

Racial Vilification and Freedom of Speech in Australia and Elsewhere

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Abstract: This paper considers the difficult balance to be struck between values of freedom of speech and attempts by legislators in a range of jurisdictions to ban racially offensive speech. It compares the position in Australia, where the High Court has established an implied freedom of political communication, with the position in the United States, which has enshrined freedom of speech in its Bill of Rights, and in Canada, which has enshrined such a freedom in its Charter. After reflecting how such provisions have been applied in the context of legislative attempts to curb racially-motivated speech, the paper argues that there are real questions over the constitutional validity of Australia's racial vilification laws, since they interfere with an individual's right to express an opinion, albeit an offensive one. This discussion takes place in the broader context of question marks over the utility of banning speech in an effort to improve race relations, and the marketplace of ideas type philosophy, where it is thought that in free democracies such as those under consideration, individuals need to be exposed to a full range of views and opinions, in order to develop more considered views on important topics, rather than have access to views and opinions controlled by the government.

Keywords: democracy, free speech, racial vilification

I. Introduction

In 1995, an amendment was made to the Australian Racial Discrimination Act 1975 (Cth) to introduce provisions prohibiting racial vilification. These changes have been widely lauded as reflecting Australian multicultural society, and reflecting the harm that can be done by speech or acts with racist overtones. While generally being a tolerant and generally very successful multicultural society, Australia's history contains numerous occasions where Australia has not dealt with race issues well, and racist attitudes and behaviours have been demonstrated among sections of the community.¹ Of course, many other

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1 Examples here include the treatment of the indigenous peoples, discriminatory laws against Asians, particularly associated with the discovery of gold in the second half of the nineteenth century, partly explaining the lack of an equal protection provision in the Australian Constitution, the White Australia policy,

countries are dealing with similar issues. The amendments may be seen as a further attempt to grapple with such attitudes and behaviours. This paper will not seek to gauge the success of legislation such as this in achieving such a laudable aim, as opposed to other possible public policy options that might also seek to achieve the same end. To a constitutional lawyer, it is not relevant to constitutionality, directly at least, to ask whether legislation is effective in achieving a stated aim, although to the extent that proportionality is an accepted approach to such questions, such issues may indirectly be considered. The wisdom of legislation is typically removed from questions of constitutionality.

The purpose of this paper is to ask a different question: whether the legislation is consistent with Australia's status as a representative democracy, where the High Court of Australia has found an implied freedom of political communication. The question here is whether restrictions on race-based speech are consistent with the implied freedom of political communication, in that they amount to restrictions on speech based on its content. The paper will conclude that serious constitutional questions arise as to the validity of content-based restrictions, in light of the constitutional freedom.² These issues are highly topical in Australia at present, with the recent successful proceeding against journalist Andrew Bolt for breaching the racial vilification laws, for alleging that particular individuals who identify as indigenous Australians had done so for lifestyle reasons. Of course, these issues have been considered in other democracies as well, and this paper will make extensive use of comparative materials in discussing these matters.

II. Outline of Current Australian Racial Vilification Provision

Attempts by governments to suppress speech due to its content are not new. One early reference is to the 1275 English statute *De Scandalis Magnatum*, creating an offence involving spreading false news such that discord was likely to develop between the monarch and his or her subjects, or the 'great' people of the realm. Reisman notes that during the Tudor period where royal powers grew, the Court of Star Chamber was established to hear alleged cases of libel against the

and relatively recent legislative provisions to combat discrimination. Some argue that the ongoing refugee debate contains hallmarks of racism, as might some discussion around population policy. Some of these issues are alluded to by David Partlett, 'From Red Lion Square to Skokie to the Fatal Shore: Racial Defamation and Freedom of Speech' (1989) 22 *Vanderbilt Journal of Transnational Law* 431.

² Marcus O'Donnell asserts that highly respected constitutional law advocate Sir Maurice Byers QC claimed at the time of the passage of the racial vilification laws that they were in breach of the implied right of political communication: 'Hate Speech, Freedom, Rights and Political Cultures: An Analysis of Anti-Vilification Law in the Context of Traditional Freedom of Speech Values and an Emerging International Standard of Human Rights' [2003] *University of Technology, Sydney Law Review* 1 at 13.

ruling groups. The court acted, Reisman says, as a powerful support of autocratic government, inhibiting any criticism of the reigning powers. Amazingly enough, it was no defence to show the 'libel' was true.³ The link between suppression of speech and autocratic forms of government, and the reverse links between freedom of speech and democratic government, has been shown over many centuries.

The key relevant Australian provision is section 18C of the Racial Discrimination Act 1975 (Cth),⁴ with state equivalents.⁵ It makes it unlawful for a person to do an act, otherwise than in private,⁶ where:

- (a) The act is reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group of people; and
- (b) The act is done because of the race, colour, national or ethnic origin of the other person or some or all of the group.

Section 18D creates defences dealing with something said in good faith in making a fair comment on any event or matter of public interest, if it is a genuinely held belief.

There has been extensive academic critique of this key provision, focusing particularly on the vagueness of the words used, possibly leading to subjectivity in decision making, the lack of clarification of the extent of connection required between the act and the race etc. of

3 In the case of *De Libellis Famosis*, 5 Rep. 125a, the court concluded, 'it is not material whether the libel be true': V. Veeder, 'The History and Theory of the Law of Defamation' (1903) 3 *Columbia Law Review* 546-73; 4 *Columbia Law Review* 33-56. Lord Mansfield coined the phrase 'the greater the truth, the greater the libel': David Reisman, 'Democracy and Defamation: Control of Group Libel' (1942) 42 *Columbia Law Review* 727 at 735.

4 This section relates to a provision of the International Convention on the Elimination of All Forms of Racial Discrimination which requires signatory nations to, among other things, introduce an offence regarding the dissemination of ideas based on racial superiority or hatred, and incitement to racial discrimination. Australia ratified this Convention in 1975, but made a reservation in relation to that part of the Convention, at least temporarily. This reservation was (partly) overcome with the introduction of s. 18C but the Australian provision is civil, rather than criminal, in character. The law was upheld pursuant to the external affairs power in *Toben v Jones* [2003] FCAFC 137. See, for further discussion, Louise Johns, 'Racial Vilification and ICERD in Australia' (1995) *Murdoch University Electronic Journal of Law* 6. Article 20(2) of the International Covenant on Civil and Political Rights also requires that advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence be prohibited.

5 I do not dwell here on the different provisions applying in different Australian states; more detail is found about these in Dan Meagher, 'So Far No Good: The Regulatory Failure of Criminal Racial Vilification Laws in Australia' (2006) 17 *Public Law Review* 209.

6 This is clarified further in s. 18C(2) to the effect that an act is not done in private if it causes words, sounds, images or writing to be communicated to the public, is done in a public place, or is done in the sight or hearing of people who are in a public place. A public place is a place to which the public have access as of right or invitation, express or implied; whether a charge is made for admission is irrelevant: s. 18C(3).

the victim, and the scope of the exceptions.⁷ The provision does not require that the alleged wrongdoer have any malicious intent; a related point is that the concept of ‘incitement’ is missing as an ingredient of the section. For present purposes, it is not necessary to dwell on these possible deficiencies in the drafting of the provision.

III. Implied Freedom of Political Communication

In a series of cases commencing in 1992, the High Court of Australia has identified that implicit in the system of representative democracy for which the Australian Constitution provides in ss 7 and 24 is an implied freedom of political communication. The way in which the freedom was expressed by all seven members of the court in *Lange v Australian Broadcasting Corporation*⁸ has come to be recognized as the definitive expression of the freedom:

When a law of a State or Federal Parliament or a Territory legislature is said to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution, two questions must be asked before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s. 128 for submitting a proposed amendment of the Constitution to the informed decision of the people? If the first question is answered ‘yes’ and the second is answered ‘no’, the law is invalid.⁹

Such a freedom was held to be essential so that our system of representative government was to work as intended; citizens needed to have broad freedom to discuss ‘political’ issues, or as some called it,

⁷ See, e.g., Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Sydney Institute of Criminology: Sydney, 2002); Dan Meagher, ‘So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia’ (2004) 32 *Federal Law Review* 225 at 228–36; ‘Regulating History: Australian Racial Vilification Law and History Denial’ (2005) 24 *University of Queensland Law Journal* 499; Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate: Aldershot, 2000); Katharine Gelber and Adrienne Stone, *Hate Speech and Freedom of Speech in Australia* (Federation Press: Sydney, 2007). There is conjecture as to how s. 18C and D work together: *Bropho v Human Rights and Equal Opportunity Commission* (2004) 204 ALR 761 at 780 (per French J, claiming that s. 18D defences limited the operation of s. 18C and were not an exception to it). As Meagher points out, this would affect the burden of proof: ‘Regulating History’, above at 528. To the extent that the provision makes speech illegal, the practicalities of such restrictions can also be questioned in an era of cyber communication.

⁸ (1997) 189 CLR 520.

⁹ *Ibid.* at 567–8; subsequently in *Coleman v Power* (2004) 220 CLR 1, four members of the High Court agreed that the phrase ‘in a manner’ should be substituted for the phrase in the second limb ‘the fulfilment of’: McHugh J (at 50), Gummow and Hayne JJ (at 77–8) and Kirby J (at 82).

‘public affairs’, to make and receive communication on these topics, and to discuss the suitability of candidates for public office. Robust discussion was the sign of a healthy democracy.

In reviewing the ‘political free speech cases’ in terms of specific comments that might pertain to the specific context of what might be alleged to be racial vilification, Mason CJ, Toohey and Gaudron JJ in *Theophanous v Herald and Weekly Times Ltd*¹⁰ gave suggestions of what ‘political discussion’ might include; one of their suggestions was discussion of the political views and public conduct of those who are engaged in activities that are the subject of public debate, including Aboriginal political leaders. There is a possibility, and the author puts it no higher than this, that speech that might fall within the above category could be argued to be racial vilification according to the s. 18C definition. One key consideration would be whether the offensive conduct was done because of the alleged victim’s race, or whether it occurred independently of their race. It would be difficult to separate race out of the exercise if the person is identified as an ‘Aboriginal political leader’. Say, for instance, that a person makes offensive comments about an Aboriginal political leader who has expressed views on matters such as native title, recognition of Aboriginal customary law, the Stolen Generation or recognition of indigenous Australians in the Constitution. It would surely be difficult to argue that these comments were not made ‘because of’ the alleged victim’s race. The views of the victim might have been given special prominence precisely because they were made by someone identifying as indigenous, speaking out about matters of prime importance to their people.¹¹

Several members of the High Court in *Coleman v Power* were prepared to accept that insulting language could qualify as political speech.¹² Three members of the court in that case could only make an offence around the use of such language valid by reading in a requirement that such language amounted to ‘fighting words’, about which more will be said later.¹³ Otherwise, they would have answered the second limb of the *Lange* test ‘no’.

Another important passage from the cases in this context is the view expressed in *Australian Capital Television Pty Ltd v Commonwealth*.¹⁴ In recognizing the implied freedom of political communication, and discussing how it would be applied, Mason CJ said:

A distinction should perhaps be made between restrictions on communication which target ideas or information and those which restrict an activity or mode of communication by which ideas or information are

10 (1994) 182 CLR 104 at 124.

11 It is possible that the s. 18D defence might apply to resolve the conflict.

12 *Coleman*, above n. 9 at 30 (Gleeson CJ), at 45–6 (McHugh J), at 78 (Gummow and Hayne JJ), at 91 (Kirby J).

13 *Ibid.*, Gummow and Hayne JJ (at 78–9), Kirby J (at 87).

14 (1992) 177 CLR 106.

transmitted. In the first class of case, only a compelling justification will warrant the imposition of a burden on free communication by way of restriction and the restriction must be no more than is reasonably necessary to achieve the protection of the competing public interest which is invoked to justify the burden on communication. Generally speaking it will be extremely difficult to justify restrictions imposed on free communication which operate by reference to the character of the ideas or information. But, even in these cases, it will be necessary to weigh the competing public interests, though ordinarily paramount weight would be given to the public interest in freedom of communication . . . On the other hand, restrictions imposed on an activity or mode of communication by which ideas or information are transmitted are more susceptible of justification . . . Whether [restrictions on radio and television broadcasting] are justified calls for a balancing of the public interest in free communication against the competing public interest which the restriction is designed to serve, and for a determination whether the restriction is reasonably necessary to achieve the competing public interest.¹⁵

The distinction made here between content-based and mode-based restrictions has not generally¹⁶ been carried forward in subsequent case law on the implied freedom in Australia, but bears close similarity¹⁷ to the discussion of content-based restrictions discussed in terms of the First Amendment to the United States Constitution. Two of Mason CJ's footnotes on the same page of this discussion allude to United States case law on the question of content-based restrictions.¹⁸ It is to that topic that the paper now turns.

15 *Ibid.* at 143.

16 However, Gaudron J in *Levy v Victoria* (1997) 189 CLR 579 at 618 noted that judgments in *ACT* had distinguished between laws that were directed to political communication 'or content', and laws which had other purposes but which incidentally affected political communication. This distinction also appears in the joint reasons in *Hogan v Hinch* (2011) 85 ALJR 398 at 422.

17 Eric Barendt also notes the similarity between the dictum of Mason CJ regarding content-based restrictions and the American approach: 'Free Speech in Australia: A Comparative Perspective' (1994) 16 *Sydney Law Review* 149 at 163.

18 These are footnotes 24 and 25 of the judgment of Mason CJ (at 143); Gaudron J (at 211) refers to the recognition in American case law of the cruciality of public discussion in a representative democracy; McHugh J refers to American case law on the need for voters to have full information about political candidates (at 231); in *Theophanous*, above n. 10 at 130 Mason CJ, Toohey and Gaudron JJ, in discussing the content of the implied freedom of political communication, supported their conclusion as to its application to onerous civil and criminal liability provisions by referring to American case law on the First Amendment (at 130–1, 133–4). Deane J in that case claimed (at 168) that the contrast between rights protection in the United States and Australian Constitutions 'cannot be pushed too far'. In relation to another aspect of representative government, the right of an individual to attend the seat of government, members of the High Court in *R v Smithers ex parte Benson* (1912) 16 CLR 105 referred to relevant American cases such as *Crandall v Nevada* (1867) 6 Wall 35—Griffith CJ (at 108–9), and Barton J (at 109): 'the reasoning of the Supreme Court of the United States in the case of *Crandall v Nevada* . . . is as cogent in relation to the Constitution of this Commonwealth as it was when it was applied to the Constitution of the United States'. (To be clear, of course, the High Court in the 1912 decision did not speak of this right in terms of the implied freedom of political communication,

IV. United States Case Law on Freedom of Speech

Some justification may be required for resort to the American case law on freedom of speech, in casting some light on the meaning of the Australian equivalent. The First Amendment applies to speech generally, while the Australian provision is confined, at least at present, to speech that is political in nature.¹⁹ This is not considered to present an obstacle to considering in some detail how the United States Supreme Court has interpreted the provision, when considering the Australian 'equivalent'.

There are key parallels and similarities between aspects of the United States Constitution and the Australian Constitution. The founding fathers in Australia were clearly mindful of the American document, and to a large extent drew from that document in crafting the local version. The great jurist Sir Owen Dixon noted that the Australian founding fathers 'followed with remarkable fidelity the model of the American instrument of government'.²⁰ He referred to differences between the Australian and American models as being 'intangible'.²¹ Many specific constitutional examples may be given of the use of American constitutional concepts in the development of Australian constitutional law;²² in the specific context of freedom of speech, it is admitted that the links are weaker, but there is an obvious conceptual analogy between First Amendment questions and

first recognized in Australia in 1992, but Deane J in *Theophanous*, above n. 10 at 169 states that the 'right of due participation in the activities of the nation' (referring to *Smithers*) is an implication of the Constitution's doctrine of 'representative government'. The other judges in *Smithers* also expressly referred to American authorities, albeit in a different context to representative government (Isaacs J at 114–15, and Higgins J at 119); see also *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1 at 73 (Deane and Toohey JJ). In that case McHugh J referred to American precedent in discussing the meaning of the implied freedom in Australia (at 103); see also references to the American law of freedom of speech in the judgment of Gummow and Hayne JJ in *Coleman*, above n. 9 at 76.

19 Eric Barendt argues the American provision is explicable on the basis of that country's particular history, traditional distrust of government and pioneering spirit: above n. 17 at 157.

20 'Two Constitutions Compared' in Sir Owen Dixon, *Jesting Pilate* (Law Book Co: Melbourne, 1965) 102.

21 *Ibid.* at 104. Several of Sir Owen Dixon's papers, collected in *Jesting Pilate* include this theme: see, for instance: 'Two Constitutions Compared' (above n. 20) and 'Government Under the American Constitution', where again he alluded to the founding fathers imitating the American model with fidelity in many respects (p. 106). In another paper, giving tribute to (former American Supreme Court Chief Justice) John Marshall, he spoke of the American model as an 'inspiration' to the drafters of the Australian Constitution, 'Marshall and the Australian Constitution', *ibid.* at 167; and in a tribute to (former American Supreme Court Justice) Felix Frankfurter, Sir Owen Dixon noted that 'to Australia no small part of the constitutional law of the United States must be of first importance': *ibid.* at 180.

22 These include federalism itself, representative government, formal separation of powers in the Constitution, enumeration of specific heads of power of the federal government in the Constitution, implied immunities and reserved powers reasoning (at least, until *Amalgamated Society of Engineers v Adelaide Steamship*

questions arising from the implied freedom of political communication, such that discussion of the latter is well informed by discussion of the former. Further, the American system of democracy has much in common with the Australian system of democracy in terms of its stability and relatively long duration, free and fair election process, the broad franchise, and representative nature of the democracy and political actors.²³

It is acknowledged here that the American position on freedom of speech differs greatly from the position in other jurisdictions, particularly Europe, where racial vilification bans have survived human rights-based challenges. Such bans in Europe are particularly understandable in light of history, obviously including World War II, though their utility in preventing or discouraging genocide or lesser race-based hostility is open to question given that they were in existence in the 1930s in Germany.²⁴ The constitutional links are considered to be

Co Ltd (1920) 28 CLR 129), the notion of judicial review according to a written Constitution (*Marbury v Madison* 5 US 137 (1803), expressly adopted in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 263 (Fullagar J), the 'reasonably appropriate and adapted' method of assessing the constitutional validity of a law (Marshall CJ in *McCullough v Maryland* 4 Wheat 316 at 421 (1819), applied in cases such as *Commonwealth v Tasmania* (1983) 158 CLR 1, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1). Sir Owen Dixon paid tribute to the influence of the great American jurist on Australian constitutional development: 'Marshall and the Australian Constitution' in *Jesting Pilate* above n. 20 at 166-79; trade and commerce power/commerce clause (G. Winterton, H.P. Lee, A. Glass and J.A. Thomson, *Australian Constitutional Law: Commentary and Materials*, 2nd edn (Thomson Lawbook Co: Sydney, 2007) 172; Leslie Zines, *The High Court and the Constitution*, 4th edn (Butterworths: Sydney, 1997) 55, referring to the 'United States provision, from which the Australian position was clearly taken'; Anthony Gray, 'Reinterpreting the Trade and Commerce Power' (2008) 36 *Australian Business Law Review* 29); freedom of interstate trade (the High Court used American jurisprudence in *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 318; Anthony Gray, 'State Based Business Licensing and Section 92 of the Constitution' (2009) 14(2) *Deakin Law Review* 165); guarantees (such as they are) of trial by jury (where the High Court in *Cheatle v The Queen* (1993) 177 CLR 541 at 556 alluded to their expectation that the Australian framers intended to carry over any settled interpretation of the American provision); freedom of religion (*Adelaide Company of Jehovah Witnesses Inc v Commonwealth* (1943) 67 CLR 116 at 127 (Latham CJ)); right to a fair trial (*Dietrich v The Queen* (1992) 177 CLR 293); and just terms (Dixon J in *Andrews v Howell* (1941) 65 CLR 255 at 282 refers to the American equivalent).

²³ Of course, there are differences, including the republican model in the United States compared with the constitutional monarchy in Australia, direct election of the leader of the executive in the United States, stricter separation between the executive and legislature in that country, and a voluntary voting system there. However, in essence the representative nature of the system of government is clearly evident in each, perhaps even more so in the United States with some election of public officials other than members of Congress and the President.

²⁴ This point was noted by the dissenting judges in *Keegstra*, and will be elaborated upon further later in the paper. See also Anne Twomey, 'Laws Against Incitement to Racial Hatred in the United Kingdom' (1994) 1(1) *Australian Journal of Human Rights* 235; R. Delgado, 'A Shifting Balance: Freedom of Speech and Hate Speech Regulation' (1992) 78 *Iowa Law Review* 737 at 745.

much stronger between the United States and Australia than between Europe and Australia,²⁵ justifying extended consideration of the United States position, though conceding that it is vastly different to the jurisprudence in other parts of the world.

The starting point in summarizing the American First Amendment freedom of speech jurisprudence is the repeated affirmation of the fundamental nature of free speech in a democratic system of government. In *Board of Education v Barnette*²⁶ the court noted:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are circumstances which permit an exception, they do not now occur to us.²⁷

It sums up the rationale well in *Cohen v California*:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that the use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests . . . To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.²⁸

25 Of course, there were very strong links between the United Kingdom and Australia, but of course the United Kingdom is just one member of the European Union, and the European Court of Human Rights has dealt with the issue of racial vilification laws drawn from different parts of the Union.

26 319 US 624 (1943).

27 *Ibid.* at 641–2. The court noted that ‘there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas’: *Gertz v Robert Welch Inc* 418 US 323 at 339–40 (1974); ‘if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought’ (*United States v Schwimmer* 279 US 644 at 654 (1929) (Holmes J, dissenting); Justice Cardozo in *Palko v Connecticut* referred to it as the matrix and indispensable condition of nearly all other freedoms (302 US 319 at 327 (1937)).

28 403 US 15 at 24–5 (1971); Holmes J talked in *Abrams v United States* 250 US 616 (1919) about the marketplace of ideas as a test of truth.

It has referred to the ‘breathing space’ required by First Amendment jurisprudence requiring that citizens tolerate insulting and outrageous speech.²⁹ Speech concerning public affairs is not merely self-expression, but the essence of self-government.³⁰ Speech on public issues is on the highest rung of the hierarchy of First Amendment values, warranting special protection.³¹

The court has noted that order should not be secured through fear of punishment, and that suppression of thought is hazardous, because repression itself breeds hatred, and hatred threatens stable government. The solution is said to be the ability to discuss grievances.³² Justices Black and Douglas in *New York Times* claimed that representative democracy would not exist if constituents could be restrained from speaking, writing or publishing their opinions on any public measure, or on the conduct of those advising or executing the measure.³³ The court has been impressed with arguments based on the ‘free trade of ideas’ being protected by the First Amendment, even if the ideas are distasteful to many people.³⁴ The freedom has even been extended to the advocacy of the use of violence or breach of the law, provided the advocacy was not likely to lead to incite imminent lawless action.³⁵

A key variable in deciding whether speech enjoys First Amendment protection has been whether the regulation is content-based. It is much less likely that a content-based restriction on speech would be found consistent with the First Amendment protection:

Above all else, the First Amendment means that government has no power to restrict expression because of its messages, its ideas, its subject matter or content . . . To permit the continued building of our politics and culture, and to assure self-fulfilment for each individual, our people are guaranteed the right to express any thought, free from

29 *Hustler Magazine Inc v Falwell* 485 US 46 at 56 (1988).

30 *Garrison v Louisiana* 379 US 64 at 75–6 (1964).

31 *Connick v Myers* 461 US 138 at 145 (1983).

32 *New York Times Co v Sullivan* 376 US 254 at 270 (1964), citing *Whitney v California* 274 US 357 at 375–6 (1927) (Justice Brandeis).

33 *New York Times*, above n. 32 at 297. The court in this case referred to the ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open’ (at 270).

34 *Abrams*, above n. 28 at 630 (Holmes J, dissenting); ‘if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable’ (*Texas v Johnson* 491 US 397 at 414 (1989)).

35 *Brandenburg v Ohio* 395 US 444 (1969) (the conviction of the defendant, a member of the Ku Klux Klan, was overturned; the defendant burned a large wooden cross at a rally and used remarks such as ‘bury the n. . .’, ‘the n. . . should be returned to Africa’, and ‘send the Jews back to Israel’. The Supreme Court ruled the law under which he was charged to be inconsistent with the First Amendment freedom. In contrast, the court in *Virginia v Black* 538 US 343 (2003) found that a law banning the burning of a cross, if it were proven that the action was taken with an intention to intimidate, would be lawful. (The court in this case did strike down that part of the law to the effect that cross burning was presumed to be evidence of an intention to intimidate.)

government censorship. The essence of this forbidden censorship is content control.³⁶

The court's greater scrutiny of bans on speech or communication based on content has led, for example, to successful challenges to regulations prohibiting picketing if the picketing was about a particular issue,³⁷ to a ban on a movie because of its allegedly immoral messages,³⁸ to a ban on a display within 500 feet of a foreign embassy of a sign tending to bring the foreign government into public disrepute.³⁹ It has meant that an action for tort for intentional infliction of emotional distress based on a church picket at the funeral of a naval officer could not proceed, because the speech conveyed by the signs at the picket was protected by the First Amendment.⁴⁰ It has led to the striking down of a law criminalizing the sale of depictions of animal cruelty on the basis that the restriction was drawn in an overbroad way.⁴¹ A content-based restriction would need to serve a compelling state interest in order to be valid.⁴²

The court has recognized a 'fighting words' exception to the First Amendment, allowing regulation of speech if it is likely to lead to an immediate breach of the peace.⁴³ However, such an exception has been progressively tightened, not being applied to a case involving

36 *Police Department of the City of Chicago Et Al v Mosley* 408 US 92 at 95-6 (1972); 'under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers': *Street v New York* 394 US 576 at 592 (1969); *Watts v United States* 394 US 705 at 708 (1969) refers to a 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks'. This has some links with the famous footnote 4 in the United States Supreme Court decision in *United States v Carolene Products* 304 US 144 at 154 (1938) where the court stated that restrictions on political processes which might be expected to bring about the repeal of undesirable legislation could be subjected to greater judicial scrutiny. Here, content-based restrictions on political discussions could be within this category. See further: Anthony D'Amato, 'Harmful Speech and the Culture of Indeterminacy' (1991) 32 *William and Mary Law Review* 329; Susan Williams, 'Content Discrimination and the First Amendment' (1991) 139 *University of Pennsylvania Law Review* 616; and Geoffrey Stone, 'Content Regulation and the First Amendment' (1983) 25(2) *William and Mary Law Review* 189.

37 *Police Department of the City of Chicago*, above n. 36.

38 *Kingsley International Pictures Corp v Regents of the University of the State of New York* 360 US 684 (1959).

39 *Boos, Waller and Brooker v Barry* 485 US 312 (1988).

40 This included signs such as 'Thank God for Dead Soldiers', 'God Hates Fags', and 'America is Doomed': *Snyder v Phelps* 131 S Ct 1207 (2011).

41 *United States v Stevens* 130 S Ct 1577 (2010).

42 *Boos, Waller and Brooker*, above n. 39. Examples have been the banning of child pornography, upheld against a First Amendment challenge in *New York v Ferber* 458 US 747 (1982), a criminal prosecution for espionage for a person distributing leaflets opposing the military draft (*Schenck v United States* 249 US 47 (1919)) or for burning a military registration certificate to make the same point (*United States v O'Brien* 391 US 367 (1968)).

43 *Beauharnais v Illinois* 343 US 250 (1952) (restrictions on the distribution of a leaflet expressing negative sentiment towards African-American people, seeking to discourage further movement of African-American people to the area, upheld on this basis, against a First Amendment challenge).

the wearing of a swastika in a strongly Jewish community.⁴⁴ A further example of this is the leading case of *RAV, Petitioner v City of St Paul, Minnesota*,⁴⁵ involving the petitioner's action in allegedly burning a cross in the yard of an African-American family. He was charged with a breach of a city ordinance proscribing placing a symbol, object or graffiti on public or private property where the perpetrator knew or should have known it was likely to arouse anger, fear etc. among others on grounds such as race, creed or religion. The court invalidated the city ordinance because it was impermissible to regulate speech or communication based on hostility or favouritism to the underlying message expressed.⁴⁶ By singling out speech that had a connection with race, creed or religion, the ordinance discriminated against communication based on the message it conveyed. The ordinance had been drafted to rely on the 'fighting words' exception but the court said that it was not available here because the law sought to limit speech based on the viewpoint it expressed, which was unacceptable even in this context.⁴⁷

V. Canadian Case Law on Freedom of Expression

It is also instructive to consider Canadian case law on this topic. The High Court of Australia in the *Australian Capital Television Pty Ltd v Commonwealth*⁴⁸ decision expressly⁴⁹ referred to the precedent of the Canadian Supreme Court in recognizing as implicit in the British North America Act 1867 (Imp) freedom of speech or communication,⁵⁰ to support the recognition of an implied freedom of political communication. There are possible analogies between the Canadian two-step

44 *The Village of Skokie v National Socialist Party of America* 373 NE 2d 21 (1978) (Supreme Court of Illinois) (in other words, that speech was protected by the First Amendment).

45 505 US 377 (1992); Akhil Amar, 'The Case of the Missing Amendments: *RAV v City of St Paul* (1992) 106 *Harvard Law Review* 124.

46 505 US 377 at 386 (1992).

47 *Ibid.* at 393–4; see also *Terminiello v Chicago* 337 US 1 (1949) (successful challenge to city ordinance forbidding a breach of the peace, which applied to a petitioner who made a speech accusing certain racial groups of acting contrary to the general welfare).

48 (1992) 177 CLR 106.

49 *Ibid.* at 140 (Mason CJ, in the first paragraph he wrote under the heading 'Implication of a Guarantee of Freedom of Communication on Matters Relevant to Public Affairs and Political Discussion'); other discussions of the use of the Canadian principle in the context of the Australian implied freedom occur in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 48–50 (Brennan J), at 74 (Deane and Toohey JJ); see also *Theophanous*, above n. 10 at 125 (Mason CJ, Toohey and Gaudron JJ). Again, in contrast, some judges have expressly denied the relevance of Canadian precedent (based on either implications drawn from the British North America Act or the Charter) on the implied freedom of political communication in Australia: *Theophanous*, *ibid.* at 162 (Brennan J).

50 This obviously pre-dated the introduction of the Canadian Charter of Rights and Freedoms, which makes express provision for freedom of expression (s. 2(b)). McIntyre J of the Canadian Supreme Court recognized in *RWDSU v Dolphin Delivery Ltd* [1986] 2 SCR 573 at 583 that: 'freedom of expression is not . . . a

process (which will be discussed presently) and the *Lange* two-step approach in Australia. I will now discuss a fundamental Canadian case in which the principle of freedom of expression has been considered in the context of racial vilification. In so doing I must first concede that this case was based on the freedom of expression contained expressly in the Canadian Charter, rather than the implied freedom of political expression which had been recognized prior to the introduction of the Charter. They do not necessarily mean the same thing.⁵¹ Further, the Canadian cases involve the criminal context, while the provisions in the Racial Discrimination Act 1975 (Cth) do not. The Canadian system of representative government has many similarities to that in Australia.⁵²

In *R v Keegstra*,⁵³ the Canadian Supreme Court considered the constitutional validity of s. 319(2) of the Criminal Code (Can). The section made it an indictable offence, punishable by imprisonment for two years, to 'communicate statements, other than in private conversation, [which] wilfully promotes hatred against any identifiable group'.⁵⁴ The accused had been charged with a breach of the Act,

creature of the Charter. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.'

- 51 This was noted expressly by Mason CJ, Toohey and Gaudron JJ in *Theophanous*, above n. 10 at 125.
- 52 Most obviously, both are longstanding and stable democracies, enjoying universal suffrage, free and fair elections, and both are constitutional monarchies. Differences include the compulsory nature of the vote in Australia, but this is not thought to make consideration of the Canadian position inapt.
- 53 [1990] 3 SCR 697; for critique of the decision see Bede Harris, 'Race Vilification Laws: A Comparative Perspective' (1999) 6 *Canberra Law Review* 257 at 269-75; on somewhat similar facts the Canadian Supreme Court in *Attis v Board of School Trustees, District No. 15* [1996] 1 SCR 825 validated the removal of a teacher from a teaching position within New Brunswick. The teacher had made publicly racist and derogatory comments about Jewish people, including several books, letters to newspapers, and a television interview. The court found the Board's actions in removing the teacher from the classroom and adopting a position that he would be dismissed if he wrote or published anything further derogatory about Jewish people infringed the teacher's freedom of expression and religion; however, his removal from a teaching position (but not the policy of termination for further expression or publication) was justified by s. 1 of the Charter as being a proportional response seeking to address a substantial concern in a free and democratic society. The court found that young children were impressionable and the teacher's comments could undermine meaningful participation in social and democratic decision making by Jewish people, a result antithetical to the democratic process (at para. 61-2). The case is also considered in Luke McNamara, 'Criminalising Racial Hatred: Learning from the Canadian Experience' (1994) 1(1) *Australian Journal of Human Rights* 198.
- 54 A defence was provided in s. 319(3) where the statements made were true, made in good faith as an opinion on a religious subject, if they were in the public interest, for the public benefit and reasonably believed by the maker to be true, or if made in good faith intending to point out, for purposes of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

after he used various labels in relation to Jews, including ‘treacherous’, ‘sadistic’, ‘money-loving’, ‘power hungry’, and ‘child killers’. He blamed the Holocaust on the Jews, who were apparently trying to garner sympathy. Keegstra sought to defend himself against prosecution under s. 319 by arguing that the provision was incompatible with s. 2(b) of the Canadian Charter of Rights and Freedoms, which preserved freedom of belief, opinion and expression as fundamental freedoms.⁵⁵ By a 4–3 margin, the Canadian Supreme Court upheld the constitutionality of s. 319.

Dickson CJ for the majority⁵⁶ accepted that s. 319 infringed the right to freedom of expression in s. 2(b). In so doing, the majority noted that the type of meaning conveyed was not relevant in assessing whether s. 2(b) was enlivened;⁵⁷ in other words, the ‘quality’ of the communication was not relevant in assessing whether the implied freedom had been breached, because to do so would approach content-based restrictions, to which the United States Supreme Court had also expressed an aversion, if not absolute non-acceptance.⁵⁸

The majority conceded that the use of strong language and social debate, including hate-based speech, was an unavoidable part of the democratic process. Of particular relevance to the Australian context, given the limit of our principle here to communication that is ‘political’ in nature, the majority also acknowledged that ‘hate propaganda is expression of a type which would generally be categorized as “political”, putting it at the centre of the principle of freedom of expression as key to the democratic process.⁵⁹

However, the majority noted that hate expression could work to undermine democratic values by showing, and encouraging, lack of respect and dignity for members of the community simply for racial or religious reasons.⁶⁰ Hate speech could threaten the Canadian value of equality, and the connection of targeted groups to their community.⁶¹ The majority was also influenced⁶² by international instruments such as the Convention on the Elimination of All Forms of Racial Discrimination (CERD), which required signatories (including Canada) to criminalize the expression of ideas based on racial hatred or superiority, incitement to racial discrimination and race-based violence,⁶³ and the International Covenant on Civil and Political Rights, requiring the prohibition of advocacy of national, racial or religious

55 Section 1 of the Charter provides that the rights enshrined within it are subject to reasonable limits prescribed by law and which can be demonstrably justified in a free and democratic society.

56 Dickson CJ was joined by Wilson, L’Heureux-Dube and Gonthier JJ.

57 At para. [37].

58 *Ibid.* at para. [49], where Dickson CJ expressly acknowledged this link between Canadian and United States jurisprudence here.

59 *Ibid.* at para. [71].

60 *Ibid.*

61 *Ibid.* at para. [65].

62 *Ibid.* at paras. [58–61].

63 Article 4(a).

hatred that constitutes incitement to discrimination, hostility or violence.⁶⁴ The majority stated, in response to arguments favouring broad freedom of speech rights based on ‘marketplace of ideas’ or ‘search for truth’ principles, that there was little chance that statements based on racial hatred were true, or would be likely to lead to a ‘better world’.⁶⁵ Suppression of racial hatred would reduce the harm done to targeted individuals or members of targeted groups, and to relations between different cultural and religious groups in Canadian society.⁶⁶ The majority was fortified in its view by the fact that the s. 319 offence applied only to ‘wilful’ promotion of hatred, interpreted to require *mens rea* or intent. This significantly curbed the operation of the section and its potential to stifle expression.⁶⁷

As a result, the majority concluded that while the section did infringe the freedom of expression found in s. 2(b) of the Canadian Charter, it was saved by s. 1 as being a reasonable limit prescribed by law in a free and democratic society.⁶⁸

The dissentients agreed with the majority that content-based restrictions were not compatible with the freedom of expression guaranteed by s. 2(b) of the Charter. The extent to which the idea or thought expressed was unpopular, offensive, distasteful or contrary to the mainstream was irrelevant.⁶⁹ The dissentients referred to the fundamental nature of the freedom of expression in a representative democracy, ‘freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life’,⁷⁰ and the freedom upon which other freedoms depend.⁷¹ They also referred to the ‘marketplace of ideas’ and ‘search for truth’ rationales for preserving freedom of expression, contrasting such a freedom with totalitarian societies where government propaganda can flourish, quite removed from the real concerns of the population.⁷² The dissentients pointed out that during heated political debate, often things were said that could be said to promote hatred, such as name-calling, unflattering comparisons etc. This did not mean that such action subverted democracy, such that it should be banned. Statements amounting to an expression of racial hatred were not exceptional in that regard.⁷³

The other important point for the dissentients, in denying that s. 1 of the Charter justified the law, notwithstanding its infringement of the s. 2 freedom, was the efficacy of the provisions to achieve the

64 Article 20.2.

65 At para. [70].

66 *Ibid.* at para. [74].

67 *Ibid.* at paras. [80–2].

68 *Ibid.* at para. [94].

69 *Ibid.* at paras. [132–5] (La Forest, Sopinka and McLachlin JJ).

70 *Ibid.* at para. [117].

71 *Ibid.* at para. [110].

72 *Ibid.* at paras. [110–11].

73 *Ibid.* at para. [138].

desired end. Framing the question under s. 1 as being whether the means—the criminal prohibition of wilfully promoting hatred—was proportional and appropriate to the end of suppressing hate propaganda to maintain social harmony and individual dignity, the answer for the dissentients was ‘no’. They reasserted the primary importance of freedom of expression, a first order right the existence of which allowed other rights. The dissentients noted that this restriction was on speech that was ‘political’ in nature,⁷⁴ so that even closer scrutiny and justification was required, lest such restrictions became a stalking horse for state censorship. Such restrictions could have a chilling effect on a much greater range of expression than that to which the restriction was targeted.⁷⁵

The dissentients doubted that hate speech laws such as s. 319 would effectively curb hate speech. They pointed to the experience in Germany in the 1920s and 1930s, where hate speech laws clearly did not prevent the rise of a dictatorship intent on genocide.⁷⁶ Far from stamping out hate speech, hate speech laws might provide more publicity to the views of those who might make hate speech, making them martyrs or, in the minds of some, victims of a government conspiracy.⁷⁷ For these reasons, they believed that s. 319(2) was not saved by s. 1 of the Canadian Charter.

The Canadian jurisprudence confirms that the mere fact that a restriction is content-based is not necessarily fatal to its constitutional validity. If the High Court were minded to find s. 18C constitutional, it would find support in the Canadian jurisprudence.

VI. Constitutional Arguments Against the Australian Provisions

I turn now to consider some of the constitutional arguments about the Australian racial hatred provisions, in the light of the Australian freedom of political communication. I take as a given here (as some other commentators have)⁷⁸ that comments regarding race, or about matters with a connection to race, are (or may be) broadly discussion about ‘government or political matters’ within the first limb of the

⁷⁴ *Ibid.* at para. [157].

⁷⁵ *Ibid.* at para. [158].

⁷⁶ *Ibid.* at para. [162].

⁷⁷ *Ibid.* at paras. [160–1].

⁷⁸ Dan Meagher, ‘What is Political Communication? The Rationale and Scope of the Implied Freedom of Political Communication?’ (2004) 28 *Melbourne University Law Review* 438 at 440; ‘The Protection of Political Communication Under the Australian Constitution’ (2005) 28 *University of New South Wales Law Journal* 30; Nicholas Aroney, ‘The Constitutional (In)validity of Religious Vilification Laws: Implications for their Interpretation’ (2006) 34 *Federal Law Review* 287.

Lange v Australian Broadcasting Corporation test.⁷⁹ So, for example, a statement that certain races are entitled to ‘too much’ government support in Australia, or a statement about those seeking refugee status in Australia, both of which clearly touch on race, are statements about government or political matters. The refugee debate in Australia, multiculturalism and indigenous affairs are clearly matters of great political interest. If the racial hatred provisions in the Racial Discrimination Act 1975 (Cth) were applied to prohibit some debate on such matters, it would clearly burden freedom of communication on such matters. The really contentious aspect of *Lange* would be whether such a restriction was reasonably appropriate and adapted to a legitimate end in a manner which was compatible with the system of representative and responsible government for which the Constitution provides.

i. The Restrictions Are Content-Based

Clearly, s. 18C of the Racial Discrimination Act 1975 (Cth) is a content-based restriction, prohibiting the doing of an act, including expression of a view, in public that is likely to offend or humiliate a person or group of people, where the act is done because of that individual or group’s race or ethnicity. Mason CJ in *Australian Capital Television Pty Ltd* alluded to such laws, concluding that a ‘compelling justification’ would be required and that although a balancing of interests would be necessary, it would be extremely difficult to justify.⁸⁰

Similarly, the United States Supreme Court and Canadian Supreme Court in the decisions alluded to above have expressed strong reservations about content-based restrictions. In the United States, a compelling justification for such restrictions has also been required, and there have been very limited cases in which these have been upheld. These have included the so-called ‘fighting words’ exception, where the message communicated is likely to lead to an immediately violent response. This has only been used once by the United States Supreme Court to strike down racial vilification laws (the *Beauharnais* precedent), and there is serious doubt that this decision remains good law.⁸¹

79 Cass Sunstein reaches the same conclusion: ‘much racist speech belongs at the free speech core because it is a self-conscious contribution to social deliberation about political issues’: ‘Words, Conduct, Caste’ (1993) 60 *University of Chicago Law Review* 795 at 796; as does Bede Harris: ‘if (hate speech) provisions are to be used to proscribe the expression of ideas which are offensive because they are “racist” . . . the very concept of “racist speech” is a political one’: above n. 53 at 295.

80 (1992) 177 CLR 106 at 143; Harris reaches the same conclusion on Mason CJ’s views: ‘the emphasis given in this dictum to the high level given to ideas contained in expression is, I would argue, a strong indication that viewpoint discrimination legislation is likely to be found unconstitutional’: Harris, above n. 53 at 292; Harris concludes that by this standard s. 18C is ‘problematic’: *ibid.* at 293; see also *Cunliffe v Commonwealth of Australia* (1994) 182 CLR 272 at 299 (Mason CJ), at 389 (Gaudron J).

81 E.g. Cass Sunstein: ‘most people think that after *New York Times v Sullivan*, *Beauharnais* is no longer the law’: above n. 79 at 814.

It is most unlikely that racial vilification laws could be justified on the 'fighting words' exception, and the Australian laws are not written in such a way as to embrace this exception (explicitly) anyway. The other exceptions where content-based restrictions in the United States have been permitted have been in the area of child pornography and seditious activity. As unpleasant as racial hatred might be, it is hard to put such behaviour in the same category as the former two, in terms of justification for regulating speech or communication. All members of the Canadian Supreme Court in *Keegstra* agreed that the content of speech was irrelevant in determining whether it infringed the freedom of communication for which s. 2(b) of the Canadian Charter provides.⁸²

Of course, there is good reason why content-based restrictions are frowned upon. If validated by a court, a government might use them to influence debate in certain ways, to shut down debate on some topics, and to favour others. This is completely contrary to the essence of a free society, based on the fact that people have a right to air views, and to receive a broad range of views and information about others. It is the essence of a democracy. We are well aware of other countries which suffer from government-controlled media and thought suppression, and will fight to save our society from this fate. The price of this liberty is that people may express views which we don't share, or views which we find abhorrent, offensive or insulting. This price is high, but the alternative is worse.

ii. The Prohibition in the RDA Does Not Require Intent to Racially Vilify

As has been noted by other authors, as read the Australian provisions can be applied against a person although that person did not express or intend hatred for the person's race or ethnicity.⁸³

In the leading Canadian case of *Keegstra*, one of the key aspects of the racial vilification legislation which the majority hesitatingly validated against a freedom of expression challenge was the requirement in the Act that the promotion of racial hatred be 'wilful', obviously analogous to 'intended'. In the words of the majority:

. . . the interpretation of wilfully . . . has great bearing upon the extent to which s. 319(2) limits the freedom of expression. This mental element, requiring more than merely negligence or recklessness as a result, significantly restricts the reach of the provision, and thereby reduces the scope of the targeted expression . . . this stringent standard of *mens rea* is an invaluable means of limiting the incursion of s. 319(2) into the

82 At para. [37] (Dickson CJ, Wilson, L'Heureux-Dube and Gonthier JJ), at 133 (La Forest, Sopinka and McLachlin JJ).

83 Meagher, above n. 7 at 232; Luke McNamara and Tamsin Solomon, 'The Commonwealth Racial Hatred Act 1995: Achievement or Disappointment?' (1996) 18 *Adelaide Law Review* 259 at 267.

realm of acceptable (though perhaps offensive and controversial) expression. It is clear that the word 'wilfully' imports a difficult burden for the Crown to meet and, in so doing, serves to minimize the impairment of freedom of expression.⁸⁴

Dickson CJ referred to the Law Reform Commission of Canada's *Working Paper on Hate Propaganda*, which recommended against removing an intention or purpose requirement in hate legislation. It is possible, given the majority's expressed view here, that if the Canadian provision had not been confined to 'wilfully' promoting racial hatred, the majority may not have validated the provision under s. 1 of the Canadian Charter, as being a reasonable limit justified in a free and democratic society.⁸⁵

Of course, the obvious corollary is that the absence of an intent requirement in the Australian version means that the incursion of the provision on freedom of political communication is greater than it otherwise would have been. It is surely even more difficult to meet the 'compelling justification' requirement of Mason CJ in *Australian Capital Television Pty Ltd*.

iii. Compatibility With Representative and Responsible Government

The obvious place to begin in terms of what representative government requires is the writings of a leading proponent of the doctrine, John Stuart Mill. Many extracts of his work *On Liberty* are directly relevant for present purposes and warrant extensive quoting:

No argument, we may suppose, can now be needed against permitting a legislature or executive, not identified in interest with the people, to prescribe opinions to them, and determine what doctrines or what arguments they shall be allowed to hear . . . If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind . . . the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose what is almost as great a benefit, the

84 At para. [82] (Dickson CJ, for the majority).

85 The decision cannot be distinguished away from the Australian situation by claiming that the case turned on the concept of 'intent', often associated with criminal proceedings (as the Canadian provisions were), in contrast with the provisions of the Racial Discrimination Act 1975 (Cth), which are not criminal proceedings. As evidence for this point, we should bear in mind that the Western Australian provisions, found in the Criminal Code Amendment (Racial Vilification) Act 2004 (WA), criminalize (s. 78) conduct likely to incite racial animosity or harassment; intention is not required in order for the criminal provision to be breached. As a result, one cannot dismiss the relevance of the Canadian case on the basis it is confined to racial vilification provisions that are criminal in nature.

clearer perception and livelier impression of truth, produced by its collision with error . . . We can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if it were true, stifling it would be an evil still . . . All silencing of discussion is an assumption of infallibility⁸⁶ . . . [Mill questioned why there was a preponderance among humans of rational opinion and conduct, and claimed that free discussion had brought this state of affairs to exist] . . . [Humankind] is capable of rectifying . . . mistakes, by discussion and experience. Not by experience alone. There must be discussion, to show how experience is to be interpreted. Wrong opinions and practices gradually yield to fact and argument, but facts and arguments, to have any effect, must be brought before it . . . the only way in which a human being can make some approach to knowing the whole of a subject is by hearing what can be said about it by persons of every variety of opinion, and studying all modes by which it can be looked at by every character of mind. No wise man ever acquired his wisdom in any mode but this . . . the steady habit of correcting and completing his own opinion by collating it with those of others, so far from causing doubt and hesitation in carrying it into practice, is the only stable foundation for a just reliance on it.⁸⁷

In other words, there is a fundamental value to society in allowing individuals to express their views on matters, with few limits.⁸⁸ It allows listeners to consider issues and points of view which they would not otherwise have considered, causing them to strengthen their opinions on those matters, refine their views, or change their position.⁸⁹ It is the process of discussion that provides a more

86 John Stuart Mill, *Utilitarianism, On Liberty, Considerations on Representative Government* (Everyman Paperbacks: New York, 2002) 83–5.

87 *Ibid.* at 88; he went on to relate the fate of Socrates and Jesus Christ as examples of the dangers of punishing thought and expression in society (at 92); a similar theme is evident in the writings of: Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (Harper and Brothers: New York, 1948); Wojciech Sadurski, ‘Offending With Impunity: Racial Vilification and Freedom of Speech’ (1992) 14 *Sydney Law Review* 163; and Robert Post, ‘The Rule of Law: What Is It? Democracy and Equality’ (2006) 603 *Annals of the American Academy of Political and Social Science* 24.

88 Meiklejohn, above n. 87. Kirby J noted ‘we tolerate robust public expression of opinions because it is part of our freedom and inherent in the constitutional system of representative democracy’: *Coleman*, above n. 9 at 99–100.

89 This is the marketplace of ideas argument: see *Watts v United States* 394 US 705 at 708 (1969); *Abrams*, above n. 28 at 630 (Holmes J); similarly Kirby J speaks in *Coleman*, above n. 9 at 91, about insult, emotion, calumny and invective as part of the ‘struggle of ideas’. Meagher alludes to how ‘noxious ideas or viewpoints may further rather than undercut the advancement of historical knowledge’, but inviting responses which otherwise may not have been forthcoming: ‘Regulating History’, above n. 7 at 530. In lamenting a European Court of Human Rights’ decision (*Otto-Preminger-Institut v Austria* ECt HR, Ser A, No 295-A [1994]) upholding an Austrian ban on a film said to be offensive to Catholics, Eric Heinze concludes ‘the court thus upholds bans on a form of expression, religious satire, from which the very tradition of candid, rigorous debate in Europe had largely emerged’: ‘Viewpoint Absolutism and Hate Speech’ (2006) 69 *Modern Law Review* 543 at 559.

sophisticated view of matters among the populace.⁹⁰ A person who has an opinion on something based on no more than what they were told to believe by their teacher or parent is most unlikely to be able to defend that opinion when challenged. In contrast, a person who has carefully considered different points of view before reaching their opinion is in a much better position to justify and defend their opinion, which is likely to be much deeper and richer as a result of their having heard different views.⁹¹ These arguments are not here based, as they sometimes appear elsewhere, on the notion of a ‘search for truth’.⁹²

Another argument focuses particularly on the ‘representative’ nature of the democracy. If a politician is elected to accurately and comprehensively reflect the collective wishes and will of his or her constituents, it can be argued that constituents need to be able to express their true views, without fear or favour. This might include opinions on matters including race that others might find to be offensive. Arguably, this tends to reflect the incompatibility of freedom of speech restrictions with the representative nature of our political process.

The second limb of the *Lange* principle considers whether the laws are ‘reasonably appropriate and adapted’ to achieving a legitimate end. It may be conceded immediately that prevention of discriminatory treatment of an individual based on race or ethnicity, and the pursuit of a successful multicultural society with mutual respect, tolerance and dignity for others is a legitimate end to which legislation might be directed. However, is s. 18C reasonably appropriate and adapted to achieving this end?

Several authors have focused on the pain and damage caused by racist speech. It has been argued that such speech can cause long-term psychological impact on those at whom it is targeted.⁹³ Some

90 Some authors refer to this as self-realization: see, e.g. Lawrence Solum, ‘Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech’ (1989) 83 *NorthWestern University Law Review* 54 at 80; and Maurice Redish, ‘The Value of Free Speech’ (1982) 130 *University of Pennsylvania Law Review* 592.

91 This view is sometimes expressed as the ‘marketplace of ideas’ argument; e.g. Holmes J in *Abrams*, above n. 28 at 630, said that the ‘ultimate good desired is better reached through free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market’; in other words, there is no such thing as a false idea: *Gertz*, above n. 27 at 339.

92 As Dan Meagher acknowledges, “‘truth’ is in today’s postmodern world very much a contested proposition”: ‘Regulating History’, above n. 7; cf e.g. Mill, above n. 86 at 85–8, references to finding ‘truth’ in justifying free discussion.

93 Mari Matsuda, ‘Public Response to Racist Speech: Considering the Victim’s Story’ (1989) 87 *Michigan Law Review* 2320; Richard Delgado, ‘Words That Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling’ (1982) 17 *Harvard Civil Rights-Civil Liberties Law Review* 133; T. Massaro, ‘Equality and Freedom of Expression: The Hate Speech Dilemma’ (1991) 32 *William and Mary Law Review* 211; Anne Flahvin, ‘Can Legislation Prohibiting Hate Speech Be Justified in Light of Free Speech Principles?’ (1995) 18 *University of New South Wales Law Journal* 327; Stefanou Haag, ‘Antiracism: From Legislation to Education’ (1994) 1 *Australian Journal of Human Rights* 185; Robert Post, ‘Racist Speech, Democracy

have described the damage caused as ‘spirit murder’.⁹⁴ For these authors, the restrictions on hate speech are thus justified in order to minimize these impacts. Others argue that hate speech is inconsistent with fundamental values such as tolerance, respect for others and inclusion, and that it may have the effect of ostracizing certain groups from political and social discussion, such that the banning of it is consistent with representative democracy.⁹⁵ As one example, Mahoney states ‘it is hard to imagine how the unhindered, wilful promotion of group hatred could be characterized as either elemental to the structure of democracy, or an advancement in the protection of freedom’.⁹⁶ There is some evidence of this in the *Lehideux and Isorni v France* decision,⁹⁷ where the European Court of Human Rights stated that ‘like any other remark directed against the Convention’s underlying values, the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10’.⁹⁸

However, in the author’s view there are several difficulties with this argument. In saying this, it is not sought to downplay the pain which some victims of racial vilification may feel about what someone else has said. It is acknowledged that some speech within the category of racial vilification may be extremely hurtful to those to whom it is directed.

Firstly, there is the slippery slope argument—there are many things that one person might say that might be hurtful to another, or a group of others. A person might say things about people with red hair, people with freckles, tall people, short people, people who are of above average weight, those of below average weight, those who are intelligent, those who are not intelligent, those who like particular music bands, those who like particular movies, those who support particular political parties, members of a particular profession, those of a particular sexuality, those with larger ears, those with larger noses etc. Statements made on any or all of those things could also be extremely hurtful and, in some cases, cause emotional harm. Yet, no-one suggests that these comments can or should be banned in a democracy.⁹⁹ Thomas Jefferson’s adage about our freedom depending

and the First Amendment’ (1991) 32 *William and Mary Law Review* 267 at 271–7. Frederick Schauer says that the costs of free speech are borne disproportionately by racial minorities: ‘Uncoupling Free Speech’ (1992) 92 *Columbia Law Review* 1321 at 1322.

94 Patricia Williams, ‘Spirit Murdering the Messenger: The Discourse of Fingerprinting as the Law’s Response to Racism’ (1987) 42 *Miami Law Review* 127.

95 Post, above n. 93 at 300–17; David McGowan and Ragesh Tangri, ‘A Libertarian Critique of University Restrictions of Offensive Speech’ (1991) 79 *California Law Review* 826 at 842; McNamara and Solomon, above n. 83 at 283–6.

96 Kathleen Mahoney, ‘Hate Vilification Legislation and Freedom of Expression: Where is the Balance?’ (1994) 1(1) *Australian Journal of Human Rights* 353.

97 ECt HR, [1998] VII ECHR 90.

98 *Ibid.* at para. 53.

99 D’Amato, above n. 36.

on the liberty of the press (free speech), and that this liberty cannot be limited without being lost, is apposite here.¹⁰⁰ How is it justifiable to single out vilification speech based on race for special treatment, while leaving other types of vilification speech unregulated? Similarly, if speech is to be banned because it is inconsistent with society's values, it is impossible to draw acceptable boundaries. As Heinze says, some of what was written by philosophers including Aristotle, Plato, Marx and Nietzsche could also be argued to be contrary to today's fundamental values, yet no-one is seriously calling on a ban of such works.¹⁰¹

The price we pay for democracy is that some people will exercise this right in an irresponsible way, but the solution for this is not (should not be) to ban someone saying it.¹⁰² Inherent in democracy is that there be a robust exchange on a whole range of contentious issues; in some ways there is irony in the very body symbolizing the views of the people seeking to act to suppress certain views.¹⁰³ The court has noted that:

... the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments ... if there is any danger that the people cannot evaluate the information and arguments advanced (during the course of public debate), it is a danger contemplated by the Framers of the First Amendment.¹⁰⁴

Sometimes, particularly in the political arena, comments may be ill-informed, nasty, offensive, hurtful, or unfair.¹⁰⁵ As Kirby J says in *Coleman*, freedom of expression 'belongs as much to the obsessive, emotional and the inarticulate as it does to the logical, the cerebral and the restrained'.¹⁰⁶ The response to concerns expressed that race

100 As Strossen puts it, 'history demonstrates that if the freedom of speech is weakened for one person, group or message, then it is no longer there for others': Nadine Strossen, 'Regulating Racist Speech on Campus: A Modest Proposal' (1990) *Duke Law Journal* 484 at 536.

101 Heinze, above n. 89 at 565. He says that movies such as *Gone With the Wind* and *Breakfast at Tiffany's* would need to be banned also because of their racial stereotyping and racist caricatures, respectively (at 563).

102 Cass Sunstein makes a similar point: 'a good deal of public debate involves racial or religious bigotry or even hatred, implicit or explicit. If we were to excise all such speech from political debate, we would severely curtail our discussion of such important matters as civil rights, foreign policy, crime, conscription, abortion and social welfare policy. Even if a form of hate speech is involved, it might well be thought a legitimate part of the deliberative process ... it bears directly on politics. Foreclosure of such speech would probably accomplish little good': above n. 79 at 815.

103 Post, above n. 93 at 285; McGowan and Tangri, above n. 95 at 856; Barendt, above n. 17 at 161; cf C. Lawrence, 'If He Hollers Let Him Go: Regulating Racist Speech on Campus' (1990) *Duke Law Journal* 431.

104 *First National Bank v Bellotti* 435 US 765 at 791-2 (1978).

105 'The language of the political arena ... is often vituperative, abusive and inexact': *New York Times*, above n. 32 at 270; 'From its earliest history, Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion. They are part and parcel of the struggle of ideas': *Coleman*, above n. 9 at 91.

106 *Coleman*, above n. 9 at 100.

hate speech is not fundamental to the structure of democracy or an advancement in freedom protection is that it is not for the government to decide what speech is acceptable and what speech is not. It doesn't justify censorship.

If it is thought that banning someone from saying something will stop them from thinking it, it is considered unlikely to be the case. For example, in Australia's recent past some politicians have made comments that might be perceived to be negative about indigenous Australians, or about the level of Asian immigration. It is unlikely that charging such a person with a breach of the racial vilification laws for such comments will stop the person from holding such views, or others from holding such views.¹⁰⁷ Voltaire's idea is apposite here, of supporting the right of that person or anyone else to express such a view, even if I vehemently disagree with the remarks made. Kirby J in *Coleman v Power* refers to the 'counterproductive' attempts to suppress opinion.¹⁰⁸

One concrete piece of evidence to support this argument is to consider that there were laws in Germany in the 1920s and 1930s forbidding racial vilification, as the Canadian Supreme Court noted in the *Keegstra* decision.¹⁰⁹ Clearly, these laws did not stop the attempted genocide of a race of people. While it is always dangerous to generalize from extreme examples, it does cause us to question carefully the perceived benefit of racial vilification laws, compared with their impact on fundamental rights in a democratic system of government. It is also possible that prosecutions for alleged racial vilification will be counterproductive, giving the alleged offender publicity for their views, making them a martyr in the minds of some, and leading others

107 Sadurski makes the same point: 'racists are there, and it is better to let them air their views in the open rather than allow an illusion to grow that the problem has been solved because racist statements have been made illegal . . . by prohibiting public statements that vilify those groups we may slightly reduce the hurt to the feelings of their members, but at the same time we risk removing the issue of racism from the public agenda': Sadurski, above n. 87 at 193. Catharine Mackinnon has similarly concluded there is no evidence that 'consumers' of racist propaganda are more likely to commit aggression against the target of the racist comments: *Only Words* (Harvard University Press: Cambridge, MA, 1993) 62. See also Strossen: 'there is no persuasive psychological evidence that punishment for name-calling changes deeply held attitudes. To the contrary, psychological studies show that censored speech becomes more appealing and persuasive to many listeners merely by virtue of the censorship': above n. 100 at 554 (citing studies like: S. Worchel and S. Arnold, 'The Effects of Censorship and Attractiveness of the Censor on Attitudinal Change' (1973) 9 *Journal of Experimental Social Psychology* 365, and T.C. Brock, *Erotic Materials: A Commodity Theory Analysis of Availability and Desirability*, Technical Report of the United States Commission on Obscenity and Pornography (1971) 131-2).

108 *Coleman*, above n. 9 at 99.

109 Para. 162; see also A. Borovoy and K. Mahoney, 'Language as Violence vs Freedom of Expression: Canadian and American Perspectives on Group Defamation' (1989) 37(2) *Buffalo Law Review* 337 at 344. Others have made the same point about the United Kingdom anti-vilification laws and their failure to stop active neo-Nazi groups: Aryeh Neier, *Defending My Enemy: American Nazis, the Skokie Case and the Risks of Freedom* (Dutton: New York, 1971) 154-5.

to suggest conspiracy theories involving the government.¹¹⁰ Reflecting on the experience in Europe, Anne Twomey notes:

In the United Kingdom, during every review of the racial hatred legislation, the allegation is made that the legislation has failed and must be amended because racist material and racist violence is increasing, rather than decreasing. The experience of places where racial hatred or vilification legislation has been enacted, such as the United Kingdom, Northern Ireland, former Yugoslavia and Germany, shows that it will not have the effect of eliminating racial hatred, and if we expect it to do so, we too will be disappointed and consider our legislation to have failed. While racial vilification legislation may have the effect of removing from circulation some of the more virulent and offensive racist literature it may also result in the production of more sophisticated racist propaganda, couched in moderate and persuasive tones, as has occurred in the United Kingdom. If the aim of racial vilification legislation is to punish racists and racist organisations, we may also be disappointed. Experience in the United Kingdom has again shown that many of the most notorious racists are capable of avoiding conviction under such legislation, and that it is often members of minority groups, who do not have the same access to legal advice, who are caught by the legislation.¹¹¹

Further, in considering the extent to which the law is reasonably appropriate and adapted to a legitimate end the fulfilment of which is compatible with representative and responsible government,¹¹² the existence of alternative measures less invasive of human rights to meet this legitimate end, and questions of proportionality between the invasion and the corresponding benefit, are considered relevant.¹¹³ The author does not deny that racism, including racist speech, is a

110 Heinze, above n. 89 at 552.

111 'Laws Against Incitement to Racial Hatred in the United Kingdom' (1994) 1(1) *Australian Journal of Human Rights* 235; Delgado also found that evidence of racism in Europe had substantially increased while racial vilification laws were in place: above n. 24 at 745.

112 Aleardo Zanghellini concludes that racial hatred speech restrictions are not compatible with the requirements of representative and responsible government: 'Jurisprudential Foundations for Anti-Vilification Laws: The Relevance of Speech Act and Foucauldian Theory' (2003) 27 *Melbourne University Law Review* 458 at 485.

113 In the specific context of the implied freedom of political speech, the High Court of Australia has referred, as a criterion of validity, to the question whether 'there were other less drastic means by which the objectives of the law could be achieved': *Lange*, above n. 8 at 568 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). Questions of proportionality were also important in the Supreme Court of Canada decision in *R v Keegstra* [1990] 3 SCR 697 (in the context of the Charter). In other constitutional contexts, examples of the High Court of Australia's use of proportionality principles in assessing validity include *Betfair*, above n. 22 at 479 (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ) (s. 92) and *Commonwealth v Tasmania* (1983) 158 CLR 1 at 266-7 (Deane J); *Richardson v Forestry Commission* (1988) 164 CLR 261 at 317 (Deane J) (both s. 51(29)). See also the discussion of 'proportionality' in Australian constitutional law in Justice Susan Kiefel, *The Use of Constitutional Supra Principles by Judges*, VIII World Congress, International Association of Constitutional Law 2010, 10 December 2010.

problem in Australia, as it is in many other countries. However, other, arguably more effective, ways exist to tackle such an issue, including effective education of the community on such matters, government policies that bring different groups in society together, organization of multicultural festivities and events etc. If racism thrives on ignorance and fear, the answer is to tackle those issues head-on, not to stop the manifestation of racism, racist speech. Of course, it is not for a constitutional lawyer to tell the government which policy option is best to tackle a problem; however, these matters are considered relevant in considering the application of ‘reasonably appropriate and adapted’ and ‘proportionality’ principles in this context.

Some of the judgments in *Coleman v Power* can also be utilized in support of an argument that a ban on racist hate speech may not be considered by some judges to be ‘reasonably appropriate and adapted’ and consistent with representative democracy within the *Lange* test. For instance, Gummow and Hayne JJ (with whom Kirby J agreed)¹¹⁴ validated the provisions in that case, but that was only because they confined the provisions to prohibiting insulting, abusive or threatening words that were likely to provoke a physical response. In other words, this was very similar to the ‘fighting words’ exception allowed by the United States Supreme Court in *Chaplinsky v New Hampshire*¹¹⁵ case, and to which Gummow and Hayne JJ expressly alluded in their judgment. Though they made this decision on the basis of statutory interpretation, they found it was ‘reinforced’ by the *Lange* principles.¹¹⁶ They were satisfied that, as read by them, the relevant legislation was confined to ‘fighting words’, limits on which were appropriate and adapted to a legitimate end of keeping public areas free of violence.¹¹⁷ They went on to say that if the Act were not so read, and was read ‘in terms of ensuring the civility of discourse, the very basis of the decision in *Lange* would require the conclusion that an end identified in that way could not satisfy the second of the tests articulated in *Lange*’.¹¹⁸

Given that the relevant provision of the Racial Discrimination Act 1975 (Cth) dealing with racial hatred acts is not confined to ‘fighting words’, surely the implication from Gummow and Hayne JJ in *Coleman* is that they would not conclude that it satisfied the second limb of the *Lange* test. It must be acknowledged, however, that no member of the court in this case expressly adopted a distinction between restrictions that were content-based and those that were not, or indicated a two-tier level of scrutiny, with content-based restrictions viewed more suspiciously. This was in the context of the law in *Coleman* which clearly was a content-based restriction.

114 *Coleman*, above n. 8 at 87.

115 *Chaplinsky v New Hampshire* 315 US 568 (1942).

116 *Ibid.* at 77.

117 *Ibid.* at 78.

118 *Ibid.* at 79.

iv. The Section 18D Qualification

Section 18D of the Act creates a qualification¹¹⁹ to s. 18C, allowing anything said or done reasonably and in good faith, where it is (a) a statement, publication, discussion or debate for any genuine academic or other genuine purpose in the public interest, or (b) in making 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. The question is whether this s. 18D exception to s. 18C saves the latter section from being found to be incompatible with the implied freedom of political communication.¹²⁰ One commentator has expressed doubt that it does.¹²¹

There have been relatively few cases that have considered this matter, and none at the High Court of Australia level. In a single judge decision, *Jones v Scully*,¹²² Hely J of the Federal Court considered a racial vilification complaint against a person who expressed doubt over the veracity of the Holocaust and claimed it had been used to garner sympathy, suggested that Jewish people control pornography and were trying to control the world and involved in several conspiracies. In denying that s. 18D applied, Hely J stated:

I am not satisfied that in distributing this leaflet, the respondent was acting either reasonably, or in good faith. The leaflet employs sensationalised findings which place the blame for pornography upon Jews per se . . . The other reasons are not stated, but it is implicit in the article that the fact that a person is a Jew is a sufficient reason for not allowing the person to settle in America. The leaflet vilifies Jews because they are Jews, and for that reason its distribution is neither reasonable nor in good faith.

Hely J accepted that the respondent believed what she was saying but this was not sufficient to attract the s. 18D defence, because he found the publication was not ‘reasonable and in good faith’. In so concluding, he stated that:

. . . if as the respondent says available information only casts doubt on the accepted version of the Holocaust, then distribution of a leaflet

119 It has been stated that the true nature of the section is a qualification to the s. 18C provision, rather than an exception to it: *Bropho v Human Rights and Equal Opportunity Commission and Another* (2006) 135 FCR 105.

120 In *Jones v Scully* (2002) 120 FCR 243, Hely J found that s. 18C (with the s. 18D exception) were reasonably appropriate and adapted to a legitimate objective consistent with representative government (the *Lange* test) (at 306); see also *Catch the Fire Ministries Inc and Others v Islamic Council of Victoria Inc and Another* (2006) 206 FLR 56.

121 It is debatable . . . whether communication needs to be reasonable or in good faith in order to enjoy the protection of the implied freedom of political communication’: Aroney, above n. 78 at 315.

122 *Jones v Scully*, above n. 119 at 286. Section 18D was not raised by the respondent in *Jones v Toben* [2002] FCA 1150 and the Federal Court found the onus of proof was on the respondent to do so (para. 101). In any event, the court was not satisfied that the ‘good faith’ requirement had been established. The context was an organization claiming that the Holocaust was exaggerated and that Jews were seeking to garner sympathy with their claims.

conveying the imputation I have found is neither reasonable nor in good faith.¹²³

Hely J concluded in this paragraph that the respondent may have intended to vilify Jews with her material, and if that was her intention, then reasonableness, good faith and genuineness of purpose could not be established.¹²⁴

What the author considers to be a narrow approach to the s. 18D exemption was again taken in *Toben v Jones*.¹²⁵ Three members of the Full Federal Court denied that the exemption could apply to similarly distasteful comments about the Jewish people. Carr J found the exemption did not apply, because 'in the context of knowing that Australian Jewish people would be offended by the challenge the appellant sought to make, 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'. Similarly in *Bropho v Human Rights and Equal Opportunity Commission and Another*, French J (then of the Federal Court) claimed that the fact that the person believed what they were saying was not enough to attract s. 18D; in addition, 'objectively viewed, [they must have] taken a conscientious approach to advancing the exercising of that freedom, in a way that is designed to minimize the offence or insult, humiliation or intimidation suffered by people affected'.¹²⁶ These views were adopted and applied by Bromberg J in the recent decision of *Eatock v Bolt*.¹²⁷

With respect, as a general observation the above comments suggest that some courts have found it difficult to ignore the content of an expression, or the way in which it was said, in deciding whether it was made 'reasonably and in good faith'. To reiterate, no doubt many of the comments referred to above were extremely hurtful to members of society, and we might have wished that those expressing those views had not done so, or done so in different terms. But our disagreement with the way in which views were expressed cannot (should not) be the determinant of whether or not a person's right to express the view is constitutionally protected or not.¹²⁸ The fact that the s. 18D qualification has been interpreted in this way by some lower courts reinforces, in the author's view, rather than denies, the incompatibility of the racial vilification regime established in the

123 *Jones v Scully*, above n. 119 at 293.

124 *Ibid.*

125 [2003] FCAFC 515 at 528 (with whom Kiefel J (at 534) and Allsop J (at 555) agreed).

126 *Bropho*, above n. 118 at 133.

127 [2011] FCA 1103 (28 September 2011), paras 348–9.

128 The words of Kirby J in *Coleman*, above n. 9 at 91 (an implied freedom of political communication case) spring to mind here: 'one might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse. But those of that view must find another homeland. From its earliest history, Australian politics has regularly included insult and emotion,

Racial Discrimination Act 1975 (Cth) with the implied freedom of political communication.

VII. Conclusion

Provisions in the Racial Discrimination Act 1975 (Cth) are vulnerable to a constitutional challenge based on the implied freedom of political communication. The freedom, drawn from the principle of representative democracy for which the Constitution provides, is fundamental in nature. In this light, restrictions on speech based on content must be subject to strict scrutiny, and courts in other jurisdictions have not generally favoured content-based restrictions. Validity here opens the door to validity in other contexts, such that the freedom of communication inherent in any functioning democracy is under threat. Applying the *Lange* test, comments or acts referring to racial issues or a person's race could well be 'political' speech within the first *Lange* limb. As to their possible justification as being reasonably appropriate and adapted to a legitimate end compatible with representative government, it is hard to reconcile the need for open debate with content-based restrictions. The price to be paid for a robust democracy is that sometimes individuals will say things that are unpleasant, hurtful, unfair or offensive, but we live with this because the alternative, that of government control over what can be said, is worse. There is no justification for singling out vilification based on race for special treatment, as opposed to many other kinds of vilification. Based on experiences elsewhere, government attempts at thought control or expression control in the race area are very unlikely to achieve their desired ends, and may well have unintended consequences, and when the cost in terms of loss of free speech and debate is so high, the legislation cannot be said to be reasonably appropriate and adapted to a legitimate end consistent with representative government.

calumny and invective, in its armoury of persuasion. They are part and parcel of the struggle of ideas . . . By protecting from legislative burdens governmental and political communications in Australia, the Constitution addresses the nation's representative government as it is practised. It does not protect only the whispered civilities of intellectual discourse.'