

INCONSISTENT AT BEST?: AN ANALYSIS OF AUSTRALIA'S FEDERAL RACIAL VILIFICATION LAWS

DILAN THAMPAPILLAI*

I INTRODUCTION

Australia's federal law on racial vilification is contained in Part IIA of the *Racial Discrimination Act 1975* (Cth) (RDA). Part IIA sets out to regulate racist speech in Australian society. But from its very inception the Part IIA scheme has been plagued by inconsistency in relation to both the key terms of the statute and the scope of the scheme. The problem is that the terms of the statute suggest that it could apply to a wide range of racist speech from that which is egregious to that which is arguably of a lower level of offensiveness. However, the Explanatory Memorandum makes reference to 'extreme racist behaviour' and the title of Part II refers to 'hatred'. In practice, the courts have mostly read Part IIA in such a way as to apply only to the more direct and egregious forms of racist speech.¹ Even then a measure of uncertainty still surrounds the case law. In this regard, the early critiques of Part IIA, by Meagher and McNamara, which noted that the scheme suffered from serious inconsistencies, appear to have remained largely correct.²

The consequences of this unaddressed problem are difficult to quantify. Though, it is notable that after a flurry of cases before the Federal Court and the Human Rights Commission during the first five years of the statutes operation, the amount of claims that go to a formal hearing have diminished greatly. Indeed, in the last five years only three cases, with substantial merit, have emerged.³ All of these were cases involving direct racist insults or Holocaust denial. These types of cases constitute the matters that are almost prima facie likely to be successful in the Federal Court. The only other matters of note that have arisen have been the attempts by Jeremy Jones, on behalf of the Australian Council of Jewry, to

* Lecturer, School of Law, Deakin University.

¹ See for example, *Toben v Jones* (2003) 199 ALR 1; *Jones v Scully* (2002) 120 FCR 243; *McMahon v Bowman* [2000] FMCA 3; *Campbell v Kirstenfeldt* [2008] FMCA 1356.

² Dan Meagher, 'So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32 *Federal Law Review* 225; Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Sydney Institute of Criminology Monograph Series, 2002).

³ *Jones v Bible Believers Church* [2007] FCA 55; *Campbell v Kirstenfeldt* [2008] FMCA 1356; *Silberberg v Builders Collective of Australia Inc and Another* [2007] FCA 1512. There have been other instances where litigants have vexatiously raised racial vilification before the Federal Magistrates Court but these claims have been dismissed as being without basis.

compel Frederick Toben to comply with the rulings of the Federal Court in the *Toben v Jones*⁴ case by removing Holocaust denial material from the internet.⁵

The lack of case law under Part IIA should not be interpreted to suggest that racism has disappeared in Australia. Nor does it mean that any potential complainant is without recourse to a forum. Australia does have state and territory legislation that regulates racial vilification but the threshold for offensiveness under these statutes is geared towards expressions of 'hatred' rather than dislike or contempt. However, not every instance of harmful racist speech is imparted with venom or vulgarity.⁶ The federal laws on racial vilification have an appealingly lower threshold. But this lower threshold does not guarantee the success of a claim, given the other elements that must be satisfied under Part IIA.⁷ Indeed, there is a curious juxtaposition between the low threshold of offensiveness in 18C(1)(a) and the more onerous standard of causation in 18C(1)(b) and the free speech defence in s 18D.

This may reflect the fundamentally unresolved nature of the debate on racial vilification in Australia. Free speech considerations are of paramount importance in a liberal democracy.⁸ This is clear in the Explanatory Memorandum to Part IIA of the RDA and also in the broadly worded terms of the section 18D exemption. However, Parliament is a better forum for resolving the tension between the need for free speech and the countervailing need to penalise vilification. Indeed, for an effective racial vilification scheme to exist this tension must be resolved in the words of the legislation rather than in the interpretive battles of the courts and tribunals.

In addition the Federal Court has emerged as the only forum within which disputes under Part IIA are being heard. At its inception Part IIA was justiciable before both the Human Rights Commission (the Commission) and the Federal Court. However, in 2000 the then Howard

⁴ (2003) 199 ALR 1. In *Toben* the posting of Holocaust denial material to a website was found to constitute unlawful racial vilification. The Federal Court ordered its removal.

⁵ See for example *Jones v Toben* [2009] FCA 354; *Jones v Toben* [2009] FCA 477. In each of these matters Jones has attempted to compel Toben to comply with the orders of the Federal Court to remove Holocaust denial material from his website.

⁶ For a discussion of the increasing subtlety of racist hate speech see further Gail Mason, 'The Reconstruction of Hate Language' in Katharine Gelber and Adrienne Stone (eds) *Hate speech and freedom of speech in Australia* (Federation Press, 2007) 34.

⁷ See *Creek v Cairns Post* [2001] FCA 1007. In *Creek*, Keifel J found that offensiveness was satisfied but found that the plaintiff could not prove that the offensive speech was made because of her race.

⁸ See further, Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate, 2000); Katharine Gelber, 'Pedestrian Malls, Local Government and Free Speech Policy in Australia' (2003) 22(2) *Policy and Society: Journal of Public, Foreign and Global Policy* 23.

Government amended the Commission's powers pursuant to the *Human Rights Legislation Amendment Act 1999* (Cth) and removed the ability of the Commission to hear complaints and decide matters. Presently, the Commission can receive a complaint and instigate a conciliation process. The Commission cannot reach a decision or publish any findings. While the amendments to the Commission's powers are understandable in light of the decision in *Brandy v Human Rights and Equal Opportunity Commission*,⁹ they have removed a low cost alternative to dispute resolution where conciliation is neither possible nor desirable.

In terms of an analytical framework it is suggested that there are two ways in which the case law can be designated as 'inconsistent'. Firstly, inconsistency can exist where a decision is made under the statute but where the plain meaning of the statute's provisions suggest that an opposite decision could easily be justified. Secondly, inconsistency can exist where a finding is made with little or no recourse to the terms of the statute. But there are more compelling reasons to revisit the case law under Part IIA than to see whether the inconsistency problem has persisted in the jurisprudence. For example, the adoption by the Federal Court of one test for causation where another test, with equal measure of support from the High Court, was available and more relevant to the problem at hand, is a troubling development that frustrates the law.¹⁰ Similarly, there does appear to be a quarantining of political speech away from the scheme. Apart from *McGlade v Lightfoot*,¹¹ where Senator Lightfoot did not appear and failed to advance a defence, cases such as *Walsh v Hanson*¹² and *Combined Housing v Hanson*,¹³ suggest a free speech sensitivity in relation to mainstream political life. On reflection, these problems might reflect the reluctance of the judiciary to extend the Part IIA scheme into mainstream Australian political and cultural life despite the fact that it is not explicitly immune from the scheme.

This article examines whether an inconsistency narrative is in fact justified in relation to Part IIA of the RDA and, if it is, *how* the problem may be solved. In this regard this article is the first step in what the author hopes will be a broader re-evaluation of the entire Part IIA scheme some 15 years after its inception. To this end this article examines the case law under

⁹ (1995) 183 CLR 245.

¹⁰ See Part 4 below.

¹¹ (2002) 124 FCR 106.

¹² Unreported, HREOC (2 March 2000) (Commissioner Nader).

¹³ *Combined Housing Organisation Limited v Hanson* [1997] HREOCA 58.

Part IIA in relation to the key terms of the scheme. It is argued, with consideration to the type of matters that have been successful before the Federal Court, that it makes sense to quarantine those types of matters before the Federal Court and to deny hearing to other less serious disputes. It is argued that those disputes that are less egregious may be re-directed to the Commission.

II THE PART IIA SCHEME

In 1995 the *Racial Hatred Act 1995* (Cth) was passed by the Keating Government, amending Part IIA of the RDA. The amendments made it unlawful to publicly do an act that was reasonably likely offend, insult, humiliate or intimidate others on the basis of race.¹⁴ To accommodate concerns about free speech a safeguard provision was included to protect speech made reasonably and in good faith.¹⁵ The amendments as passed were different in form to the scheme originally put forward by the then Attorney-General Michael Lavarch MP in the *Racial Hatred Bill 1994*. The original scheme included provision for a criminal offence of racial vilification. However, due to opposition from the Greens in the Senate the Bill was modified.¹⁶ The Part IIA scheme as it now operates regulates racial vilification as part of the civil law.

The mixed intentions behind the scheme are evident in both the text of the statute and the secondary materials. The title to Part IIA makes clear reference to ‘Racial Hatred’. However, as noted, the terms of s 18C set a low threshold for racially offensive speech. Further, the Explanatory Memorandum makes reference to protecting victims of ‘*extreme* racist behaviour’.¹⁷ However, in the Parliamentary debates racist speech was discussed in general terms with no overwhelming emphasis on extreme racial hatred. Instead, the debates discussed racist speech as a social problem in a variety of instances.

The Part IIA scheme consists of two main parts: the standard set out in s 18C and the safeguard contained in s 18D.

Section 18C provides:

¹⁴ Section 18C.

¹⁵ Section 18D.

¹⁶ See further Luke McNamara and Tamsin Solomon, ‘The Commonwealth *Racial Hatred Act 1995*: Achievement or Disappointment,’ (1996) 18 *Adelaide Law Review* 259.

¹⁷ Explanatory Memorandum, *Racial Hatred Bill 1994* (Cth). Emphasis added.

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

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

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

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

Section 18C has four elements. These are (i) the act must take place in a public place: (ii) the act must satisfy the threshold for offensiveness; (iii) the act must be reasonably likely to offend the target group and (iv) the act must have been done because of the ethnicity, nationality, race or colour of the target group. All four elements under s 18C must be made out in a vilification case. Even then, the 18D limitation can still prevent a vilification finding.

There are three issues relating to s 18C that need consideration. Firstly, there is the question harm threshold under s 18C(1)(a). There are two issues in relation to the harm threshold. The first issue is the suggestion that as the title of Part IIA makes reference to ‘hatred’ that this should necessarily inform the construction of s 18C(1)(a).¹⁸ The second is the scope of the phrase, ‘to offend, insult, humiliate or intimidate’. Both of these issues are highly relevant to the question of whether Part IIA can be made to apply to indirect racist speech, or, whether, as it currently stands, the statutory scheme is ineffectual against sophisticated or semi-disguised racist speech. Secondly, there is the requirement that offence be ‘reasonably likely’ under the same sub-section. Whilst this has not been controversial in past cases it does affect the burden of proof.

Thirdly, there is the causal link requirement in section 18C(1)(b). The burden imposed by the causal link is problematic and needs to be reconsidered.¹⁹ The causal link requirement effectively calls for an examination of the motives of the author of the challenged speech. The difficulty that this poses is that in cases where the racial vilification is less than blatant it can be hard to discern the existence of racist intent despite its presence.²⁰ As discussed below,

¹⁸ As a matter of statutory interpretation the title of a section is to be considered in the interpretation of that section: *Acts Interpretation Act 1903* (Cth) s 13.

¹⁹ For a discussion of the causation problem see Kate Eastman, ‘Problems With Evidence in Hate Speech Case’ in Gelber and Stone (eds), above n6 106.

²⁰ This has been an issue in cases of indirect discrimination. The RDA does recognise that indirect discrimination can occur. But in cases where racism is a possible cause of disadvantage or discrimination, but

if the purpose of Part IIA is in part to set the rules for civilised discourse on sensitive matters, by proscribing harmful racist speech, then an objective standard on offensiveness, which would remove or discourage racist commentary, does not require an inquiry as to motive.

III THE HARM THRESHOLD

Uncertainty surrounds the interpretation of the harm threshold under s 18C(1)(a). Primarily, the problem is that there are two ways in which the s 18C harm threshold could be viewed. It could be suggested that ‘hatred’ needs to be present or it could be that hatred plays no part in establishing harm. The early approaches to s 18C, at least those by the former High Court judge Sir Ronald Wilson serving in his role as HREOC President, correspond with the former view. In two decisions, *Bryant v Queensland Newspapers*²¹ and *Combined Housing v Hanson*,²² Sir Ronald emphasised the importance of ‘hatred’ under s 18C.

At dispute in *Bryant* was the use of the terms “Pommie” and “Poms” in a newspaper article.²³ In *Bryant* he stated:

It may be helpful, in discussing the proper construction of the racial Hatred Act, to note both the title and the heading of Part IIA. The heading of Part IIA is “Prohibition of Offensive Behaviour based on Racial Hatred”. The notion of “hatred” although not used in section 18C itself, suggests that the section allows a fair degree of journalistic licence, including the use of flamboyant or colloquial language.²⁴

Similarly in *Combined Housing*, Sir Ronald stated in relation to section 9 of the RDA:

I hope it will be understood - particularly by Aboriginal and Torres Strait Islander peoples - that I am required to decide this case on a strictly legal basis. It is not a question whether or not I agree with the political views which I have found the respondent to be expressing in her interview with the journalist from *The Australian*. I appreciate that the complainants and many other members of the community may find them misguided, unwarranted and *offensive*,

where it has not manifested itself in a highly tangible way, the complainant has failed to succeed in their claim. See *Department of Health v Arumugam* [1988] VR 319. In *Arumugam* the complainant, a senior medical professional alleged discrimination on the grounds of race after losing out on an appointment to a junior rival. However, there was no direct evidence of racial bias and his claim failed.

²¹ *Bryant v Queensland Newspapers Pty Ltd* [1997] HREOCA 23.

²² *Combined Housing Organisation Limited v Hanson* [1997] HREOCA 58.

²³ These terms are used in relation to people of English descent.

²⁴ Above n21.

but that does not mean that giving expression to them as part of a political statement was an unlawful act contrary to s 9(1) or any other section of the Act.²⁵

At issue in *Combined Housing* were the comments of right-wing Australian politician Pauline Hanson that she would represent only white Australians. The comments were made in an interview for a newspaper article and they were not made directly to the complainants. In *Combined Housing*, Sir Wilson decided that the complainant could not succeed under section 18C. Whilst he did not elaborate on his findings, it is notable that he did recognise that comments by Pauline Hanson that she would represent only white people, could be seen as offensive. However, Sir Ronald did not connect the general offensiveness of the remarks with the legal standard under s 18C.

Both of the cases above contained racist statements that were not made directly to the complainants. Even acknowledging the offensiveness of Pauline Hanson's statements in *Combined Housing* it must be stated that the depth of the insult does not correspond to that found in the detailed racist tracts that might be found in the writings of an extreme racist hate group, such as a neo-nazi group or any other type of organised racist hate group.

In that context it is pertinent to consider the treatment of Holocaust denial literature under Part IIA. Such speech, which is often accompanied by anti-Semitic remarks, can be considered to be hate speech. Denying one of the worst crimes in human history, the genocide of European Jews, and vilifying that ethnic group is an expression of hatred and extreme contempt. Such material has been present in cases such as *Toben v Jones*, *Jones v Scully*²⁶ and *Jones v Bible Believers Church*.²⁷ In each of these cases the Federal Court had little trouble in finding that the requirements of Part IIA, and the harm threshold in particular had been satisfied.

In *Scully* Hely J stated:

In my view, a leaflet that conveys an imputation that Jews are fraudulent, liars, immoral, deceitful and part of a conspiracy to defraud the world is reasonably likely to offend, insult, humiliate or intimidate Jews in Australia. This would be so regardless of whether or not the

²⁵ Above n22. For a discussion of the *Combined Housing* decision see Lawrence McNamara, 'The Things You Need: Racial Hatred, Pauline Hanson and the Limits of the Law,' (1998) 2 *Southern Cross University Law Review* 92.

²⁶ (2002) 120 FCR 243.

²⁷ *Jones v Bible Believers Church* (2007) FCA 55.

leaflet made mention of the Holocaust. However, the fact that the imputation arises in the context of a debate about the Holocaust makes it even more likely that the leaflet would cause offence. This is particularly so owing to the inflammatory language used in the leaflet, as well as the fact that it is unambiguously dismissive of the Jewish view of the Holocaust. I therefore find that this leaflet contravenes s 18C.²⁸

The type of material at issue in *Scully* included lurid anti-Semitic tracts. It was unsophisticated, crude and clearly racist. Moreover, it pertained to a particular point of sensitivity, as Hely J noted, as it concerned the Holocaust. Very similar material was at issue in *Toben v Jones* and *Jones v Bible-Believers Church*. This type of material did not cause any particular problems for the adjudication of the harm threshold. It did not concern debates that were ongoing in mainstream Australian politics unlike the Pauline Hanson cases.²⁹ Nor was it expressed with a sufficient degree of restraint.

In a similar vein to the Holocaust denial cases those matters involving direct vulgar abuse have easily satisfied the harm threshold. For example, in the case of *Campbell v Kirstenfeldt*³⁰ the victim was subjected to repeated instances of direct racial abuse. This was easily found to be racial vilification. Similarly, in *McMahon v Bowman*³¹ the direct use of racist names to the victim was found to amount to racial vilification. In *Silberberg*,³² *Campbell* and *McMahon* extreme profanity was pivotal in a finding of unlawfulness. In these decisions there is little, if any, analysis of the relevant terms under s 18C(1)(a).³³ For the most part this appears to be because of the fact that the vulgar racist insults used were very clearly offensive and were used because of the race of the complainants. In these cases the issue of ‘hatred’ was not raised at all. Instead, the court had recourse only to the bare terms of the relevant statutory provisions.

²⁸ Above n25, [177].

²⁹ At the time Pauline Hanson, clearly espousing some decidedly racist views, had gathered substantial attention and some support in Australian politics.

³⁰ [2008] FMCA 1356.

³¹ [2000] FMCA 3.

³² *Silberberg v Builders Collective of Australia Inc and Another* [2007] FCA 1512.

³³ With particular reference to the cases of *Rugema v J Gadsten Pty Ltd* [1997] EOC ¶92-887; *Combined Housing Ltd v Hanson* [1997] HREOCA 58; *McMahon v Bowman* [2000] FMCA 3; *Horman v Distribution Group* [2001] FMCA 52, Meagher (above n 2) suggests that the absence of such analysis is evidence of the unsatisfactory nature of the Part IIA scheme. The counter-argument is that in most of those cases and cases like *Silberberg*, *Campbell* and *McMahon* the impugned speech acts are obviously in violation of Part IIA. Though, Meagher’s point should stand in relation to *Combined Housing*.

The conflict between the bare terms of 18C(1)(a) and its legislative context has not been satisfactorily resolved by either the HREOC panels or by the judiciary. It is notable that the early HREOC decisions of *Combined Housing, Bryant, Shron v Telstra Corporation*³⁴ and *De La Mare v Special Broadcasting Service*³⁵ all emphasised hatred as an important basis for unlawfulness. Arguably, this is correct as s 13 of the *Acts Interpretation Act 1901* (Cth) does require recourse to heading in the interpretation of legislation.

However, the Federal Court subsequently moved away from the approach of earlier courts and tribunals, whilst simultaneously creating a threshold above that suggested by the bare terms of the statute. Most notably, Keifel J in *Creek v Cairns Post Pty Ltd*,³⁶ in interpreting 18C read down the title of Part IIA on the basis that it was intended to apply to three criminal offences relating to inciting racial hatred and threatening racial violence.³⁷ The approach of Keifel J correctly identifies that the drafters of 18C intended for it to serve multiple purposes.³⁸ This would have required that 18C would have had to be interpreted differently depending upon the context in which it was to be applied. The differences between criminal and civil standards might have resulted in some very contested interpretations of 18C, but as Keifel J noted in *Creek*, the criminal provisions did not enter into law.³⁹

However, removing ‘hatred’ from the equation does not resolve the matter of the actual threshold. The bare terms of 18C should be capable of capturing any speech that insults, offends, humiliates or intimidates. But in *Creek* Keifel J lifted the harm threshold above the low standard suggested by the bare terms and stated that ‘to “offend, insult, humiliate or intimidate” are profound and serious effects, not to be likened to mere slights’.⁴⁰ This again suggests a dividing line between cases where the racial insult is of a lesser degree and magnitude than in cases of extreme racist behaviour. In considering Keifel J’s statement on 18C(1)(a), Branson J in *Jones v Toben* at first instance stated that: ‘I understand her Honour to have found in the context provided by s 18C of the RDA a legislative intent to render unlawful only acts which fall squarely within the terms of the section and not to reach to

³⁴ [1998] HREOCA 24.

³⁵ [1998] HREOCA 26.

³⁶ [2001] FCA 1007.

³⁷ *Ibid* [15].

³⁸ *Ibid*.

³⁹ *Ibid*.

⁴⁰ *Ibid* [16].

“mere slights” in the sense of acts which, for example, are reasonably likely to cause technical, but not real, offence or insult’.⁴¹

This statement, which was endorsed on appeal, reflects a certain degree of uncertainty surrounding the application of s 18C(1)(a). What is unclear is the point at which a statement moves from being a ‘technical’ breach of s 18C(1)(a) to being a real offence.

The case of *Hagan v Trustees of the Toowoomba Sports Ground Trust*⁴² demonstrates the inconsistency regarding the harm threshold. In *Hagan* the applicant complained of the use of what may be regarded as a profoundly racist term. The local council had named a sports stadium after a deceased Toowoomba man known as E.S. ‘Nigger’ Brown. The applicant objected to the use of the name and the repeated broadcast of the name in commentary on local radio. The respondents argued that the name had lost its original racist context over time. It was suggested that the nickname had been given to ES Brown in the 1920’s because of the type of shoe polish he used, but it could also have been given to him in relation to his relationship with the local Aborigines.

In deciding in favour of the respondent, Drummond J relied on the views of approximately 60 members of the local Toowoomba Aboriginal community who stated that they did not object to the use of the term given its context. Drummond J held that the objection of the applicant alone was insufficient. But even applying the objective test it seems reasonably likely that any member of the wider Aboriginal community, and any dark-skinned non-white Australian, would object to the use of a term that evokes enslavement and inferiority, particularly when used by a white person with regard to a non-white.

Of course, in *Hagan* the term ‘nigger’ was not directed at any person, but was used in reference to the nickname of a white person. However, the context in which the nickname emerged was clearly one of entrenched casual racism. Indeed, the very fact that the shoe polish in question was referred to as ‘Nigger brown’ typifies the deeply ingrained racism of the 1920s and way in which such attitudes often went unchallenged in everyday life. In that context, it can be argued that naming the stadium the ‘Nigger Brown Stadium’ could

⁴¹ [2002] FCA 1150, [92].

⁴² [2000] FCA 1615. See also *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2001] FCA 123. For a criticism of the *Hagan* decisions see Mariana Mello, ‘*Hagan v Australia: A Sign of the Emerging Notion of Hate Speech in Customary International Law*’ (2006) 28 *Loyola International & Comparative Law Review* 365.

reasonably be seen by a marginalised community as an endorsement by the Trustees of that past racism.

In *Hagan*, the reasonable likelihood of offence requirement also served to limit the threshold of offensiveness. As Drummond J stated:

It is apparent from the wording of s 18C(1)(a) that whether an act contravenes the section is not governed by the impact the act is subjectively perceived to have by a complainant. An objective test must be applied in determining whether the act complained of has the necessary offensive, insulting, humiliating or intimidatory quality for it to be within the sub-section. The question so far as s 18C(1)(a) is concerned is not: how did the act affect the particular complainant? But rather would the act, in all the circumstances in which it was done, be likely to offend, insult, humiliate or intimidate a person or a group of people of a particular racial, national or ethnic group?⁴³

The weakness of the reasoning in the *Hagan* case is that the decision could easily have been decided the other way.⁴⁴ The decision in *Hagan* was later criticised by a United Nations committee. Notwithstanding the international criticism that the decision garnered, in the later decision of *Campbell v Kirstenfeldt*, Lucev FM stated that ‘the word “nigger” is a derogatory term for an aborigine’.⁴⁵ Given the uncertainty surrounding the way in which ES Stanley earned his nickname this should have been considered by Drummond J. Moreover, Lucev FM’s statement clearly contradicts the finding of Drummond J. Admittedly, this concerns a finding of fact, and not of law, and context is important, but given the universally acknowledged racist taint that pertains to the word ‘nigger’ the decision in *Hagan* is puzzling.

The difference between *Campbell* and *Hagan* is that the former case concerned a direct verbal assault on the complainant. Taken together, *Hagan* and *Combined Housing* suggest that an indirect insult is less likely to cross the harm threshold even though it can still be racially offensive. But as against that are the decisions in *Creek* and *Bropho*,⁴⁶ where the impugned speech act was also indirect, but where the harm threshold was crossed, even though these claims failed on other grounds. This can only point to a lack of certainty.

⁴³ [2000] FCA 1615, [15].

⁴⁴ See *Hagan v Australia*, GAOR, Elim. of Racial Discrim. Comm, 62nd Sess, U.N. Doc. CERD/C/62/D/26/2002 (2003).

⁴⁵ [2008] FMCA 1356, [32].

⁴⁶ *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105.

In part this unpredictability may owe itself to the nominal conflict between the open-ended terms of s18C and the narrower intent that appears to have been behind Part IIA when it was originally enacted. This conflict between the intent and the actual scope of the terms used in the provision might be contributing to the inconsistency in the jurisprudence.

IV THE CAUSATION REQUIREMENT

The jurisprudence relating to the causation requirement has also proved somewhat problematic under Part IIA. Under s 18C(1)(b) the causal link requires that the act was done because of the race, colour or national or ethnic origin of the victim. In *Creek*, Keifel J adopted the approach of inquiring whether, ‘anything suggests race as a factor in the respondent’s decision to publish’.⁴⁷ This approach was followed in *Toben v Jones* and *Jones v Scully* where the courts engaged in an examination of whether anything suggested race as a factor in the act.

In *Creek* Keifel J was prepared to accept that the publication of two photos side by side, one flattering and another being rather unflattering, could constitute offensiveness under s 18C.⁴⁸ In *Creek* the respondents used a photo of the complainant, taken several years previously which showed her at a traditional tribal event. This was contrasted with a photo of a white couple who lived in a house. The story that the newspaper was running related to a custody dispute between the complainant and the couple. The inference made by the photo was that the complainant did not live in house like the white couple and was less able to care for the child. The complainant did in fact live in a house.

The issue that became problematic for the complainant in *Creek* was meeting the evidentiary standard set by s 18C(1)(b). What becomes apparent from Keifel J’s decision in *Creek* is that whilst the RDA does have a provision, s 9(1A), that deals with indirect discrimination, Part IIA does not have such a provision. What this means is that indirect discrimination, that which is unconscious or where malicious intent is not manifestly obvious, is not captured by Part IIA and that only direct and blatant vilification is captured.

⁴⁷ [2001] FCA 1007, [28].

⁴⁸ *Ibid* [16].

Keifel J considered two different approaches to causation; that of McHugh J in *Waters v Public Transport Corporation*⁴⁹ and that of Deane and Gaudron JJ in *Australian Iron & Steel Pty Ltd v Banovic*.⁵⁰ The difference between the two approaches is crucial because it directly relates to the evidentiary burden that is placed upon the complainant. Notably, Keifel J endorsed the approach of McHugh J in *Waters*, which whilst legally correct, imposes an immense burden on the complainant.

McHugh stated in *Waters*:

The words “on the ground of the status or by reason of the private life of the other person” in s. 17(1) require that the act of the alleged discriminator be actuated by the status or private life of the person alleged to be discriminated against. ... The words “on the ground of” and “by reason of” require a causal connexion between the act of the discriminator which treats a person less favourably and the status or private life of the person the subject of that act (“the victim”). The status or private life of the victim must be at least one of the factors which moved the discriminator to act as he or she did.⁵¹

For the approach enunciated by McHugh J in *Waters* to be satisfied there must be a degree of blatancy on the part of the person whose conduct is impugned. That is, it cannot be said that their behaviour was actuated by the other person’s race unless there is something manifestly present which would support such a suggestion. Where care is taken to disguise the true motives for an act it becomes much harder to satisfy this test.

Deane and Gaudron JJ stated in *Banovic*:

And there may be other situations in which habits of thought and preconceptions may so affect an individual's perception of persons with particular characteristics that genuinely assigned reasons for an act or decision may, in fact, mask the true basis for that act or decision. Thus, in the ascertainment of the true basis of an act or decision it may well be significant that there is some factor, other than the ground assigned, which is common to all who are adversely affected by that act or decision. In certain situations that common factor may well be seen to be the true basis of the act or decision. And that may also be the case

⁴⁹ (1991) 173 CLR 349.

⁵⁰ (1989) 168 CLR 165.

⁵¹ (1991) 173 CLR 349, 400-401.

where some factor is identified as common to a significant proportion of those adversely affected.⁵²

It is submitted that the approach of Deane and Gaudron JJ is more suitable for racial vilification because it recognises the possibility of the existence of unconscious bias. The approach of McHugh J in *Waters*, as endorsed by Keifel J in *Creek*, will only be satisfied where the perpetrator of the vilification does little to mask their racism. It can too easily be avoided by a modicum of intelligence and the employment of some degree of subtlety or distancing in the construction of a racist and exclusionary message. The approach of Deane and Gaudron JJ in *Banovic* also has a closer relationship to the reality of discrimination wherein discriminatory behaviour is not always motivated by a deliberate desire to exclude but, rather, may emerge from deeply internalised prejudices, which whilst not consciously expressed, still do form a part of the person's overall decision-making process. In effect, to require the complainant to follow the approach of McHugh J in *Waters*, where they encounter a person whose prejudices are fundamentally internalised, is to almost require the complainant to be a mind-reader and a psychologist. Obviously, this is a burden that is far too great to impose upon a complainant and it effectively undermines the efficacy of Part IIA.

Notwithstanding the problems relating to the burden of proof, the jurisprudence under s 18C(1)(b) has produced some other inconsistent results. In *Walsh v Hanson*, Commissioner Nader found that Hanson's comments, which vilified Aborigines, were not made on the basis of their race. The insult in contention was the statement in Pauline Hanson's book *The Truth* that 'Aboriginal people were savages who ate babies, family members and Chinese people'.⁵³ Commissioner Nader dismissed the complaint on that basis. Commissioner Nader stated:

the statements made were not made '*because of* the race, colour or national or ethnic origin' of the complainants. They were made because the respondents were of the opinion that the Aboriginal community as a whole were being unfairly favoured by governments and courts. On the evidence before me, it was not the race or colour of Aboriginal people that was the cause of what the respondents said but the alleged fact that Aboriginal people were being unfairly favoured.⁵⁴

⁵² (1989) 168 CLR 165, 176-177.

⁵³ Unreported, HREOC (2 March 2000) (Commissioner Nader).

⁵⁴ *Ibid.*

As Meagher has noted, ‘one is left to ponder what kind of additional conduct *could* have established the required causal connection in s 18C’.⁵⁵ McNamara has characterised Nader’s approach to s 18C(1)(b) as ‘idiosyncratic’ and ‘difficult to justify’.⁵⁶

In *McLeod v Power*⁵⁷ racist insults directed at a white corrective services officer by an Aboriginal respondent were held not to have been done on the basis of race. Brown FM held that Power’s insulting remarks, which included derisory references to McLeod’s skin colour, were not done on the basis of race. Brown FM stated:

There seems no other satisfactory explanation for the use of the words “white” or “whites” by Ms Power in the context of this case other than that she wished to express her frustration at what she perceived as being a power imbalance between herself and Mr McLeod. He being a person of light coloured skin and a correctional services officer who was refusing her entry to the prison and she being a person of dark coloured skin, who was being foiled in her desire to enter it. She wanted to do this in as stark and confrontational manner as she could. ... In this sense only were the words “white” and “whites” used by Ms Power because of Mr McLeod’s “race, colour or national or ethnic origins”. As a consequence of section 18B of the RDA this brings the matter within the purview of Part IIA of the Act. However in my view it is drawing a long bow to use the RDA in this way and was certainly not the primary purpose of the legislature in enacting legislation of this kind.⁵⁸

Whilst, Brown FM’s invocation of the social justice aspects of this case are understandable, they are very much at odds with the plain meaning of the terms of the statute. Though justice may well have been served in this matter, the ruling, along with the puzzling decision in *Walsh*, does suggest a lack of fidelity to the terms of the statute.⁵⁹

It may well be that the contrary results in *McLeod* and *Walsh* are attributable to their being amongst the first generation of Part IIA cases wherein the courts and HREOC were still working through the meaning of the terms of the scheme. In the cases of more explicit and

⁵⁵ Meagher, above n 2, 238.

⁵⁶ McNamara, above n 2, 93.

⁵⁷ [2003] FMCA 2.

⁵⁸ *Ibid*, [62]. One criticism of Brown FM’s opinion is that it reinforces rather than challenges notions of racial hierarchies. Moreover, it fails to acknowledge that power can shift between racial groups such that a member formerly persecuted group might also be or become capable of inflicting racial discrimination. For a view supportive of Brown FM see further Aleardo Zanghellini, ‘Jurisprudential Foundations for Anti-Vilification Laws: The Relevance of Speech Act and Foucauldian Theory’ (2003) 27 *Melbourne University Law Review* 458.

⁵⁹ See also *Korczak v Commonwealth* Unreported, HREOC (16 December 1999) (Commissioner Innes).

direct racial vilification it has been easier to satisfy s 18C(1)(b). In *Jones v Toben*⁶⁰ Branson J paid cursory attention to the causation requirement other than noting that she was satisfied on the facts that it was made out. In *Jones v Bible Believers Church* Conti J relied on the respondents failure to contest s 18C to skip the s 18C(1)(b) analysis altogether.

It is submitted that the focus of Part IIA should be on the outcome of racist speech. That is, Part IIA should be aimed at preventing the exclusion and sense of division fostered by racist speech. The danger is that 18C(1)(b), whilst perhaps appropriate to a scheme that contemplated criminal sanctions for extremist speech, is less appropriate to a civil law speech. Moreover, if the intention behind the scheme is to ever be reconsidered, and, if Part IIA is to be re-imagined as a scheme that seeks to eliminate racism, rather than merely to police crude and extreme speech, then the standard of causation needs to re-evaluated. One solution might be a greater degree of legislative guidance on how causation is to be approached.

V THE FREE SPEECH EXEMPTION

Part IIA of the RDA provides a free speech defence under s 18D. Section 18D provides:

Exemptions

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

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in making or publishing:
 - (i) a fair and accurate report of any event or matter of public interest; or
 - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

The s 18D defence represents a compromise between the need to protect members of the community from hate speech and the need to allow for a level of free speech in public debates. The key terms under s 18D are ‘reasonably’ and ‘good faith.’ The case law that has

⁶⁰ [2002] FCA 1150, [99].

emerged suggests that the term ‘reasonably’ can apply to both the content of the message and the manner in which it is communicated.⁶¹ Good faith generally refers to the intent of the maker of the offending speech or communication. As the section uses a conjunctive in providing that the act must be done ‘reasonably and in good faith’ both elements must be satisfied.

However, the Explanatory Memorandum reflects some of the mixed intentions behind the scheme. The Explanatory Memorandum states in relation to 18D:

... the operation of proposed section 18D is governed by the requirement that to be exempt, anything said or done must be said or done reasonably and in good faith. It is not the intention of that provision to prohibit a person from stating in public what may be considered generally to be an extreme view, so long as the person making the statement does so reasonably and in good faith and genuinely believes in what he or she is saying.⁶²

The notion that an extreme view, which can be characterised as one that is racially insulting, can be communicated reasonably and in good faith, is highly problematic. In fact it almost undermines the very purpose of the scheme and it would certainly be inconsistent with any notion of eliminating racism. This is particularly crucial in the current context because not all forms of racist speech are extreme or vitriolic. It is possible for offensive and hurtful racist sentiments to be effectively communicated with a degree of subtlety. Such forms of racial vilification is most likely to occur within the contexts contemplated by 18D(b) and 18D(c).

In the leading case of *Bropho v Human Rights and Equal Opportunity Commission* French J held that an act is done ‘reasonably’ under s 18D ‘if it bears a rational relationship to that activity and is not disproportionate to what is necessary to carry it out’.⁶³ French J stated:

The publication of a genuine scientific paper on the topic of genetic differences between particular human populations might, for one reason or another, be insulting or offensive to a group of people. Its discussion at a scientific conference would no doubt be reasonable. Its presentation to a meeting convened by a racist organisation and its use to support a view that a particular group of persons is morally or otherwise ‘inferior’ to another by reason of their race or ethnicity, may not be a thing reasonably done in relation to par (b) of s 18D.⁶⁴

⁶¹ *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105.

⁶² Explanatory Memorandum, Racial Hatred Bill 1994 (Cth).

⁶³ (2004) 135 FCR 105, [128].

⁶⁴ *Ibid.*

French J suggests in *Bropho* that context is crucial to the meaning of the term reasonable. The juxtaposition offered, that of presentation to a genuine academic audience as opposed to a presentation to a racist organisation, is persuasive. But more subtle forms of racial vilification speech are less commonly associated with an audience made up of the members of a racist hate group, it is more prevalent within mainstream discourses where the audiences are neutral. Whilst context is relevant it does seem curious to tie reasonableness to the identity of the audience, particularly in a society where individual liberty is a paramount concern, because it imposes upon the speaker some responsibility for the existing views of the audience. Alternately, the reliance on context may suggest that a statement that is inflammatory in one context is neutral in another.

In *Bropho* French J expanded upon the concept of reasonableness and applied it to the content of the speech itself. French J stated:

A feature article on criminal activity said to be associated with a particular ethnic group would in the ordinary course be expected to fall within the protection of (c). If it were written in a way that offered gratuitous insults by, for example, referring to members of the group in derogatory racist slang terms, then it would be unlikely that the comment would be offered 'reasonably'.⁶⁵

The view expressed by French J in *Bropho* underlines the division identified in this paper between the effectiveness of Part IIA in targeting crude and vulgar racist speech and its general ineffectiveness where the racism is slightly disguised or is expressed in a more civil and sophisticated way. Though I do recognise that given the overall context of s 18D, and the constitutional context within which Part IIA exists, that there might be a reasonable desire to broadly exempt certain types of speech, tying key terms of the exemptions more or less to gratuitous insults narrows the application of the scheme. This critique has been previously stated by other commentators such as Chesterman and Thornton. Chesterman argues that 'because the legislation requires no consideration of truth or falsity and contains this public interest ground of exoneration, what it chiefly proscribes is incivility in the style and content of publication of racist material, not racist content as such'.⁶⁶

⁶⁵ Ibid.

⁶⁶ Chesterman, above n8, 226. See also Dan Meagher, 'Regulating History: Australian Racial Vilification Law and History Denial' (2005) 24 *University of Queensland Law Journal* 499, 517.

Similarly, Thornton, writing in a different context, has suggested that such exemptions result in the ‘chilling of blue-collar muck and preservation of upper-crust mud’.⁶⁷ However, Meagher has responded to this critique and has suggested that the importance of the good faith requirement, a co-requisite requirement with reasonableness, does not privilege racist speech simply on the grounds of civility.⁶⁸

In the context of history denial, a form of vilification or racist speech which is similar to the low level racist speech with which this article is concerned, Meagher has suggested that the existence of an ulterior motive would render the speech unlawful.⁶⁹ As French J stated of subjective good faith in *Bropho*, ‘the knowing pursuit of an improper purpose, should be *sufficient* to establish want of good faith for most purposes’.⁷⁰ Meagher has written:

But Australian law is not so ill-equipped to deal with this species of racial vilification as it may first appear. For even if an act that offends the objective harm threshold is done reasonably and for an academic, scientific, research or other public interest purpose, it will still be unlawful if not done in good faith. In other words, if a historical work is motivated by spite, ill will or another improper purpose then the free speech/public interest protection otherwise available under Australian racial vilification law is lost.⁷¹

This conception of good faith is quite promising as it would tend to prevent the exemption from moving towards being overly broad in its operation. Notably, in *Bropho* where French J engaged in a long examination of the concept of good faith, a distinction was drawn between subjective and objective good faith.⁷² The difficulty that might arise with subjective good faith, and with the ulterior motive approach generally, is that it can be very difficult to ascertain the true motive of the person whose speech is in question. In support of his proposition Meagher uses the example of the David Irving libel trial.⁷³ In that trial historian David Irving sued Deborah Lipstadt for defamation over the claim that he was ‘one of the most dangerous spokespersons for Holocaust denial’.⁷⁴ However, in that instance the

⁶⁷ Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990).

⁶⁸ Meagher, above n 66, 516-20.

⁶⁹ *Ibid*, 519.

⁷⁰ 135 FCR 109, 133.

⁷¹ Above n 66, 518-19.

⁷² Lee and Carr JJ are broadly supportive of French J’s overall approach to good faith.

⁷³ *Irving v Penguin Books Ltd & Deborah Lipstadt* [2001] QB 115.

⁷⁴ *Ibid*. See also Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and History* (Penguin Press, 1993).

existence of ample extrinsic material helped prove the existence of an ulterior motive. Where such material is unavailable the burden might again be too great for a complainant.

The concept of good faith advanced in *Bropho*, and which has developed in other cases such as *Toben* and *Scully*, calls for an objective analysis. In *Bropho* French J considered good faith in a variety of legal contexts to draw out the core meaning of the term. The term good faith requires, honesty, fidelity and loyalty.⁷⁵ French J stated:

In a statutory setting a requirement to act in good faith, absent any contrary intention express or implied, will require honest action and fidelity to whatever norm, or rule or obligation the statute prescribes as attracting the requirement of good faith observance. That fidelity may extend beyond compliance with the black letter of the law absent the good faith requirement. In ordinary parlance it may require adherence to the ‘spirit’ of the law.⁷⁶

The concept of fidelity to the statutory scheme imposes a greater burden of the defendant. As French J noted the good faith exercise of speech under s 18D ‘will honestly and conscientiously endeavour to have regard to and minimise the harm it will ... inflict’.⁷⁷ This harm minimisation principle requires an analysis of the language used by the defendant and an examination of whether care was taken to lessen the insult or the offence.

This approach is consistent with both the constitutional imperative to maintain a system of representative government and the need to have a workable Part IIA scheme. It does not mean that some topics are off limits. Even where viewpoints or subject matter are offensive to some members of the communicated, they can still be protected provided that care has been taken to limit any harmful effects that such speech might have.

VI IS AN INCONSISTENCY CRITIQUE JUSTIFIED?

On many levels it would appear that there is a degree of inconsistency surrounding the key terms and concepts of Part IIA of the RDA. On the one hand this is understandable given the need for the courts and tribunals to develop the jurisprudence of Part IIA in the years after the scheme’s commencement. Further, given the mixed intentions behind the scheme and the vagueness of the language in key provisions, the divergent nature of the jurisprudence was

⁷⁵ *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, 131.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

perhaps inevitable. The inconsistency most likely reflects the difficulty in balancing free speech on the one hand and the need to regulate hate speech on the other.

It is compelling to note that the early writings on the Part IIA scheme criticised the scheme and the jurisprudence for serious inconsistencies. Tellingly, this has remained justified as later cases have been decided. There has been little consideration by successive Federal Governments of reform options. Indeed, it is one thing to now acknowledge that inconsistency exists but it is another thing to consider how to solve the problem. After fifteen years the scheme is in need of a review. This is the vital next step in any policy reform process.

There are some possible reform steps. One reform option would be to amend the RDA by including a definition of racist speech. In particular racist speech could be defined in such a way as to indicate the category of racist speech that should be raised before the Federal Court and that which should be conciliated by the Human Rights Commission. In effect this could mean attempting to amend the terms of the statute to indicate a clear demarcation between egregious racist speech and that which is of less intensity. Whether this is possible is debatable. At this point it seems clear that the Federal Government will persist with a bifurcated approach to racial vilification with the courts having a formal legal adjudication role and the Commission having an informal conciliation role. If this split is to remain, then it should be acknowledged in the legislation for the sake of certainty.

To this end, vilification that warrants a court hearing could be defined in the RDA as that which is direct, contains vulgar abuse and reaches an egregious standard by including material such as Holocaust denial, incitements to violence or other seriously degrading statements. A second definition of general or less egregious racist speech could be inserted with a presumption that such matters are resolved by conciliation before the Commission. Given that cases involving indirect racist speech, such as *Creek*, *Combined Housing* and *Hagan*, seem less likely to succeed in the Federal Court, such cases might be better directed to the Human Rights Commission where at least the costs imposed on the complainant will be much less.

A second reform option may be to give the Human Rights Commission back its complaint hearing capability and allow it to operate as a quasi-court, albeit one that cannot make a

binding declaration. Instead, the Human Rights Commission could be allowed to provide an advisory opinion on disputes. This would keep the Commission clear of operating as a proper court but would still allow a public airing of the legal aspects of racial vilification matters. This would in part resolve the issue of complaints with merit being terminated for lack of any prospect of conciliation. An alternative forum with an advisory capability with aegis over those complaints of racist speech that are of a lesser degree of offensiveness than Holocaust denial or direct vulgar racist insults is an appealing prospect.

What the Parliamentary debates do make obvious is that all manner of racist speech was considered, and the jurisprudence also makes it plain that a wide variety of cases involving racist speech, many of which do not rise to the level of ‘hatred’ have been brought before the courts. Clearly, there are going to be claims of racist speech that warrant some form of hearing, but which are of a different nature to the speech at issue in *Toben*, *Scully* and *Campbell*. The Commission could serve as the proper forum for those complaints but without the requirement of a conciliation process. This would at least mean that vilification speech is debated publicly and that racist conduct is brought to light. Indeed, it makes little sense to compel the victim of racist speech into ‘conciliation’ with the perpetrator, even though the Commission’s reports indicate that some conciliation processes have been successful.

VII CONCLUSION

Part IIA is presently an under-utilised scheme. Whilst racist speech remains a problem in Australia it appears that there is not always an effective recourse through Part IIA as it presently stands. As stated, after 15 years Part IIA is in need of a thorough review and legislative reform. The scheme has a role to play in combating racism in Australia and it can effectively do that in both the Federal Court and the Human Rights Commission. For the scheme to play this role it needs a workable set of rules and a clearer concept of the type of speech that it seeks to proscribe. At the same time it needs to be mindful of free speech considerations. Nonetheless, a review of the jurisprudence under Part IIA demonstrates that there is ample room for legislative reform which would still maintain the balance that the original law-makers sought to achieve.