage alone, deep humanistic ideals and enlightened opinion are debased (1A-37). It is suggested that a better approach would be for these individuals to acclaim being "proud of being half-white too" (1A-37). Or, alternatively that people should all get beyond racial pride and "be proud only of being human beings set on this land together, determined to find what unites us and not to invent such racist and trivial excuses to divide" (1A-38). This theme reflects Mr Bolt's evidence as to his subjective reason for writing the article. That the article contains this message is not in dispute and is not relied upon by Ms Eatock as a basis for complaint, other than for some of the language utilised which is said to reinforce the messages which are relied upon. For instance, in the passage just quoted, the reference to inventing "racist and trivial excuses" (1A-38).

35 In characterising the imputations to be drawn from the first article, I have taken into account a paragraph which appears in about the middle of the article which is in the following terms (at 1A-22):

> 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.

36 The contents of that paragraph are incongruous and inconsistent with the contents of the article as a whole. That inconsistency, when the article is read as a whole, is likely to be understood as explicable on the basis that the disclaimer is intended as an exculpatory device ("merely formal": *Lezam Pty Ltd v Seabridge Australia Pty Ltd* (1992) 35 FCR 535 at 557 (Burchett J)) rather than a genuine attempt to counter the contrary messages that the article otherwise conveys. Whether or not the paragraph was written with that intent, in my view it would be read and understood by the reader as merely formal and not really intended to

distract from what is elsewhere said or suggested. That understanding would be reinforced by the artful manner in which the second sentence of the disclaimer has been crafted.

37 Whilst I have undertaken an analysis of the text, I am conscious of the need to bear in mind that it is the ordinary reader's overall impression gained from a once-over-lightly assessment of the contents which is to be identified: *The Herald & Weekly Times Pty Ltd v Buckley* (2009) 21 VR 661 at [33] (Nettle, Ashley and Weinberg JJA). In my view, from the perspective of the ordinary reasonable member of the Australian community, imputations conveyed by the first article include that:

- There are fair-skinned people in Australia with essentially European ancestry but with some Aboriginal descent, of which the identified individuals are examples, 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; and,
- Fair skin colour indicates a person who is unlikely to be sufficiently Aboriginal to be genuinely identifying as an Aboriginal person.

The Second Article – "White fellas in the black"

38 The structure of the second Article is similar to the first and some of the same individuals are used as examples of the same 'trend' being discussed. Its tone is more cynical and mockery is used more extensively than is the case for the first article, but otherwise its use of language and its structure are similar and the observations I have made at [26] are applicable.

39 The article begins with what would be understood as a derisory description of two of the individuals as "from a tribe of people who face terrible racism just because of the colour of their skin" (2A-1).

40 The group of people critiqued and the alleged choice of identity made by them is described as:

> [A] booming new class of victim you'd never have imagined we'd have to support with special prizes and jobs. (2A-9)
>
> They are "white Aborigines" – people who, out of their multi-stranded but largely European genealogy, decide to identify with the thinnest of all those strands, and the one that's contributed least to their looks. Yes, the Aboriginal one now so fashionable among artists and academics (2A-10).

41 Examples from the second article which would lead the reader to understand that Mr Bolt was asserting that the people in the 'trend' had made a deliberate choice to identify as Aboriginal people include:

- "…people, who, out of their multi-stranded but largely European genealogy, decide to identify with the thinnest of all those strands…" (all)(2A-10);
- "Behrendt….as a professional Aborigine…" (Behrendt)(2A-20);
- "…also identified herself as a 'white Koori'" (Sax)(2A-25);
- "She needed to write just one book – and say her dad had Afghan-Aboriginal ancestry…" (Winch)(2A-26);
- "Yes, yes, I know. What business is it of anyone else how we identify ourselves?" (all)(2A-29);
- "Seeking power and reassurances in a racial identity is not just weak…" (all)(2A-42);
- "I've never before seen so many Australian-born people identify themselves by their ethnicity…" (2A-45);
- "…and sign up instead as white Aborigines, insisting on differences invisible to the eye…" (2A-48).

42 Towards the end of the article, Mr Bolt gave three reasons why he objects to the behaviour he has examined. The first reason would have been understood to challenge the claim of these people to identify as Aboriginal and, in the context of what preceded it, to suggest that their claim was spurious. The article says:

> Yes I *do* object, and not just because I refuse to surrender my reason and pretend white really is black, just to aid some artist's self-actualisation therapy. (Mr Bolt's emphasis) (2A-32)
>
> That way lies madness, where truth is just a whim and words mean nothing. (2A-33)

43 An asserted lack of Aboriginal ancestry is utilised extensively in the article to support that objection. Skin colour is extensively emphasised. The descriptor "white Aborigines" used in the first article is at times used in the second but there is in the second article a distinctive slide to a descriptor with no connection to Aboriginal identity. Thus the group or

the individuals identified are described as: "white people" (2A-8), "white men" (2A-6); and in the heading and sub-heading "white fellas" and "white man".

44 Other examples of the article's use of colour and physical features include:

- Photographs of Mark McMillan and Danie Mellor in relation to which a rhetorical question is posed in the following terms:

> If, studying the faces of these two "Aboriginal" men you think this is surely the most amazing stretch of definition, you're wrong (2A-5).

- "pink in face" (McMillan) (2A-18);
- "very pale" (Behrendt) (2A-20);
- "blue-eyed and ginger-haired" (Mellor) (2A-21);
- "white face" (Cole) (2A-24);
- "pale as a blank canvas" (Sax) (2A-25);
- "auburn-haired" (Winch) (2A-26);
- "white university lecturer" (Mellor) (2A-37).

45 Colour is also used as a point of contrast between the people in the group and those intimated to be 'real' Aboriginal people. It is also used as a marker of advantage (and disadvantage):

- "That's the sound of black people being elbowed out by white people shouting 'but I'm Aboriginal, too'" (2A-8);
- [You would have thought that public funds] "would at least go to people who *looked* Aboriginal" (2A-18) (Mr Bolt's emphasis);
- "white men claiming prizes meant for black women" (2A-31);
- "privileged white Aborigine…underprivileged black Aborigine" (2A-36);
- "White university lecturer…real draw-in-the-dirt Aboriginal artists" (2A-37);
- "What's a black Aboriginal artist from the bush to think, seeing yet another white man lope back to the city with the goodies" (2A-39);

- "Same with McMillan. When a man as white as I, already a lawyer with a job, wins a prize meant to encourage and inspire hard-struggle black students, what must those Aborigines conclude?" (2A-40).

46 There are three non-colour based references made to ancestry:

- "'American-Australian' father and a mother with only part-Aboriginal ancestry in her otherwise Irish-Australian past" (Mellor) (2A-21);
- "English mother" (Cole) (2A-24);
- "Right to call himself Aboriginal rests on little more than the fact that his Indian great-grandfather married a part-Aboriginal woman" (Graham Atkinson) (2A-28).

47 The ordinary reasonable reader would perceive that one of the core messages conveyed by the second article is that people who are not really Aboriginal are taking benefits that were intended for 'real' Aboriginal people. That message is intimated by:

- The heading – "White Fellas in the black";
- The sub-heading – "What's an Aboriginal artist from the bush to think when he or she sees yet another white man lope off with a prize originally meant to inspire blacks?"; and,
- The pull-out quote – "Mellor and McMillan are representatives of a booming new class of victim you'd never have imagined we'd have to support. They are 'white Aborigines'".

48 This message is the subject of Mr Bolt's second stated objection to the 'trend'. That objection is described as follows:

> …that the special encouragements and prizes we set aside for Aborigines are actually meant for…well, *Aborigines*. You know, the ones we fear would get nothing, if we didn't offer a bit extra, just for them.
> (Mr Bolt's emphasis) (2A-35)

49 The examples described or the references made in the article in support of this objection include:

- Danie Mellor winning the Telstra Award and Mark McMillan the Fulbright Indigenous Scholarship, despite their non-Aboriginal appearance;
- Mark McMillan winning the Black Women's Action in Education Foundation Scholarship "originally intended to help educate black women, not white men" (2A-6);
- "Hear that scuffling at the trough? That's the sound of black people being elbowed out by white people shouting 'but I'm Aboriginal, too"' (2A-8);
- "McMillan…has received all the special help you once thought, when writing the tax man another cheque, would at least go to people who *looked* Aboriginal, but which is increasingly lavished on folk as pink in face as they are in politics"; (Mr Bolt's emphasis) (2A-18);
- "This trained lawyer [McMillan] has not just won several prizes intended for Aborigines but has worked for Aboriginal groups and been an Aboriginal representative on several boards, including that of a local land council" and is a researcher for an "'indigenous' outfit" (2A-19 & 20);
- "the very pale Prof Larissa Behrendt, who may have been raised by her white mother but today, as a professional Aborigine, is chairman of our biggest tax payer-funded Aboriginal television service" (2A-20);
- "The blue-eyed and ginger-haired Mellor has been similarly privileged" (2A-21) despite his American-Australian father and part-Aboriginal mother;
- "how can Graham Atkinson be co-chair of the Victorian Traditional Owners Land Justice Group when his right to call himself Aboriginal rests on little more than the fact that his Indian great-grandfather married a part-Aboriginal woman?" (2A-28);
- "Lovely! Soon there'll be no end of white men claiming prizes meant for black women" (2A-31);
- "So when a privileged white Aborigine then snaffles that extra, odds are that an underprivileged black Aborigine misses out on the very things we hoped would help them most" (2A-36);
- "What's an Aboriginal art prize for, if a man as white and cosseted as Mellor can win it" (2A-38);

- "What's a black Aboriginal artist from the bush to think, seeing yet another white man lope back to the city with the goodies?" (2A-39); and,
- "Same with McMillan. When a man as white as I, already a lawyer with a job, wins a prize meant to encourage and inspire hard-struggle black students, what must those Aborigines conclude?" (2A-40).

50 The article will have been understood by the ordinary reasonable reader to draw a connection between the people constituting the 'trend' identifying as Aboriginal and those people obtaining personal advantage. The suggestion that personal advantage is a motivating factor for the alleged choice made is less pronounced than in the first article, but it is nevertheless made. There are a number of examples through which that suggestion is made:

- Annette Sax's identification is said to have "fortuitously allowed her to make the shortlist for the Victorian Indigenous Art Award, alongside other Aboriginal artists as pale as a blank canvas" (2A-25);
- Tara June Winch "was just as lucky. She needed to write just one book – and say her dad had Afghan-Aboriginal ancestry – for the Australian Council to snap her up as its Indigenous Literacy Project Ambassador" (2A-26).

Other examples suggestive of the connection are set out at [49] above. Additionally, in his concluding remarks, Mr Bolt objects to people "[s]eeking power and reassurance in a racial identity" (2A-42).

51 In the article, Mr Bolt describes the individuals he has identified as not "atypical or even rare" (2A-23) and says that he has written before "of a dozen similar cases, several even more incongruous" (2A-27).

52 At the very end of the article, Mr Bolt gave the third basis for his objection. He said that a noble Australian ideal is breaking down. That noble ideal is described as "that we judge each other by our character and deeds, and not our faith, fortune or fatherland" (2A-44). Mr Bolt says (at 2A-45 to 46):

> I've never before seen so many Australian-born people identify themselves by their ethnicity, whether by joining ethnic gangs, living in ethnic enclaves, forming ethnic clubs, demanding ethnic television, playing in ethnic sports clubs, or grabbing ethnic prizes and grants.

> Why is that a problem? Because people who feel they owe most to their tribe tend to feel they owe less to the rest. At its worst, it's them against us.

53 The article ends with Mr Bolt questioning "how much is there left to hold us together" when "even academics and artists now spurn the chance to be people of our better future – people of every ethnicity but none – and sign up instead as white Aborigines, insisting on differences invisible to the eye…" (2A-48).

54 The mocking and derisive tone of the article is stronger than that of the first article. A number of the individuals exemplified are derided and ridiculed. The article opens with the derisive comment that Mr McMillan and Mr Mellor "faced terrible racism just because" (2A-1) of their skin colour. Mr McMillan is later portrayed, through comments ascribed to him, as someone who thinks that his pale skin colour has made him a "victim" (2A-15). The reader is told that comments about Mr McMillan's identity are made by him seriously but are akin to comments from a comic satire. Mr McMillan's alleged confusion about his own identity is said to have lead him to declare that he is both a "proud gay" and a "proud father" (2A-18). The theme that these people see themselves as victims, with which the article opened and which lead to the group being described as "a booming new class of victim" (2A-9), is continued through comments made about Bindi Cole. Ms Cole is a photographer who is said to be exploring "her own pain at being too white" (2A-24) through her photographic exhibition in which black powder covers "her distressingly white face" (2A-24).

55 The imputations which I have found would be conveyed to an ordinary, reasonable member of the Australian community by the first article are also conveyed by the second article. There is in this article a stronger contrast made between the group of people challenged and those people who are to be regarded as 'real' Aboriginal persons. An imputation is conveyed that opportunities which should have been conferred on genuine Aboriginal persons have instead been taken by people like those exemplified. The suggested motivation conveyed as the reason why the people in the 'trend' identify as Aboriginal is confined to career aspirations.

The First Blog Article – "One of these women is Aboriginal"

56 Immediately underneath the title of this blog article is a picture of two women. They look quite similar. Both have pale skin and similar facial features and hair colouring. One of the women is readily recognisable as Anna Bligh, the current Premier of Queensland. The article identifies Leeanne Enoch as the other person in the photograph and as "the first indigenous woman preselected for a winnable state seat by the ALP" (1B). The comparison invited by the photograph, the heading and the content of the blog would have prompted the reader to question Ms Enoch's Aboriginality. The blog asks:

- "Exactly how Aboriginal is Enoch?";
- "By what superior right can she welcome me to 'her' country?";
- "Why is she insisting on a racial difference the eye cannot even detect?";
- "Doesn't her ancestry in fact make her more an oppressor than a victim?".

57 Ms Enoch is accused of "plucking one racial identity from the many open to her" and it is said that her career seems "to have relied to quite some extent on her insisting on her Aboriginality".

58 The conduct criticised is suggested to extend to others beyond Ms Enoch by its opening reference to "[t]his New Racism" which is said to be "becoming farcical".

59 Mr Bolt suggests that we should "stop wasting our time on stressing such trivial – even non-existent – racial divides and start judging each other as individuals instead".

The Second Blog Article – "Aboriginal man helped"

60 This blog article begins with a picture of Mark McMillan above what appears to be an extract from an announcement that Mr McMillan has received the 2009 Fulbright Indigenous Scholarship. The article states:

> It is wonderful to see a rare and wonderful opportunity like this being offered to someone from a race that faces so much discrimination and poverty just because of the color [sic] of their skin:

61 There are two further references to the Fulbright Indigenous Scholarship. They are:

- "(Hmm. I wonder which Aborigines missed out on this scholarship, thanks to McMillan's entry. *Maybe the judges* could explain.)" (Mr Bolt's emphasis); and
- "It's some feat when Fulbright's affirmative action – an indigenous scholarship – ends up leaving this year's intake of Fellows looking just as white as ever".

62 A second subject dealt with by the blog article is a reference to Mr McMillan having been chosen by Reconciliation Australia as the face of a campaign called *"Which One of These Men is Aboriginal?"* (Mr Bolt's emphasis). Mr Bolt explains that this is a campaign by Reconciliation Australia "to break down racist preconceptions that so hurt other members of his [McMillan's] community of *white Aborigines*" (Mr Bolt's emphasis). The blog article then extracts a list of qualifications taken from a Reconciliation Australia publication relating to Mr McMillan. That extract identifies Mr McMillan as a 40-year-old Wiradjuri man and a Masters of Law recipient. It identifies a number of positions and board memberships held by Mr McMillan and turning to Mr McMillan's personal achievements the extract says: "He is a proud father of an 11-year-old son, a proud gay man, rugby player, partner and active member of his community". To that, Mr Bolt comments:

> A gay white man with a law degree? Just the kind of Aboriginal who needs a special handout.

63 A second photograph appears in the blog article which shows a group of individuals. The photograph is accompanied with what would be understood to be the sarcastic comment; "that's certainly *not Mark* [Mr McMillan] in the middle of the back row" (Mr Bolt's emphasis) because Mr McMillan "is Aboriginal, you see".

64 The blog article then extracts comments said to have been made by Mr McMillan that are introduced with the mocking suggestion that Mr McMillan describes *"the agony of not being discriminated against* for being Aboriginal" (Mr Bolt's emphasis). This appears to be followed through in Mr Bolt's conclusion that "[r]acism sure has come a long way in this country if the problem now is that some people aren't black enough".

THE ADMITTED FACTS

65 By their pleadings both Mr Bolt and HWT have admitted that each of Ms Heiss, Ms Cole, Mr Clark, Dr Wayne Atkinson, Mr Graham Atkinson, Professor Behrendt, Ms Enoch, Mr McMillan and Ms Eatock are of Aboriginal descent; that since each was a child, at the

times of publication of each of the Articles, and at present, each person did and does genuinely self-identify as an Aboriginal person and did and does have communal recognition as an Aboriginal person. It is admitted that each of these persons has fairer rather than darker skin colour. That each was reasonably likely to be offended and was offended by the Articles or parts thereof is denied.

66 HWT admits that Mr Bolt was its employee at the relevant time and that it is vicariously liable for his conduct under s 18E of the RDA, should the Court find that his conduct was in contravention of s 18C. However, HWT denies liability as a principal in its own right.

THE WITNESS EVIDENCE

Anita Heiss

67 Ms Heiss is an author who lives in New South Wales. Ms Heiss gave evidence that she is and has always been Aboriginal. Her maternal great-grandmother was Aboriginal, as was her maternal grandmother. Both her maternal grandmother and great aunt were part of the Stolen Generation and were removed from their families along with other relatives. Ms Heiss's mother is Aboriginal. Her father was not Aboriginal, he was born in Austria. Her father did not seek to incorporate any Austrian culture, language or heritage into her family life. Her father was part of the Aboriginal family and community in which Ms Heiss was raised. She does not recall how she came to know she was Aboriginal. She has never thought of having a choice about being Aboriginal. That is who she is and has always been as far as she can remember. She has five siblings, three have brown skin and two are fair. All have the same parents.

68 During her childhood she had negative experiences at school and in her local community associated with being Aboriginal. She was disparaged as an "Abo", a "Boong" and a "Coon". She experienced a lot of racial abuse. She has also been exposed to negative reactions from people who initially had not realised that she was Aboriginal and who reacted badly when they realised she was.

69 When she attended university she became more conscious of what she regarded as injustices perpetrated against Aboriginal people. She has held a range of positions connected

with indigenous issues. She graduated with a PhD in Communication in Media in 2001. Her studies were focused on indigenous literature and publishing in Australia. She has served on numerous boards and committees involved with indigenous issues. Some of those positions have had sitting fees for meetings, most were voluntary. The paid positions involved modest payments. She has performed a large amount of unpaid work dealing with Aboriginal issues. She volunteers about a day a week of her time.

70 Her evidence as to how and why she was offended by the Articles was extensive. She felt the irony of having previously been discriminated against for being dark and now being discriminated against by Mr Bolt because she is not dark enough. She says Mr Bolt wants to take away her Aboriginal identity because of the way she looks. She is offended because of what she perceives to be Mr Bolt's claims that "we are not genuinely Aboriginal because of how we look".

71 She is offended by what she called Mr Bolt's suggestion that she chose her identity to pursue better career options. She says that suggestion challenges her integrity, her ethics and her personal beliefs. She denies claiming Aboriginal identity to advance her career. Her career has been advanced through study, training, goal-setting and hard work. She has pursued a career focused upon Aboriginal issues because she wants to help the Aboriginal community to which she belongs. She feels obligated to assist. She is insulted and offended by Mr Bolt's claim that benefits, awards and prizes that she and others have gained were gained because they identified as Aboriginal people. She accuses Mr Bolt of mischaracterising her commitment to her community as self-advancement.

72 She is offended by Mr Bolt's "blood quantum" approach to racial identity and its focus on how people look. She is also offended that the Articles do not recognise Aboriginality in all its diversity noting that 32 per cent of Australia's Aboriginal population live in metropolitan centres. She says the Articles ignore contemporary Aboriginal Australia. She finds that offensive.

73 She is also humiliated and insulted by the reference in the first article to awards she has won and the suggestion that these are encouragement awards as distinct from being recognitions of her achievements. She also points to a number of factual errors in the

Articles which she found offensive, including Mr Bolt's assertion that her mother is only part-Aboriginal.

74 The evidence given by Ms Heiss was not contested and I have no reason to not accept it as truthful. In particular, I find that by reason of Ms Heiss having been raised as Aboriginal she has and does genuinely self-identify as Aboriginal. She has Aboriginal ancestry and communal recognition as an Aboriginal person. She is an Aboriginal person and entitled to regard herself as an Aboriginal person within the conventional understanding of that description. That conventional understanding is a matter with which I deal with at [172] to [190] below. She did not consciously choose to be Aboriginal. She has not improperly used her Aboriginal identity to advance her career. She is a person committed to her Aboriginal community and is entitled to regard her achievements as well deserved rather than opportunistically obtained. I accept that she feels offended, humiliated and insulted by the Articles or parts thereof in the manner outlined by her evidence.

Bindi Cole

75 Ms Cole is an artist who lives in Victoria. Ms Cole's father is Aboriginal and her mother was not. Both her mother and maternal grandmother were born in Australia. Her mother did not identify herself as either English or Jewish although her mother had English and Jewish heritage. Ms Cole only learned of her mother's Jewish heritage a few years ago and after her mother's death. Judaism had no influence in her upbringing.

76 In her early childhood and until she was seven or eight years old, Ms Cole lived with her mother, who was a single parent, in St Kilda. Her father had been a part of her life until she was about six years old. When her mother became unfit to look after her from the age of seven or eight, Ms Cole lived with her father for a year before living with, and being looked after by, her paternal grandmother. She lived with her paternal grandmother for the next four years. She lived in the country with her grandmother, her grandmother's eight children, cousins, aunties and uncles who were and who all identified as Aboriginal persons. She later returned to Melbourne and continued to live with her grandmother. She was always surrounded by family who identified as Aboriginal. She moved back to live with her mother at about the age of 13, but regularly visited and maintained strong ties with her maternal grandmother. Ms Cole's mother died when Ms Cole was 16. Her Aboriginal father had come back into her life when she was about 14 or 15 and she had been in regular contact with

him. She continued to maintain strong ties with her maternal grandmother until she passed away when Ms Cole was 18. Ms Cole grew up in quite disadvantaged circumstances.

77 It was Ms Cole's Aboriginal grandmother who instilled in her a sense of pride in her Aboriginal heritage. However, Ms Cole was aware of her Aboriginal heritage before she went to live with her grandmother. Her mother always told her that she was Aboriginal. Ms Cole has always regarded herself to be Aboriginal. She did not choose to be Aboriginal.

78 In 2008, Ms Cole learnt about her maternal heritage from her maternal grandmother. At about that time she began to describe herself as of English, Jewish and Wathaurung descent. She agreed that there was nothing to have precluded her from deciding to identify more closely with her Jewish heritage but said that this was something she had not explored because she does not feel a connection to her Jewish heritage.

79 Ms Cole studied to become an artist from about 2001. She is a photographer. She is recognised within the Koori community and the broader Australian art community as an Aboriginal artist. She has never applied for any positions designated exclusively for Aboriginal people. She has worked hard for everything that she has achieved. She works for herself and does not claim social security benefits. She applies for grant funding which is available to support artistic work. She probably applies for more non-Aboriginal funding than funding available to Aboriginal people. She applies for funding because it is there and available irrespective of whether the funding is designated for Aboriginal people. She works to support the Victorian Aboriginal arts community. That community has always indicated support for her when she receives funding for Aboriginal artists. Members of the Aboriginal community have not suggested to her that she is taking their jobs. She has never had anything but support from the Aboriginal community.

80 In 2008, she photographed and exhibited a series of photographs called "Not Really Aboriginal". This is the exhibition which Mr Bolt refers to in the second article. Her idea for the series was to question the perception that if a person does not fit the stereotype of an Aboriginal person, that person is not really Aboriginal. Prior to making the series, she had experienced challenges to her identity from persons outside the Aboriginal community. Those challenges were based on her appearance. The exhibition was a very personal expression of her feelings about that issue. The exhibition was about challenging the

stereotype of an Aboriginal person being very dark-skinned and living in a remote community. The exhibition was about her saying that she was very proud of her family.

81 The photographs in the exhibition portray Ms Cole and members of her family including her father. The photographs show people who have pale skin colour, but whose faces have been painted black.

82 At the time of the exhibition, pamphlets promoting the exhibition were available on the internet. I have examined those pamphlets in which Ms Cole as well as others identified the purpose of the exhibition. That material identifies that the exhibition was intended to challenge stereotypical assumptions about race and identity and the stereotype that a person who is not dark-skinned and not from a remote community is not really Aboriginal.

83 Ms Cole found the first article very upsetting. She had calls from her aunties asking her "why are they saying that about us?" In her view, the article affected the whole Aboriginal community and Mr Bolt's words "offended and hurt everyone". The reference in both the first and second articles to her exhibition offended Ms Cole. She perceived Mr Bolt to be deriding her and giving no artistic reference to what she was trying to convey. She found his use of the phrase "distressingly white face" insulting, humiliating and offensive. She was intimidated by the Articles. She felt scared. She didn't want to go out in public for a while. She didn't want to be seen. It was very humiliating for her.

84 She perceived the Articles as reinforcing the stereotype of the "black" Aboriginal. Based on how she looked, Mr Bolt was denying that her Aboriginality was real. That made her feel that Mr Bolt was taking her identity away. It hurt her and her family. She was very upset. She perceived Mr Bolt as saying that she was not legitimately Aboriginal because she was not dark-skinned enough and inferring that she had not suffered. She found Mr Bolt's focus on looks and his failure to address culture as offensive.

85 She also perceived that the Articles undermined her achievements. She perceived Mr Bolt as saying that she and the other named individuals had falsely claimed to be Aboriginal to get ahead and access prizes as a rort. She perceived Mr Bolt as labelling them as opportunistic. Ms Cole is offended by the suggestion that the only reason she says she is Aboriginal is to gain benefits.

86 Ms Cole was cross-examined, but in the main her evidence was not contested and I have no reason to not accept it as truthful. In particular, I find that by reason of Ms Cole having been raised as an Aboriginal person she has and does genuinely self-identify as Aboriginal. She has Aboriginal ancestry and communal recognition as an Aboriginal person. She is entitled to regard herself to be an Aboriginal person within the conventional understanding of that description. She did not consciously choose to be Aboriginal. She has not improperly used her Aboriginal identity to advance her career as an artist. She is recognised by her peers in the Aboriginal arts community as an Aboriginal artist and is entitled to regard her achievements as well deserved rather than opportunistically obtained. I accept that she feels offended, humiliated, insulted and intimidated by the Articles or parts thereof in the manner outlined by her evidence.

Geoff Clark

87 Mr Clark is a former national chairman of the Aboriginal and Torres Strait Islander Commission ("ATSIC") who lives in Victoria. Mr Clark's mother is Aboriginal. Both of his mother's parents were Aboriginal. His mother was born in the Aboriginal community at the Framlingham Forest in Victoria. Mr Clark's mother had several siblings, each of them had different skin colour.

88 Mr Clark's father was not Aboriginal. Mr Clark described him as Australian. As his name was McIntosh, Mr Clark's mother had told him that his father had some Scottish ancestry. His father and mother were not married and never lived together. He spent some Christmas holidays with his father until he was 15 years old but did not have extensive contact with him. His father had no role in, or influence on, Mr Clark's upbringing or influence on his identity.

89 Mr Clark was essentially raised by his Aboriginal grandmother at Framlingham. Framlingham was established in 1861 and is one of the longest established Aboriginal communities in Victoria. Apart from a six year period in the 1970s, Mr Clark has lived in Framlingham nearly all of his life. This is where he and his two sisters were raised. It is where he learnt his Aboriginal culture watching his grandmother making traditional baskets and food and hunting and fishing with his Aboriginal uncles. He watched his uncles making Aboriginal cultural artefacts and his grandfather mixing traditional medicines and remedies. Traditional knowledge of sacred sites and stories of the Aboriginal people were passed down

to him by his relatives and other elders. He is currently a custodian of this knowledge and an elder of the Tjapwhuurrung people.

90 He was educated at an entirely Aboriginal primary school at Framlingham. He became exposed to racism and prejudice when he attended high school at Warrnambool. This was confronting and challenging. It included his classmates talking about their grandfathers going out shooting and poisoning Aboriginal people in the local area. He was often confronted about his identity when classmates would say that he was too white to be Aboriginal.

91 Mr Clark has only ever identified as an Aboriginal person. Mr Clark became active in Aboriginal issues in his mid 20s. His exposure to racism motivated his involvement. He began attending meetings of Land Councils from the age of 25. His involvement was both local and national. He was employed by the Aboriginal community at Framlingham in 1979. He worked on Aboriginal community issues attending national and state meetings including as an Aboriginal delegate drafting a Convention of the International Labour Organisation dealing with the rights of indigenous peoples. In 1999 he was elected as the ATSIC representative for Victoria. He held various positions at ATSIC including as its national chairman having been elected by Aboriginal people to represent them in nine separate elections.

92 Mr Clark found each of the Articles insulting and offensive. He regards Mr Bolt as having questioned his Aboriginality and suggested that he had disingenuously chosen to identify as Aboriginal. He was outraged by Mr Bolt's comments. He regards the first article as having challenged his human rights, his identity and undermined everything that he has committed his life to. He regards the Articles as at the very essence of prejudice and racism in Australia.

93 Mr Clark regards himself to have been disadvantaged in being Aboriginal "in terms of the suffering, racism and prejudice you receive" and was offended by Mr Bolt's suggestion that there has been an advantage for him in claiming that he is Aboriginal. He was very offended by the Articles' concentration on skin colour as defining Aboriginal identity.

94 Mr Clark perceives the personal attack made in the Articles on the individuals named, as an attack on the collective rights of Aboriginal people. He regards the Articles as intimidating Aboriginal people from identifying as Aboriginal. He found the suggestion that he and others are not genuine Aboriginal people to be humiliating.

95 Details of Mr Clark's life story and his identification as an Aboriginal person are available on the internet.

96 The evidence given by Mr Clark was not contested and I have no reason to not accept it as truthful. In particular, I find that by reason of Mr Clark having been raised as an Aboriginal person he has and does genuinely self-identify as Aboriginal. He has Aboriginal ancestry and communal recognition as an Aboriginal person. He is an Aboriginal person and entitled to regard himself as Aboriginal within the conventional understanding of that description. He did not consciously choose to be Aboriginal. He has not improperly used his Aboriginal identity to advance his career. He is a person committed to his community who has regularly been elected to represent it. He is entitled to regard his achievements as well deserved rather than opportunistically obtained by reason of his identification as an Aboriginal person. I accept that he feels offended, humiliated and insulted by the Articles or parts thereof in the manner outlined by his evidence.

Dr Wayne Atkinson

97 Dr Atkinson is an academic who lives in Victoria. He is the brother of Graham Atkinson, who also gave evidence in the proceeding. Dr Atkinson's parents are both Aboriginal persons and descendants of the Yorta Yorta and Dja Dja Wurrung tribal groups of central Victoria and the Murray Goulburn Region. All four of Dr Atkinson's grandparents were of Aboriginal descent. All of his great grandparents were of Aboriginal descent except one of his great grandfathers, Thomas Shadrach James. Thomas James was born in Mauritius and was of Indian heritage. He arrived in Australia in the late 1800s and worked as a teacher in Aboriginal communities where he met and married Dr Atkinson's great grandmother.

98 Dr Atkinson was raised by his maternal Aboriginal grandmother until his early teens. He grew up with his cousins on the riverbanks of Mooroopna in an Aboriginal fringe camp on the ancestral land of the Yorta Yorta. Both English and Aboriginal language were used in daily conversation at home. His siblings and cousins are all Aboriginal people who identify

as such. He grew up with his Aboriginality continually being reinforced by his parents, grandparents, relations, elders and many significant Aboriginal leaders.

99 Dr Atkinson says that he has lived every day of his life as an Aboriginal person. At no stage of his life has he regarded himself as choosing or electing to be Aboriginal. Being Aboriginal is what and who he is and always has been.

100 He experienced racism in primary and secondary school. He dropped out of school at year eight in order to find work to assist his family. He worked mostly unskilled and semi-skilled jobs. After some 10 or 12 years of work, he began his studies wanting to follow in the footsteps of some of his relatives and work for his community learning more about its history and culture. Over the course of his life, Dr Atkinson has sought to make a contribution to his Aboriginal community. He has contributed academically through research and writing and to community affairs through membership of a multitude of Aboriginal community decision-making bodies. His evidence included an impressive list of involvement in Aboriginal issues through various community structures over a period of 30 years. He is currently a member and a senior elder of the Yorta Yorta Nation Aboriginal Corporation. He was the principal claimant for the Yorta Yorta native title claim and gave evidence of his genealogy and Yorta Yorta connections for over a week during proceedings relating to that claim. He currently teaches Indigenous Studies at the University of Melbourne and other universities in Australia and overseas as a Senior Lecturer and Visiting Fellow.

101 He has always been recognised as an Aboriginal person by the Aboriginal community. He is a respected elder of both the Yorta Yorta and Dja Dja Wurrung peoples. This he says is something he has earned over many years. As an elder, he has leadership, mentoring and education responsibilities and is a spokesperson for his community. Over the course of his career, Dr Atkinson has held a range of positions and has been awarded a range of grants and scholarships. Most have focused on indigenous issues.

102 Dr Atkinson's evidence was that he is constantly dealing with attacks on his identity which he referred to as "personalised attacks on [his] sense of being and identity". He has sought a legal remedy through this case in order to defend his integrity. He perceives the Articles to be humiliating because they question his identity and integrity. He thinks it offensive that Mr Bolt excludes people as not being Aboriginal because they do not have dark

skin. He does not regard being Aboriginal as being about skin colour. He finds the idea that he has to be sufficiently Aboriginal according to Mr Bolt to claim his heritage and identity to be extremely offensive. He regards what Mr Bolt has said in the Articles to affect a huge number of people in the Aboriginal community. He finds it ironic that Mr Bolt says that he is not genuinely Aboriginal, when all of his life he has suffered the deep consequences of discrimination for being Aboriginal.

103 Dr Atkinson perceives Mr Bolt's assertion that his only claim to Aboriginality is that his great grandfather Thomas James married his great grandmother, to be highly offensive, insulting and totally inaccurate. He says he is angry that people like Mr Bolt get away with terrible distortions of the truth. He is distressed and agitated when powerful white people negate Aboriginal history and the right to be Aboriginal. He has a deep concern for the children of relatives who he suggests will be subjected to similar identity attacks as a result of the Articles. He is frustrated that after 30 years of teaching about his history, people in positions of authority and influence do not accept the reality of who he is and his family's lived experience.

104 Many of the matters that he gave evidence about are on the public record including evidence he gave on oath in the Yorta Yorta native title case.

105 The evidence given by Dr Atkinson was not contested and I have no reason to not accept it as truthful. In particular, I find that by reason of Dr Atkinson having been raised as an Aboriginal person, he has and does genuinely self-identify as Aboriginal. He has Aboriginal ancestry and communal recognition as an Aboriginal person. He is an Aboriginal person and entitled to regard himself as an Aboriginal person within the conventional understanding of that description. He did not consciously choose to be Aboriginal. He has not improperly used his Aboriginal identity to advance his career. He is a highly respected and committed member of his Aboriginal community and is entitled to regard his achievements as well deserved rather than opportunistically obtained. I accept that he feels offended, humiliated and insulted by the Articles or parts thereof in the manner outlined by his evidence.

Graham Atkinson

106 Graham Atkinson is a member of the Board of Native Title Services Victoria, he is a Councillor appointed to the Victorian Aboriginal Heritage Council and is also Chair of the Dja Dja Wurrung Clans Aboriginal Corporation. He lives in Victoria. I have dealt with Graham Atkinson's ancestry in setting out the descent of his brother Wayne.

107 Graham is the youngest of seven siblings, each of whom have always identified as Aboriginal. He grew up in Echuca where his mother and father settled in the early 1940s. His family was always recognised as an Aboriginal family. They were one of the first Aboriginal families in Echuca to buy their own block of land and build a house.

108 He has always known that he was Aboriginal and has always identified as an Aboriginal person. That is not something he has ever had to think about. It was never a matter of choice. At school, he was regarded by others as Aboriginal as were his brothers. The skin tone of his siblings and his own skin tone varies. When he was young his skin was very dark, as he got older it has become lighter. Other members of his family were also very dark, but it varied.

109 He and one of his cousins were the only Aboriginal students when he attended technical school. He was then subjected to racism from non-Aboriginal students. He was taunted as a "Blackie", "Abo", "Boong" and "Nigger". He got support from his parents and siblings to deal with racism and that strengthened his self-esteem and pride in his identity as an Aboriginal person. He also experienced racism whilst serving in the army, including in Vietnam.

110 The racism that he encountered spurred him to "fight to get a better deal for Aboriginal people". After he left the army he took up studies and graduated with a degree in Social Work. In 1977 he was one of only three Aboriginal students at Melbourne University. In 1994 he also obtained a Masters of Business Administration.

111 As one of very few tertiary qualified Aboriginal people living in Melbourne at the time, he was often asked to apply for positions and support causes dealing with Aboriginal issues. He wanted to advance Aboriginal people and it was logical for those in control to seek out the few qualified Aboriginal people available. In his career he has never used his

Aboriginal identity opportunistically. His positions were always based on his qualifications for the job.

112 Given that both of his parents are Aboriginal and each of their parents had Aboriginal ancestors, when he read the first article he was highly offended that Mr Bolt had said that he identified as Aboriginal only because Thomas James had married his great-grandmother. He perceives that in both the first and second articles, Mr Bolt suggested that he is not a "real" Aboriginal. He regards the attribution of identity based on skin colour as making no sense. Some Aboriginal people are really dark. Some Aboriginal people are not. He thinks it is offensive in a historical sense as well because it ignores the assimilation process and the taking of Aboriginal women by white settlers, in circumstances where children of mixed race were reared in the Aboriginal community. In his view, Mr Bolt ignores the government process of assimilation and "reduces us again to that invisible group of people that government policies or government authorities tried to create in the past". He stated that in Mr Bolt differentiating between Aboriginal people with lighter and darker skin, Mr Bolt was repeating the same discredited approach which occurred with early governmental assimilation policies. That he finds offensive and hurtful.

113 He is offended that Mr Bolt presumes to validate or not validate who he is. He stated that he wants to live a normal life and not have to defend his identity. In his view, it is not for Mr Bolt to define his Aboriginality. He expects mainstream society to afford him the respect of not questioning who he is.

114 He is offended by Mr Bolt's suggestion that because of the colour of his skin he cannot genuinely identify as an Aboriginal person. He is also offended by the mocking and scepticism of the achievements of the individuals named in the articles. In his view, the people named are not "professional Aborigines". By that comment he perceives Mr Bolt to be insinuating that he and those people are part of an Aboriginal industry, where Aboriginal people consciously or opportunistically use their Aboriginal identity for financial gain. He perceives Mr Bolt to have put him in that category when he has never been in that category. He is offended by that because he wants to see "the best outcome for Aboriginal people". His time and aspirations have been consumed by "trying to get a better deal for Aboriginal people". He regards the language used by Mr Bolt as of a passing era in Australian society. In his view, it is dismissive and serves to undermine the achievements of Aboriginal people.

115 He also perceives Mr Bolt's articles as implying that, in order to be genuinely Aboriginal, a person must be in disadvantaged circumstances. He regards that suggestion as completely misconceived and offensive, as within the Aboriginal community there is a diversity of experiences ranging from extreme disadvantage to people who have been successful.

116 The evidence given by Graham Atkinson was not contested and I have no reason to not accept it as truthful. In particular, I find that by reason of Mr Atkinson having been raised as Aboriginal, he has and does genuinely self-identify as an Aboriginal person. He has Aboriginal ancestry and communal recognition as an Aboriginal person. He is an Aboriginal person and entitled to regard himself an Aboriginal person in accordance with the conventional understanding of that racial description. He did not consciously choose to be Aboriginal. He has not improperly used his Aboriginal identity to advance his career. He is a person highly committed to his community and is entitled to regard his achievements as well deserved rather than opportunistically obtained. I accept that he feels offended, humiliated and insulted by the Articles or parts thereof in the manner outlined by his evidence.

Professor Larissa Behrendt

117 Professor Behrendt is a law professor and author who lives in New South Wales. Prof Behrendt gave evidence that she is and has always been an Aboriginal person. Her father was Aboriginal and her paternal grandmother was Aboriginal. Her paternal grandmother lived in an Aboriginal camp before she was taken away from her family by the Aborigines Protection Board. Prof Behrendt's paternal grandfather was not Aboriginal. He was born in England and came to Australia as a child. Prof Behrendt's mother and maternal grandmother were born in Western Australia and are not Aboriginal. Her maternal great-grandmother came from England.

118 Prof Behrendt referred to Mr Bolt's reference in the first article to her "looking almost as German as her father" (1A-14). To her knowledge, there is no German descent on either her father or mother's side of the family although she assumes that because of her father's Germanic surname, there may have been some German descent. Her paternal grandfather came to Australia from England. Mr Bolt also referred to her father as being white. Her father had dark skin.

119 Her father was a prominent, well-respected member of the Aboriginal community. He was an expert on oral histories and his works are held by the Australian Institute of Aboriginal and Torres Strait Islander Studies. A detailed obituary was published in the *Sydney Morning Herald* on his death about two and a half years ago. It reported that he was Aboriginal and reported his contribution to the Aboriginal community.

120 Prof Behrendt's father was always part of her family during her upbringing including after her parents separated when she was 15 years old. Her mother explained to her and her brother that they were Aboriginal and was always strongly supportive of their Aboriginal identity. Her father's negative experiences as an Aboriginal had sometimes made him self-conscious about his Aboriginality, but his attitude changed in the 1980s when he became more active in the Aboriginal community. Prof Behrendt was about 11 years old when her father started to reconnect with his Aboriginal family and became part of it. At that time her father became active in telling Prof Behrendt about his family's stories, the dreamtime stories and Aboriginal traditions. Her father also started teaching her and her brother Aboriginal languages. Prof Behrendt's upbringing and experience up to that time was as an Aboriginal person, but her father's role during that period reinforced her identification. She became proud of her Aboriginal heritage and culture and also became conscious of social justice issues in relation to Aboriginal people.

121 Prof Behrendt has identified as an Aboriginal person since before she can remember. She denies Mr Bolt's suggestion that she chose to be Aboriginal and says that she never had a choice, she has always been Aboriginal and has "identified as Aboriginal since before I can remember".

122 Prof Behrendt began to experience racism when she began her schooling. She was teased for being "black". Prof Behrendt was motivated to become a lawyer because her grandmother had been removed from her family by what Prof Behrendt regarded as a racist policy. She graduated in law at the University of New South Wales and completed a Masters and then a Doctorate in law at Harvard Law School. She was not the beneficiary of any special admission program for Aboriginal people. She competed with everyone else for her place at Harvard. Prof Behrendt has held several positions that she could only have held as an Aboriginal person. She has also won and been nominated for a number of awards for which only Aboriginal persons were eligible. That she has obtained those positions and

awards is regarded by her as indicative of her acceptance as an Aboriginal person by the Aboriginal community. She has been recognised as an Aboriginal person in the wider community as well, including by winning a number of awards such as the Victorian Premier's Literary Award for Indigenous writing.

123 In the second article Mr Bolt referred to Prof Behrendt as a "professional Aborigine" who is "chairman of our biggest taxpayer – funded Aboriginal television service" (2A-20). Prof Behrendt believes this is a reference to the National Indigenous Television Service established in about 2006. She was approached to be the Chair of the service for a three year appointment for which she received $20,000 per year. She worked extraordinarily hard for at least two days a week as Chair and voluntarily stepped down at the end of her appointment. She did not accept the appointment for the money. She did so because of her view that there was a need for Aboriginal people to have their own voice in contemporary Australia.

124 Prof Behrendt read the first article in the days following its publication. It was emailed to her by a number of Aboriginal friends and colleagues who were offended by its content. Prof Behrendt found the first article to be offensive because she regarded it as an attack on who she is as a person. She viewed the article as undermining what she had worked very hard for by implying that she claimed to be Aboriginal to receive certain benefits.

125 She perceives Mr Bolt as saying that she is "too blonde and too light to be Aboriginal" and that she is "not Aboriginal enough". That is completely insulting to her. She regards Mr Bolt's conduct in writing the Articles as both intimidating and humiliating to her because he invites members of the public, who know nothing about her, to challenge her integrity and identity based on how she looks. By doing that, she regards Mr Bolt to have humiliated her in front of her family, friends and work colleagues.

126 Prof Behrendt regards the Articles as communicating that she and other Aboriginal people, who are fairer rather than darker skinned, and who have some Aboriginal descent, are not genuinely Aboriginal. She perceives Mr Bolt as saying that in identifying as Aboriginal, she is being dishonest and pretending to be Aboriginal to get benefits. For Mr Bolt to say that she is not Aboriginal enough because of her skin colour is a denial of her race and identity.

127 She also found Mr Bolt's reference to her as a "professional Aborigine" (1A-14 and 2A-20) to be hurtful, insulting and offensive. She perceives that as suggesting she identifies with her race, not because she is Aboriginal, but because she wants to exploit the system because identifying as Aboriginal is lucrative. She found Mr Bolt's reference to her as "mein liebchen" (1A-17) particularly offensive, patronising and denigrating.

128 Prof Behrendt expressed concern that the Articles sent a message to young Aboriginal people that if you are light-skinned and identify as Aboriginal you will be publically attacked and criticised in the same way as she perceives that she was attacked by Mr Bolt. She regards that message as very intimidating.

129 Prof Behrendt is regarded as an expert on Aboriginal issues and her perspective is valued. A book that she has written is on the current Victorian Certificate of Education reading list. She believes that the first article has undermined her professional integrity. She perceives it as questioning her credibility to offer views from an Aboriginal perspective. This she finds humiliating and hurtful.

130 Information about her is widely available on the internet. That material includes photographs of Prof Behrendt with brown hair. Those photographs were available on the internet at the time of the publication of the first article. The first article contains a picture of Prof Behrendt with blonde hair. Prof Behrendt had dyed blonde hair between 2003-2009 but not at the time the Articles were published.

131 Although she was cross-examined, the evidence given by Prof Behrendt to which I have referred was either not contested or takes account of what she said in cross-examination. I have no reason to not accept her evidence as truthful. In particular, I find that by reason of Prof Behrendt having been raised as an Aboriginal person she has, and does genuinely, self-identify as Aboriginal. She has Aboriginal ancestry and communal recognition as an Aboriginal person. She is an Aboriginal person and entitled to regard herself as such within the conventional understanding of that description. She did not consciously choose to be Aboriginal. She has not improperly used her Aboriginal identity to advance her career. She is a person highly committed to her community. She is entitled to regard her achievements as well deserved rather than opportunistically obtained. I accept that she feels offended,

humiliated and insulted by the Articles or parts thereof in the manner outlined by her evidence.

Leeanne Enoch

132 Ms Enoch works for the Australian Red Cross in the position of Queensland Director, Aboriginal and Torres Strait Islander Partnerships. Ms Enoch lives in Queensland. Ms Enoch's father is Aboriginal. Her mother is not. Both her paternal grandmother and grandfather were Aboriginal. Ms Enoch's cultural upbringing and that of her siblings was very much dominated by her father's side of the family. She has always identified as Aboriginal. She spent the earlier part of her childhood on North Stradbroke Island mixing with her family, the majority of whom were Aboriginal. Her mother has always been accepted as part of her father's extended Aboriginal family. She has had only sporadic contact with her mother's side of the family.

133 Her mother fully supported her Aboriginal identity and her education in Aboriginal culture. She was very much influenced by her paternal grandmother as she was growing up. As the eldest grandchild of the eldest son (her father), she had particular Aboriginal cultural and family responsibilities and she was groomed for those responsibilities from a young age.

134 Ms Enoch is fair-skinned and looks very much like her mother. She has three younger brothers all of whom are darker than her.

135 Ms Enoch has not questioned her identity. She never chose at any particular time to be an Aboriginal person. That is who she is. She has always been recognised as being an Aboriginal person by the Aboriginal communities in which she grew up and the communities in which she has lived. She has a large network of Aboriginal friends and colleagues. They have all recognised her as being an Aboriginal person.

136 Ms Enoch began to face challenges about her identity when her family left Stradbroke Island and while she was attending school. It was only when teachers and students came into contact with her father that they first realised that she was Aboriginal. This was an issue for the children who asked whether she had been adopted. Because of her fair skin, she has experienced people being racist towards Aboriginal people, whilst not realising that she is Aboriginal and likely to be deeply offended.

137 Ms Enoch trained as a teacher and then worked as a teacher for 10 years. She was recognised as an Aboriginal person in her work in schools and assisted with Aboriginal cultural awareness programs. Ms Enoch left teaching to work in social policy, focusing on Aboriginal issues. She has held a range of positions. She has not gained her various qualifications through special access provided for Aboriginal people. Nor, to her knowledge, have any of the positions she has held been identified for or reserved for Aboriginal people. Many of the positions that she has held have been positions in which an indigenous person was preferred, although many of those roles have also since been filled by non-Indigenous persons.

138 Ms Enoch joined the Australian Labor Party some six years ago. She stood as a candidate for election because she desired to make a difference.

139 Ms Enoch is the subject of the first blog article. Her first reaction to it was dismissive on the basis that she thought no one would read it. She became more alarmed when she saw the first article and realised that everyone in her family and community would see it. Both her father and many of her relatives have been upset by Mr Bolt's comments. Compounding the offence that she experienced, Ms Enoch was upset by the effect of the comments on her father and also on her children, particularly her oldest son who is fair, unlike her younger son who is darker. For her eldest son, the Articles have been confronting and have exacerbated his own identity issues.

140 Ms Enoch found it highly offensive that Mr Bolt stated she was "not really Aboriginal" or "not genuinely Aboriginal" because of her skin and hair colour. She perceived Mr Bolt as suggesting that she had chosen to identify as Aboriginal to further her political career and that she has constructed her career as a bureaucrat suggesting that she is some kind of sell out, riding on her Aboriginal heritage. In the context of her care for her community, her care for the quality of her work and that money is very much secondary for her, she found Mr Bolt's insinuations untrue and insulting. That was so because she perceives Mr Bolt to be saying that her hard work, skill and talent are of no significance. Many of her friends and colleagues were upset by the Articles as well as Aboriginal elders to whom she showed the Articles.

141 The evidence given by Ms Enoch was not contested and I have no reason to not accept it as truthful. In particular, I find that by reason of Ms Enoch having been raised as an Aboriginal person she has and does genuinely self-identify as Aboriginal. She has Aboriginal ancestry and communal recognition as an Aboriginal person. She is an Aboriginal person and entitled to regard herself as such within the conventional understanding of that description. She did not consciously choose to be Aboriginal. She has not improperly used her Aboriginal identity to advance her career. She is a person interested in advancing the interests of her community and is entitled to regard her achievements as well deserved rather than opportunistically obtained. I accept that she feels offended, humiliated and insulted by the Articles or parts thereof in the manner outlined by her evidence.

Mark McMillan

142 Mr McMillan currently lives in the United States of America, he is a lawyer and an Appeals Court judge (for sovereign American Indians) in Arizona. Mr McMillan's father was born in Sussex, England. He was not Aboriginal. Mr McMillan's father was not involved in raising Mr McMillan. Mr McMillan was raised by his mother and his grandmother. Both have Aboriginal ancestry. Mr McMillan's great grandmother was the child of an Aboriginal woman and a non-Aboriginal man. Mr McMillan was raised by his mother until he was eight years old and then moved to Trangie where his maternal grandmother lived. From that point he was raised by his mother and grandmother. His family were all recognised as part of the Trangie Aboriginal community.

143 Growing up, Mr McMillan and his siblings all knew they were Aboriginal. Whilst growing up in Trangie, Mr McMillan and his siblings were told stories about their Aboriginal relatives, including about their maternal great grandmother who was the last Aboriginal language speaker in the town. Those stories helped to shape his identity as an Aboriginal person.

144 Mr McMillan has always actively and willingly identified as an Aboriginal person. His identity and his pride in being an Aboriginal person were reinforced by his great grandmother, grandmother and mother as he was growing up. The Aboriginal community accepts him as Aboriginal. His great grandmother, grandmother, mother, aunties and uncles were all involved in the Trangie Aboriginal Land Council. That Council has also recognised him as Aboriginal. Two years ago he was elected to the Board of the Council.

145 Growing up, Mr McMillan experienced racism. He was called an "Albino Boong".

146 Mr McMillan began his work career at ATSIC as a clerk in 1996. Three years later he was awarded an Aboriginal undergraduate study award from ATSIC. He studied law at the Australian National University. He was selected to participate in further study through an exchange program in Canada. To be selected, he competed with non-Aboriginal and Aboriginal people. He was admitted as a solicitor in 2001. He obtained a research position working with Prof Behrendt at the University of Technology, Sydney. In 2003, he applied for and was accepted to the University of Arizona's Indigenous Peoples Law and Policy program. He obtained a scholarship which was open to both Aboriginal and non-Aboriginal people alike. Mr McMillan is also a recipient of the Fulbright Scholarship.

147 Mr McMillan perceives that in the Articles, Mr Bolt is implying that he is "not Aboriginal enough", that he is "too white to be Aboriginal" and therefore he is "not really Aboriginal". Mr McMillan finds that offensive. He also perceives Mr Bolt to be inferring that he has only identified with his Aboriginal heritage for political or economic purposes. Mr McMillan perceives Mr Bolt in this respect to be denying him his Aboriginality and inferring that he is not genuine in his identification, but only engaging with his Aboriginality for personal gain.

148 Mr McMillan was very offended and insulted by a number of particular comments made of him by Mr Bolt. He perceived that Mr Bolt's comments about him being a "proud gay" and a "proud father" together with other comments made in the second article about Mr McMillan having suffered "shocking pain having *not* been discriminated against for being black" (Mr Bolt's emphasis), involved Mr Bolt taking quotes from an article that he had written for the Australian Broadcasting Corporation ("the ABC article"). Mr McMillan was offended, insulted and humiliated by the fact that quotes from the ABC article were taken out of context by Mr Bolt.

149 Mr McMillan referred to the comment in the second blog article that he is "a gay white man with a law degree" and "just the kind of Aboriginal who needs a special handout". He found that comment offensive and humiliating. The comment assumes that he has not suffered disadvantage and that he has been given a handout. From his perspective, he was awarded a scholarship, not a handout, and the comment denigrates his achievement by saying

that he received it only because he is Aboriginal. He agrees that was a factor, but he was also given a scholarship because he had both a Masters in Law and a Bachelor of Law.

150 Mr McMillan was offended, insulted and humiliated by the comment in the second article about "scuffling at the trough". He perceived Mr Bolt to be suggesting that he identified as Aboriginal only for some financial gain. He was also offended at Mr Bolt's treatment of his receipt of the Black Women's Action in Education Foundation Scholarship. He regards Mr Bolt's account as misleading because the scholarship was open to indigenous men and women.

151 As a result of seeing the Articles, Mr McMillan was contacted by a person representing the Australian American Fulbright Commission. Whilst that person confirmed the Commission's support for him, he was asked how the Commission should respond to any media enquires made to the Commission about Mr McMillan. Mr McMillan was humiliated by the conversation. He perceived that what was being asked of him was confirmation of his Aboriginality. Similarly, the Director of the program with which he is currently involved at the University of Arizona also spoke to him about the Articles. Whilst again Mr McMillan was given support, he was embarrassed and humiliated by these conversations because he had to assure the organisations concerned that he was Aboriginal and had not been dishonest about his Aboriginal identity. Mr McMillan was both humiliated and insulted by the fact that the Articles put him in a position to have to justify his identity.

152 Mr McMillan was also offended, insulted and humiliated by Mr Bolt's use of colour as the determinant of race. He was also offended by the suggestion that he and others were taking money from more deserving "black" Aboriginal people and that he and others had not suffered disadvantage. Mr McMillan did in fact experience disadvantage in his life. For Mr McMillan, his Aboriginality is more than an attribute, it is how he sees himself as a human being. It was hurtful for him to have people talking about his Aboriginal identity in the abstract and it was hurtful for him to have his Aboriginal identity challenged.

153 The evidence given by Mr McMillan was not contested and I have no reason to not accept it as truthful. In particular, I find that by reason of Mr McMillan having been raised as Aboriginal he has and does genuinely self-identify as Aboriginal. He has Aboriginal ancestry and communal recognition as an Aboriginal person. He is an Aboriginal person and is

entitled to regard himself as an Aboriginal person within the conventional understanding of that description. He did not consciously choose to be Aboriginal. He has not improperly used his Aboriginal identity to advance his career. He is entitled to regard his achievements as well deserved rather than opportunistically obtained. I accept that he feels offended, humiliated and insulted by the Articles or parts thereof in the manner outlined by his evidence.

Pat Eatock

154 Ms Eatock was born in Brisbane in 1937. She is now retired and lives in New South Wales. Ms Eatock's mother was born in Scotland and came to Australia in about 1928. Ms Eatock's Aboriginal heritage comes from her father. Her paternal grandfather was Aboriginal and her paternal grandmother had an Aboriginal mother and a non-Aboriginal father.

155 Ms Eatock's evidence was that a lot of her Aboriginal identity was formed by negative experiences of being Aboriginal. She has identified herself as Aboriginal since she was a teenager. The Aboriginality of her family was not talked about much at home as she grew up because it was something her father was very ashamed of. Her parents were also scared that the children's Aboriginality would be discovered and that they would be taken away.

156 As she was growing up she experienced a number of incidents which she now recognises to have involved racial discrimination but which, at the time, she had not appreciated as instances of racial discrimination. Whilst at primary school, she did not think of herself as being Aboriginal and perceived that on various occasions when she was picked on, that was for other reasons. She and her siblings thought that her father was somehow at fault but they didn't know exactly why. Ms Eatock stated that she first encountered her Aboriginality at the age of five at a primary school in Ingham. The playground at the school was divided by a fence. "White kids" played on one side of the fence and "black kids" on the other. As they had a "white" mother and fair skin, Ms Eatock and her sisters were put to play with the "white kids". Her father had been away working, but when he returned home on leave it was realised at the school that Ms Eatock had an Aboriginal father. She and her sisters were taken out of the "white" children's playground and put in the "black" children's playground. Complaints were then made by parents who saw apparently "white" children

playing on what they perceived to be the wrong side of the fence. As a result Ms Eatock and her sisters were removed from the "black" children's playground and put in with the "white" children again. For Ms Eatock, this was her first identity crisis.

157 Ms Eatock left school at age 14 in 1951. This was the first time she identified herself in public as an Aboriginal person. She did that because she didn't want to be accused of hiding her racial background. On one occasion when she was 16 years old, this led to her boss coming to her house and asking whether she could adopt Ms Eatock and give her a better life.

158 Ms Eatock performed a range of jobs in factory settings until she married in 1957. She was at home caring for her children until 1973 when she commenced tertiary studies. During that period and at other times she has experienced racism but said that because she was not perceived to be Aboriginal she used to experience a different type of racism. Often people would make racist remarks about Aboriginal people in her presence. Ms Eatock found experiences of that kind stressful. Her way of dealing with it was to pre-empt it by telling people at the outset that she was Aboriginal or wearing clothes that announced her involvement with Aboriginal issues.

159 In the 1960s, Ms Eatock went to hear Faith Bandler speak at a political meeting. This meeting awakened her to the nature of Aboriginal disadvantage. As a result of what she had learnt, she decided to be more assertive about her Aboriginality. That, however, was not really a matter of choice for her. It was driven by her sense of oppression and the recognition that she needed to become more proactive about who she is.

160 After graduating with a Bachelor of Arts degree in 1978, Ms Eatock was employed as a temporary clerical assistant in the Department of Aboriginal Affairs. She then moved to a different Departmental job, but from 1980 to 1987 she was unemployed. She undertook further training in 1986. She worked in the TAFE sector from 1987 until 1991. She became a lecturer in Aboriginal Community Development in late 1991. From 1992 until 1996 she was unemployed, although involved in unpaid activity developing an Aboriginal television station.

161 In 1996 she was granted a disability support pension which was later converted into a senior's pension. She has had some weeks of employment since that time, has done further studies and volunteered to promote various Aboriginal issues. She lives in a one bedroom Department of Housing flat in Sydney. She does not own a car or other significant assets and has no meaningful savings.

162 She has been involved in a lot of work with the Aboriginal community, including as part of the Aboriginal Tent Embassy in Canberra in 1972 and 1973. She has stood for election in the Australian Capital Territory as an independent Aboriginal candidate. She has attended conferences and other events as a person active in Aboriginal affairs. In that involvement, she was recognised as an Aboriginal person by the people she met.

163 Ms Eatock's evidence was that she was horrified, disgusted, angry and upset and felt sick in the stomach when she saw Mr Bolt's Articles. She perceived Mr Bolt as disconnecting her from her Aboriginality in every way. She stated that she was offended in a personal way because what Mr Bolt wrote was a denial of who she is, her life's work and her ethics. Part of the offence she experienced related to Mr Bolt saying she had only begun to identify as an Aboriginal person when she was 19. She perceived that Mr Bolt attacked her identity in saying that she chose to identify as an Aboriginal person for self-gain and that she had "thrived" as an Aboriginal bureaucrat and academic. In her view she has done anything but thrive. She has been more disadvantaged than advantaged by identifying as Aboriginal. In total, she has had only six to six-and-a-half years of employment since 1977. She perceives Mr Bolt's articles as racist and she remains deeply offended.

164 Ms Eatock was cross-examined, but the evidence I have referred to was largely uncontested. I have no reason to not accept Ms Eatock's evidence as truthful. I find that Ms Eatock does genuinely self-identify as Aboriginal. She has Aboriginal ancestry and communal recognition as an Aboriginal person. She did not choose to be Aboriginal. Her identity is a product of her upbringing. In her adult life she chose to be proactive about her Aboriginal identity. She is an Aboriginal person and is entitled to regard herself as an Aboriginal person in accordance with the conventional understanding of that racial description. She has not improperly used her Aboriginal identity to advance her career. Her professional career involved significant unemployment. She is a person committed to her community and is entitled to regard her achievements as well-deserved rather than

opportunistically obtained. I accept that she feels offended, humiliated and insulted by the Articles or parts thereof in the manner outlined by her evidence.

Andrew Bolt

165 Mr Bolt gave evidence. I have considered all of his evidence and deal with it later in these reasons in conjunction with the particular issue to which that evidence is relevant.

HWT

166 No witness evidence was given on behalf of HWT. To some extent Mr Bolt gave evidence about the operations of the *Herald Sun*.

ABORIGINAL IDENTITY

167 It is necessary to make some observations about Aboriginal identity. The manner in which Aboriginal people have identified, and have been identified, by others since the British settlement of Australia is a background matter of some significance to a number of issues in the case, including whether the Articles were reasonably likely to offend and the extent to which Mr Bolt should have realised that to be so. In the context of a challenge made to the legitimacy of a person's racial identification, the extent to which that identification is generally accepted, and thus, the extent to which the person challenged has a legitimate expectation that their identity will be respected, has a rational bearing upon the nature and extent of any offence that may be generated by the challenge. The extent to which racial categorisation has been a matter of historical sensitivity for a particular race of people is also relevant to the likelihood of offence.

168 Both parties relied upon judicial authorities and tendered many articles intended to assist me in forming a view on these matters, as well as relying on the nature and extent to which Aboriginal identity has been a matter of public interest.

Aboriginal Sensitivity to Racial Categorisation

169 The Australian Law Reform Commission's 2003 Report on the Protection of Human Genetic Information considered whether a biological basis for the identification of a race was justifiable. It noted (at [36.41]) that one of the outcomes of the Human Genome Project and other scientific research is "that there is no meaningful genetic or biological basis for the

concept of 'race'". Human beings are 99.9 per cent genetically identical. Some 95 per cent of human genetic variation occurs within racial groups whereas, on average, a genetic variation of five per cent occurs between racial groups. The ALRC observed at [36.42] that:

> It is now well-accepted among medical scientists, anthropologists and other students of humanity that 'race' and 'ethnicity' are social, cultural and political constructs, rather than matters of scientific 'fact'.

170 Despite what is now known about the invalidity of biology as a basis for race or ethnicity, legal definitions of Aboriginality, at least until the 1980s, exclusively concentrated on biological descent. Dr John Gardiner-Garden, in his report titled "Defining Aboriginality in Australia" (Department of the Parliamentary Library, Current Issue Brief No.10 2002-03) noted that for Aboriginal people, loss of identity began with the dispossession of their lands. Dr Gardiner-Garden's report summarised the legislative position on racial categorisation at page 3 as follows:

> Although in the first decades of settlement Aboriginal people were grouped by reference to their place of habitation, in subsequent years, as settlement resulted in more dispossession and intermixing, a raft of other definitions came into use. The most common involved reference to 'Blood-quotum'. 'Blood-quotum' classification entered the legislation of New South Wales in 1839, South Australia in 1844, Victoria in 1864, Queensland in 1865, Western Australia in 1874 and Tasmania in 1912. Thereafter till the late 1950s States regularly legislated all forms of inclusion and exclusion (to and from benefits, rights, places etc.) by reference to degrees of Aboriginal blood. Such legislation produced capricious and inconsistent results based, in practice, on nothing more than an observation of skin colour.
> (Footnotes omitted.)

171 It is a notorious and regrettable fact of Australian history that the flawed biological characterisations of many Aboriginal people was the basis for mistreatment, including for policies of assimilation involving the removal of many Aboriginal children from their families until the 1970s. It will be of no surprise that a race of people subjected to oppression by reason of oppressive racial categorisation will be sensitive to being racially categorised by others. I accept that to be the case in relation to Aboriginal Australians. At paragraph 36.7 of its report, the ALRC acknowledged that sensitivity with an extract from the final report of the Royal Commission into Aboriginal Deaths in Custody in the following terms:

> No area of research and commentary by non-Aboriginal people has such potential to cause offence as does that which attempts to define 'Aboriginality'. This determination of non-Aboriginal people to categorise and divide Aboriginal people is resented for many reasons, but principally, I suspect, because the worst experiences of assimilation policies and the most long term emotional scars of those policies relate directly to non-Aboriginal efforts to define 'Aboriginality' and to deny to those

> found not to fit the definition, the nurture of family, kin and culture. To Aboriginal people there appears to be a continuing aggression evident in such practices. (Footnote omitted.)

The Conventional Meaning of "Australian Aboriginal"

172 A move away from the use of biological descent as the exclusive determinant of Aboriginality can be traced back to the 1967 Referendum, when s 51(xxvi) of the Australian Constitution was amended with the effect that the Commonwealth Parliament gained the power to legislate with respect to Aboriginal people. As the ALRC report identified, the Commonwealth subsequently enacted a number of statutes for the purpose of providing rights and privileges for indigenous Australians. In the early 1980s a new three-part definition of an Aboriginal or Torres Strait Islander was proposed by the Commonwealth Department of Aboriginal Affairs. As the ALRC report describes at [36.14], the definition was in the following terms:

> An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he [or she] lives.

173 Dr Gardiner-Garden's report and the ALRC report (at page 4 and [36.15] respectively) observe that the three-part definition was adopted by all Federal Government Departments as their 'working definition' for determining eligibility to access certain services and benefits.

174 With the enactment of the *Aboriginal Land Right Acts 1983* (NSW), the three-part definition found its way into legislation and from about that time the definition came to be the subject of judicial consideration.

175 The meaning of "Aboriginal race" arose before the High Court in the *Commonwealth v Tasmania* (1983) 158 CLR 1 (the *Tasmanian Dam Case*), although only two of the judges (Brennan and Deane JJ) discussed its meaning. Deane J at 273-4 considered that the phrase "people of any race" in s 51(xxvi) of the Constitution has a "wide and non-technical meaning". In that respect Deane J relied on *King-Ansell v Police* [1979] 2 NZLR 531 and *Mandla v Dowell Lee* [1983] 2 AC 548 (to which I later refer at [310]-[312]). Deane J thought that the phrase "people of any race" was apposite to refer to all Australian

Aboriginals collectively and also to any identifiable racial sub-group among Australian Aboriginals. Deane J continued at 274:

> By "Australian Aboriginal" I mean, in accordance with what I understand to be the conventional meaning of that term, a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognized by the Aboriginal community as an Aboriginal.

176 Brennan J at 243 considered that a biological element was an essential element of membership of a race. Membership of a race could be proved by proof of descent from ancestors who are acknowledged members of the race. Brennan J otherwise identified cultural and sociological factors as indicative of a race.

177 In his later judgment in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 70, Brennan J took an approach reflective of the three-part test which Deane J had described as the "conventional meaning" of an Australian Aboriginal:

> Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.

178 In *Attorney-General of the Commonwealth v Queensland* (1990) 25 FCR 125, the meaning of "Aboriginal" in Letters Patent authorising the Royal Commission into Aboriginal Deaths in Custody was considered by a Full Court of this Court (Jenkinson, Spender and French JJ). The Queensland Government had challenged the inquiry by the Royal Commission into the death of a 17 year old boy in custody on the basis that he was not Aboriginal. The father of the boy was born in Holland. His mother was of Aboriginal descent. He had light skin and blonde hair. It was not at issue that he had significant Aboriginal descent. The extent to which he had identified as an Aboriginal and been recognised as such by the Aboriginal community had been the subject of different findings by the Royal Commission on the one hand and the trial judge on the other.

179 It was in that context that the Full Court considered whether proof of Aboriginal descent was sufficient and held that it was for the particular purposes at hand. French J considered the three-part test propounded by Deane J in the *Tasmanian Dam Case*. French J noted the constitutional context in which those criteria were stated and thought it unsurprising that emphasis should be placed upon elements of self-identification and communal

recognition as well as descent. He thought that the three-part test "should not be seen as representing the contemporary content of the word 'Aboriginal' irrespective of context or purpose": at 147. French J determined that for the purposes of the Letters Patent, the better view was that Aboriginal descent was a sufficient criterion for classification as "Aboriginal" irrespective of self-identification or communal acceptance. In that respect, French J took a broader view of "Aboriginal" than is required by the three-part test. His Honour left open "the question whether a person with no Aboriginal genetic heritage may be regarded as Aboriginal by reason of self-identification and communal affiliation": at 148.

180 Jenkinson J considered that "Aboriginal" in its ordinary use applied to a person thought to be a descendant or thought possibly to be a descendant of the people who occupied Australia before British settlement. Descent, "at least as a real possibility", was essential: at 126. At 126-127 the judge said:

> I would find that, in reference to him who identifies himself as a person of Aboriginal descent and who is recognised as Aboriginal by the Aboriginal community, the word "Aboriginal" will be used, notwithstanding that he is thought to be in only small part of Aboriginal descent, or to be not certainly, only possibly, of Aboriginal descent at all.

181 Spender J considered that the modern use of "Aboriginal" "refers to those who are descended of such people, wholly or in part": at [132]. Where the extent of Aboriginal descent might be regarded as insignificant, self-recognition or recognition by persons who are accepted as being Aboriginal may have an evidentiary value. Once it is established "that the person is non-trivially of Aboriginal descent", Spender J thought that the person falls within the ordinary meaning of the word "Aboriginal": at 133.

182 The meaning of the phrase "Aboriginal persons" was later examined by Drummond J in *Gibbs v Capewell* (1995) 54 FCR 503. The Court examined that phrase in the context of its use in the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) ("the ATSIC Act"). The case involved a challenge to the validity of elections held for positions in the Aboriginal and Torres Strait Islander Commission. The ATSIC Act restricted the right to stand for election and to vote to "Aboriginal persons".

183 By reference to the preamble and objects of the ATSIC Act, Drummond J (at 506) thought that the phrase was an intended reference to persons who were descendants from the

inhabitants of Australia immediately prior to European settlement. At 507 the judge noted, by reference to observations made by Lush J in *Re Bryning* [1976] VR 100 at 103, that it has long been accepted that there remain very few Aboriginal persons in Australia who are not of mixed descent and that the description 'Aboriginal' is ordinarily used in Australia to describe such persons. Drummond J accepted that Aboriginals of mixed descent came within the expression "Aboriginal persons".

184 The judge made a number of further observations about the ordinary understanding of "Aboriginal". At 511 he said:

> Although an opportunistic claim by a person to identification as an Aboriginal would not, I think, be regarded by ordinary Australians as sufficient to attract to that person the status of "Aboriginal" even if he could prove he possessed a small quantum of Aboriginal genes, in my opinion a person of limited Aboriginal heritage who nevertheless genuinely identified himself or herself as Aboriginal would be likely to be described by ordinary Australians as an Aboriginal, even without Aboriginal communal recognition as such. Of course, genuine self-identification plus Aboriginal communal recognition would very likely lead to a person with only a small degree of Aboriginal descent being described in ordinary speech as an Aboriginal. Counsel for the Minister referred to the possibility of there being many persons of limited aboriginal descent who learn of that fact only after a time, but who then feel a genuine desire to proclaim their Aboriginality; counsel referred to past government policies of separating Aboriginal infants from their families and of seeking to integrate them into white society. I do not think that Australians using their ordinary manner of speech would deny to such persons who discovered their Aboriginal heritage in maturity and who genuinely desired to acknowledge that heritage the description "Aboriginal". Communal Aboriginal recognition as an Aboriginal person would not in such a case be required before the person would be so described.

185 Drummond J stated at 512 that in determining whether a person is Aboriginal, the smaller the degree of Aboriginal descent, the more important will be the place of cultural or social circumstances attending the valid characterisation of that person as an Aboriginal person. In that respect, the judge was of the view that in current ordinary usage, a person with a small degree of Aboriginal descent but who genuinely identified as Aboriginal and had Aboriginal communal recognition would be described as an Aboriginal person and, may be so described where only one of those two factors was present.

186 *Shaw v Wolf* (1998) 83 FCR 113 raised the same legal issue as considered in *Gibbs v Capewell*. On that occasion, whether particular persons were "Aboriginal persons" within the meaning of the ATSIC Act was the subject of challenge in relation to elections held in Tasmania. This case, as other evidence before me shows, was part of a significant battle

which largely split the Tasmanian Aboriginal population in what appears to have been a contest for control of Aboriginal organisations in Tasmania which began from about 1995. In *Shaw v Wolf,* Merkel J held that, for the purposes of the ATSIC Act, some degree of descent was necessary but was not of itself a sufficient condition of eligibility to be an "Aboriginal person": at 118. The judge applied the three-part test and observed that descent, self-identification and communal recognition are interrelated and in order to understand the nature of that relationship, it was necessary to consider the sociological context in which identification as an Aboriginal person occurs in Australia: at 118.

187 In *Patmore v Independent Indigenous Advisory Committee* (2002) 122 FCR 559, a question was referred to a Full Court (Gray, Merkel and Downes JJ) in relation to a challenge to the validity of certain rules made pursuant to the ATSIC Act. Merkel and Downes JJ referred to *Shaw v Wolf* and the three-part test at [56]:

> As was made clear in Shaw v Wolf at 117-122 the question of whether a person is an Aboriginal person can be a vexed and difficult question requiring inquiry into the person's descent, self-identification and communal recognition as an Aboriginal person.

The three-part test was also applied to determine whether a person was an "Aboriginal person" in *Re Watson (No 2)* [2001] TASSC 105 (Cox CJ).

188 The authorities to which I have referred, make it clear that a person of mixed heritage but with some Aboriginal descent, who identifies as an Aboriginal person and has communal recognition as such, unquestionably satisfies what is conventionally understood to be an "Aboriginal Australian". For some legislative purposes and in the understanding of some people, compliance with one or two of the attributes of the three-part test may be regarded as sufficient. To some extent, including within the Aboriginal community, debate or controversy has occurred as to the necessary attributes for the recognition of the person as an Aboriginal. Those controversies have usually occurred in relation to whether a person meets the necessary criteria, rather than as to the criteria itself. Those controversies have however from time to time focused upon whether a person with no or no significant Aboriginal descent should be accepted as an Aboriginal person.

189 A person possessing all three attributes identified by the three-part test clearly satisfies the conventional understanding of an Aboriginal person. Consistently with the authorities to which I have referred, in the knowledge of the possession of those three

attributes, such a person would be described by ordinary Australians as Aboriginal. In my view, such a person would be entitled to expect that other Australians would recognise and respect his or her identification as an Aboriginal Australian. I do not wish to suggest that a person with less than the three attributes of the three-part test should not be recognised as an Aboriginal person. That question does not arise for determination in this case.

190 The conventional understanding is not, however, the universal understanding. The perception of many Australians of an Aboriginal person will no doubt be influenced by stereotypical images of dark skinned Aboriginal persons in outback Australia. It is likely that a person with each of the attributes of the three-part test and fair skin colour will, from time to time, be challenged as to his or her Aboriginality. The evidence from the witnesses called by Ms Eatock demonstrates that to be so. Other material tendered is confirmatory. That material also shows that from time to time prominent people, amongst others, have raised concerns that identification by others as Aboriginal people involves opportunism. An example is given in Dr Gardiner-Garden's report (at page 5) and involves a call made in 1988 by the then Victorian State President of the RSL, Mr Bruce Ruxton who urged the Federal Government:

> To amend the definition of Aborigine to eliminate the part-whites who are making a racket out of being so-called Aborigines at enormous cost to the taxpayers.

PART IIA OF THE RACIAL DISCRIMINATION ACT

The Legislation

191 The RDA was first enacted in 1975. I will later refer to the purposes of the enactment of the RDA which are set out in its preamble. The RDA was amended in 1995 to insert Part IIA into the Act. The provisions of Part IIA which are relevant for determining the issues in this case are as follows:

> **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.

18E Vicarious liability

(1) Subject to subsection (2), if:

(a) an employee or agent of a person does an act in connection with his or her duties as an employee or agent; and

(b) the act would be unlawful under this Part if it were done by the person;

this Act applies in relation to the person as if the person had also done the act.

(2) Subsection (1) does not apply to an act done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent

the employee or agent from doing the act.

192 There are aspects of Part IIA which are at issue and call for interpretation. A number of well known principles of interpretation are to be applied. Firstly, the provisions do not create a criminal offence. If they had, a narrower approach to construing the scope of the conduct caught by Part IIA would have been warranted: compare *Coleman v Power* (2004) 220 CLR 1 at [185] (Gummow and Hayne JJ). Secondly, for the fundamental common law right of freedom of expression to be eroded, clear words are required: *Coleman* [185], [188] (Gummow and Hayne JJ) and [313] (Heydon J). Thirdly, the context in which words are utilised is vital to a proper understanding of their intended meaning: *Coleman* [12] (Gleeson CJ), [59] (McHugh J), [177] (Gummow and Hayne JJ) and [306] (Heydon J). Context is provided by the surrounding words, but most importantly by the "purpose of the enactment": *Coleman* [59] (McHugh J). Section 15AA of the *Acts Interpretation Act 1901* (Cth) requires that a construction which promotes the object and purpose of the legislation be preferred to a construction that would not.

193 Next, it is necessary to observe that the provisions in question are broken up into three distinct elements. Ultimately, each of these elements is brought together in answer of the single question of whether the act in question was unlawful. The first element (s 18C(1)(a)) concerns the likelihood of the impugned act causing offence (unless otherwise apparent, I use that word as shorthand for "offend, insult, humiliate or intimidate"); the second element (s 18C(1)(b)) concerns the reason for the impugned act; and the third (s 18D) is an exemption for justifiable expression which, if satisfied, negates any finding of unlawfulness which would otherwise have been made. Whilst each element is not to be construed entirely divorced from the next, each element has its place and should primarily be taken into account when the structure adopted by Part IIA calls for it to be considered.

194 The constitutional validity of Part IIA was upheld by a Full Court of this Court in *Toben v Jones* (2003) 129 FCR 515 (Carr, Kiefel and Allsop JJ). Mr Bolt and HWT recognised that I am bound to follow that judgment, but formally reserved their position.

An Overview

195 The legislative history and the purpose and policy of Part IIA need to be examined for a number of reasons before I turn to consider each of the provisions of the Part. Firstly, Mr

Bolt and HWT relied upon the heading to Part IIA as an overarching element in the proper interpretation of the provisions in question. Secondly, the purpose and policy of Part IIA reveals that there are two foundational values which Part IIA is concerned with. As those values throw light upon Parliament's intention, they should also be examined at the outset.

The Heading to Part IIA

196 Part IIA was not included in the RDA when it was originally enacted in 1975. The *Racial Hatred Act 1995* (Cth) inserted Part IIA into the Act in 1995. The heading to Part IIA is "Prohibition of offensive behaviour based on racial hatred". However, the heading suggests a narrower field of operation for Part IIA than the words utilised in Part IIA and the legislative history reveal. Those words and the legislative history do not support Mr Bolt's contention that the operation of Part IIA is restricted to extreme racist behaviour based upon racial hatred or behaviour calculated to induce racial violence. The following legislative history and judicial consideration of it confirms that conclusion.

197 The preamble to the RDA refers to the International Convention on the Elimination of all Forms of Racial Discrimination ("CERD") and recites Parliament's desire to provide for "the prohibition of racial discrimination and certain other forms of discrimination and, in particular, to make provision for giving effect to the Convention". From its inception, the RDA has included provisions which address discriminatory conduct, that is, inequality of treatment based on race, colour, descent or national origin. However, despite a number of unsuccessful attempts, the RDA does not include a provision which implements in full, the obligation contained in Art 4(a) of CERD to create a criminal offence prohibiting conduct of the kind there dealt with. Article 4(a) refers to racial hatred and is in the following terms:

> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:
>
> (a) Shall declare an offence punishable by law all 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, and also the provision of any assistance to racist activities, including the financing thereof;

198 A proposed criminal offence proscribing the promotion of racism in the manner condemned by Art 4(a) formed part of the Racial Discrimination Bill introduced in 1974 but which was rejected by the Senate. The failure to enact that provision (cl 28) led to Australia depositing a reservation to Art 4(a) on 30 September 1975. As Allsop J recounts in *Toben* at [123], a further unsuccessful attempt was made in 1992 to revisit the issue, including by the enactment of a combination of criminal and civil provisions. The legislative history leading to the enactment of Part IIA is comprehensively set out in the judgment of Allsop J in *Toben*. The judge also describes State and Territory Acts enacted in the 1980s and early 1990s and a number of reports published at that time which dealt with racial vilification.

199 A Bill was once again introduced in 1994. The Racial Hatred Bill 1994 ("the 1994 Bill") contained a Part 2 which dealt with proposed amendments to the *Crimes Act 1914* (Cth) and a Part 3 which proposed the insertion of Part IIA into the RDA. The Explanatory Memorandum to the 1994 Bill ("the Explanatory Memorandum") described the intent of the proposed legislation as "to strengthen and support the significant degree of social cohesion demonstrated by the Australian community at large". However, an examination of the provisions of Parts 2 and 3 show that different approaches were contemplated in furtherance of that common goal.

200 Part 2 sought to create a number of criminal offences. The first was directed to prohibiting racially based threats of physical harm. The subject of the second was racially based threats to destroy or damage property and the subject of the third proposed offence (cl 60) was the incitement of racial hatred. Clause 60 was in the following terms:

> A person must not, with the intention of inciting racial hatred against another person or a group of people, do an act, otherwise than in private, if the act:
>
> (a) is reasonably likely, in all the circumstances, to incite racial hatred against the other person or group of people; and
> (b) 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.
>
> Penalty: Imprisonment for 1 year.
>
> (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.

201 The Explanatory Memorandum described the proposed criminal offences as giving effect to, and wholly based upon, Australia's obligations under Art 4 of CERD.

202 The proposed civil provisions (which became Part IIA of the RDA) made no reference to the incitement of racial hatred and did not require an act to intentionally inflict harm as an element of breach. Instead, the civil provisions focused upon racially offensive behaviour and (by what became s 18D) included free speech protections which were not included in the proposed criminal offence of inciting racial hatred.

203 Not only were (what became) ss 18C and 18D of the RDA significantly different from the proposed cl 60 of the 1994 Bill, these provisions took a new and different approach than the approach which had until that time been taken by provisions dealing with racial vilification by both State and Territory legislatures. It was also different to the approach taken by the failed 1992 Bill. Having set out the legislative history, Allsop J in *Toben* at [128] identified the difference in approach from other civil provisions as follows:

> The civil provisions (now found, relevantly, in ss 18B, 18C and 18D of the RD Act) were new in their terms and structure. They were different from the various provisions of the State and Territory Acts and the provisions in the 1992 Bill. The 1992 Bill had used the words "hatred, serious contempt or severe ridicule" and recklessness or intent was required. Under the new provisions, no intent or recklessness was required; but s 18D had a body of justified conduct. The words of Part IIA, especially s 18C, did not require there to be an expression of racial hatred, or intended "vilification"; s 18C did not refer to incitement to violence. Rather, Pt IIA of the RD Act had a less charged body of expression. It worked in the following way. Reading ss 18B, 18C and 18D together as a cohesive whole, acts were made unlawful which reasonably caused offence etc (see s 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 was the race etc (see s 18C(1)(b)) of the person or persons reasonably likely to be offended and where the act was not justifiable as a form of expression contemplated by s 18D.

204 A further distinction between the proposed cl 60 and what became ss 18C and 18D was the means of addressing the mischief to which the provisions were directed. Unlike the proposed criminal offence, the civil provision was (as the Explanatory Memorandum explained) to form a part of the Commonwealth scheme of human rights administration based on the conciliation of complaints under the *Human Rights and Equal Opportunity*

Commission Act 1986 (Cth) (now entitled the *Australian Human Rights Commission Act 1986* (Cth)). In that respect, the Explanatory Memorandum said:

> Part 3 will add offensive behaviour because of race, colour and national and ethnic origin as additional grounds for investigation and conciliation under that scheme. The emphasis is therefore to promote racial tolerance by bringing the parties together to discuss the act the subject of complaint and arrive at a conciliated and agreed outcome… The proposed prohibition on offensive behaviour based on racial hatred would be placed within the existing jurisdiction of HREOC to conciliate and/or determine complaints alleging breaches of the Racial Discrimination Act. This victim-initiated process is quite different from the criminal offence regime where the initiative for action generally involves police and prosecution authorities.

205 Unlike the "offence" contemplated by Art 4 (a) of CERD, the provisions of Part IIA "are set in a framework of conciliation in cognate legislation…": *Toben* at [135] (Allsop J); *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at [68] (French J). For the civil provisions, racial tolerance was to be promoted through remedial measures encouraging understanding and agreement, rather than punishment, deterrence and the stigma of a criminal conviction.

206 Section 18C does not refer to racial hatred or hate. It is not concerned with incitement: *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207 at [140] (Neave JA). The act which s 18C(1)(a) makes unlawful is not dependent upon a state of emotion which has either motivated the act or which is sought to be incited in others. The "intensity of feeling of the person whose act it is, is not necessary to be considered": *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at [18] (Kiefel J). The emotions upon which s 18C(1)(a) turns are those of a victim and not of an aggressor. The emotions of hurt or offence or fear need to be demonstrated, not hate or incitement to hatred. An act that hurts or offends a victim may be driven by hatred or may incite hatred of the victim by others, but hurt or offence may be the product of a benevolent intent and may incite negative attitudes to the victim which fall short of enmity. The section refers to the reason for the act being done as simply "race, colour or national or ethnic origin". The act need not be based on racial hatred: *Creek* at [17]-[18] (Kiefel J). As Allsop J said in *Toben* at [136]:

> Many acts comprehended by ss 18B, 18C and 18D will involve an expression of racial hatred, though other acts may not.

Part IIA encompasses conduct extending beyond expressions of racial hatred: *Bropho* [68] (French J).

207 Both the words utilised in s 18C and the legislative context in which Part IIA was enacted, demonstrates that the mischief which those provisions seeks to address is broader than conduct inciting racial hatred and extends to conduct at a lower level of transgression to the objective of promoting racial tolerance. Whilst Part IIA is headed "Prohibition of Offensive Behaviour based on Racial Hatred", the phrase "racial hatred" should, for the reasons given by Allsop J in *Toben* (and followed by French J in *Bropho* at [68]), be seen to have been used as a "convenient short-hand" for a broader concept: *Toben* at [130]-[131] and [137].

208 The use of the word "hatred" in the heading to Part IIA is not to be "seen as a control upon otherwise clear words that were deliberately chosen, as a departure from previous models" (*Toben* at [137] (Allsop J) or as creating a separate test confined to racial hatred: (*Creek* at [18] (Kiefel J)). No member of the Full Court in *Toben* was of the view that s 18C was to be read down as applying only to cases of racial hatred. No member of this Court has adopted that view in any other case. A number of judges of this Court have construed Part IIA as extending beyond the limits or boundaries of the prohibitions contemplated by Art 4 of CERD and thereby encompassing conduct extending beyond expressions of racial hatred and as "intended to pursue a policy of eliminating racial discrimination and promoting understanding among races": *Toben* at [136] (Allsop J) and see [19], [20] (Carr J) and [50] (Kiefel J); *Bropho* at [68] (French J).

209 Other judicial statements have identified the underlying purpose of Part IIA as intending to regulate conduct which stimulates contempt or hostility between groups of people within the community by lowering regard for, and demeaning the worthiness of, the person or persons subjected to the conduct: *Bropho* at [138] (Lee J); or as seeking to control "socially corrosive conduct": *Bropho* at [138] (Lee J); or as seeking to eliminate racial discrimination: *Scully* at [240] (Hely J); and as seeking to promote racial tolerance: *McGlade v Lightfoot* (2002) 124 FCR 106 at [90] (Carr J).

210 That all Australians should be able to live their lives free from the harm caused by the dissemination of racial prejudice is not, however, the only value that Part IIA of the RDA seeks to promote and protect. The terms of s 18D together with the Explanatory Memorandum and the Second Reading Speech to the 1994 Bill ("the Second Reading Speech") make it abundantly clear that freedom of expression was also regarded as an

important value which Parliament intended should, in the circumstances defined by s 18D, be balanced against the objective of promoting racial tolerance and proscribing inappropriate racially based behaviour. The Second Reading Speech described the provisions of Part IIA as balancing free speech against the rights of Australians to live free of fear and racial harassment: see further *Creek* at [32] (Kiefel J); and *Bropho* at [3] and [62] (French J).

211 A proper understanding of what Part IIA seeks to achieve requires an understanding of the two foundational values upon which the Part is founded. Whilst to some extent those values are complementary of each other, Part IIA puts them in contest and then seeks to identify a point of balance at which harmony between them is to be found. Whilst the terms of Part IIA provide the boundaries within which that search for harmony is to be undertaken, the search inevitably involves evaluative judgment. Judgments of the kind that the Court is authorised and required by the legislature to make: *Bropho* at [93] (French J). That evaluation is much assisted by an analysis and understanding of the nature and content of the two competing values which largely control the balancing exercise which Part IIA requires. It is to that analysis I now turn.

Freedom from racial prejudice and intolerance

212 At the heart of any attempt to secure freedom from racial prejudice and intolerance is the protection of equality and the inherent dignity of all human beings. These are the values that infuse international human rights: *R v Keegstra* [1990] 3 S.C.R. 697 at 754-755 (Dickson CJ, delivering the judgment of the majority); Waldron J, "Dignity and Defamation: the Visibility of Hate", (2009-2010) 123 Harv. L. Rev. 1596 at 1610-1611. Those values are reflected in both the preamble and text of CERD. Equality of treatment for all persons irrespective of race, colour, descent, national or ethnic origin is at the foundation of CERD. So much is obvious from the definition of racial discrimination which CERD has adopted. That definition emphasises that the mischief of racial discrimination is:

> any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or other field of public life.

213 Those rights and fundamental freedoms are comprehensively listed in Art 5 of CERD, and by category, include political, civil, economic, social and cultural rights of the kind that

may be expected in an open and pluralistic democracy. They are rights which Art 5 guarantees to all, without distinction as to race, colour, or national or ethnic origin.

214 In giving effect to CERD, the RDA has taken the words of the definition of racial discrimination and imported them directly into s 9(1) of the RDA, which makes unlawful an act meeting that description. The full and equal enjoyment or exercise, free of racial discrimination, of the rights and fundamental freedoms specified by Art 5 of CERD is an objective or value that the RDA seeks to promote and protect. A manifestation of racial discrimination is inequality of treatment by the denial or diminishment of access to the fundamental rights of democratic citizenship. Without such access, both equality and human dignity are denied. But before exploring that further, it is necessary to look to the source of racial discrimination because that will take us closer to the particular subject matter of Part II of the RDA.

215 Racial discrimination is a product of the dissemination of racial prejudice. At the core of racial prejudice is the idea that some people are less worthy than others because of their race. The dissemination of racial prejudice usually involves attributing negative characteristics or traits to a specific group of people. As Neave JA said in *Catch the Fire* at [176]:

> Attributing characteristics to people on the basis of their group membership is the essence of racial and religious prejudice and the discrimination which flows from it.

The attribution of negative characteristics will often, although not invariably, involve the use of stereotyping. As Kleg states in *Hate Prejudice and Racism* (State University of New York Press, Albany, 1993) at 155:

> The effects of stereotyping lie at the base of prejudice. Stereotypic beliefs form the rationale for feelings of disdain and disparagement. When tied to prejudiced attitudes, stereotypes help create a number of behaviors ranging from avoidance to violence.

216 Ascribing negative traits to people by reason of their group membership disseminates the idea that members of the group are not worthy or less worthy and are thus deserving of disdain and unequal treatment. As Dickson CJ said delivering the judgment of the majority in *Keegstra* at 756:

> The message of the expressive activity covered by s 319(2) [racial hatred] is that

> members of identifiable groups are not to be given equal standing in society, and are not human beings equally deserving of concern, respect and consideration. The harms caused by this message run directly counter to the values central to a free and democratic society, and in restricting the promotion of hatred Parliament is therefore seeking to bolster the notion of mutual respect necessary in a nation which venerates the equality of all persons.

The majority in *Keegstra* found that hate speech was not only an affront to individual dignity but noted the potential risk "that prejudiced messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in …society" (at 748).

217 Similarly, the majority of the Canadian Supreme Court in *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892 at 919 (Dickson CJ, delivering the majority judgment) said:

> …messages of hate propaganda undermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open mindedness that must flourish in a multicultural society which is committed to the idea of equality.

218 The trend of western democracies to regulate the dissemination of racial prejudice is summarised by Tsesis in his article "Dignity and Speech: The Regulation of Hate Speech in a Democracy," (2009) 44 Wake Forest L.REV.497. Tsesis identifies that trend as grounded in securing for all citizens "the prerequisites of a life worthy of human dignity": at 521.

219 The values of dignity and equality are also what Professor Michael Chesterman in his book *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate, 2000) regards as at the core of racial vilification laws in Australia. Chesterman correctly observes that if racial vilification goes unchecked within a community, "equality between groups of citizens and the dignity and security of individual citizens are threatened" (at 193). As Chesterman says, racial vilification, or "discrimination in verbal form", infringes "the fundamental liberal-democratic principle that all members of the community as a whole should be treated as equal to each other" (at 194). After reviewing racial vilification laws in Australia including the RDA, Chesterman considered (at 248) that the broad policy underlying those laws as:

> …based on the proposition that where a single national community contains numerous more or less identifiable racial and ethnic groups – including both indigenous inhabitants and many groups composed of recent migrants - encouraging tolerance and mutual civility amongst them is an especially important aim to be

> pursued. If these things are not done, the dignity of individual citizens and their claim to equal treatment under the law are placed in jeopardy.

220 Chesterman argues, correctly in my view, that the protection of reputation as dignity may be discerned within Australian vilification laws. Chesterman's conception of reputation as dignity is taken from American scholar Robert Post's view that the law of defamation intertwines three concepts of reputation – 'honour', 'property' and 'dignity': at 215-216 citing Post R, "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74 California L.Rev 691. At 215, Chesterman outlines Post's argument that in a "communitarian society" defamation law "has a dual purpose" (both public and private):

> [B]y vindicating the plaintiff's claim to a good reputation, it both protects his or her entitlement to full membership within the community and maintains, through definition and enforcement, rules of 'civility' by which the community is constituted. Accordingly, when a plaintiff succeeds in a defamation claim, 'the court, speaking for the community at large, designates the plaintiff as worthy of respect.
> (Footnote omitted).

221 As Milo states, by reference to the jurisprudence of the South African Constitutional Court, "dignity may be regarded subjectively, as a person's sense of intrinsic worth: 'human beings are entitled to be treated as worthy of respect and concern'" (footnote omitted): see Milo D, *Defamation and Freedom of Speech* (2008, Oxford University Press, Oxford), at 35. Milo makes the further point, that reputation encompasses both the private and public aspects of an individual's dignity and that –

> …it is especially the publication of false statements, or expressing opinions on the basis of false facts, that demonstrates a lack of respect for a person's moral integrity. (Footnote omitted)

222 The connection between dignity, reputation and social standing and the private and public interest involved in the protection of dignity, is also strongly advocated by Waldron. Waldron argues (at 1610) that hate speech or what he calls 'group defamation' are reputational attacks which:

> [A]mount to assaults upon the *dignity* of the persons affected – *dignity*, in the sense of these persons' basic social standing, of the basis of their recognition as social equals, and of their status as bearers of human rights and constitutional entitlements. (Original emphasis)

223 Waldron contends that dignity is "a matter of status – one's status as a member of society in good standing" (1611-1612). Waldron's 'dignity assurance' ("a pervasive, diffuse,

ubiquitous, general, sustained and reliable underpinning of people's basic dignity and social standing, provided by all for all" – at 1630) echoes what Dickson CJ in *Keegstra* referred to at 756 as the " mutual respect" necessary to venerate the "equality of all persons".

224 Waldron makes an important distinction in analysing the kind of respect that a dignity assurance is intended to protect. He says at 1628-1629:

> It is important to distinguish between two senses of respect that might be in play here: what Stephen Darwall has called "appraisal respect" (in which one's estimation of people varies by their merits, their virtues and vices, their crimes, their views and so on) and "recognition respect" (which is fundamental to the dignity of persons and invariant in the face of differential merit, even commanding how people are to be treated when they are guilty of terrible crimes).
> (Footnote omitted.)

225 It is 'recognition respect' that Waldron says is to be protected from group defamation. It is 'recognition respect' that the dissemination of racial prejudice undermines. Racial vilification will usually involve negative attacks on another person, not based on what that person has said or has done but principally because of negative characteristics (real or imagined) which are ascribed to the group to whom that person belongs. The essence of racial vilification is that it encourages disrespect of others because of their association with the racial group to whom they belong. That kind of stigmatisation and its insidious potential to spread and grow from prejudice to discrimination, from prejudice to violence, or from prejudice to social exclusion, is at the fundamental core of racial vilification. In a free and pluralistic society, every citizen is entitled to live free of inequality of treatment based upon a denial of dignity of the kind that 'recognition respect' confers.

226 It is in this respect that I perceive equality and dignity to provide the underlying rationale for protecting both individuals and society from the ills of the dissemination of racial prejudice. These are the underlying values which, in my view, s 18C is directed to protect. They are consonant with the commitment to equal dignity for all persons upon which CERD is based and which the RDA was enacted to give effect to.

Freedom of expression

> *WITHOUT Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as public Liberty, without Freedom of Speech; which is the Right of every Man, as far as by it, he does not hurt or control the Right of another.*
>
> Benjamin Franklin,

The New England Courant, Issue 49, 9 July 1722

227 The promotion of freedom of expression has broad origins. The development of the concept of freedom of expression as a central component of democracy in the modern era is largely attributed to the writings of English philosopher and father of liberalism, John Locke. Locke's writings on modern liberalism later influenced the American founding fathers, including James Madison and Thomas Jefferson, to formulate and institute the first and perhaps most historically significant constitutional protection for the freedom, the First Amendment to the American Constitution.

228 Liberal-democratic thinking identified three main pillars or foundational arguments that justify the existence of the principle of freedom of expression; firstly, the pursuit and discovery of truth (also known as the 'argument from truth'); second, the harvest of self-fulfilment (also known as 'the argument from autonomy'); and thirdly, the enablement of democratic governance (also known as 'the argument from democracy'); *Keegstra* at 727-728; and *Coleman* at [333] (Heydon J); and see Carmi G, "Dignity – The Enemy from Within: Theoretical and Comparative Analysis of Human Dignity As A Free Speech Justification" (2006-2007) 9 U. Pa. J. Const. L. 957; Chesterman M, *Freedom of Speech in Australian Law*, Chapter 2; Barendt E, *Freedom of Speech* (2nd ed, Oxford University Press, 2005) at 6-23; Weinstein J "Extreme Speech, Public order, and Democracy: Lessons from *The Masses"* in Hare I and Weinstein J (eds), *Extreme Speech and Democracy* (Oxford University Press, 2009) pp 23-30.

229 The right to freedom of expression has been recognised within the realms of international law, the constitutions of many nations and in the common law. Both international and regional human rights instruments provide for the protection of the right of freedom of expression including the: *International Covenant on Civil and Political Rights,* Art 19; *United Nations Declaration of Human Rights,* Art 19; and *the European Convention on Human Rights,* Art 10.

230 The Australian Constitution protects freedom of communication on matters of government and politics as an indispensable incident of the representative government which the Australian Constitution has created: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-562; *Coleman* at [195]-[196] (Gummow and Hayne JJ) and at [320]

(Heydon J); This implied freedom of political communication does not confer personal rights on individuals but precludes the curtailment of the protected freedom by the exercise of legislative or executive power: *Lange* at 560.

231 The common law recognises freedom of expression. In *Lange,* the High Court unanimously stated at 564:

> Under a legal system based on the common law, "everybody is free to do anything, subject only to the provisions of the law", so that one proceeds "upon an assumption of freedom of speech" and turns to the law "to discover the established exceptions to it.
> (Footnote omitted)

232 A number of decisions of this Court suggest that freedom of expression at common law is not simply residual. In that context, the following observation of Allen TRS in his article "The Common Law as Constitution: Fundamental Rights and First Principles" in *Courts of Final Jurisdiction: The Mason Court in Australia*, Saunders C (ed) (Federation Press, 1996) at 148, has been cited with approval in *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414 at [113]; *Evans v The State of New South Wales* (2008) 168 FCR 576 at [72] (French, Branson and Stone JJ) and *Bropho* at [72] (French J):

> Liberty is not merely what remains when the meaning of statutes and the scope of executive powers have been settled authoritatively by the courts. The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction. The common law, then, has its own set of constitutional rights, even if these are not formally entrenched against legislative repeal.

233 Whether a positive or residual right, freedom of expression at common law enjoys special recognition. As the Full Court said in *Evans* at [74]:

> Freedom of speech and of the press has long enjoyed special recognition at common law. Blackstone described it as "essential to the nature of a free State": *Commentaries on the Laws of England*, Vol 4 pp 151-152. In 1891 Lord Coleridge said *in Bonnard v Perryman* [1891] 2 Ch 269 at 284:
>
> > The right of free speech is one which it is for the public interest that individuals should possess, and indeed that they should exercise without impediment, so long as no wrongful act is done.
> >
> > See also *R v Commissioner of Metropolitan Police; Ex parte Blackburn (No 2)* [1982] 2 QB 150 at 155; *Wheeler v Leicester City Council* [1985] AC 1054; *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 203.

234 In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, Callinan J referred to free speech as "a matter of fundamental importance in a democratic society": at [277]. In *Coleman* at [185], Gummow and Hayne JJ spoke of expression as a fundamental common law right.

235 Whilst the importance and fundamental nature of freedom of expression is recognised in each of the international, constitutional and common law spheres to which I have referred, the fact that the right is not unqualified is also unequivocally the case in each sphere.

236 The non-absolute and qualified nature of the implied freedom of political communication has been expressly stated by the High Court on many occasions. That freedom is not absolute; "It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution": *Lange* at 561. There are many examples of the High Court finding that laws which intrude upon free political discourse are nevertheless constitutionally valid because those laws reasonably serve a countervailing public purpose: see *Levy v State of Victoria & Ors* (1997) 189 CLR 579, *Cunliffe v Commonwealth* (1994) 182 CLR 272, *Langer v Commonwealth* (1996) 186 CLR 302, *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 and *Lange*. See also Chesterman M, *Freedom of Speech in Australian Law* at 25-26.

237 In the United States and in relation to the First Amendment, the content of and the extent of the restriction on freedom of expression is more limited than in Australia. However, European and Australian approaches are based on different traditions including a greater deference to political authority. That the Australian constitutional and legal context in relation to freedom of expression is different to that of the United States, has been stated a number of times by the High Court: see *Coleman* at [188] (Gummow and Hayne JJ); *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [113]-[114] (Kirby J); *Theophanous* 133-134 (Mason CJ, Toohey & Gaudron JJ); *Lenah Game Meats* (at [201]-[202] (Kirby J). That "not too much can be taken from the American jurisprudence" was also recognised by Allsop J in *Toben* at [148].

238 The right of freedom of expression at common law is, by definition, qualified by those exceptions otherwise provided by law. The law of defamation imposes significant limitations on freedom of expression. Other laws imposing limitations include laws dealing with blasphemy, contempt of court and of Parliament, confidential information, the torts of negligent misstatement, deceit and injurious falsehood. Further, a wide range of legislative provisions dealing with obscenity, public order, copyright, censorship and consumer protection place restrictions on the exercise of the right to freedom of expression. These laws recognise that there are legitimate countervailing interests which require the imposition of limitations upon freedom of expression.

239 In *Keegstra*, the Canadian Supreme Court considered the extent to which the right to freedom of expression could permissibly be qualified by legislation which made racial hatred (as defined) a criminal offence. In that context, the Court examined the qualified nature of freedom of expression by reference to its underlying rationale embodied in the three pillars to which I have already referred. Relevantly, the majority said:

> [(i) In relation to the pursuit of truth:]
>
> … the argument from truth does not provide convincing support for the protection of hate propaganda.
> … the greater the degree of certainty that a statement is erroneous or mendacious, the less its value in the quest for truth. Indeed, expression can be used to the detriment of our search for truth; the state should not be the sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas. There is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world. To portray such statements as crucial to truth and the betterment of the political and social milieu is therefore misguided: at 762-763.
>
> [(ii) In relation to individual self-fulfilment or autonomy:]
>
> …such self-autonomy stems in large part from one's ability to articulate and nurture an identity derived from membership in a cultural or religious group. … The extent to which the unhindered promotion of this message furthers free expression values must therefore be tempered insofar as it advocates with inordinate vitriol an intolerance and prejudice which view as execrable the process of individual self-development and human flourishing among all members of society: at 763.
>
> [(iii) In relation to participation in democratic governance:]
>
> … expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values. Hate propaganda works in just such a way, arguing as it does for a society in which the democratic process is subverted and individuals are denied respect

> and dignity simply because of racial or religious characteristics. This brand of expressive activity is thus wholly inimical to the democratic aspirations of the free expression guarantee: at 764.

240 With that broad overview, I turn now to consider the specific legislative provisions relied upon and their application to the conduct which Ms Eatock contends is a contravention of Part IIA.

WERE THE ARTICLES REASONABLY LIKELY TO OFFEND?

Section 18C(1)(a) – Legal principles

The Nature of the Assessment to be Made

241 Section 18C(1)(a) requires an assessment to be made of the reasonable likelihood of a person or group of people being offended, insulted, humiliated or intimidated (which, as a short-hand, I will refer to as "offended") by the act of another person. That calls for an assessment of the reasonably likely reaction of the person or people within the group concerned. It is thus the risk of a person or one or more people within a particular group of people being offended, rather than the actuality of offence that is being assessed. 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).

242 The assessment required by s 18C(1)(a) is obviously to be conducted objectively and not subjectively: *Bropho* [66] (French J); *Hagan* at [15] (Drummond J); *Creek* at [12] (Kiefel J); *Scully* at [99] (Hely J); *McGlade* [42]-[45] and [47] (Carr J).

Whose Reaction is to be Assessed?

243 The assessment needs to be undertaken by reference to a "person or group of people". Section 18C(1)(a) does not identify the persons or group of persons that should be considered as the possible victims for the purpose of deciding whether the impugned act was reasonably likely to cause offence. That is true also of other legislative provisions and is most notably the case for what was s 52 of the *Trade Practices Act 1974* (Cth) (and now s 18 of Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) ("the Trade Practices Act"). The principles developed by the law relating to misleading and deceptive conduct provide some

assistance to the way in which the assessment required by s 18C(1)(a) should be approached. Parity of reasoning with the law relating to misleading and deceptive conduct was utilised for similar purposes in *Catch the Fire*: see at [18] (Nettle JA), at [132] (Ashley JA) and at [158] (Neave JA).

244 As Gibbs CJ said in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 199, in the absence of the provision expressly stating the possible victims, "consideration must be given to the class of consumers likely to be affected by the conduct". Following the approach taken in *Puxu,* in *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45, the High Court observed at [103], that where the conduct in question is not directed to identified individuals but is instead directed at members of a class "in a general sense", it becomes necessary to isolate by some criterion a representative member of the class or group of people whose reactions are being assessed. In that sense, the enquiry is abstract and is made with respect to a hypothetical individual who, for the purpose of the assessment, is adopted as a representative member of the class. Where the target is an identified individual, the assessment need not proceed on the basis of that person being reconstructed. As French CJ said in *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [26]:

> In the case of an individual it is not necessary that he or she be reconstructed into a hypothetical, "ordinary" person. Characterisation may proceed by reference to the circumstances and context of the questioned conduct. The state of knowledge of the person to whom the conduct is directed may be relevant, at least in so far as it relates to the content and circumstances of the conduct.

245 Gleeson CJ, Hayne and Heydon JJ in *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 identified the two points of view from which allegedly misleading conduct can be analysed in the following passage at [36]:

> Questions of allegedly misleading conduct, including questions as to what the conduct was, can be analysed from two points of view. One is employed in relation to "members of a class to which the conduct in question [is] directed in a general sense". The other, urged by the purchasers here, is employed where the objects of the conduct are "identified individuals to whom a particular misrepresentation has been made or from whom a relevant fact, circumstance or proposal was withheld"; they are considered quite apart from any class into which they fall. Adoption of the former point of view requires isolation by some criterion or criteria of a representative member of the class.
> (Footnotes omitted)

246 A distinction between an identified person and a group of people is found in the words of s 18C(1)(a). The provision acknowledges that conduct may be reasonably likely to offend a "person" on the one hand or a "group of people" on the other. It seems to me that the reference to a "person" must be intended as a reference to an identified person (or persons) that the conduct in question was directed at. In that respect, the provision is addressing an act directed to an identified individual or individuals. In contrast, the reference to "a group of people" is dealing with a class to whom the conduct was directed in a general sense. That distinction facilitates what logic suggests are the different approaches to be taken in the assessment process between a claim of personal offence and a claim of group offence.

247 The distinction utilised by the law on misleading and deceptive conduct is based upon reasoning which, in my view, applies with equal force to s 18C(1)(a). Whilst the decided cases on s 18C(1)(a) have not expressly drawn attention to the law on misleading and deceptive conduct, that the same approach is to be taken in relation to s 18C(1)(a) is implicit in the reasoning of those cases: *Creek* at [13] (Kiefel J); *Scully* at [108] (Hely J); *McGlade* at [52], [60] and [88] (Carr J).

248 The dichotomy between conduct directed to an identified individual, on the one hand, and conduct directed to a group of people in a general sense on the other, works well in the ordinary case. There will, however, be cases where the conduct may be directed to identified individuals, as well as a group of people of which those identified individuals form part. Indeed, for the reasons that I later set out, the Newspaper Articles can be characterised as doing exactly that, because they are directed to individuals identified as examples of people in a wider group. In that sense, the Newspaper Articles are directed both at the individuals and the wider group of which the individuals form a part. The question arises as to which of the two points of view is the conduct to be analysed, when it is directed at both identified individuals and also at a group of people into which those individuals fall?

249 A similar dilemma arises in relation to cases involving allegations of misleading and deceptive conduct. In *.au Domain v Domain Names* (2004) 207 ALR 521, Finkelstein J considered the issue at [17]-[20]. This particular difficulty of identifying the correct point of view from which conduct is to be analysed was also touched upon by Gleeson CJ, Hayne and Heydon JJ in *Butcher* at [37]. The approach suggested by those authorities is that where conduct is directed to a person as an individual as well as a part of a wider group, the conduct

of the respondent should be analysed in relation to the identified person alone rather than by reference to the hypothetical representative. But that will only be so where the applicant alleges that he or she was misled rather than alleges that members of the wider group (of which the applicant is one) were misled. As Finkelstein J said in *.au Domain* at [18], the answer to the dilemma invites attention to the nature of the claim made (and see *Butcher* at [37]).

250 I intend to adopt that approach, as the reasoning to which I have referred appears apposite for s 18C(1)(a). Where allegedly offensive conduct is directed at both an identified person and a group of people and the claim made is that both the identified person or persons and the group of people were offended, the conduct should be analysed from the point of view of the hypothetical representative in relation to the claim that the group of people were offended, and in relation to each of the identified persons where a personal offence claim has been made. If no claim of personal offence is made and only a claim of group offence is made, the conduct is to be analysed from the point of view of the hypothetical representative of the group, despite the fact that the conduct is directed at both identified individuals and the group of people of which they form part.

251 A group of people may include the sensitive as well as the insensitive, the passionate and the dispassionate, the emotional and the impassive. The assessment as to the likelihood of people within a group being offended by an act directed at them in a general sense, is to be made by reference to a representative member or members of the group. For that purpose the "ordinary" or "reasonable" member or members of the group are to be isolated: *Nike* at [102]. In that way, reactions which are extreme or atypical will be disregarded. I have deliberately referred to the reasonable member or members (plural) of the group because as Dowsett J said in *National Exchange Pty Ltd v Australian Securities and Investments Commission* [2004] FCAFC 90 at [24]:

> Such a test does not necessarily postulate only one reasonable response in the particular circumstances. Frequently, different persons, acting reasonably, will respond in different ways to the same objective circumstances. The test of reasonableness involves the recognition of the boundaries within which reasonable responses will fall, not the identification of a finite number of acceptable reasonable responses.

252 As the observation of Dowsett J suggests, it is necessary to bear in mind that conduct may be directed at a diverse group of people. A diverse group will likely comprise

discernible sub-groups. Reactions to the same conduct may vary as between sub-groups. That may be because of an extra attribute common to the sub-group. An example from the decided cases is "young and impressionable Jews" who were regarded as a vulnerable sub-group of Australian Jewry by Branson J in *Jones* at [96]. Additionally, it may be appropriate in some cases of alleged group offence to assess the reaction of those within a group to whom the conduct is particularly targeted and thus most likely to have been offended. Finkelstein J in *.au Domain* expressed that approach when at [21] he said:

> Logic demands that if one is dealing with a diverse group then, for the purpose of determining whether particular conduct has the capacity to mislead, it is necessary to select a hypothetical individual from that section of the group which is most likely to be misled. If the court is satisfied that this hypothetical individual is likely to have been misled by that conduct, that would be sufficient.

The Relevance to the Assessment of Community Standards

253 Mr Bolt contended that the objective nature of the assessment required by s 18C(1)(a) imported an objective assessment of community standards and that the same standard applied irrespective of whether group offence or personal offence was alleged. Acceptance of that contention would see a reasonable person test substitute the reasonable representative test and result in the perspective clearly required by the words of s 18C(1)(a) to be ignored. For the reasons I have just outlined, that contention must be rejected. It is the values, standards and other circumstances of the person or group of people to whom s 18C(1)(a) refers that will bear upon the likely reaction of those persons to the act in question. It is the reaction from their perspective which is to be assessed: *Creek* at [16] (Kiefel J); *Scully* at [108] (Hely J). Further, to import general community standards into the test of the reasonable likelihood of offence runs a risk of reinforcing the prevailing level of prejudice. To do that would be antithetical to the promotional purposes of Part IIA. Such an approach has been rejected in relation to sexual harassment: *Ellison v Brady* 924 F.2d 872 (9th Cir. 1991) at 878-879; *Stadnyk v Canada (Employment and Immigration Commission)* (2000) 38 CHRR 290 at [11]; and see *Corunna v West Australian Newspapers Ltd* (2001) EOC 93-146 at [75467]-[75468]. Sexual harassment legislation is the arena from which the words "offend, insult, humiliate or intimidate" were deliberately borrowed: see Explanatory Memorandum at 10 and the Second Reading Speech to the RDA at column 3341.

254 However, there is one aspect of general community standards that should be imported into the assessment. In *Puxu*, and by reference to the intent of the provision there under consideration, Gibbs CJ at 199 said:

> The heavy burdens which the section creates cannot have been intended to be imposed for the benefit of persons who fail to take reasonable care of their own interests.

As the High Court observed in *Nike* at [102] there is "an objective attribution of certain characteristics" to the ordinary or reasonable member of the class. That attribution occurs by reference to the objectives of the legislation in question.

255 It seems to be that in the context of provisions which seek to promote racial tolerance and proscribe intolerance, the purposes of the RDA are to be served by objectively attributing to the "ordinary" or "reasonable" representative of the group, characteristics consistent with what might be expected of a member of a free and tolerant society. Whilst the following observations made by Nettle JA in *Catch the Fire* at [96] were made in relation to provisions dealing with religious vilification and in a context more akin to s 18D than s 18C, I think that the observations made are helpful in relation to identifying the characteristics attributable to the ordinary or reasonable representative in the application of the test required by s 18C(1)(a). Nettle JA said:

> In my view one is entitled to assume that a fair and just multicultural society is a moderately intelligent society. Its members allow for the possibility that others may be right. Equally, I think, one is entitled to assume that it is a tolerant society. Its members acknowledge that what appears to some as ignorant, misguided or bigoted may sometimes appear to others as inspired. Above all, however, one is entitled to assume that it is a free society and so, therefore, one which insists upon the right of each of its members to seek to persuade others to his or her point of view, even if it is anathema to them. But of course there are limits. Tolerance cuts both ways. Members of a tolerant society are as much entitled to expect tolerance as they are bound to extend it to each other. And, in the scheme of human affairs, tolerance can extend each way only so far. When something goes beyond that boundary an open and just multicultural society will perceive it to be intolerable despite its apparent purpose, and so judge it to be unreasonable for the purpose for which it was said.

See further, *McGlade* at [88] (Carr J).

256 In my view, the burdens created by Part IIA were not imposed for the benefit of persons whose intolerance to the points of view of others is the true cause of the offence, insult, humiliation or intimidation that those persons experienced. In those situations it may

be properly said that it is the intolerance of the receiver of the message rather than the intolerance of the speaker that is responsible for causing the offence.

"In all the circumstances"

257 The next issue is the reference in s 18C(1)(a) to "in all the circumstances". That needs to be firmly kept in mind. It requires 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.

"Reasonably Likely"

258 I turn then to consider the phrase "reasonably likely". That phrase has been the subject of judicial consideration, as has the word "likely". Many of the cases are summarised by McClelland CJ in *Attorney General for the State of New South Wales v Winters* [2007] NSWSC 1071. As the judge said at [32], including by reference to the High Court's decision in *Boughey v The Queen* (1986) 161 CLR 10, the meaning to be given to the word "likely" may vary depending on its context. In the context of s 52 of the Trade Practices Act, Bowen CJ, Lockhart and Fitzgerald JJ said in *Global Sportsman Pty Ltd v Mirror Newspapers* (1984) 2 FCR 82 at 87:

> Conduct is likely to mislead or deceive if that is a "real or not remote chance or possibility regardless of whether it is less or more than fifty per cent"; cf *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367 at 380; 42 FLR 331, per Deane J at 346; *Sheen v Fields Pty Ltd* (1984) 51 ALR 345; 58 ALJR 93.

259 In *Department of Agriculture and Rural Affairs v Binnie* [1989] VR 836, the Victorian Supreme Court considered the meaning of the phrase "reasonably likely". Marks J (with whom Young CJ and Teague J agreed) stated at 842:

> The expression "reasonably likely" is substantially idiomatic, its meaning not necessarily unlocked by close dissection. In its ordinary use, it speaks of a chance of an event occurring or not occurring which is real--not fanciful or remote. It does not refer to a chance which is more likely than not to occur, that is, one which is "odds on", or where between nil and certainty it should be placed. A chance which in common parlance is described as "reasonable" is one that is "fair", "sufficient" or "worth noting".

260 In that case, Young CJ observed further that "reasonably" was a qualifying adverb "which requires the word 'likely' to be given a meaning less definite than probable": at 837.

The approach of the Court in *Binnie* has been taken up in a number of decisions of this Court summarised and applied by Cowdroy J in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Emergency Transport Technology Pty Ltd* (2011) 277 ALR 388 at [18]-[19]. I can see no reason why the expression "reasonably likely" as utilised in s 18C(1)(a) should not be given the meaning identified in *Binnie* as speaking "of a chance of an event occurring or not occurring which is real – not fanciful or remote".

261 Whether the act in question is reasonably likely to have caused offence is to be assessed on the balance of probabilities: *Bropho* at [65] (French J). The onus of proof on that, and the other elements of s 18C, rests with the applicant.

"Offend, insult, humiliate or intimidate"

262 Lastly, it is necessary to consider the words "offend, insult, humiliate or intimidate". Hely J in *Scully* at [103] (as well as Carr J in *McGlade* at [52]; Branson J in *Jones* at [90]; and French J in *Bropho* at [67]) identified the ordinary meaning of these words by reference to their dictionary definitions:

> Dictionary definitions of the terms used in s 18C are as follows:
>
> *Offend*
> •"1.To irritate in mind or feelings; cause resentful displeasure in.
> 2. To affect (the sense, taste, etc) disagreeably."
> (Macquarie Dictionary 3rd Ed)
>
> • In its chief sense "to hurt or wound the feelings or susceptibilities of; to be displeasing or disagreeable to; to vex, annoy, displease, anger; to excite a feeling of personal annoyance, resentment or disgust in (any one)."
> (Oxford English Dictionary)
>
> *Insult*
> •"To assail with offensively dishonouring or contemptuous speech or action; to treat with scornful abuse or offensive disrespect; to offer indignity to; to affront, outrage."
> (Oxford English Dictionary)
>
> *Humiliate*
> • "To lower the pride or self respect of; cause a painful loss of dignity to; mortify."
> (Macquarie Dictionary)
>
> •"To make low or humble in position, condition or feeling; to humble."
> (Oxford English Dictionary)
>
> Intimidate
> •"1. To make timid, or inspire with fear; overawe; cow.

> • 2. To force into or deter from some action by inducing fear."
> (Macquarie Dictionary)
>
> •"To render timid, inspire with fear; to overawe, cow; in modern use especially to force to or deter from some action by threats or violence."
> (Oxford English Dictionary)

263 The ordinary meaning of these words is potentially quite broad. To "offend" can mean to hurt or irritate the feelings of another person. If the concern of the provision was to fully protect people against exposure to personal hurt, insult or fear, it might have been expected that the private domain would not have been excluded by the phrase "otherwise than in private" found in the opening words of s 18C(1). The fact that it is, suggests that the section is at least primarily directed to serve public and not private purposes: *Coleman* at [179]. That suggests that the section is concerned with consequences it regards as more serious than mere personal hurt, harm or fear. It seems to me that s 18C is concerned with mischief that extends to the public dimension. A mischief that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public's interest in a socially cohesive society.

264 That is not to say that protecting the public good may not be coextensive with protecting private interests. Proscribing offensive conduct in a public place not only preserves public order but protects against personal offence. The wounding of a person's feelings, the lowering of their pride, self-image and dignity can have an important public dimension in the context of an Act which seeks to promote tolerance and social cohesion. Proscribing conduct with such consequences will clearly serve a public purpose. Where racially based disparagement is communicated publicly it has the capacity to hurt more than the private interests of those targeted. That capacity includes injury to the standing or social acceptance of the person or group of people attacked. Social cohesion is dependent upon harmonious interactions between members of a society. As earlier explained, harmonious social interactions are fostered by respectful interpersonal relations in which citizens accord each other the assurance of dignity. Dignity serves as the key to participatory equality in the affairs of the community. Dignity and reputation are closely linked and, like reputation, dignity is a fundamental foundation upon which people interact, it fosters self-image and a sense of self-worth: *O'Neill* at [160]-[161] (Kirby J) and *Hill v Church of Scientology of Toronto* [1995] 2 S.C.R. 1130 [117] and [120].

265 The definitions of "insult" and "humiliate" are closely connected to a loss of or lowering of dignity. The word "intimidate" is apt to describe the silencing consequences of the dignity denying impact of racial prejudice as well as the use of threats of violence. The word "offend" is potentially wider, but given the context, "offend" should be interpreted conformably with the words chosen as its partners.

266 In *Bropho*, Lee J considered the words "humiliated" or "intimidate" and said at [138]:

> Humiliation or intimidation involves more than destruction of self-perception or self-esteem of a person. It affects others in the community by lowering their regard for, and demeaning the worthiness of, the person, or persons, subjected to that conduct. It stimulates contempt or hostility between groups of people within the community and it is the intent of the Act that such socially corrosive conduct be controlled.

267 In my view, "offend, insult, humiliate or intimidate" were not intended to extend to personal hurt unaccompanied by some public consequence of the kind Part IIA is directed to avoid. That public consequence need not be significant. It may be slight. Conformably with what I regard as the intent of Part IIA, a consequence which threatens the protection of the public interest sought to be protected by Part IIA, is a necessary element of the conduct s 18C is directed against. For the reasons that I have sought to explain, conduct which invades or harms the dignity of an individual or group, involves a public mischief in the context of an Act which seeks to promote social cohesion.

268 It is for those reasons that I would respectfully agree with the conclusion reached by other judges of this Court, that the conduct caught by s 18C(1)(a) will be conduct which has "profound and serious effects, not to be likened to mere slights": *Creek* at [16] (Kiefel J); *Bropho* at [70] (French J); *Scully* at [102] (Hely J); or, as Branson J put it in *Jones* at [92] "real, offence".

Section 18C(1)(a) - Application of Principles to the facts

Whether a group or personal offence claim was made?

269 A claim made by an individual relying upon a contravention of s 18C(1) of the RDA may be brought on the basis that an impugned act offended a "person or a group of people". I have referred earlier at [243] to [252] to the difference between a claim for personal offence and a claim of group offence. For reasons there identified, different principles apply to the assessment of the likelihood of offence for personal offence claims and for group offence

claims. It is necessary for me to consider and resolve whether claims of personal offence have been made in this case. Whilst Mr Bolt and HWT accepted that a group offence claim was made, they disputed that Ms Eatock had made claims of personal offence in relation to named individuals. The dispute was mainly agitated by reference to the pleadings but the way in which the case was run may also be relevant.

270 Ms Eatock contended that her case raised a personal offence claim in relation to herself and the eight other persons who gave evidence for her. There are some suggestions in the pleadings of a personal offence claim for each of the nine witnesses. However, those suggestions are countered by a range of suggestions to the contrary. Ultimately, I have come to the view that the pleadings do not specify with sufficient clarity that personal offence claims were being pressed for each of Ms Eatock and her witnesses.

271 Whilst there are specific allegations made relating to each of the individuals in question, when Ms Eatock's pleadings turn to the conclusions to be drawn from the primary material facts pleaded, those conclusions suggest that only a group offence claim is being pursued. That can be seen in particular from paragraphs 88, 89 and 90 of the Amended Statement of Claim which is where the contraventions of s 18C of the RDA are alleged. The alleged contraventions, insofar as the requirements of s 18C(1)(a) are concerned, rely on the facts and circumstances pleaded at paragraph 88 only. They do not rely upon the personal circumstances of each of the witnesses nor on the allegations earlier pleaded that each of the witnesses were reasonably likely to be offended. Instead, paragraph 88 speaks in collective terms and alleges that the Articles were reasonably likely to offend, insult, humiliate or intimidate "the group members".

272 The phrase "group members" is defined in the Amended Statement of Claim and describes a wide class not limited to the nine witnesses. Paragraph 11 of the Amended Statement of Claim is as follows:

> The group members to whom this proceeding relates are persons (the **group members**) who:
>
> (a) by a combination of descent, self identification and communal recognition are, and are recognised as, Aboriginal persons;
>
> (b) are Aboriginal persons who have a fairer, rather than a darker skin; and
>
> (c) were reasonably likely to be offended, insulted, humiliated or intimidated, and were offended, insulted, humiliated or intimidated by [the Articles] or

> parts thereof.
> (Original emphasis)

273 The members of the group referred to are fair skinned Aboriginal persons who, by a combination of descent, self-identification and communal recognition are, and are recognised as, Aboriginal persons. I regard paragraph (c) of the definition as inessential for the purposes of identifying the group of people which the Amended Statement of Claim seeks to identify for s 18C(1)(a) purposes. As the defined expression "group members" is also used to define the class for the purposes of the representative nature of this proceeding, paragraph (c) of the definition should be read as confined to that purpose.

274 The function of pleadings and the need for reasonable clarity was recently considered by a Full Court of this Court in *Betfair Pty Ltd v Racing New South Wales & Anor* (2010) 189 FCR 356 at [52] (Keane CJ, Lander and Buchanan JJ). Ms Eatock's pleadings have not stated with reasonable clarity that a case based on the personal offence of the nine witnesses was being pressed. My observations about the Amended Statement of Claim are reinforced by the nature of the relief sought in the Amended Application, which, like the concluding allegations in the Amended Statement of Claim, are also couched in collective rather than individual terms.

275 Beyond her argument on the pleadings, Ms Eatock contended that the personal offence claims were "in the ring". As the Full Court said in *Betfair* at [55]:

> …mere infelicity of drafting will rarely be allowed to defeat a case on its merits if the merits of the case have been made apparent on the evidence without unfairness to the other party.

276 However, a clear assertion by counsel for Ms Eatock of personal offence claims was not made until closing submissions. Those submissions followed the closing submissions of Mr Bolt and HWT. Whilst the case was run largely by reference to the evidence of the nine witnesses, that evidence was also relevant to a claim of group offence and that circumstance, of itself, should not be regarded as sufficient to have made it clear to Mr Bolt and HWT that the nature of the contest included claims of group offence as well as claims of personal offence. For those reasons, I consider that the personal offence claims contended for by Ms Eatock were raised too late and Ms Eatock ought not be permitted to pursue them in this proceeding.

277 That conclusion disposes of the need to include the first and second blog articles in the conduct which is to be assessed. As I understand the final submissions made for Ms Eatock, the first blog article was only pressed in relation to the personal offence claim relating to Ms Enoch and the second blog article was only pressed for the personal offence claim relating to Mr McMillan.

Is the claim of group offence established?

278 Having determined that no personal offence claims have been made, it would not be appropriate to determine whether from the perspective of any particular individual, the Newspaper Articles were reasonably likely to offend. That determination needs to be made from the perspective of the "ordinary" or "reasonable" member of the group in respect of which the claim was made. As is apparent from the relief sought by Ms Eatock, the claim made was that "some or all" members of the group were offended. As I see nothing impermissible in an applicant narrowing the allegation of a group offence to a sub-group or sub-groups within the group claim, whether there was a reasonable likelihood of offence may also be assessed from the perspective of the ordinary or reasonable member of a sub-group or groups. I have referred to the authorities which support the validity of that approach at [252] above.

279 By her submissions, Ms Eatock sought to confine her claim of offence to two groups. I will deal with each in turn.

The Broad-group claim

280 The first group was said to be constituted by:

> Aboriginal persons of mixed descent who have a fairer, rather than darker skin, and who identify as Aboriginal persons in accordance with the popular meaning of those words.

281 Ms Eatock's reference to "popular meaning" was a reference to the three-point test for Aboriginality to which I earlier referred. In simple terms, the broader group is said to be made up of people who, like each of Ms Eatock and her witnesses, have fair skin and who by a combination of descent, self-identification and communal recognition are, and are recognised as, Aboriginal persons. This group is the group of people which the "group members" definition in the Amended Statement of Claim relevantly identifies.

282 The ordinary person within that group is, I would infer, a person who is likely to have had similar life experiences and many of the same attributes as those of the witnesses called for Ms Eatock. For the purpose of the exercise, gender need not be allocated to the hypothetical ordinary person being considered, but for convenience I will assume that the person is female. On the basis of the evidence given by Ms Eatock's witnesses together with the findings earlier made about Aboriginal identity (see [167]-[190]), I would infer that typically such a person:

- will, like most people, have been raised to identify with a particular racial identity;
- will not have chosen to identify as an Aboriginal person as a conscious choice but will have been raised to identify as an Aboriginal person and identified as such since childhood;
- will have a non-Aboriginal parent or earlier ancestor;
- will have had significant exposure to Aboriginal culture;
- will regard herself as genuinely Aboriginal and entitled to be recognised as such by the rest of the community;
- will regard her cultural and lived experiences as an Aboriginal person to be a vital aspect of her identification as an Aboriginal person;
- will be sensitive to appearance based, or purely biologically based assessments of racial identity which give little or no regard to her cultural and lived experiences;
- will be sensitive to suggestions that she is not Aboriginal or not sufficiently Aboriginal to be identifying as such, particularly when made by non-Aboriginal people;
- will have experienced racism from non-Aboriginal persons;
- 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.

283 For such a person, the Newspaper Articles would at least have conveyed the imputations which I have listed at [37] and [55]. But it is likely that the derogatory nature of those imputations would have been conveyed in starker terms than that which I have determined would be conveyed to an ordinary reasonable member of the Australian community. By that, I mean that for such a person, each of the Newspaper Articles are likely to have conveyed a stronger sense of falsity, dishonesty and pretence to the message that the identification as Aboriginal persons by the people in the 'trend' was not legitimate or genuine. Additionally, such a person will be more sensitive to the use of appearance and in particular pale skin colour as an indicator of non-Aboriginality and an imputation that a genuine Aboriginal person does not have pale skin will be more readily conveyed than for an ordinary member of the Australian community.

284 In my view, from the perspective of an ordinary member of a group of Aboriginal persons of mixed descent who have fair skin and who by a combination of descent, self-identification and communal recognition are, and are recognised as, Aboriginal persons, the imputations conveyed by the Newspaper Articles would have included that:

- There are fair-skinned people in Australia with essentially European ancestry but with some Aboriginal descent, of which the identified individuals are examples, who are not genuinely Aboriginal persons but who, motivated by career opportunities available to Aboriginal people or by political activism, have chosen to falsely identify as Aboriginal; and
- Fair skin colour indicates a person who is not sufficiently Aboriginal to be genuinely identifying as an Aboriginal person.

285 The imputations I have found are similar to those contended for by Ms Eatock. They are not more injurious than those pleaded: *Chakavarti v Advertiser Newspapers* (1998) 193 CLR 519 at [53]-[55] (Gaudron and Gummow JJ).

286 In my view, from the perspective of the group members, the imputations listed are conveyed by each of the Newspaper Articles, other than that the second article does not convey political activism as a motivation for the choice to identify as an Aboriginal person. Taking the two articles together, the imputations conveyed are as set out above. It is convenient that I proceed to assess the imputations as collectively conveyed by both of the

articles. This is the way the parties approached the case (in that each propounded a single set of imputations for all of the Articles), and that seems to me to be justified. Although separated by significant time, the Newspaper Articles deal with largely the same subject matter and many of the same named individuals. The second article refers to Mr Bolt having written earlier about "similar cases" (2A-27). It is likely that the attention of many members of the group of people concerned, would have been drawn to both articles and that many would have read or re-read both articles together. In any event, the conclusions I have arrived at would not be different if the reaction to the articles was to be assessed article by article rather than collectively.

287 Whilst the Newspaper Articles identified named individuals, those individuals are portrayed as examples of a 'trend' involving a wider group of individuals. The wider group is identified primarily by skin colour and heritage – "white Aborigines" or similar description. A fair-skinned Aboriginal person with the attributes that I have identified who is not named in the articles will perceive that the people identified have similar attributes to her and that they are put up as examples of people like her. She is reasonably likely to perceive the articles as speaking indirectly of her and to her.

288 She would be reasonably likely to fear that there will be many people who will read and agree with the imputations conveyed by the Newspaper Articles and will, as a result, attribute to her the negative characteristics attributed by the articles to those named within them and which are ascribed more generally to "white Aborigines".

289 The nature and extent of the offence actually experienced by the witnesses called for Ms Eatock, whilst not determinative of the issue I need to resolve, is instructive. I well appreciate that some of the offence experienced by the witnesses called, was attributable to comments entirely personal and peculiar to them. For example, the "mein liebchen" comment made in relation to Prof Behrendt or the factual errors in the Newspaper Articles which were only likely to produce offence for the particular individuals who were dealt with and were aware of the nature and extent of the error. No doubt, being personally named in a popular newspaper contributed to the sense of outrage as well.

290 However, for the most part, the offence experienced by the witnesses called relates to imputations which are likely to cause offence generally to members of the group here being

considered, including because of the wide range of common attributes which the witnesses called and this wider group are likely to share.

291 One of those attributes is that the ordinary person in the group is, as a result of her life experiences, likely to be particularly sensitive to challenges to her identity. She will be aware that her appearance does not fit the stereotypical image of an Aboriginal person that many people in the Australian community have. She will be resistant to attempts to define her by her appearance without regard to the cultural and social bonds which have fashioned who she is. She will, like all of us, regard her identity as the distinguishing feature of her personality. A vital feature of crucial importance to her self-worth, self-image and personal dignity. Her Aboriginal identity, as many of the witnesses said, is who she is.

292 She is also likely to be sensitive about attempts by non-Aboriginal persons to define Aboriginal identity. She will have a legitimate expectation that people should respect her identity and will be likely offended and insulted when they do not.

293 I consider it reasonably likely that the ordinary person within this group would have been offended and insulted by her perception that the Newspaper Articles were challenging the legitimacy of her identity and that of others like her. It is reasonably likely that she will also have been offended and insulted by what she would have perceived to be Mr Bolt's concentration on skin colour as the defining determinant of racial identity.

294 She will have been conscious of Mr Bolt's standing as a popular columnist writing in a highly popular newspaper. She will have thought that the stereotype of the "white Aborigine" which the Newspaper Articles portray will be seen, read and probably accepted as the truth by many. She will have been conscious that, given her appearance and her identification as an Aboriginal person, others may perceive her to have falsely chosen to identify as an Aboriginal person and done so for opportunistic or political reasons, just like those people that Mr Bolt wrote about. That will be very offensive and insulting to her because it is not true. Her Aboriginal identity is important to her. It is who she is. The thought that others may regard her as fake or dishonest about her identity will likely be highly offensive and insulting.

295 It is also reasonably likely that she will be humiliated and intimidated by her perception of the capacity of the Newspaper Articles to generate negative or confronting attitudes to her from others – work colleagues and acquaintances who seemingly pause to study her appearance as she passes and others to whom she is introduced as an Aboriginal person. She will have a heightened fear of experiencing unpleasantness of the kind experienced by Mr McMillan when he perceived that he was being asked to justify or confirm his identity by his University and to the Australian American Fulbright Commission.

296 The trepidation in her reaction will likely have been sharpened by the stinging tone and language utilised by Mr Bolt. The mockery, derision, sarcasm and disrespectful way in which Mr Bolt attacked the subjects of the Newspaper Articles will resonate with her. There is a real chance that pressure will have been imposed to negate her identity. She may now think twice about asserting her Aboriginal identity in public generally or in particular public settings. That will be particularly the case, if she is young or otherwise vulnerable in relation to challenges to her Aboriginal identity. Vulnerability in relation to identity will not be out of the ordinary for people like her.

297 Acts which are reasonably likely to cause offence, insult, humiliation or intimidation of that kind have "profound and serious effects" and are caught by s 18C(1)(a). That kind of likely offence is not to be likened to "mere slights". It has a real potential to lower the pride and self-image of the person or group attacked and thereby inhibit the participatory equality in the affairs of the community which the group and its members are entitled to enjoy. Conduct with these consequences threatens the dignity assurance which all citizens are entitled to be accorded. The reactions which I have concluded were reasonably likely, are not reactions likely to be caused by the intolerance of the people affected.

298 I am satisfied that at least some members of this group were reasonably likely to have been offended, insulted, humiliated or intimidated by the imputations conveyed by the Newspaper Articles and set out at [284] above.

299 I should add that if, contrary to my view, the assessment of the reaction of the ordinary representative of the group should be made by reference to the imputations conveyed to the ordinary and reasonable reader (see [37] and [55] above), I would in any event have reached the same conclusions as those here expressed.

The Narrower Sub-Group

300 Counsel for Ms Eatock identified a second group as the witnesses who gave evidence for Ms Eatock. There were nine such witnesses including Ms Eatock herself. Each of those nine persons meet the definition of a person in the broad group, and as I have found that it is reasonably likely that people in that group would have been offended, insulted, humiliated or intimidated, it is unnecessary that I consider the position of a sub-group. However, in case I am wrong in relation to my findings as to the broad group, I will indicate the findings I would make in relation to the sub-group.

301 Firstly, it seems to me that if a claim is to be narrowed to identify a group more likely to have been offended, the sub-group needs to be identified by a common attribute rationally related to the question of whether offence was reasonably likely. The fact that each of the nine witnesses gave evidence, including evidence of actual offence, is not in my view a common attribute of a sufficiently rational kind to justify those people being considered a proper sub-group. However, each of those witnesses does share a common attribute. Each of them was identified and criticised in the Newspaper Articles. Most were criticised in both of those articles. The fact that they were all publicly named and directly criticised provides a common attribute rationally related to whether they were reasonably likely to be offended. It matters not whether the analysis proceeds on the basis of a sub-group for each of the Newspaper Articles. The result is the same. The personal identification and direct criticism engaged in by Mr Bolt against these individuals serves to add a personal dimension to the attributes of the ordinary and reasonable group member beyond those attributes that I have identified for the broader group.

302 This additional attribute and its personal dimension, serves to strengthen the extent of offence, insult and humiliation which I have determined was reasonably likely for the broader group. I would have made the same findings I have made for the broader group with one exception. I would not have found a reasonable likelihood of intimidation because the representative member of this sub-group is likely to be mature aged and experienced in Aboriginal issues, and thus likely to be resilient to being intimidated by the imputations conveyed.

WERE THE ARTICLES WRITTEN AND PUBLISHED BECAUSE OF RACE, COLOUR OR ETHNIC ORIGIN?

Section 18C(1)(b) – Legal Principles

Causal Nexus

303 Section 18C(1)(b) specifies the causal nexus between the act reasonably likely to offend and the racial or other characteristic or attribute of one or more of the persons reasonably likely to have been offended: *Hagan* at [16] (Drummond J); *Creek* at [19] (Kiefel J); *Toben* at [31] (Carr J) and [65] (Kiefel J); *Bropho* [71] (French J). That nexus or link is concerned with the reason that the act was done. But before searching for the reason for the act, it is necessary to clearly identify the act in question.

304 The "act" that s 18C(1)(b) is dealing with is the same "act" which s 18C(1)(a) deals with. It is the act which was reasonably likely to offend. A publication, a speech or other communication may have many parts and different parts may be motivated by different reasons. Section 18C(1)(b) is addressing the causal link that led to "the act" that meets the description in s 18C(1)(a). Sometimes, the whole of a publication will constitute the offensive act. But where a publication in part or in parts is inoffensive and in part offends in the manner contemplated by s 18C(1)(a), it will be what actuated the offensive parts of the publication that is relevant for consideration under s 18C(1)(b).

305 That is not to say that the entirety of a publication or communication may not be relevant to a consideration of whether s 18C(1)(a) is satisfied, even as to a part of a publication. In *Creek*, Kiefel J assessed the reason for the inclusion of a photograph which accompanied a newspaper article. It was the photograph and not the narrative that was said to constitute the offending conduct and Kiefel J correctly, in my view, focused upon the reason for that part of the publication when she considered s 18C(1)(b).

306 Part IIA recognises that an act may be done for two or more reasons and that if one of the reasons is the race, colour or national or ethnic origin of a person then, the act is taken to be done because of one or more of those attributes: s 18B. It is not necessary that such a reason be the dominant reason or a substantial reason for the doing of the act: s 18B(b). Nevertheless, the reason will need to be an operative reason in the sense that it was involved in actuating the act. So much is apparent from the phrase "because of" utilised by

s 18C(1)(b). That phrase poses the "central question" of why the act was done and motive, purpose and effect may all bear upon that question: *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92 at [236] (Gummow, Hayne and Heydon JJ).

307 In s 18C(1)(b), the central question is whether the act was done including because of the race, colour or national or ethnic origin of one or more of the persons reasonably likely to have been offended. The question is not whether the act was done to cause offence, but the fact of the likelihood of offence flowing from the act will assist a conclusion that the act was done because of the race or other attribute of the person or persons likely to have been offended: *Toben* at [67]-[68] (Kiefel J) and [154] (Allsop J). That conclusion may also be assisted by the fact that there is a disconformity between the act and the respondent's evidence as to his or her motivation for the act. Thus, a publication which contains unnecessary asides which appear to have no real purpose other than to disparage will tend to evidence that the publication was written including for the purpose of disparaging: *Toben* at [77] (Kiefel J).

308 The test has been expressed in different but not inconsistent ways:

- "whether anything suggests race as a factor in the respondent's decision to publish": *Creek* at [28] (Kiefel J); *Scully* at [114] and [116] (Hely J); *Jones* at [99] (Branson J);
- Did considerations of race actuate or motivate the conduct?: *Creek* at [28] (Kiefel J);
- Was the act "plainly calculated to convey a message about" or concerned with the racial group?: *Jones* at [99]-[100] (Branson J); *Toben* at [38] (Carr J), [65] (Kiefel J), [154] (Allsop J); *Scully* at [117]-[118] and [224] (Hely J); *McGlade* at [66] (Carr J).

Race, Ethnic Origin and Colour

309 Section 18C(1)(b) requires that the impugned act be done because of "the race, colour or national or ethnic origin" of some or all of the people in the group said to have been offended. Whilst Mr Bolt's case denied that he was motivated by those attributes, it was not seriously contested that Aboriginal persons constitute a "race" or are of a common "ethnic origin".

310 The attributes described in s 18C(1)(b) have an obvious overlap and it would be wrong to approach the question of construction on any other basis. A combination of these attributes is often used in legislation dealing with discrimination or prejudice, so as to ensure that there is no loophole for evasion: *King-Ansell* at 542 (Richardson J) and at 537 (Woodhouse J). Ms Eatock contended that "race", "ethnic origin" and "colour" are to be understood in their ordinary or popular meaning. The Explanatory Memorandum was reasonably comprehensive in outlining what was intended and how the terms should be construed. The following appears at 2-3:

> The terms 'ethnic origin' and 'race' are complementary and are intended to be given a broad meaning.
>
> The term 'ethnic origin' has been broadly interpreted in comparable overseas common law jurisdictions (cf *King-Ansell v Police* [1979] 2 NZLR per Richardson J at p. 531 and *Mandla v Dowell Lee* [1983] 2 AC 548 (HL) per Lord Fraser at p. 562). It is intended that Australian courts would follow the prevailing definition of "ethnic origin" as set out in *King-Ansell*. The definition of an ethnic group formulated by the Court in *King-Ansell* involves consideration of one or more of characteristics such as a shared history, separate cultural tradition, common geographical origin or descent from common ancestors, a common language (not necessarily peculiar to the group), a common literature peculiar to the group, or a religion different from that of neighbouring groups or the general community surrounding the group. This 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.

311 This passage from the Explanatory Memorandum was relied upon by Hely J in *Scully* to find that Jews in Australia were a group of people with an "ethnic origin" for the purposes of the RDA: at [112]-[113]. On the basis of *King-Ansell*, a Full Court of this Court in *Miller v Wertheim* [2002] FCAFC 156 at [14] (Heerey, Lindgren and Merkel JJ) also accepted that Jewish people in Australia comprise a group of people with an "ethnic origin" for the purposes of the RDA.

312 In *King-Ansell*, the New Zealand Court of Appeal (Richmond P, Woodhouse and Richardson JJ) was asked to construe s 25(1) of New Zealand's *Race Relations Act 1971*. An element of an offence under that section included intent to excite hostility or ill will against a group of persons on the grounds of colour, race, or ethnic or national origin of that group.

The *Race Relations Act 1971* was enacted including in order to implement CERD. In that context, Richardson J considered the meaning of "race" and "ethnic origin" and stated at 542:

> Race is clearly used in its popular meaning. So are the other words. The real test is whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour or their racial, national or ethnic origin. That must be based on a belief shared by members of the group.

and at 543:

> …a group is identifiable in terms of its ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents.

Those passages were approved by the House of Lords in *Mandla* at 564. In that case, the Court was dealing with whether Sikhs were to be regarded as a "racial group" for the purposes of the *Race Relations Act 1976*. The answer to that central question depended on whether Sikhs were a group defined by reference to "ethnic origins". The main purpose of the 1976 Act was to prohibit discrimination against people on racial grounds and to make provision with respect to relations between people of different racial groups. In answering the central question raised, Lord Fraser of Tullybelton (with whom the other judges agreed) relevantly said at 562:

> For a group to constitute an ethnic group in the sense of the Act of 1976, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups.

313 I agree that the words "race" and "ethnic origin" should be given their broad popular meanings. In popular usage, the terms are often used interchangeably. Attempts to draw a meaningful distinction between "race" and "ethnic origin" are likely to be illusive, although "race" can be used to identify a category of people made up of many ethnic origins (for instance the Caucasian race).

314 In my view, Australian Aboriginal people are a race and have common ethnic origin. They are a group of people who regard themselves and are regarded by others as having the two essential distinguishing conditions referred to by Lord Fraser in *Mandala* – a long shared history and a culture distinctly of their own. An act done because a person or a group of people are Aboriginal people is, in the terms of s 18C(1)(b), done because of the race or ethnic origin of the person or group.

315 The word "colour" is a word of many applications but it is here to be construed by reference to the words that surround it in s 18C(1)(b). The use of colour as a characterisation is no doubt a response to historical systems of identification of different peoples even though those systems may now be regarded as lacking justification. As De Plevitz and Croft record in their article "Aboriginality Under the Microscope: The Biological Descent Test in Australian Law" (2003) 3(1) QUT Law and Justice Journal 1-17, the origins of speciation are based on physical similarities. The discovery in 1781 of an old skull in the Caucasus Mountains of Russia provided the catalyst for the classification of peoples into racial sub-species. As Europe and Asia were separated by the Caucasus Mountains, Europeans were classified as Caucasians. Human kind was then further classified into five sub-species based on place of origin: Caucasian, Asian, African, American and Australasian. As De Plevitz and Croft observe at 7:

> Later taxonomy overcame the classificatory problems produced by migration and intermarriage by classifying races on the basis of skin colour: white, black, yellow, brown and red (the natives of the continents of America). The peoples of Oceania were an enigma because Polynesians were sometimes classified as "white". Generally however Oceanians were "brown" and included Melanesians and Australian Aborigines.
> (Footnotes omitted)

316 The word "colour" is utilised in s 18C(1)(b) to refer to skin-colour when used as an indicator of race including as an indicator of a broad racial sub-species like the Caucasians. Accordingly, an act based on the skin-colour of a person when used to connote race, is an act

done "because of" the "colour" of the person within the meaning of that word in s 18C(1)(b) of the RDA.

S18(1)(b) – Application of Principles to the Facts

317 I have found that a group of people were reasonably likely to have been offended by the Newspaper Articles. The race and ethnic origin of the people within that group is Aboriginal. Aboriginal people are, for reasons already explained, a race or ethnic group for the purposes of s 18(1)(b).

318 The Newspaper Articles are about fair-skinned and mixed descent Aboriginal people who identify as Aboriginal people and they are the subjects of the imputations conveyed. The imputations conveyed by the Newspaper Articles address the race, ethnicity and colour (as an indicator of race or racial attribute) of those people. The imputations are "plainly calculated to convey a message about" that topic including that the people concerned are not sufficiently of Aboriginal race, colour or ethnicity.

319 I appreciate that sometimes the same words may convey different meanings to different people, even different reasonable readers. It seems to me however that a journalist can be expected to perceive the meaning conveyed by the articles that he or she writes, including the possible meanings which are likely to be conveyed to the reader: *Bonnick v Morris* [2003] 1 AC 300 at 310 (Lord Nicholls of Birkenhead).

320 The race and skin colour of the people whose racial heritage is examined by the Newspaper Articles are essential to the message conveyed. The asserted choice to identify as Aboriginal people is a matter focused upon in each of the articles.

321 Mr Bolt is an experienced journalist. He has high level communication skills. His writing displays a capacity to cleverly craft language to intimate a message. I consider it highly unlikely that in carefully crafting the words utilised by him in the Newspaper Articles, he did not have an understanding of the meaning likely to be conveyed by those words to the ordinary, reasonable reader. I am satisfied that he understood that the Newspaper Articles will have conveyed the imputations which I have found were conveyed to the reasonable ordinary reader. At the very least, I am well satisfied that Mr Bolt understood that at least one meaning conveyed by the Newspaper Articles was that the Aboriginality of the people in

the 'trend' was questionable. I need not consider for current purposes, whether Mr Bolt would have appreciated the imputations conveyed to the group members. That might be a relevant and necessary consideration in other cases.

322 In writing those parts of the Newspaper Articles which conveyed the imputations which I have found were conveyed to the ordinary reader, with the understanding which I attribute to Mr Bolt, I find that Mr Bolt plainly intended to convey a message about the Aboriginal identity of the people he wrote about. In those circumstances I have no doubt that one of the reasons which motivated Mr Bolt was his desire to convey a message about the Aboriginality and thus the race, ethnic origin and colour of the people dealt with by the imputations. I am satisfied that Mr Bolt wrote those parts of the Newspaper Articles which convey the imputations, including because of the race, ethnic and origin and colour of the people who are the subject of them.

323 I am firmly of the view that a safer and more reliable source for discerning Mr Bolt's true motivation is to be found in the contents of the Newspaper Articles themselves rather than in the evidence that Mr Bolt gave, including the denials made by him as to his motivation.

324 What Mr Bolt wrote was either written contemporaneously with or proximate to, the formation of Mr Bolt's motivation. Not surprisingly, given the lapse of time, Mr Bolt had some difficulty recalling his thinking processes at the time of writing and at times during his evidence frankly admitted that he was "reconstructing". Additionally, having observed Mr Bolt, I formed the view that he was prone to after-the-fact rationalisations of his conduct. I note in this respect in particular that Mr Bolt's stated motivation for writing the Articles evolved during his cross-examination. I deal with that matter further at [362] and [444].

325 As Kiefel J said in *Toben* at [63], the inquiry as to motive or reason is not to be limited to the explanation given by the person whose conduct is at issue or that person's genuine understanding as to his or her motivation as "their insight may be limited" and they "might not always be a reliable witness as to their own actions". The inquiry "is as to the *true reason* or *true ground* for the action" (original emphasis). What the person actually said or did may be a more reliable basis for discerning that person's true motivation. In making

those observations Kiefel J followed her approach in *Creek* at [22]-[23]. The approach has been followed by Carr J in *Toben* at [31] and by French J in *Bropho* at [71].

326 Mr Bolt's counsel argued that Mr Bolt wrote about the choices made to identify as Aboriginal and not the race, colour or ethnic origin of the people who had made those choices. Whilst I accept that Mr Bolt was motivated to write about what he perceived to be the identity choices made, I do not accept that race, colour and ethnic origin were not motivating reasons.

327 Mr Bolt was not content with conveying a message that people should not choose a racial identity. The Newspaper Articles sought to convey the message that certain people of a certain racial mix should not identify with a particular race because they lack a sufficiency of colour and other racial attributes to justify the racial choice which they had made. Race, colour and ethnicity were vital elements of the message and therefore a motivating reason for conveying the message, even if the message is to be characterised as ultimately about choice of racial identity. In a provision which requires that only one of the reasons for the act in question was either race, ethnicity or colour, Mr Bolt's contention must fail even if it were accepted that his primary motivation was to write about choice of identity.

328 Mr Bolt's counsel also sought to draw a distinction between a motivating reason and a "step" or "building block" in the motivating reason. The submission is reminiscent of the distinction sometimes sought to be drawn between a reason and a factor in a reason. In relation to a provision which, for current purposes, has similarity to s 18C(1)(b), such a distinction has been rejected: *Barclay v The Board of Bendigo Regional Institute of Technology and Further Education* (2011) 191 FCR 212 at [30] (Gray and Bromberg JJ). I see no basis for drawing the kind of distinction which Mr Bolt contended for in relation to s 18C(1)(b) of the RDA.

329 No evidence was given on behalf of HWT as to its motivation for publishing the Articles. HWT contended and I accept, that it is the publisher of opinion pieces from a variety of people. HWT says that it published the Articles in the ordinary course of its business and that Ms Eatock has failed to show that HWT's publication of the Articles had anything to do with the race, colour or ethnic origin of Aboriginal persons.

330 On that argument, a publisher (who is not the employer of the author) would escape liability irrespective of the content of what has been published, on the basis that the content is somebody else's opinion and the publisher was merely motivated to publish the opinion in the ordinary course of its business. If that were right, the most racially offensive of material could be published and republished without restraint. Such a result would seem to be at odds with the objectives of Part IIA of the RDA.

331 There may well be cases where the motivations of a publisher are entirely free from or independent of those of the author in relation to a particular article. That may be the position where the publisher is a mere passive conduit of information or comment: see *Silberberg v The Builders Collective of Australia* (2007) 164 FCR 475. Where however, a publisher is aware that the author's motivation includes the race, colour, national or ethnic origin of the people the article deals with, then it seems to me that it can be said that the act of publication (as an act in aid of the dissemination of the author's intent) was done because of the racial or other attributes which motivated the author.

332 This is a case in which the motivation of the author to communicate a message about the Aboriginality of the people dealt with by the Newspaper Articles was apparent from the articles that HWT published. The evidence is that HWT was, through its editors and sub-editors, involved in the editorial oversight of the Newspaper Articles. In the absence of evidence to the contrary, I would infer that HWT knew of and understood the contents of the Newspaper Articles and was aware of the imputations conveyed by them to the same extent as I have found for Mr Bolt. I am somewhat reinforced in that view because the headings, sub-headings and pull-out quote (second article) utilised show an editorial understanding of the racial theme in the Newspaper Articles. In aiding the dissemination of the imputations conveyed and thus Mr Bolt's motivation for conveying them, HWT published the Newspaper Articles including because of the race, colour or ethnicity of the Aboriginal people the subject of those imputations.

333 Finally, I should say something about the contention of Mr Bolt and HWT that for conduct to fall within s 18C(1)(a) or (b) it needs to involve a racial slur.

334 In seeking to promote tolerance and protect against intolerance in a multicultural society, the RDA must be taken to include in its objective tolerance for and acceptance of

racial and ethnic diversity. At the core of multiculturalism is the idea that people may identify with and express their racial or ethnic heritage free of pressure not to do so. Racial identification may be public or private. Pressure which serves to negate it will include conduct that causes discomfort, hurt, fear or apprehension in the assertion by a person of his or her racial identity. Such pressure may ultimately cause a person to renounce their racial identity. Conduct with negating consequences such as those that I have described, is conduct inimical to the values which the RDA seeks to honour.

335 People should be free to fully identify with their race without fear of public disdain or loss of esteem for so identifying. 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 racial tolerance than a slur directed at the real or imagined practices or traits of those people.

DOES THE FREEDOM OF EXPRESSION EXEMPTION APPLY?

Section 18D – Legal Principles

Burden of Proof

336 There is contest between the parties as to who bears the burden of proof in relation to the exemption provided for by s 18D.

337 In *McGlade*, Carr J at [67]-[69] addressed the issue of onus of proof. His Honour referred to *Scully* where Hely J assumed that the onus rested on the respondent: at [127]-[128]. Carr J then referred to *Jones* at [101] where Branson J said: "The onus of proof with respect to an exemption provided by s 18D rested on the respondent…". Carr J continued at [69]:

> I respectfully agree with their Honours. In my view, the exemptions provided by s 18D of the Act fall within the following description in *Vines v Djordjevitch* (1955) 91 CLR 512 at 519-520:
>
> > "... it may be the purpose of the enactment to lay down some principle of liability which it means to apply generally and then to provide for some special grounds of excuse, justification or exculpation depending upon new or additional facts. In the same way where conditions of general application giving rise to a right are laid down, additional facts of a special nature may be made a ground for defeating or excluding the right. For such a purpose the use of a proviso is natural. But in whatever form the enactment is cast, if it expresses an exculpation, justification, excuse, ground of defeasance or

> exclusion which assumes the existence of the general or primary grounds from which the liability or right arises but denies the right or liability in a particular case by reason of additional or special facts, then it is evident that such an enactment supplies considerations of substance for placing the burden of proof on the party seeking to rely upon the additional or special matter."
> (Footnotes omitted.)

338 In *Toben* at [41], Carr J recounted the approach that he had taken to the question of onus in *McGlade* and determined the s 18D issues raised by the appeal on the basis that the onus rested with the respondent. Kiefel J at [78] expressed her general agreement with the reasons for judgment of Carr J. At [159]-[161], Allsop J also agreed with Carr J expressing his specific agreement with the reasons of Carr J dealing with the failure of the evidence to establish that the publication in question was done reasonably and in good faith. In those circumstances, it seems to me that I am bound by the decision of the Full Court in *Toben* to impose the onus of proof under s 18D upon the respondents. Further, in *Bropho* both Lee J at [141] and Carr J at [172] acknowledged that the respondent in that case bore the onus of proof in relation to s 18D. However, the issue of onus does not appear to have been contested in that case and only French J referred to it other than in passing. His Honour was of the view that the question of the burden of proof should not be regarded as settled: at [75]. His Honour did not express a concluded view on that issue but the central point that French J seems to me to have been driving at has not so much to do with whether a respondent has the burden of proof in relation to primary facts relevant to the considerations required by s 18D, but that the process of making assessments of reasonableness and good faith which are required by s 18D "is not so readily compatible with the notion of the burden of proof": at [77].

339 Mr Bolt and HWT rely on the reasons of French J for the proposition that s 18D does not impose an evidentiary burden on them. As I have indicated, I regard myself as bound by the Full Court decision in *Toben*. In any event, all of the judges who have expressed a concluded view on this issue favour the imposition of the burden of proof on the respondent. I should follow those earlier decisions unless I was of the view that they were plainly wrong: *BHP Billiton v NCC* (2007) 162 FCR 234 at [88]-[89] (Greenwood J, with whom Sundberg J agreed). I am not of that view, as I regard s 18D as falling within the description in *Vines v Djordjevitch* (1955) 91 CLR 512 at 519-520. I am reinforced in that view by the Explanatory Memorandum which at [11] specifically deals with the question of onus and supports what I

regard was Parliament's intention that the onus "rests on the respondent to show, on the balance of probabilities, that his or her action falls within one of the exemptions in s 18D".

Reasonably and in good faith

340 Section 18D of the RDA provides that s 18C does not render unlawful anything said or done "reasonably and in good faith", if done in furtherance of one or other of the pursuits identified in paragraphs (a)-(c) of s 18D.

341 The meaning of the phrase "reasonably and in good faith" is at issue. Ms Eatock contends that the word "reasonably" imports the requirements identified by French J in *Bropho* at [79]-[82]. Those requirements may be summarised as follows, noting however that French J at [82] specifically stated that he did not intend to set out an exhaustive account of the concept of reasonableness:

- A thing done "reasonably" must bear a rational relationship to that activity and is not disproportionate to what is necessary to carry it out;
- "Reasonably" imports an objective judgment;
- It allows the possibility that there may be more than one way of doing things "reasonably";
- The judgment required involves assessing whether the thing was done "reasonably" not whether it could have been done more reasonably;
- That judgment "will necessarily be informed by the normative elements of ss 18C and 18D and a recognition of the two competing values that are protected by those sections";
- Considerations which may have a bearing on whether an act is done reasonably include time, place, audience, and whether or not gratuitously insulting or offensive matters, irrelevant to the question of public interest under discussion, have been included.

342 Mr Bolt and HWT contended that the word "reasonably" is much more confined than the analysis of French J suggests. They contended that "reasonably" requires only that the impugned act be "rationally related to the matter of public interest being pursued". That approach adopts the rationality element of French J's analysis but eschews the element of

proportionality and the need for the assessment to be informed by the "normative elements" to which French J referred, that is, the purpose of Part IIA including the "recognition of the two competing values that are protected by those sections". The approach is also at odds with the view of Lee J in *Bropho* at [136] that the reasonableness of the act is to be judged against the possible degree of harm it may cause to the ills which the RDA seeks to guard against.

343 As to "good faith", Ms Eatock again primarily relied upon the analysis of French J in *Bropho* and contends that both Lee and Carr JJ took similar approaches. The reasons for judgment of French J at [83]-[102] identified the following matters as relevant to a conception which French J considered had both subjective and objective elements:

- As Part IIA condemns racial vilification of the defined kind but protects freedom of speech and expression, the good faith exercise of that freedom "will, so far as practicable, seek to be faithful to the norms implicit in its protection and to the negative obligations implied by s 18C. It will honestly and conscientiously endeavour to have regard to and minimise the harm it will, by definition, inflict": at [95];
- Good faith is therefore to be tested both subjectively and objectively: at [96];
- "[G]ood faith requires more than subjective honesty and legitimate purposes. It requires, under the aegis of fidelity or loyalty to the relevant principles in the Act, a conscientious approach to the task of honouring the values asserted by the Act. This may be assessed objectively": at [96];
- A person exercising a protected freedom of speech or expression under s 18D "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": at [102];
- A person who exercises the freedom "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": at [102].

344 Mr Bolt and HWT contended that "good faith" involved no objective consideration but only an assessment of whether the impugned act was honestly and conscientiously

pursued in the course of dealing with the matter of public interest. Mr Bolt and HWT relied on *Catch the Fire* at [92]-[93]. They further contended that French J's view that the words "reasonably and in good faith" required objective fidelity to the norms in s 18C of the RDA was not part of the ratio of *Bropho* and ought not be followed. Whilst their submissions observed "echoes" of the approach of French J in the judgment of Lee J, those echoes were dismissed on the basis that Lee J was in dissent.

345 Although Lee J was in dissent in the result, Lee J was not in dissent on the point of principle here being addressed. His Honour's approach required that each of the words "reasonably" and "good faith" be interpreted as requiring the minimisation of the harm that s 18C seeks to avoid: see at [136]-[141] and [144]. At [144], Lee J said:

> In short the risk of harm from the act of publication must be shown to have been balanced by other considerations. The words "in good faith" as used in s 18 D import a requirement that the person doing the act exercise prudence, caution and diligence, which, in the context of the Act would mean due care to avoid or minimise consequences identified by s 18C. (see: *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290 per Gummow, Hill, Drummond JJ at 298).

346 That establishing "good faith" required that both a subjective and objective assessment be satisfied was emphasised by Lee J at [141]:

> The question whether publication was an act done in good faith must be assessed, in part, by having regard to the subjective purpose of the publisher but overall it is an objective determination as to whether the act may be said to have been done in good faith, having due regard to the degree of harm likely to be caused and to the extent to which the act may be destructive of the object of the Act. (See: *Cannane v J Cannane Pty Ltd (In liq)* (1998) 192 CLR 557 per Kirby J at 596-597.)

347 In my view, Lee J's approach is consistent with that taken by French J. The reasoning of Carr J in *Bropho* is not inconsistent with that taken by French and Lee JJ. Carr J considered the words "reasonably and in good faith" as a composite expression noting that both objective and subjective considerations were relevant. At least French and Lee JJ interpreted "in good faith" as including an objective satisfaction of whether the freedom of expression in question had been exercised in a manner designed to minimise offence, insult, humiliation or intimidation.

348 That requirement also finds support in the judgment of the Court in *Toben* where Carr J (with whom Kiefel J agreed at [78] and Allsop J agreed at [159]-[161]) said at [44]:

> …a reasonable person acting in good faith would have made every effort to express the challenge and his views with as much restraint as was consistent with the communication of those views.

349 The minimisation of harm by reference to the objectives of s 18C is, I think, imported into the words "reasonably and in good faith" because non-compliance with that requirement (in the pursuit of an activity described by paragraphs (a), (b) or (c) of s 18D) is a basis for the impairment of the rights or freedoms protected by s 18C. Where rights and freedoms are in conflict, the impairment of one right by the exercise of another is often subjected to a test of proportionality. Proportionality, in the sense that the measures adopted are rationally connected to the objective of the competing right, and that the means used to impair the protected right is no more than is necessary to achieve the objective of the competing right. I can see no reason why a requirement of proportionality is not apt in the context of the balancing exercise involved in s 18D.

350 Mr Bolt and HWT contended that the approach of French J in construing a requirement of proportionality, had the effect of prioritising the norms sought to be protected by s 18C over those protected by s 18D, so that s 18D was effectively subjugated to the norms of s 18C. Mr Bolt and HWT are right to say that Parliament intended a balancing of the competing rights and not the subjugation of one over the other. However, Mr Bolt is wrong to suggest that a balance is not achieved by the construction which French J (and Lee J) adopted. On that construction, neither of the competing rights is supreme or unbending. Each must to some extent give way to the other. The right to be free of offence gives way to the reasonable and good faith exercise of freedom of expression. The right to freedom of expression is limited to its reasonable and good faith exercise having regard to the right of others to be free of offence. The requirement of proportionality does not involve the subjugation of one right over the other and is consistent with achieving a balanced compromise between the two.

Section 18D – Application of Principles to the Facts

Section 18D(c)(ii)

351 Section 18D assumes the existence of offensive conduct. That is, conduct which satisfies the elements of s 18C and that would be unlawful if not exempted by s 18D. Section 18D asks whether the offensive conduct (conduct that meets the requirements of s 18C) was

done reasonably and in good faith in the pursuit of the activities identified in s 18D(a), (b) or (c).

352 There are two activities identified in s 18D(c). They are the making or publishing of a fair and accurate report and the making or publishing of a fair comment. The report or comment must concern an event or matter of public interest. Mr Bolt and HWT rely upon s 18D(c)(ii). The question raised here is whether the conduct which I have found meets the requirements for a contravention of s 18C ("the s 18C conduct") was done reasonably and in good faith in the pursuit of the making of a fair comment.

353 At common law, fair comment exists as a defence to a defamatory comment in order to facilitate freedom of expression on matters of public interest. The fundamental importance of facilitating freedom of expression has already been explained. It is of importance that on social and political issues in particular, people should be able to express their opinions. Those opinions will at times be ill-considered. They may be obstinate, exaggerated or simply wrong. But that, of itself, provides no valid basis for the law to curtail the expression of opinion. The fair comment defence at common law extends to protect opinions, even those that reasonable people would consider to be abhorrent. As Gleeson CJ said in *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245 at [3] "fair" does not mean objectively reasonable.

354 Like all good things, freedom of expression has its limits and that is also recognised by the common law defence of fair comment. Those limits are there to ensure that freedom of expression is not abused. One of the safeguards against such abuse is that the comment must be based on facts which are true or protected by privilege. That means that if the facts upon which the comment purports to be founded are not proved to be true or published on a privileged occasion, the defence of fair comment is not available: *Cheng v Tse Wai Chun* (2000) 3 HKCFAR 339 at 347 (Lord Nicholls of Birkenhead NPJ with whom the rest of the Court agreed); *The Herald & Weekly Times Limited v Popovic* (2003) 9 VR 1 [259]-[264] (Gillard AJA with whom Winneke ACJ and Warren AJA agreed).

355 That limitation is important in this case for reasons I will come to. But there are two further limitations which are also fundamental and which are also made clear in the authorities to which I have just referred. The fair comment defence only applies to a

comment as distinct from a statement of fact. The basis for distinguishing between a comment and a statement of fact was discussed by Gummow, Hayne and Heydon JJ in *Channel Seven Adelaide* in a passage I will shortly set out. The comment must be recognisable as comment and the facts upon which the comment is based must be expressly stated, referred to or notorious. The facts upon which the comment is based must be, at least in general terms, explicitly or implicitly stated. The purpose of that requirement is so that the reader or hearer is put in a position to judge for him or herself whether the comment is well founded: see *Tse Wai Chun* at 347; *Channel Seven Adelaide* at [52] (Gummow, Hayne and Heydon JJ). As Lord Nicholls said in *Tse Wai Chun* at 352:

> These safeguards ensure that defamatory comments can be seen for what they are, namely, comments as distinct from statements of fact. They also ensure that those reading the comments have the material enabling them to make up their own minds on whether they agree or disagree.

356 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.

357 Honesty requires that the maker of the comment genuinely believe the comment made. If the maker knew the comment was untrue, or was recklessly indifferent to the truth or falsity of the comment, the maker would be acting dishonestly: see *Tse Wai Chun* at 352. Section 18D(c)(ii) deals with that aspect expressly by requiring that the comment be "an expression of a genuine belief held" by the maker of the comment.

358 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. That view is supported by the observations made by Kiefel J in *Creek* at [32]. Although there are examples of the statutory use of the phrase "fair comment" where not all of the common law requirements have been found to be imported (see *Pervan v North Queensland Newspaper Co. Limited* (1993) 178 CLR 309), I accept that s 18D(c)(ii) is not such an occasion.

359 One of the difficulties with the s 18D case advanced by Mr Bolt and HWT is that they put their submissions in the absence of any recognition that the Court may find s 18C to have

been satisfied by reference to one or more of the imputations upon which Ms Eatock relied. Somewhat like what might be done in a defence to a defamation case, Mr Bolt and HWT identified a comment or imputations said to be conveyed by the Articles. They then sought to justify that imputation by reference to s 18D. In doing that, they ran the same risk that a respondent runs in a defamation case, that the alternative imputations relied upon and sought to be justified will either not be accepted as having been conveyed by the publication or, alternatively, be regarded as separate and distinct from the defamatory imputations upon which the applicant relies.

360 Having taken that course, Mr Bolt and HWT made no specific submissions as to why, if the Court was to make a finding of s 18C conduct on the basis of the imputations upon which Ms Eatock relied (or similar imputations), that conduct ought nevertheless be excused pursuant to s 18D. Instead, their submissions sought to defend the Articles (all four) as a whole on the basis that the imputations relied upon by Ms Eatock were not conveyed and that the only imputations conveyed by the Articles were that:

> (a) racism is abhorrent and a gravely divisive social force, which is perpetuated by emphasising racial differences;
>
> (b) in modern Australia, there is a discernible trend whereby persons of mixed genealogy, where that genealogy includes Aboriginality, identify as Aboriginal persons, where they could identify with another race or races, or with no race at all;
>
> (c) the Applicant and the other individuals named in the Publications illustrate that trend, in that they are each persons who identify as Aboriginal persons, even though they could identify with another race or races, or with no race at all; and
>
> (d) the trend is an undesirable social phenomenon because it emphasises racial differences, rather than common humanity.

361 Those imputations ("Mr Bolt's imputations") were then sought to be justified by reference to s 18D(b) and (c)(ii). In relation to s 18D(c)(ii), it was contended that Mr Bolt's imputations were a fair comment made on a matter of public interest. Consistently with their pleadings, Mr Bolt and HWT relied on the matter of public interest as being:

> whether fair skinned-persons who, by reason of their genealogy are Aboriginal persons, tend to choose to identify as Aboriginal persons even if they could choose to identify as a member of another race or other races, or with no race at all; and if so whether that tendency is socially undesirable because of the emphasis it places on racial differences rather than common humanity.

362 Reliance was also placed on three further matters of public interest, which had not been pleaded but which were relied upon by Mr Bolt (for the first time) when cross-examined about the Articles, as follows:

> (a) the people he [Mr Bolt] identified all had a public profile and were legitimate subjects for public scrutiny;
>
> (b) some of the jobs, prizes and awards he referred to in the Publications were publicly or partly publicly funded; and
>
> (c) there was a legitimate public debate to be had about whether there were more deserving recipients for some of the prizes and awards referred to in the Publications.

A further broader attempt to define the relevant matter of public interest was also relied upon in the final submissions made. It was described as "identity politics and the search for identity, in the context of prominent members of the community".

363 Mr Bolt's imputations were said to be an expression of genuine belief held by Mr Bolt. Mr Bolt gave evidence of that belief which was not contested.

364 Mr Bolt and HWT contended that the Articles contained no material errors of fact. A number of errors asserted by Ms Eatock were denied and others were dismissed as not relevant. That was said to be so because they were not material to the matters of public interest that the Articles were ventilating or capable of rationally affecting the substance of Mr Bolt's imputations.

365 It was then contended in relation to reasonableness, that each part of the Articles bore a rational relationship and was not extraneous to the matters of public interest relied upon and as to good faith, that Mr Bolt had conscientiously and honestly set out to advance the matters of public interest to which the Articles were directed.

366 Ms Eatock neither relied upon nor sought to impugn Mr Bolt's imputations. Ms Eatock contended that the Articles included other imputations extraneous to the imputation or the matter of public interest upon which Mr Bolt and HWT relied. My findings about the imputations which were conveyed by the Newspaper Articles are largely consistent with the imputations for which Ms Eatock contended. The imputations which I have found were conveyed by the Newspaper Articles are separate and distinct from the imputations for which Mr Bolt contended. They carry a decidedly different sting to that in Mr Bolt's imputations,

which carries no suggestion of a lack of legitimacy in the identification as Aboriginal of the people with whom the imputations deal.

367 In essence, the s 18D case put by Mr Bolt and HWT sought to justify behaviour cleansed of the s 18C conduct which I have found occurred. As a result, much of what was put in reliance upon s 18D by Mr Bolt and HWT simply addressed the wrong target.

368 There can be no doubt that the defence of fair comment must address the meanings or imputations found by the Court to be defamatory. As Gummow, Hayne and Heydon JJ said in *Channel Seven Adelaide* at [83]:

> The meaning found is the comment to be scrutinised for its fairness.

369 Their Honours observed at [85], that it is the meaning of defamatory words which is relevant to the fair comment defence in several ways including:

> in determining whether the comment is fair; in determining the issue of malice, to which an absence of honest belief in the proposition stated is relevant; in determining whether the plaintiff's pleaded meaning was conveyed as a statement of fact or a statement of opinion; in determining whether the plaintiff's pleaded meaning and the defendant's comment relate to the same allegation; in determining whether the comment is based on facts which are true or protected by privilege, a question which cannot be answered without assessing what the comment means; and in determining whether the comment relates to a matter of public interest, which also depends on its meaning.

370 I need to evaluate whether the s 18C conduct which I have found occurred, is to be exempted from unlawfulness by s 18D and not whether Mr Bolt's imputations are to be excused.

371 Ms Eatock contended that the conduct she complained of failed to meet the requirements of s 18D(c)(ii). She said that the requirements for a fair comment were not satisfied. That was said to be so because the conduct was not based on true facts which were expressly stated, referred to or notorious, or sufficient to put the reader in a position to judge for him or herself how far the comment was well-founded. Ms Eatock relied on many statements in the Newspaper Articles said to be factually wrong or distorted to deny the fair comment defence and at the same time to deny that reasonableness and good faith were established. No issue was raised as to the expression being Mr Bolt's "genuine belief" as required by s 18D(c)(ii).

372 Central to the sting of the conduct which I have found was reasonably likely to offend, were the imputations conveyed that the people in the 'trend' had chosen to identify as Aboriginal, that their choices were not genuine and that they were driven by ulterior motives including career and political aspirations. I have earlier set out the words utilised in the Newspaper Articles which stated or implied a deliberate or conscious choice to identify (see [29] and [41]). The assertion that a choice was made to identify as Aboriginal was made in relation to most of the individuals identified in those articles. An issue arises as to whether those statements are statements of fact or are to be characterised as comments.

373 The imputation which conveys the choice said to have been made to identify as Aboriginal persons must be regarded as a comment. The imputation is about the group of people in the 'trend'. The reader would assume that Mr Bolt is not familiar with the circumstances of all the people in the 'trend' and thus not stating as a fact, in relation to each such person, that the person made a conscious choice to identify as an Aboriginal person. However, the Newspaper Articles set out and examine a range of facts about particular individuals. The reader will have seen that Mr Bolt collected information about those individuals and because they are given as examples of the 'trend', the reader will have understood that Mr Bolt's comments about the people in the 'trend' is an extrapolation made from the facts stated about the identified individuals. Those facts include the statements, usually expressly but sometimes impliedly made, that various individuals chose to identify as Aboriginal. It is those statements about the choices made by the individuals which will be understood by the reader as the basis for the comment conveyed in the imputation about the choice made by the people in the 'trend'. If presented as facts, those statements made of the individuals must be proven to be true for the imputation to be regarded as fair comment.

374 Mr Bolt and HWT contended that those statements were themselves comment and not presented as facts. It was said that the statements were deductions from facts, but the other facts from which those deductions were said to be made were not identified and are not apparent.

375 In *Channel Seven Adelaide* at [35]-[36] Gummow, Hayne and Heydon JJ discussed the law about distinguishing a comment from a fact:

> [35] *Distinguishing fact and comment*. In *Brent Walker Group Plc v Time Out Ltd* Bingham LJ said:

> "The law is not primarily concerned to provide redress for those who are the subject of disparaging expressions of opinion, and freedom of opinion is (subject to necessary restrictions) a basic democratic right. It is, however, plain that certain statements which might on their face appear to be expressions of opinion (as where, for example, a person is described as untrustworthy, unprincipled, lascivious or cruel) contain within themselves defamatory suggestions of a factual nature. Thus the law has developed the rule ... that comment may only be defended as fair if it is comment on *facts* (meaning true facts) *stated or sufficiently indicated*." (Emphasis added)

In *Goldsbrough v John Fairfax & Sons Ltd*, Jordan CJ said that for the defence of fair comment to succeed, "it is essential that the whole of the words in respect of which it is relied on should be comment". He continued:

> "It must be indicated with reasonable clearness by the words themselves, taking them in the context and the circumstances in which they were published, that they purport to be comment and not statements of fact; because statements of fact, however fair, are not protected by this defence. In other words, it must appear that they are opinions stated by the writer or speaker about facts, *which are at the same time presented to, or are in fact present* to, the minds of the readers or listeners, as things distinct from the opinions, so that it can be seen whether the opinions are such that they can fairly be formed upon the facts." (Emphasis added)

A "discussion or comment" is to be distinguished from "the statement of a fact". "It is not the mere form of words used that determines whether it is comment or not; a most explicit allegation of fact may be treated as comment if it would be understood by the readers or hearers, not as an independent imputation, but as an inference from other facts stated." As the passages quoted from Bingham LJ and Jordan CJ above illustrate, the distinction between fact and comment is commonly expressed as equivalent to that between fact and opinion. Cussen J described the primary meaning of "comment" as "something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, judgment, remark, observation, etc". It follows that a comment can be made by stating a value judgment, and can also be made by stating a fact if it is a deduction from other facts. Thus, in the words of Field J:

> "[C]omment may sometimes consist in the statement of a fact, and may be held to be comment if the fact so stated appears to be a deduction or conclusion come to by the speaker from other facts *stated or referred to* by him, or *in the common knowledge of the person speaking and those to whom the words are addressed* and from which his conclusion may be reasonably inferred. If a statement in words of a fact stands by itself naked, without reference, either expressed or understood, to other antecedent or surrounding circumstances notorious to the speaker and to those to whom the words are addressed, there would be little, if any, room for the inference that it was understood otherwise than as a bare statement of fact". (Emphasis added)

[36] The question of construction or characterisation turns on whether the ordinary reasonable "recipient of a communication would understand that a statement of fact was being made, or that an opinion was being offered" not "an exceptionally subtle" recipient, or one bringing to the task of "interpretation a subtlety and perspicacity well beyond that reasonably to be expected of the ordinary reader whom the defendant was obviously aiming at".

(Original Emphasis. Footnotes omitted.)

376 As the above extract shows, a comment must "be indicated with reasonable clearness by the words themselves". Where a comment is not clearly identified, there is a tendency for courts to hold the statement to be a fact: *Gatley on Libel and Slander* 11th ed paragraph 12.13, citing *Australian Ocean Line Pty Ltd v Western Australia Newspapers* (1985) 58 ALR 549 at 594 (Toohey J). To be a comment, the statement must appear as an opinion, deduction or conclusion from facts "which are at the same time presented to, or are in fact present to the minds of the readers". Gummow, Hayne and Heydon JJ in *Channel Seven Adelaide* placed particular emphasis on that requirement.

377 The statements in question appear in an opinion piece, but they appear to be presented, amongst other obvious facts (such as the ancestry of the person concerned), as facts about a particular individual. The statements are put in definitive terms and not in evaluative terms – "she also chose" (1A-4); "she too, has chosen" (1A-7); "she chose to be" (1A-15); "started to identify as Aboriginal when she was 19" (1A-27); "also identified herself" (2A-25). The statements are not put as a deduction from other facts which are presented or referred to in the articles. Whilst questions of this kind are sometimes difficult, in my view, the reader will have regarded the statements as assertions of fact and not comment.

378 The facts in question have not been proven to be true. To the contrary, in relation to most of the individuals concerned, the facts asserted in the Newspaper Articles that the people dealt with chose to identify as Aboriginal have been substantially proven to be untrue. Nine of the eighteen individuals named in the Newspaper Articles gave evidence. Each of them had been raised to identify as Aboriginal and had identified as such since childhood. None of them made a conscious or deliberate choice to identify as Aboriginal.

379 Secondly, the imputations which I have found were conveyed, convey not only the making of a choice but that the choice was made for the purpose of facilitating career opportunities and political activism. Again, the imputation is made of the people in the 'trend' and it is to be understood as a comment because it is an extrapolation from observations made in relation to the individuals dealt with. Those observations about the individuals are also presented as comments. They would be understood as Mr Bolt commenting as to what motivated the choice made by the individuals. The pattern involves Mr Bolt pointing to various jobs or awards the individuals have obtained which are either

said or suggested to be reserved or intended for Aboriginal recipients. The jobs or awards obtained are the implied motivations for the individuals choosing to identify as Aboriginal. Additionally, political activism is the suggested motive for Ms Eatock and Ms Cole.

380 Some of the facts relied upon as the basis of the comments made about motivation have been proven to be untrue.

381 In the first article (1A-21), Mr Bolt wrote that Ms Heiss had won "plum jobs reserved for Aborigines" at each of three named institutions or enterprises. Each of those assertions was erroneous. Mr Bolt accepted that they were wrong because they were exaggerated. One of the positions that Mr Bolt claimed Ms Heiss had won as a "plum job" was a voluntary unpaid position. The other two positions were not reserved for Aboriginal people but were positions for which Aboriginal people were encouraged to apply.

382 Mr Bolt wrote that Ms Eatock "thrived as an Aboriginal bureaucrat, activist and academic" (1A-28). The comment is unsupported by any factual basis and is erroneous. Ms Eatock has had only six to six and a half years of employment since 1977. In the case of Ms Eatock, Mr Bolt also suggested in the first article that she identified as an Aboriginal for political motives after attending a political rally (1A-27). That statement is untrue. Ms Eatock recognised herself to be an Aboriginal person from when she was eight years old whilst still at school and did not do so for political reasons.

383 Further, Mr Bolt intimated that Ms Cole chose to identify as an Aboriginal motivated by access to "political and career clout" (1A-4). This is a comment. The facts upon which the comment is based are not stated, referred to or notorious.

384 The deficiencies to which I have referred to so far, are material and constitute a significant distortion of the facts upon which a central part of the offensive imputations were based. On the basis of those deficiencies, I am satisfied that the offensive imputation was not a fair comment and that s 18D(c)(ii) is not available to exempt the offensive conduct from being rendered unlawful.

385 That conclusion is also reinforced by some of the other deficiencies relied upon by Ms Eatock, which I shall identify shortly. Ms Eatock relies upon the deficiencies I have dealt

with already and other deficiencies to contend that, even if the conduct was fair comment, it was not done reasonably and in good faith. Ms Eatock's contentions about unreasonableness and lack of good faith are based on two aspects of Mr Bolt's conduct. Firstly, what she says Mr Bolt did, that is, what he wrote. Secondly, Ms Eatock relies upon what she says Mr Bolt should have done but failed to do. In both respects, Ms Eatock contends that the conduct was not reasonable nor in good faith.

386 The deficiencies I have relied upon in arriving at the conclusion that the s 18C conduct was not fair comment are about deficiencies in truth. The lack of truth in conduct which contravenes s 18C, seems to me to have an obvious bearing on whether the conduct should be exempted from unlawfulness by s 18D.

387 The incursion made into freedom of expression by defamation law is largely based upon a refusal to excuse an absence of truth or falsity in a defamatory statement. Even where a lack of complete truth may be excused by the law because of a higher than usual value placed on the freedom of expression involved, the law requires that the publisher of defamatory statements demonstrate that reasonable measures were taken to adhere to the value of truth and the protection of reputation. Beyond honesty of purpose, those measures include the publisher having taken reasonable steps to verify the accuracy of statements made and where practicable and necessary, seek responses from those whose reputations are at stake: *Lange* at 574 (qualified privilege for governmental and political communications); and see *Reynolds v Times Newspapers Limited* [2001] 2 AC 127 at 205 (Lord Nicholls of Birkenhead) (qualified privilege for political information); *Morgan v John Fairfax and Sons Limited (No 2)* (1991) 23 NSWLR 374 at 388 (Hunt A-JA) (statutory qualified privilege).

388 In the context of statutory qualified privilege, the Privy Council said in *Austin v Mirror Newspapers Ltd* (1985) 3 NSWLR 354 at 364-365:

> There will of course be cases in which despite all reasonable care the journalist gets the facts wrong, but a member of the public is at least entitled to expect that a journalist will take reasonable care to get his facts right before he launches an attack upon him in a daily newspaper. If on inquiry it is found that the facts are not true and that reasonable care has not been taken to establish them courts should be very slow to hold that the newspaper is protected by statutory qualified privilege. The public deserve to be protected against irresponsible journalism. The defence of comment provides such protection by insisting upon the newspaper establishing the substantial truth of the facts upon which it comments.

389 The majority of the Supreme Court of Canada said in *Church of Scientology* at [137] in evaluating the impact of defamation law on freedom of expression:

> Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish. The law of defamation provides for the defences of fair comment and of qualified privilege in appropriate cases. Those who publish statements should assume a reasonable level of responsibility.

In a passage relied on by Callinan J in *Lenah Game Meats* at [341], the majority in *Church of Scientology* said (at [106]) that defamatory statements were very tenuously related to the core values which underlie freedom of expression.

390 The protection of reputation through defamation law and the protection sought to be provided by s 18C are both infused with the need to protect social standing and public esteem. That feature of s 18C was emphasised by Lee J in *Bropho* at [138]. Just as an adherence to the value of truth protects reputation, so too will it serve to protect the values which s 18C seeks to foster. The protection of reputation and the protection of people from offensive behaviour based on race are both conducive to the public good: *Scully* at [239] (Hely J). Untruths are at the heart of racial prejudice and intolerance. When not misused, truth will not generally cause the kind of offence s 18C is concerned with. Untruths generally will and regularly do. The more a comment made on the basis of asserted facts is based on true facts rather than untruths, the more likely it is that any offence, insult, humiliation or intimidation arising from the comment will be minimised. A conscientious approach to freedom of expression is required by s 18D. Expressions made on the basis of untrue or distorted facts or without due care to avoid distortions of the truth are not likely to involve a conscientious approach to the task of honouring the values asserted by the RDA.

391 There is a further element to the conduct which I consider to be both significant to the sting of the imputations conveyed and also significant in terms of Mr Bolt's conduct. The asserted lack of genuineness in the Aboriginal identification of the people in the 'trend' is clearly an imputation which is conveyed as a comment. The comment is made by reference to the examples given. There is, as I have earlier found, an impression conveyed of a deficiency of Aboriginality which is largely made by reference to a biological examination based upon the skin colour and biological descent of each of the individuals examined.

392 Nine of those individuals gave evidence. To some extent, the biological examination was shown to be factually erroneous. However, the absence of any significant cultural reference in the Newspaper Articles to the Aboriginal cultural upbringing of the individuals dealt with, leaves an erroneous impression. As I have found, each of the nine individuals 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 individuals exemplified in those articles identify as Aboriginal.

393 Ms Eatock argued that relevant facts upon which a comment is based need to be included in a publication and that here, reference to the Aboriginal cultural upbringing of the individuals identified in the Newspaper Articles was not given. There is support for the proposition that an omission of relevant facts upon which a comment is based negates the fair comment defence. In *Peterson v Advertiser Newspapers* (1995) 64 SASR 152, Olsson J at 193 said:

> To establish the defence of fair comment the requirement is not merely that the facts stated are true. Rather, it is that they be *truly* stated: *Sutherland v Stopes* [1925] AC 47 at 62-3, *Thompson v Truth & Sportsman Ltd (No 4)* (1932) 34 SR (NSW) 21 at 25.
>
> The omission of a series of relevant facts, having the result that the factual scenario represented in a publication is quite unbalanced and potentially misleading to the average reader, results in a situation that the facts have not, relevantly, truly been stated.
> [Original emphasis]

See further Mullighan J at 201; and *Popovic* at [272] (Gillard AJA, with whom Winneke ACJ and Warren AJA agreed).

394 Mr Bolt and HWT argued that it is legitimate to frame a discussion about race by reference to biological descent alone. On an objective view, based on what I have found to be the conventional understanding of Aboriginal identity, cultural factors are clearly relevant to a discussion about Aboriginal identity. However, I accept the contention of Mr Bolt and HWT that an opinion about race may be expressed by reference to biological descent alone. The person expressing such a view may subjectively regard cultural references to be irrelevant. That subjective view should not deny the opinion the cover of a fair comment

defence, so long as an average reader can see that the opinion is based on the asserted irrelevance of cultural reference and thus judge the opinion for what it is.

395 However, the actual circumstances of this case are somewhat different. Mr Bolt and HWT contended that a cultural reference was given by the Newspaper Articles. Mr Bolt's evidence was that he accepted that cultural upbringing was both a part of the legal definition of "Aboriginal" and also a part of the common understanding of race. Mr Bolt did not consider cultural reference to be irrelevant to a discussion about race. Mr Bolt relied upon statements in the Newspaper Articles such as "raised by her English-Jewish mother" as demonstrating his inclusion of a cultural reference.

396 When the Newspaper Articles are analysed, what is apparent is that the individuals who are examined are dealt with in one of two ways. The first is where no cultural reference is made at all and the individual's identification is examined purely by biological considerations, either through ancestry, skin colour or a combination of the two. Alternatively, both a biological and a cultural reference (usually oblique) are made in relation to the individual, but in every case the cultural reference suggests a non-Aboriginal cultural upbringing. Thus, in the first article:

- "raised by her English-Jewish mother" (Cole) (1A-2);
- "Culturally, she's more European" (Sax) (1A-6);
- "Yet her mother, who raised her in industrial Wollongong, is in fact boringly English" (Winch) (1A-11);
- "she was raised in Sydney and educated at St Claire's Catholic College" (Heiss) (1A-19);
- "from the age of 10 was a boarder at a Victorian Catholic school" (Dodson) (1A-32);
- "having been raised by her white mother" (Behrendt) (online version of 1A);
- "raised by her white mother" (Behrendt) (2A-20); and
- "raised by her English mother" (Cole) (2A-24).

397 Thus, the reader is presented with some cultural references. The reader is not likely to assume that cultural reference was regarded by Mr Bolt as irrelevant to his opinion about

racial identification. To the contrary, the reader is presented with an opinion which appears to be based, at least in part, upon cultural references as an indicator of race. The reader would presume that as a journalist, Mr Bolt would have undertaken research and presented relevant facts. The fact that some research about cultural background has been undertaken is evident. In that context, the reader would understand the assertion conveyed that the individuals are not sufficiently Aboriginal to be genuinely self-identifying as Aboriginal, to be based upon Mr Bolt's research of both biological and cultural considerations.

398 In part, the cultural references where given, were erroneous. But more fundamentally, the Aboriginal cultural upbringing which was available to be presented at least in relation to nine of the eighteen individuals dealt with by the Newspaper Articles, was not included. Those facts were relevant, in the context of a comment in part based upon cultural considerations. Their omission meant that the facts were not truly stated. For that reason also, the offensive imputation was not a fair comment.

399 The omission of those facts is also relevant to the issue of reasonableness and good faith. The omission occurred in circumstances where the facts were likely to be either publicly available or readily obtainable, including by Mr Bolt contacting the individuals concerned. Mr Bolt presented evidence of having undertaken some online research about the individuals, but it was not evidence upon which I could be satisfied that a diligent attempt had been made to make reasonable inquiries.

400 Dr Atkinson was raised in an Aboriginal fringe camp on the ancestral lands of his Aboriginal ancestors. Mr Clark was raised as Aboriginal in a well-known Aboriginal community in Victoria. Both those witnesses and others, gave evidence that their life story and identification was available on the internet. All of Ms Eatock and her witnesses gave evidence that Mr Bolt had failed to contact them to ascertain their circumstances and that if contacted they would have told Mr Bolt of their circumstances as described in their evidence. In Mr Clark's case, he was also well known to Mr Bolt. Mr Bolt had written about him for over a decade.

401 There is other evidence which also suggests to me that Mr Bolt was not particularly interested in including reference to the Aboriginal cultural upbringing of the individuals he wrote about.

402 Mr Bolt wrote that Ms Cole was raised by her "English-Jewish" or "English" mother (1A-2; 2A-24). That statement is factually inaccurate because Ms Cole's Aboriginal grandmother also raised Ms Cole and was highly influential in Ms Cole's identification as an Aboriginal. He wrote that Ms Cole "rarely saw her part-Aboriginal father" (1A-3). That statement is factually incorrect. Ms Cole's father was Aboriginal and had been a part of her life until she was six years old. Ms Cole later lived with her father for a year whilst growing up.

403 Mr Bolt's documentary source for the statements he made in the articles about how Ms Cole was raised, expressly referred to the involvement of Ms Cole's Aboriginal grandmother in Ms Cole's upbringing. It quoted Ms Cole attributing to her grandmother the fact that she felt "staunchly proud and strong" about being an Aboriginal person. Mr Bolt disingenuously explained the omission as due to a lack of space.

404 He also relied on that reason for the lack of cultural reference given in relation to Prof Behrendt. The factual assertions made that Prof Behrendt was "raised by her white mother" (2A-20) were also erroneous. Prof Behrendt's Aboriginal father did not separate from her mother until Prof Behrendt was about 15 years old. Her father was always part of her family during her upbringing, even after that separation.

405 In my view, Mr Bolt was intent on arguing a case. He sought to do so persuasively. It would have been highly inconvenient to the case for which Mr Bolt was arguing for him to have set out facts demonstrating that the individuals whom he wrote about had been raised with an Aboriginal identity and enculturated as Aboriginal people. Those facts would have substantially undermined both the assertion that the individuals had made a choice to identify as Aboriginal and that they were not sufficiently Aboriginal to be genuinely so identifying. The way in which the Newspaper Articles emphasised the non-Aboriginal ancestry of each person serves to confirm my view. That view is further confirmed by factual errors made which served to belittle the Aboriginal connection of a number of the individuals dealt with, in circumstances where Mr Bolt failed to provide a satisfactory explanation for the error in question.

406 Mr Bolt said of Wayne and Graham Atkinson that they were "Aboriginal because their Indian great-grandfather married a part-Aboriginal woman" (1A-33). In the second

article Mr Bolt wrote of Graham Atkinson that "his right to call himself Aboriginal rests on little more than the fact that his Indian great-grandfather married a part-Aboriginal woman" (A2-28). The facts given by Mr Bolt and the comment made upon them are grossly incorrect. The Atkinsons' parents are both Aboriginal as are all four of their grandparents and all of their great grandparents other than one who is the Indian great grandfather that Mr Bolt referred to in the article. Mr Bolt did not seek to deny the evidence of Aboriginal ancestry given by the Atkinsons but insisted that their ancestry was accurately conveyed by the statements made and extracted above.

407 The documentary source upon which Mr Bolt relied for his statement that Ms Eatock only started to identify as Aboriginal "when she was 19 after attending a political rally" (1A-27), was in evidence. That source made an incorrect assertion as to when Ms Eatock began "publicly" identifying as Aboriginal. Mr Bolt repeated the error as to age (for which no complaint is made) but left out "publicly". The absence of that word created the false impression that Ms Eatock had not identified as an Aboriginal person before she was 19 years old and only upon attending a political meeting. In his evidence, Mr Bolt was unimpressively dismissive of the significance of that omission.

408 Ms Eatock also relied on the provocative and inflammatory language utilised in the Newspaper Articles and its lack of restraint as demonstrating an absence of reasonableness and good faith. She also relied upon a number of what were described as gratuitous statements in the Newspaper Articles.

409 Whether offensive language makes a valid contribution to free and informed debate is a matter upon which members of the High Court have taken different views. In the context of political discourse of the kind protected by the implied constitutional freedom of communication on government and political matters, the majority in *Coleman* viewed insult and invective as part and parcel of political communications: [81] and [105] (McHugh J); [197] and [199] (Gummow and Hayne JJ); and [239] (Kirby J). The contribution made by insulting words to free and informed debate was doubted by Callinan J at [299] and rejected by Heydon J at [330], [332] and [333].

410 In my view, even outside of political discourse, freedom of expression is not merely a freedom to speak inoffensively: *R (on the application of Gaunt) v Office of Communications*

(OFCOM) [2011] EWCA Civ 692 at [22] (Lord Neuberger MR). But there are areas of discourse where incivility is less acceptable, including because it is more damaging to social harmony. Additionally, a distinction may be drawn between harsh language directed at a person and harsh language directed at a person's opinion: *R v Office* at [27] (Lord Neuberger MR); *Catch the Fire* at [34] (Nettle JA).

411 In *Bropho* at [69], French J recognised that freedom of speech is not limited to expression which is polite or inoffensive. However, the minimisation of harm which French J spoke of involves a restraint upon unnecessarily inflammatory and provocative language and gratuitous insults. The 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 offence has been caused: *Toben* at [77] (Kiefel J).

412 I accept that the language utilised in the Newspaper Articles was inflammatory and provocative. The use of mockery and derision was extensive. The tone was often cynical. There is no doubt that the Newspaper Articles were designed to sting the people in the 'trend' and in particular those identified therein. The language was not simply colourful, as Mr Bolt's counsel described it. It was language chosen by Mr Bolt in writing articles intended to confront those that he accused with "the consequences of their actions" and done with the expectation that they would be both "offended" and "upset" and in the hope that they would be "remorseful" (the words quoted are Mr Bolt's).

413 I also agree that the Newspaper Articles contain gratuitous references. The emphasis on colour was gratuitous. References made to Mr McMillan's sexuality were further obvious examples. There were also gratuitous references to Mr McMillan pretending to be a "victim", which are based on a selective misrepresentation of what Mr McMillan actually said (2A-11 to 15). I accept that much of the mockery, derision and gratuitous asides were directed at named individuals but I reject the contention of Mr Bolt and HWT that the impact is to be regarded as confined, in each case, to the person impugned. The tone and gratuitous nature of both the specific and general comments made contributed to the disrespectful manner in which the people in the 'trend' were dealt with and contributed to the intimidatory effect of the articles.

414 The extent of mockery and inflammatory language utilised by Mr Bolt to disparage many of the individuals which the Newspaper Articles deal with, far exceeded that which was necessary to make Mr Bolt's point. The treatment of Mr McMillan and Mr Mellor are perhaps the most potent examples. The articles are replete with comments and a 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. In terms of the language utilised, I have in mind the following examples (each of which needs to be read in context, the emphasis in italics is mine):

- "*political Aborigine*" (1A-1);
- *"professional Aborigine"* (1A-14), (2A-20);
- "the choice to be Aboriginal can seem almost *arbitrary* and *intensely political*" (1A-9);
- "an *official Aborigine* and hired as such" (1A-13);
- "How much more of this *madness* can you take?" (1A-18);
- "*self-obsessed*" (1A-23);
- "it is also divisive, feeding a new movement to stress *pointless* or even *invented* racial differences" (1A-24);
- "*trivial* inflections of race" (1A-34);
- "how *comic*" (1A-35);
- "*blacker-than thou*" (1A-37);
- "to *invent* such *racist* and *trivial excuses to divide*" (1A-38);
- "*scuffling at the trough*" (2A-8);
- "is that a *man's voice* I now hear bellowing: 'And I'm *an Aboriginal* ***woman*****'** (2A-8) (original emphasis in bold);
- "you'd swear this is *from a satire*" (2A-16);
- "*surrender my reason* and *pretend white is really black*, just to aid some artist's *self-actualisation therapy*" (2A-32);

- "That way lies *madness*, where *truth is just a whim* and words mean nothing" (2A-33);
- "a privileged white Aborigine *snaffles* that extra" (2A-36);
- "*Seeking power* and reassurance in a racial identity is not just *weak* (2A-42)*;*
- *....a borrowing of other people's glories*" (2A-42); and
- "At its worst, *it's them against us*" (2A-46);

415 In relation to the sub-group constituted by the individuals named in the Newspaper Articles, the language, tone and gratuitous asides contained in the Newspaper Articles were likely to have contributed to the likely offence, insult and humiliation of the people in that group. In relation to the broader group, I have found that the strong language utilised by the Newspaper Articles and the disrespectful manner in which those articles dealt with those identified will have heightened the intimadatory impact of the conduct. I regard that impact as a particularly pernicious aspect of the s 18C conduct in the context of what the RDA seeks to achieve. That young Aboriginal persons or others with vulnerability in relation to their identity, may be apprehensive to identify as Aboriginal or publicly identify as Aboriginal, as a result of witnessing the ferocity of Mr Bolt's attack on the individuals dealt with in the articles, is significant to my conclusion that in writing the articles, Mr Bolt failed to honour the values asserted by the RDA.

416 Mr Bolt understood that he was writing about the identity of and a very personal aspect of the people he wrote about. He was extensively cross-examined as to whether he had an appreciation at the time he wrote the Newspaper Articles, that the articles or parts thereof would cause offence to the individuals dealt with by them. Mr Bolt acknowledged that he had appreciated offence would likely be caused to many of the named individuals. At times his acknowledgment was qualified. He said he perceived the offence would have arisen out of the fact that he was contradicting or disagreeing with the persons in question. In my view, Mr Bolt was acutely aware that both the content and tone of the articles were reasonably likely to offend the people he identified in the articles, and not simply because they would perceive him to be contradicting them.

417 The following exchange in cross-examination is illustrative of both that awareness and the underlying rationale for the vigorous approach taken by Mr Bolt:

> Do you agree, Mr Bolt, that where a person has made a heartfelt and a genuine honest identification of identity that to say that the identification is a self-obsession is likely to cause that person offence?
> It's the public nature of it. Once you enter the public arena you must be prepared for debate, for disagreement and disagreement can be bruising it's true. If they were private individuals privately identifying I would not pick them off the street and say, "Look at this person, this anonymous person, ha, ha, ha".

By a later answer, Mr Bolt agreed (without qualification) that he understood offence would likely to be caused by the accusations he made. His answer above reveals Mr Bolt's view that the people he criticised were in the public arena and therefore 'fair game'. Given that Mr Bolt denied any intent to convey the imputations which I have found were conveyed, the public behaviour of the individuals that warranted the attack upon them seems to be simply the fact that they have publicly identified as Aboriginal. What Mr Bolt's answer also reveals is a lack of appreciation by him of the reasonably likely impact his words would have upon the wider community of Aboriginal people of mixed descent including those that I have described as young or vulnerable.

418 Ms Eatock also relied upon a number of principles taken from a "Statement of Principles" issued by the Australian Press Council. Those principles include the following:

- Publications should take reasonable steps to ensure reports are accurate, fair and balanced. They should not deliberately mislead or misinform readers either by omission or commission.
- Where individuals or groups are a major focus of news reports or commentary, the publication should ensure fairness and balance in the original article. Failing that, it should provide a reasonable and swift opportunity for a balancing response in an appropriate section of the publication.
- News and comment should be presented honestly and fairly, and with respect for the privacy and sensibilities of individuals. However, the right to privacy is not to be interpreted as preventing publication of matters of public record or obvious or significant public interest. Rumour and unconfirmed reports should be identified as such.
- Publications are free to advocate their own views and publish the bylined opinions of others, as long as readers can recognise what is fact and what is opinion. Relevant facts should not be misrepresented or suppressed, headlines and captions should fairly

reflect the tenor of an article and readers should be advised of any manipulation of images and potential conflicts of interest.

- Publications have a wide discretion in publishing material, but they should balance the public interest with the sensibilities of their readers, particularly when the material, such as photographs, could reasonably be expected to cause offence.
- Publications should not place any gratuitous emphasis on the race, religion, nationality, colour, country of origin, gender, sexual orientation, marital status, disability, illness, or age of an individual or group. Where it is relevant and in the public interest, publications may report and express opinions in these areas.

419 Ms Eatock contended and I accept, that the Australian Press Council's Principles can be regarded as an industry standard. There was evidence that those principles are consistent with those adopted by HWT. She argued that the failure of Mr Bolt and HWT to comply with those principles is demonstrative of a lack of reasonableness and good faith. I need not assess the conduct in that way. It is however of some comfort to the ultimate conclusions I have reached to note that the normative standards of the industry in question recognise that freedom of expression is to be utilised fairly and with reasonable sensitivity.

420 In coming to the view I have arrived at in relation to the reasonableness and good faith of Mr Bolt's conduct, I have taken into account the possible degree of harm that I regard that conduct may have caused. As Lee J said in *Bropho* at [136]:

> Such harm, in the context of the Act, would be the extent to which that part of the community which consisted of persons who held racially–based views destructive of social cohesion, or persons susceptible to the formation of such opinions, may be reinforced, encouraged or emboldened in such attitudes by the publication…

421 Mr Bolt is a journalist of very significant public standing and influence. His evidence suggests that his columns are popular and widely read. They will have been read by persons inclined to regard Mr Bolt as speaking with authority and knowledge. They will likely have been read by some persons susceptible to racial stereotyping and the formation of racially prejudicial views. I have no doubt that some people will have read the Newspaper Articles and accepted the imputations conveyed to the ordinary reader as true and correct and that racially prejudiced views have been "reinforced, encouraged or emboldened".

422 I have also taken into account what I regard to be the serious nature of the offensive conduct involved and its reasonably likely consequences upon the Aboriginal people concerned. Beyond the hurt and insult involved, I have also found that the conduct was reasonably likely to have had an intimidatory effect on some people.

423 I have taken into account the value of freedom of expression and the silencing consequences of a finding of contravention against Mr Bolt and HWT. Given the seriousness of the conduct involved, the silencing consequence appears to me to be justified. The intrusion into freedom of expression is of no greater magnitude than that which would have been imposed by the law of defamation if the conduct in question and its impact upon the reputations of many of the identified individuals had been tested against its compliance with that law. Additionally, I take into account that the conduct was directed at an expression of identity. An expression of identity is itself an expression that freedom of expression serves to protect. That expression also deserves to be considered and valued. Identity has a strong connection to one of the pillars of freedom of expression – "self-autonomy stems in large part from one's ability to articulate and nurture an identity derived from membership in a cultural or religious group": *Keegstra* at 763.

424 Even 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.

425 In my view, Mr Bolt's conduct involved a lack of good faith. What Mr Bolt did and what he failed to do, did not evince a conscientious approach to advancing freedom of expression in a way designed to honour the values asserted by the RDA. Insufficient care and diligence was taken to minimise the offence, insult, humiliation and intimidation suffered by the people likely to be affected by the conduct and insufficient care and diligence was applied to guard against the offensive conduct reinforcing, encouraging or emboldening racial prejudice. The lack of care and diligence is demonstrated by the inclusion in the Newspaper Articles of the untruthful facts and the distortion of the truth which I have identified, together with the derisive tone, the provocative and inflammatory language and the inclusion of gratuitous asides. For those reasons I am positively satisfied that Mr Bolt's conduct lacked objective good faith.

426 There is, as French J recognised in *Bropho* at [103], a potential for overlap in the assessment of reasonableness and of good faith. Others judges have dealt with reasonableness and good faith as a composite expression: *Toben* at [44] (Carr J) and at [159], [161] (Allsop J); *Bropho* at [173] (Carr J). In analysing reasonableness on the one hand, and good faith on the other, Lee J in *Bropho* at [136] and [141] considered that in both cases regard had to be given to the degree of harm likely to be caused to the protective objectives of the RDA.

427 I agree that there is a very significant overlap between good faith, objectively assessed, and reasonableness. That is particularly so because each assessment requires that the conduct in question be examined and assessed against its impact on the protective objectives of the RDA. It is an assessment which in both cases raises questions of proportionality: *Bropho* at [139] (Lee J). The lack of care and diligence which I have found in the context of the harm likely to have been caused, leads me to the conclusion that the expressive conduct involved was not said or done reasonably.

428 Whilst Mr Bolt and HWT focused their submissions on demonstrating rationality to the "matter of public interest", I very much doubt that that approach is correct in relation to s 18D(c)(i) or (ii). It is a necessary element of the fair comment defence at common law, that a report or comment be on an event or matter of public interest. In my view that is the reason for the inclusion of that element into s 18D(c)(i) and (ii). That element is not there as a reference point from which to assess the rationality between the s 18C conduct and the matter of public interest. It is there because it is one of the requirements for a fair report or comment. I appreciate that the observations made by French J in *Bropho* at [81] may suggest the contrary position, although I note that at [82], his Honour indicated that he did not intend to put a definitive view about the examples which he offered.

429 Different considerations apply in relation to s 18D(b), where the relationship between the offensive conduct and the genuine purpose "in" the public interest is a matter of more obvious relevance. If I am wrong and rationality to the matter "of" public interest is an additional relevant consideration on the question of reasonableness, I would adopt the same approach I have applied in relation to s 18D(b). The existence of some rationality does not change my conclusion that the s 18C conduct was not done reasonably in pursuance of the making of a fair comment.

Section 18D(b)

430 Mr Bolt and HWT also rely upon s 18D(b) as a source of exemption. To be enlivened, the provision requires that the offending conduct be done reasonably and in good faith in the course of an expressive activity (statement, publication, discussion or debate) made or held for a genuine purpose in the public interest. The provision assumes that genuine academic, artistic or scientific pursuits are in the public interest and leaves open the possibility of other pursuits being encompassed within its scope, but only if those pursuits are genuine and in the public interest.

431 The pursuit relied upon by Mr Bolt and HWT was described in the Amended Defence as Mr Bolt expressing his genuinely held view in relation to a matter of public interest. The matter of public interest was identified in the same terms as I have recorded at [361] above. That is, drawing attention to the 'trend' and its alleged undesirable social consequences of emphasising racial differences rather than common humanity. A second matter of public interest was relied upon in final submissions and identified as a "sub-theme" of the matter of public interest raised by the 'trend'. This was that the 'trend' has the undesirable consequence of operating to the disadvantage of more deserving members of the Aboriginal community in Australia.

432 For HWT, the "genuine purpose" was contended to be the purpose of publishing the Newspaper Articles to enable Mr Bolt to draw attention to the 'trend' he had perceived.

433 There seems to me to be a difficulty in the approach taken by Mr Bolt and HWT because of its focus upon a matter "of" public interest rather than a genuine purpose "in" the public interest. The provision requires that a genuine purpose "in" the public interest be pursued, not simply a matter "of" public interest. A matter of public interest is broadly defined as a matter of interest or concern to people at large: *London Artists Limited v Littler* [1969] 2 QB 375, 391 (Lord Denning MR). It is a very broad field. To say that a discussion is "in" the public interest because it raises a matter "of" public interest is to say little more than that public discussion is in the public interest or, in other words, that the public exercise of freedom of expression is in the public interest. I doubt that this is what s 18D(b) has in mind by its requirement that a genuine purpose in the public interest is being pursued. On that view, s 18C (c) is rendered largely superfluous.

434 Section 18D(b) seems to be concerned to excuse conduct done reasonably and in good faith in the pursuit of a public benefit through the exercise of freedom of expression. The examples of purpose given in the provision (academic, artistic or scientific) reinforce the point that an additional pursuit of public benefit, beyond freedom of expression, is contemplated by the provision. What the provision is concerned with is the public interest use to which the freedom of expression is exercised and not merely freedom of expression itself.

435 The "genuine purpose" to which s 18D(b) refers does not appear to me to be a reference to the subjective purpose of the maker or publisher. What the provision calls for is the pursuance through a statement, publication, discussion or debate of a purpose which is genuinely in the public interest. That calls for an objective consideration of whether the purpose is genuinely in the public interest.

436 That the matters relied upon by Mr Bolt and HWT were matters of public interest was not contested. Nor was it contested that Mr Bolt was genuine in asserting his views on those matters. Other than putting evidence before me which I accept, that the general question of Aboriginal identity has been a matter of public interest, no submission was made by Mr Bolt or HWT as to why drawing attention to the 'trend' identified by Mr Bolt and its consequences, is of public benefit and thus a genuine purpose in the public interest. The submission focused upon the matters being matters of public interest, not why drawing attention to the matters was genuinely in the public interest.

437 Ms Eatock did not raise the construction issue I have just raised and conceded that the pursuance of the public interest raised by the Amended Defence was a genuine purpose in the public interest. Given the way in which this issue was dealt with by the parties, I will proceed on the basis that drawing attention to the socially undesirable racially divisive consequences of the 'trend' is a genuine purpose in the public interest. I will deal separately with the second matter raised by the "sub-theme".

438 Mr Bolt and HWT contended that the requirements of reasonableness and genuine purpose were satisfied because the Newspaper Articles were rationally related to the matter of public interest sought to be advanced by Mr Bolt. However, for reasons I have already discussed, so far as the issue of rationality is concerned, the question must be whether the s

18C conduct and, relevantly, the imputations which I have found were conveyed, are rationally related to the genuine purpose in the public interest relied upon.

439 The issue of rationality is not however the only consideration in assessing reasonableness and good faith, and I disagree with the contention of Mr Bolt and HWT that it is. For the reasons already canvassed in relation to s 18D(c)(ii) the pursuance of an expressive activity reasonably and in good faith is also to be assessed by reference to the extent of harm done to the protective objectives of the RDA by the expressive conduct and whether a conscientious approach was taken which gave sufficient regard to those objectives including the minimising of the potential harm.

440 The expressive activity relied upon by Mr Bolt and HWT for s 18D(b) is the same as that for s 18D(c)(ii). The concession made that it involves the pursuance of a genuine purpose in the public interest does not alter the relative value which I have ascribed to it in the balancing process. No particular importance to the public interest purpose was sought to be established. For the purposes of both s 18D(b) and (c)(ii), the expressive activity relied upon is an act of freedom of expression relating to the same matter of public interest. The conduct which led to, and is encompassed by, the expressive activity is the same. The lack of care and diligence which I have found is the same. My conclusion that the activity was not pursued reasonably and in good faith is the same and not altered by a consideration of the extent of the rational connection between the s 18C conduct and the public interest purpose relied upon.

441 I will explain my views as to the extent of the rational connection I perceive there to be.

442 The socially undesirable 'trend' put forward as the "genuine purpose" by Mr Bolt and HWT involves a wider issue than that raised by the imputations which I have found were conveyed. Accepting that one of Mr Bolt's motivations was to draw attention to a 'trend' which emphasised "racial differences, rather than common humanity", whether the participants in the 'trend' had genuinely chosen to identify as Aboriginal or not, the same socially undesirable consequence would follow. In other words, Mr Bolt could have made his point without attacking the basis upon which the participants in the 'trend' identified as Aboriginal and without attributing to them ulterior motives for so identifying.

443 Drawing attention to the basis upon which the participants so identified, may not have been irrelevant to the wider subject matter, but it was certainly not essential to it and is best described as being of tangential relevance. In terms of rationality, I accept there is a faintly rational relationship between the public interest purpose relied upon and the imputations, but the extent to which that relation contributes to the reasonableness of the conduct is not significant.

444 The "sub-theme" relied upon by Mr Bolt and HWT does not lead me to a different view as to whether the s 18D(b) exemption is established. This contention raised a different undesirable social consequence which bears no relation to that which was pleaded. As compared to that which was pleaded, the topic has moved from the desirability of racially harmonious relations to an injustice in the allocation of opportunities to Aboriginal people. That is an entirely different "genuine purpose", which was raised for the first time in the closing submissions of Mr Bolt and HWT having not being relied upon by Mr Bolt in his evidence-in-chief, despite that evidence addressing Mr Bolt's purpose for writing the articles. It was not conceded as a "genuine purpose" by Ms Eatock. However, Ms Eatock did not seriously resist reliance being placed upon this matter, despite it being outside of the pleadings and raised as late as it was.

445 I accept that a rational relationship exists between asserting that a group of advantaged Aboriginal people have been the recipients of awards and opportunities for Aboriginal people and the assertion that there needs to be a more just allocation of awards and opportunities to Aboriginal people so that less advantaged Aboriginal people become recipients. But it is neither necessary nor essential to the latter assertion to assert that the advantaged recipients are not genuinely Aboriginal.

446 An approach rationally related to the making of a public interest point about injustice in the distribution of opportunities to Aboriginal people would have directed attention to demonstrating that all the people in the 'trend' (not merely some) are advantaged, rather than that they are all of mixed biological heritage and of pale skin. A rationally related approach would have directed primary attention to the policies which served to create the alleged unjust distribution and the people responsible for them, rather than on the choice made by the recipients of the opportunities to identify as Aboriginal people. The extent to which the

public interest matter relied upon and the imputations bear a rational relationship does not significantly contribute to the reasonableness of the conduct in question.

Section 18D and the position of HWT

447 I am not satisfied that HWT has established that in relation to its act of publication, the s 18C conduct was done reasonably and in good faith.

448 No evidence was led by HWT as to its conduct. HWT relied upon its long history of publishing articles, including opinion pieces on Aboriginal people. A selection of articles was tendered. None were germane to the issues dealt with by the Newspaper Articles. It was not suggested that any of those articles, in some way counterbalanced or negated the offence caused by the Newspaper Articles. The articles tendered, evidenced the prior publication of "anodyne material" which as Lee J said in *Bropho* at [142] would not itself show that the publisher acted reasonably and in good faith in relation to the publication which was reasonably likely to cause offence.

449 HWT had the capacity to both appreciate that the imputations were conveyed by the Newspaper Articles and the editorial means to guard against that. Even if it had been established that HWT was relying upon Mr Bolt to produce articles that were compliant with the RDA, including as to the question of reasonableness and good faith raised by s 18D, HWT must stand or fall by the conduct of its own journalist.

450 In that respect I can see no reason why I should take a different approach to that taken by the Privy Council in *Austin v Mirror Newspapers Ltd*, in relation to the failure of a publisher in a defamation case to establish reasonable conduct when relying upon a defence of statutory qualified privilege. At 363 the Court said:

> A publisher that is a limited company can only discharge the duty to act reasonably through its servants or agents and in the present case it seems clear that the company were relying upon Mr Casey to produce an article that it was reasonable for them to publish. If in these circumstances it is found that the journalist not only got his facts wrong but had also failed to take reasonable care to ascertain them the publishers of the newspaper must stand in the shoes of their journalist for the purposes of considering whether their conduct in publishing the article was reasonable. The newspaper, the publisher, cannot be allowed to hide behind their journalist on the ground that it never occurred to them that their journalist would be so careless. The newspaper must stand or fall by the conduct of its own journalists. Very different considerations will of course apply to the publication of an article by an independent contributor who cannot be considered as either the servant or agent of the newspaper.

> An independent contributor is in no sense the alter ego of a newspaper for the purpose of producing the article and in such circumstances his reliability and reputation will be a very important matter in considering whether the conduct of the publisher was reasonable in accepting and publishing the article if it turns out to be defamatory and untrue.

451 Finally, I should add that I am positively satisfied that the elements which needed to be established in order for s 18D to have application, have not been established. In other words, if the burden of proof rested with Ms Eatock it has been satisfied. Further, if it had been necessary to assess the s 18C conduct by reference to the narrower sub-group, I would have arrived at the same conclusions in relation to s 18D.

FINDINGS OF CONTRAVENTION AND RELIEF

452 For the reasons I have given I am satisfied that:

- Some Aboriginal persons of mixed descent who have a fairer, rather than darker skin, and who by combination of descent, self-identification and communal recognition are, and are recognised as Aboriginal persons were reasonably likely, in all the circumstances, to have been offended, insulted, humiliated or intimidated by the imputations conveyed by the Newspaper Articles that:

  (i) There are fair-skinned people in Australia with essentially European ancestry but with some Aboriginal descent, of which the identified individuals are examples, who are not genuinely Aboriginal persons but who, motivated by career opportunities available to Aboriginal people or by political activism, have chosen to falsely identify as Aboriginal; and

  (ii) Fair skin colour indicates a person who is not sufficiently Aboriginal to be genuinely identifying as an Aboriginal person.

- That in Mr Bolt writing and HWT publishing those parts of the Newspaper Articles which conveyed the imputations, they each did so including because of the race, ethnic origin or colour of the Aboriginal persons there described;

- That the conduct of Mr Bolt and HWT is not exempted by s 18D of the RDA from being unlawful because:

  (i) it was not done reasonably and in good faith in the making or publishing of a fair comment, within the terms of s 18D(c)(ii); or

(ii) done reasonably and in good faith in the course of any statement, publication or discussion, made or held for a genuine purpose in the public interest, within the terms of s 18D(b).

453 On the basis of those findings, I am satisfied that each of Mr Bolt and HWT engaged in conduct which contravened s 18C of the RDA. In the case of HWT, I am also satisfied that as Mr Bolt's employer, it is liable for the contravention by Mr Bolt by reason of s 18E of the RDA.

454 The relief sought by Ms Eatock in relation to the Newspaper Articles may be summarised as follows:

- A declaration that the writing and publication of the Newspaper Articles by Mr Bolt and HWT, was unlawful;
- An order restraining Mr Bolt and HWT from republishing or further publishing the Newspaper Articles or articles whose content is substantially the same as, or substantially similar to, that contained in the Newspaper Articles;
- An order requiring Mr Bolt and HWT to remove the Newspaper Articles from any online site under their control or direction;
- An order that HWT publish an apology; and
- Costs.

455 The power of the Court to grant relief of the kind sought is not in issue. The power is conferred by s 46PO(4) of the *Australian Human Rights Commission Act 1986* (Cth).

456 On the basis that the Court finds a contravention of s 18C, Mr Bolt and HWT do not resist the making of a declaration. Injunctive relief is not resisted but the form suggested by Ms Eatock is said to be too wide. An order requiring that an apology be published by HWT is resisted.

457 Ms Eatock contended that, rather than making orders at this juncture, it may be appropriate for the Court to direct the parties to endeavour to agree upon a form of relief consistent with my reasons for judgment. That suggested course is not resisted by Mr Bolt and HWT. I accept that such a course is an appropriate way in which to proceed. There is

however significant disagreement about some aspects of the relief sought by Ms Eatock which I need to resolve, in order that the parties can sensibly put forward draft orders. There are also three matters in relation to relief for which I may need to receive further submissions.

458 Mr Bolt and HWT contended that the terms of any declaration made should expressly state that the conduct in contravention of s 18C "did not constitute and was not based on racial hatred or racial vilification". It is contended that the inclusion of these words will facilitate the educative effect of the declaration made and contribute to informed debate. I do not regard the inclusion of the words suggested as appropriate. The declaration the Court makes should be based only on proven facts and not on facts or matters which the Court has not been called upon to determine: *Commonwealth v Evans* [2004] FCA 654 at [57]-[59] (Branson J). Any necessary educative effect will be achieved by the terms of the declaration which will record the unlawful conduct by reference to the precise terms of the provision contravened and by the publication of the Court's reasons for judgment.

459 The terms of the declaration I have in mind should:

- Identify the Newspaper Articles by title, and date and place of publication;
- Identify that they were written by Andrew Bolt and published by the Herald and Weekly Times Pty Ltd;
- Identify the imputations conveyed by the Newspaper Articles in the terms set out at [284];
- State that the meaning conveyed by the Newspaper Articles contravened s 18C of the RDA and was unlawful in that:
    (i) it was reasonably likely to offend, insult, humiliate or intimidate Aboriginal persons of mixed descent who have a fairer, rather than darker skin, and who by a combination of descent, self-identification and communal recognition are, and are recognised as Aboriginal persons; and
    (ii) the Newspaper Articles were written and published, including because of the race, ethnic origin or colour of those Aboriginal persons.

460 All parties agree that any injunction made should be directed at the publication or republication of the articles themselves and not at the imputation conveyed by them. Mr Bolt

and HWT oppose an order restraining the publication of articles whose content is substantially the same or similar to that of the articles which have contravened s 18C. Each of those positions is based upon the recognition that the orders which are made should be clear and precise including so that freedom of expression is not unnecessarily stifled.

461 It is important 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 HWT 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.

462 Other than by prohibiting republication, controlling by an injunction the manner in which a subject matter is communicated is difficult in circumstances where the language, tone and structure of the publications in question make a significant contribution to the unlawful manner in which the subject matter was dealt with. Mr Bolt and HWT have not contended that a prohibition on republication should not extend to the whole of each of the impugned articles and that seems to me to be a sensible and practical approach. Such an order would prohibit publication of any part of the articles and should state so clearly. For those reasons and because of the need for the terms of an injunction to be clear and precise, I agree with Mr Bolt and HWT that the terms of an injunction should not extend to the publication of articles whose content is substantially the same as, or substantially similar to, that contained in the Newspaper Articles.

463 In relation to the order sought that HWT remove offending articles from any online site under its control or direction, HWT contends that it would not be appropriate for that order to extend to the internet archives of the *Herald Sun*. It was contended, and I accept, that the internet archives of a significant media organisation such as the *Herald Sun* serves an important public interest by preserving and making available historical records of news and information: *Times Newspapers Limited (Nos 1 and 2) v United Kingdom* [2009] EMLR 14, 45-48. If I were to accede to that qualification, HWT has indicated its preparedness to consent to an order that it publish permanently and prominently, on the internet versions of the Newspaper Articles, a copy of the declaratory relief granted by the Court.

464 I can well appreciate Ms Eatock's purpose in seeking to have the Newspaper Articles removed from the online archive of the *Herald Sun*. There is good reason to try and restrict continued access to, and dissemination of, the Newspaper Articles by the public. However, it seems to me that, in the age in which we live, any attempt made to restrict access to an internet publication is likely to be circumvented by access being made available on online sites beyond the control of HWT. Ms Eatock's legitimate objective would be better served by maintaining the Newspaper Articles on the online site to which people looking for them are most likely to go and including at that place a notice of the kind offered by HWT and to which I will refer further below. Accompanied by an appropriate corrective notice, the contravening effect of the Newspaper Articles will be negated. The qualification of online archives in a manner similar to that for which HWT contends is an approach adopted in modern defamation cases in the United Kingdom, informed by the reasoning of the European Court of Human Rights: *Loutchansky v Times Newspapers Ltd (Nos 2-5)* [2002] QB 783 at [74]; *Flood v Times Newspapers Ltd* [2010] EMLR 8, at [230], approved on appeal [2011] 1 WLR 153 at [77]-[78]; *Budu v British Broadcasting Corporation* [2010] EWHC 616 (QB), [79]-[80] and [93].

465 There is force in the contention of HWT that an apology should not be compelled by an order of the Court because that compels a person to articulate a sentiment that is not genuinely held. An apology is one means of achieving the public vindication of those that have been injured by a contravention of s 18C. The power granted to the Court to require a respondent to redress any loss or damage is a wide power. There are other means by which public vindication may be achieved.

466 Public vindication is important. It will go some way to redressing the hurt felt by those injured. It will serve to restore the esteem and social standing which has been lost as a consequence of the contravention. It will serve to inform those influenced by the contravening conduct of the wrongdoing involved. It may help to negate the dissemination of racial prejudice.

467 Whilst I will not order HWT to apologise, in the absence of an appropriate apology, I am minded to make an order which fulfils the purposes which I have identified.

468 My preliminary view is that a corrective order should be made which would require HWT to publish a notice in the *Herald Sun* in print and online. The terms of the notice would include an introduction which referred to this proceeding and the order requiring its publication and set out the declaration made by the Court. In order to give the publication of the corrective notice a prominence and frequency commensurate with the publication of the Newspaper Articles and to facilitate it being communicated to those likely to have read the Newspaper Articles, I have in mind that the corrective order would require the publication of the notice in the *Herald Sun* newspaper and online, on two separate occasions in a prominent place immediately adjacent to Mr Bolt's regular column.

469 I have indicated a preliminary view so that the parties can address me as to their respective positions by further submissions. I will also need to receive submissions from the parties on the question of costs, unless that and the other matter I have identified are the subject of agreement.

470 I will make orders for the parties to confer as to the terms of the relief which should be granted and for the filing and exchange of minutes of orders to give effect to these reasons and if necessary, short written submissions on the two issues which I have identified if no agreement is reached on those issues.

I certify that the preceding four hundred and seventy (470) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromberg.

Associate:

Dated: 28 September 2011

1A – *"It's so hip to be black"*

It's so hip

ANDREW BOLT

Why are so many people eager to proclaim their aboriginality, despite it being such a small part of their heritage?

(1) MEET the white face of a new black race — the political Aborigine.

(2) Meet, say, acclaimed St Kilda artist Bindi Cole, who was raised by her English-Jewish mother yet calls herself "Aboriginal but white".

(3) She rarely saw her part-Aboriginal father, and could in truth join any one of several ethnic groups, but chose Aboriginal, insisting on a racial identity you could not guess from her features.

(4) She also chose, incidentally, the one identity open to her that has political and career clout.

(5) And how popular a choice that now is. Ask Annette Sax, another artist and — as the very correct *Age* newspaper described her — a "white Koori".

(6) Her father was Swiss, and her mother only part-Aboriginal. Racially, if these things mattered, she is more Caucasian than anything else. Culturally, she's more European. In looks, she's Swiss.

(7) But she, too, has chosen to call herself Aboriginal, which happily means she could be shortlisted for this year's Victorian Indigenous Art Award.

(8) Shall I go on? Not yet convinced that there is a whole new fashion in academia, the arts and professional activism to identify as Aboriginal?

(9) Not yet convinced that for many of these fair Aborigines, the choice to be Aboriginal can seem almost arbitrary and intensely political, given how many of their ancestors are in fact Caucasian?

(10) Then meet now Tara June Winch, who is just 26 and has written only one book, *Swallow the Air*, yet is already an ambassador for the Australia Council's Indigenous Literacy Project. Yes, indeed, because despite her auburn hair and charmingly freckled face, she, too, is an Aborigine, who claims her "country is Wiradjuri".

(11) Yet her mother, who raised her in industrial Wollongong, is in fact boringly English, and her father has both Afghan and Aboriginal heritage.

(12) She could call herself English, Afghan, Aboriginal, Australian or just a take-me-as-I-am human being called Tara June Winch. Race irrelevant.

(13) Instead, she's an official Aborigine, and hired as such in a nation that now institutionalises even racial differences you cannot detect with a naked eye.

(14) Larissa Behrendt has also worked as a professional Aborigine ever since leaving Harvard Law School, despite looking almost as German as her father.

(15) She chose to be Aboriginal, as well, a member of the "Eualayai and Kammillaroi nations", and is now a senior professor at the University of Technology in Sydney's Indigenous House of Learning.

(16) She's won many positions and honours as an Aborigine, including the David Unaipon Award for Indigenous Writers, and is often interviewed demanding special rights for "my people".

(17) But which people are "yours", exactly, mein liebchen? And isn't it bizarre to demands laws to give you more rights as a white Aborigine than your own white dad?

(18) How much more of this madness can you take? Meet now Associate Professor Anita Heiss, who says she's a "member of the Wiradjuri nation" who prays to Biami, the tribe's creator spirit.

(19) Heiss's father was Austrian, and her mother only part-Aboriginal. What's more, she was raised in Sydney and educated at Saint Claire's Catholic College. She, too, could identify as a member of more than one race, if joining up to any at all was important.

(20) As it happens, her decision to identify as Aboriginal, joining four other "Austrian Aborigines" she knows, was lucky, given how it's helped her career.

(21) Heiss not only took out the Scanlon Prize for Indigenous Poetry, but won plum jobs reserved for Aborigines at Koori Radio, the Aboriginal and Torres Strait Islander Arts Board and Macquarie University's Warawara Department of Indigenous Studies.

(22) 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.

I'm saying only that this self-identification as Aboriginal strikes me as self-obsessed, and driven more by politics than by any racial reality.

(23) (24) IT'S also divisive, feeding a new movement to stress pointless or even invented racial differences we once swore to overcome. What happened to wanting us all to become colour blind?

(25) Of course, the white Aborigine — or "political Aborigine" — is not new.

(26) In 1972, Pat Eatock, founding secretary of the Aboriginal Tent Embassy, officially became the first Aborigine to stand for federal parliament in the ACT, even though she looked as white as her Scottish mother, or some of her father's British relatives.

(27) Indeed, Eatock only started to identify as Aboriginal when she was 19, after attending a political rally, so little did any racial difference matter to her before her awakening to far-Left causes.

(28) But she thrived as an Aboriginal bureaucrat, activist and academic, leading the way for Leeanne Enoch, who stood for Labor in last month's Queensland election as its "first Aboriginal candidate" in a winnable seat, despite looking as Aboriginal, or not, as Premier Anna Bligh.

TARA JUNE WINCH

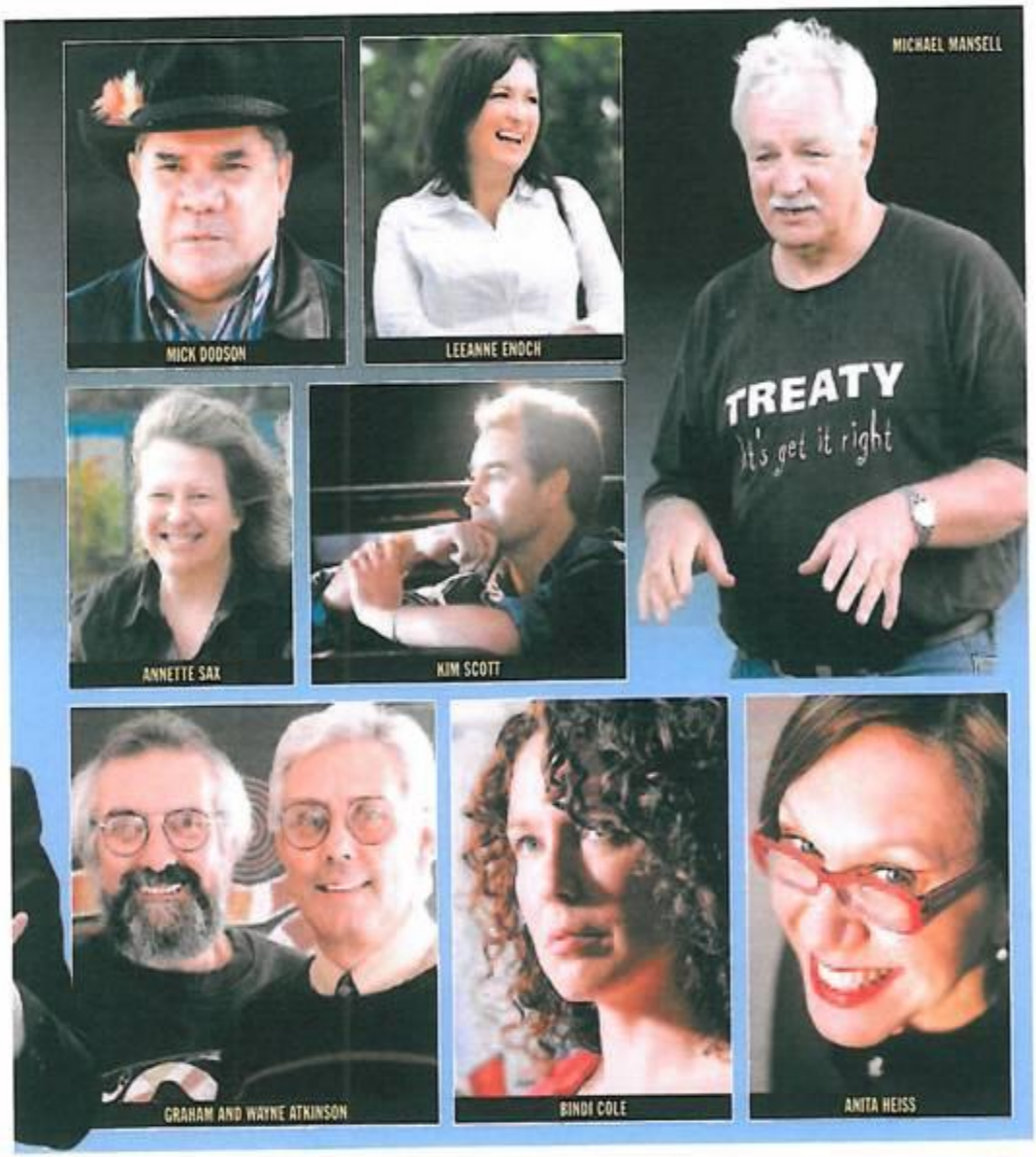
LARISSA BEHRENDT

(29) The white Aboriginal artist, too, is more than 15 years old. Kim Scott was hailed as the first Aborigine to win the Miles Franklin Award, and calls himself a Noongar, despite conceding that the Aborigines who did not know him called him *wadjila* — a white.

(30) No doubt he has Aboriginal ancestry, but why does he not also identify with his obvious European background?

(31) That is now a question even for our most famous Aboriginal leaders. Geoff Clarke, the last chairman of ATSIC, the

to be black



Aboriginal "parliament", had an English father. Lowtija O'Donoghue, another ATSIC chairman, had an Irish father. Fair Michael Mansell, the Tasmanian firebrand, clearly has more European than Aboriginal ancestry. (34)

(32) EVEN Professor Mick Dodson, the Australian of the Year and a fierce advocate for a treaty between black and white, had a white father and from the age of 10 was a boarder at a Victorian Catholic school. Sign a treaty with yourself, Mick.

(33) Or take the most prominent Yorta Yorta leaders — Melbourne University academic Wayne Atkinson and Victorian Traditional Owners Land Justice Group co-chair Graham Atkinson. Both are Aboriginal because their Indian great-grandfather married a part-Aboriginal woman.

I think it sad if we harp on about differences and rights based on trivial inflections of race. (35)

(36) And how comic. We get fair-faced Dr Mark Rose, Victorian Aboriginal Education Association head, falsely claiming as "a member of the western Victorian Gundjitamara Nation" that the northern Australia didgeridoo is banned to women.

We get Daniel Browning, host of ABC radio's *Awaye!* program for Aborigines, insisting he's Aboriginal when he looks more like one of his West Indian ancestors, and could just as correctly claim to be South Sea Islander, English, Australian or who-cares.

(37) TO me, this blacker-than-thou offends the deepest humanist ideals, and our "enlightened" opinion is debased when it takes a Casey Donovan, a mere *Australian Idol* winner, to hint at the healthier truth, saying she's proud of being Aboriginal, but "proud of being half-white, too".

(38) In fact, let's go beyond racial pride. Beyond black and white. Let's be proud only of being human beings set on this land together, determined to find what unites us and not to invent such racist and trivial excuses to divide. Deal?

2A – *"White fellas in the black"*

White fellas

ANDREW BOLT

What's an Aboriginal artist from the bush to think when he or she sees yet another white man lope off with a prize originally meant to inspire blacks?

(1) AS you see, the two men on the right are from a tribe of people who face terrible racism just because of the colour of their skin.

So you'll be thrilled that both have (2) won a rare opportunity — one offered to their race alone to end such injustice.

The man to the right, Sydney arts (3) academic Danie Mellor, this week won our richest prize for Aboriginal artists — the $40,000 Telstra Award.

And the man to the left, Sydney law (4) academic Mark McMillan, has won one of our richest prizes for Aboriginal students — the Fulbright Indigenous Scholarship.

If, studying the faces of these two (5) "Aboriginal" men you think this is surely the most amazing stretch of definition, you're wrong.

McMillan has gone one better still: (6) he's also won the Black Women's Action in Education Foundation Scholarship, originally intended to help educate black women, not white men.

But that's modern (7) race politics at our universities and anywhere else where grants and privileges are now doled out.

Hear that scuffling (8) at the trough? That's the sound of black people being elbowed out by white people shouting "but I'm Aboriginal, too". *Hark!* — is that a man's voice I now hear bellowing: "And I'm an Aboriginal *woman*."

Larissa Behrendt

You see, Mellor (9) and McMillan are representatives of a booming new class of victim you'd never have imagined we'd have to support with special prizes and jobs.

They are "white Aborigines" — (10) people who, out of their multi-stranded but largely European genealogy, decide to identify with the thinnest of all those strands, and the one that's contributed least to their looks. Yes, the Aboriginal one now so fashionable among artists and academics.

Let McMillan himself describe the (11) torture he's faced as a result — the shocking pain of having *not* been discriminated against for being black.

"I am a blonde-haired, blue-eyed, fair- (12) skinned Aboriginal Australian . . .

"As a child, I grew up expecting (13) everyone to be like me, to look like me — with the blonde hair and blue eyes.

(14) "Clearly, my naive ideas about how Aboriginal people were 'supposed' to look were wrong. But being Aboriginal and fair and blonde was normal to me and I grew up in a world where I was treated 'normally' . . .

"Impeding my growth from that (15) young person into the adult I wanted to become was the profound issue of identity. I was a white black man . . . I was becoming a victim."

(16) You'd swear this was from a satire — a local version of Sasha Baron Cohen's jive-talking routine as the fashionably aggrieved white rapper Ali G, complaining: "Is it cos I is black?"

(17) But no, this is meant seriously, and serious perks and Aboriginal-only benefits flow as a consequence.

McMillan — whose confusion about (18) his identity leads him also to declare he's both a "proud gay" and a "proud father" — has received all the special help you once thought, when writing the taxman another cheque, would at least go to people who *looked* Aboriginal, but which is increasingly lavished on folk as pink in face as they are in politics.

(19) This trained lawyer has not just won several prizes intended for Aborigines, but has worked for Aboriginal groups such as ATSIC, and is the Aboriginal representative on several boards, including that of a local land council.

(20) Now he's a researcher at Jumbunna Indigenous House of Learning at the University of Technology, Sydney — an "indigenous" outfit run by the very pale Prof Larissa Behrendt, who may have been raised by her white mother but today, as a professional Aborigine, is chairman of our biggest taxpayer-funded Aboriginal television service.

The blue-eyed and ginger-haired (21) Mellor has been similarly privileged, despite having an "American-Australian" father and a mother with only part-Aboriginal ancestry in her otherwise Irish-Australian past.

He now lectures on "Indigenous and (22) Western perspectives of culture and history" at Sydney University and his indigenous art now hangs in most of our national and state art collections.

(23) Nor are Mellor, McMillan and Behrendt atypical or even rare as "white Aborigines".

St Kilda artist Bindi Cole, raised by (24) her English mother, explored her own pain at being too white in a Next Wave Festival show, *Not Really Aboriginal*, for which she photographed herself with black powder all over her distressingly white face.

> **"Mellor and McMillan are representatives of a booming new class of victim you'd never have imagined we'd have to support. They are "white Aborigines"**

Mark McMillan

(25) Blond Annette Sax, daughter of a Swiss immigrant, also identified herself as a "white Koori", which fortuitously allowed her to make the shortlist for the Victorian Indigenous Art Award, alongside other Aboriginal artists as pale as a blank canvas.

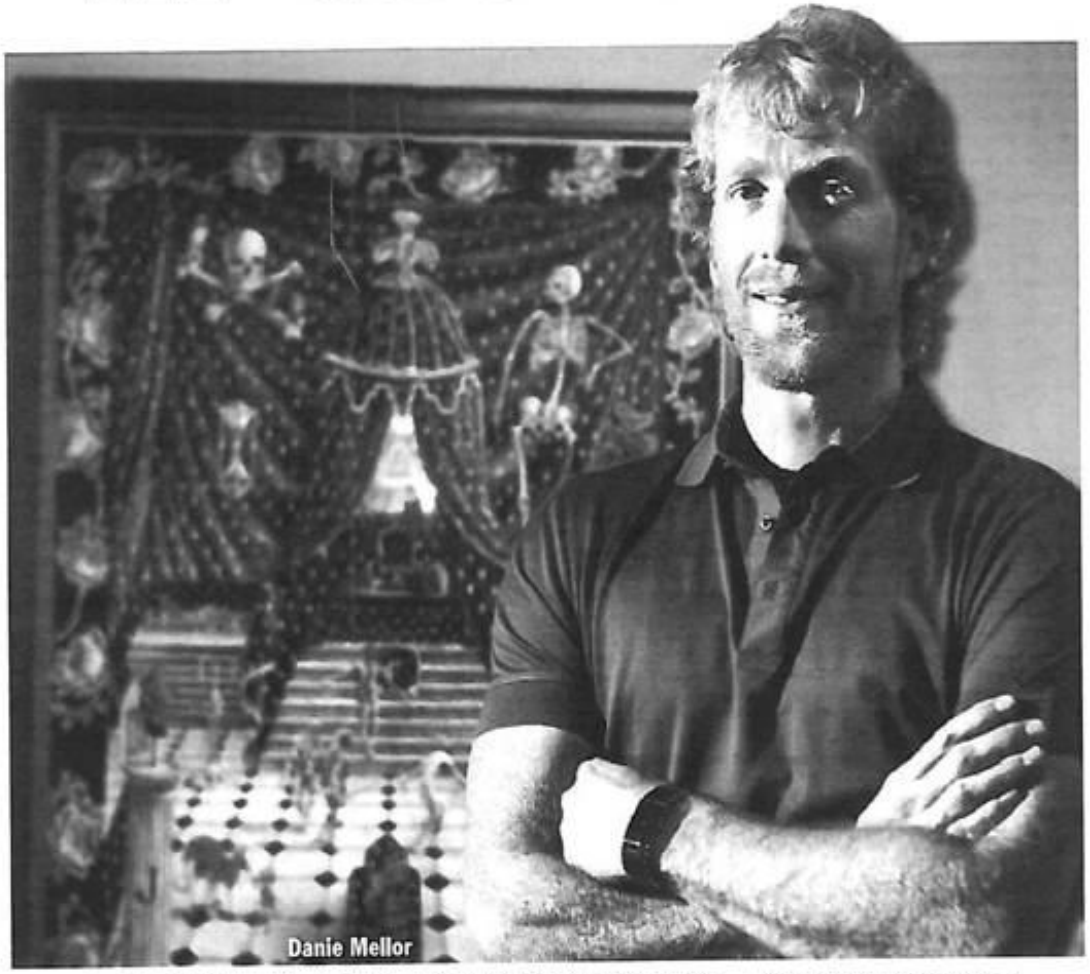
(26) THE auburn-haired Tara Jane Winch was just as lucky. She needed to write just one book — and say her dad had Afghan-Aboriginal ancestry — for the Australia Council to snap her up as its Indigenous Literacy Project ambassador.

I've written before of a dozen similar (27) cases, several even more incongruous.

For instance, how can Graham (28) Atkinson be co-chair of the Victorian Traditional Owners Land Justice Group when his right to call himself Aboriginal rests on little more than the fact that his Indian great-grandfather married a part-Aboriginal woman?

Yes, yes, I know. What business is it of (29) anyone else how we identify ourselves? In fact, we're so refreshingly non-judgmental these days — so big-hugs-

in the black



for-all — that the federal Human Rights Commission wants our laws changed so a man can even call himself a woman, should he feel like it.

(30) Hear it from the HRC itself: "The evidentiary requirements for the legal recognition of sex should be relaxed by . . . making greater allowance for people to self-identify their sex."

(31) Lovely! Soon there'll be no end of white men claiming prizes meant for black women. And don't *dare* then tell the HRC's anti-discrimination police you object.

(32) Yet I do object, and not just because I refuse to surrender my reason and pretend white really is black, just to aid some artist's self-actualisation therapy.

(33) That way lies madness, where truth is just a whim and words mean nothing.

(34) I refuse also for two other reasons that should be important to us all.

(35) First, of course, is that the special encouragements and prizes we set aside for Aborigines are actually meant for . . . well, *Aborigines*. You know, the ones we fear would get nothing, if we didn't offer a bit extra, just for them.

(36) So when a privileged white Aborigine then snaffles that extra, odds are that an underprivileged black Aborigine misses out on the very things we hoped would help them most.

(37) Take Mellor's art prize. This white university lecturer, with his nice Canberra studio, has by winning pushed aside real draw-in-the-dirt Aboriginal artists such as Dorothy Napangardi, Mitjili Napanangka Gibson and Walangkura Napanangka, who'd also entered and could really have used that cash and recognition.

(38) DOES this make sense? What's an Aboriginal art prize for, if a man as white and cosseted as Mellor can win it, and with a work that shows no real Aboriginal techniques or traditions?

(39) What's a black Aboriginal artist from the bush to think, seeing yet another white man lope back to the city with the goodies?

(40) Same with McMillan. When a man as white as I, already a lawyer with a job, wins a prize meant to encourage and inspire hard-struggle black students, what must those Aborigines conclude?

(41) And here's my other objection.

(42) Seeking power and reassurance in a racial identity is not just weak — a surrendering of your individuality, and a borrowing of other people's glories.

(43) It's also exactly what we have too much of already.

(44) The noble ideal of Australia, that we judge each other by our character and deeds, and not our faith, fortune or fatherland, is breaking down. We're not yet a nation of tribes, but that's sure the way we're heading.

(45) I've never before seen so many Australian-born people identify themselves by their ethnicity, whether by joining ethnic gangs, living in ethnic enclaves, forming ethnic clubs, demanding ethnic television, playing in ethnic sports clubs, or grabbing ethnic prizes and grants.

(46) Why is that a problem? Because people who feel they owe most to their tribe tend to feel they owe less to the rest. At its worst, it's them against us.

(47) Feel that fracturing yourself?

(48) So when even academics and artists now spurn the chance to be people of our better future — people of every ethnicity but none — and sign up instead as white Aborigines, insisting on differences invisible to the eye, how much is there left to hold us together?

1B – *"One of these women is Aboriginal"*

Courier Mail

One of these women is Aboriginal

160 Comments | Permalink
Andrew Bolt Blog

Andrew Bolt
Friday, March 20, 2009 at 03:23pm

(1) This New Racism is becoming farcical. From the Queensland election:

(2) *Not one protester turned up to the event kicked off by Coomera candidate* ***Leeanne Enoch****, the* ***first indigenous woman preselected for a winnable state seat by the ALP****, acknowledging the traditional owners of the land.*

(3) Exactly how Aboriginal is Enoch? By what superior right can she welcome me to "her" country? Why is she insisting on a racial difference the eye cannot even detect? Doesn't her ancestry in fact make her more an oppressor than a victim? And shouldn't we stop wasting our time on stressing such trivial - even non-existent - racial divides and start judging each other as individuals instead?

(4) Yet here she is, plucking one racial identity from the many open to her:

(5) ***Leeanne is a proud Nunukul/Nughi woman*** *from North Stradbroke Island.*

(6) Indeed, her career seems - from that last link - to have relied to quite some extent on her insisting on her Aboriginality.

(Thanks to reader Tamas.)

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2B – *"Aboriginal man helped"*

Herald Sun

Aboriginal man helped

134 Comments | Permalink
Andrew Bolt Blog

Andrew Bolt
Wednesday, August 19, 2009 at 02:55pm

(1) It is wonderful to see a rare and wonderful opportunity like this being offered to someone from a race that faces so much discrimination and poverty just because of the color of their skin:

(2) *MARK MCMILLAN*

(3) ***2009 Fulbright Indigenous Scholarship***...

(4) *Mark McMillan has received the 2009 Fulbright Indigenous Scholarship sponsored by the Department of Education, Employment and Workplace Relations. Mark, who is a senior researcher at Jumbunna Indigenous House of Learning, University of Technology, Sydney, will go to the University of Arizona's James E. Rogers College of Law to undertake to the newly established Doctor of Juridical Science in the Indigenous Peoples Law and Policy Program*

(5) McMillan has also been chosen by Reconciliation Australia as the face of **Which One of These Men is Aboriginal?** - its campaign to break down racist preconceptions that so hurt other members of his community of **white Aborigines**.

(6) **RA lists his other qualifications**:

(7) *A 40-year-old Wiradjuri man, Mark hails from Trangie, NSW. A law graduate from the ANU in Canberra, Mark also has a Masters of Law from the University of Arizona and will finish his doctorate - also at the University of Arizona - in 2010. Mark is Senior Researcher at the Jumbunna Indigenous House of Learning Research Unit at the University of Technology and is*

a Board member of the Trangie Local Aboriginal Land Council, Metro Screen and the NSW Mental Health Association. He is a proud father of an 11-year-old son, a proud gay man, rugby player, partner and active member of his community.

(8) A gay white man with a law degree? Just the kind of Aboriginal who needs a special handout.

(9) (Hmm. I wonder which Aborigines missed out on this scholarship, thanks to McMillan's entry. Maybe **the judges** could explain.)

(10) UPDATE

(11) It's some feat when Fulbright's affirmative action - an indigenous scholarship - ends up leaving this year's intake of Fellows looking just as white as ever:

(12) And, no, that's certainly **not Mark** in the middle of the back row. Mark is Aboriginal, you see.

(13) UPDATE 2

(14) McMillan describes **the agony of *not* being discriminated against** for being Aboriginal:

(15) *I am a blonde-haired, blue-eyed, fair-skinned Aboriginal Australian. Every time I look in the mirror, that's what I see… As a child, I grew up expecting everyone to be like me, to look like me - with the blonde hair and blue eyes.*

(16) *Clearly, my naive ideas about how Aboriginal people were 'supposed' to look were wrong. But being Aboriginal and fair and blonde was normal to me and I grew up in a world where I was treated 'normally'. Along the way however, I noticed that not everyone was receiving the same brand of treatment and that made me angry. It has taken a while to let go of that anger…*

(17) *Impeding my growth from that young person into the adult I wanted to become was the profound issue of identity. I was a 'white' black man… I was becoming a victim.*

(18) Racism sure has come a long way in this country if the problem now is that some people aren't black enough.