Managing Dissent Under Part IIA of the Racial Discrimination Act

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Freedom of speech is a universally lauded concept but it is widely recognised as being subject to curtailment when countervailing human rights considerations arise. One area of curtailment for free speech has been that of racial vilification law. This area of the law highlights the conflict between freedom and restraint and the largely unresolved nature of the public debates on regulating racist speech. Part IIA of the *Racial Discrimination Act 1975* (Cth) seeks to regulate racist speech at a Federal level in Australia. Part IIA of the RDA provides for a free speech exception in section 18D. However, this exception must serve as part of an effective law on racial vilification. Regrettably, Part IIA appears to suffer from a degree of indeterminacy in both the terms of its statutory provisions and the intent underlying the scheme. After a period during which some rather indeterminate jurisprudence emerged the number of cases initiated in the Federal under Part IIA has dropped off markedly. The time is ripe for Part IIA to be re-evaluated. This article examines one aspect of Part IIA; the way in which the scheme balances free speech values and the interests of the victims of vilification. This article argues that both the rules and the dispute resolution system matter where this balancing act is concerned. It is argued that a bifurcated approach to racist speech, with the suppression of hate speech on one hand and the non-suppression of general racist speech on the other is a more satisfactory approach to the goal of balance.

I. INTRODUCTION

Freedom of speech is a universally lauded concept but it is widely recognised as being subject to curtailment when countervailing human rights considerations arise.[1] One area of curtailment for free speech has been that of racial vilification law.[2] This area of the law highlights the conflict between freedom and restraint and the largely unresolved nature of the public debates on regulating racist speech. There are strong differences not just on *whether* to restrain racist hate speech but also on *how* it should be regulated.[3] There are also intense difficulties surrounding the crucial task of defining racist speech in such a way that a clear and workable division emerges between racist 'hate' speech, as opposed to the milder forms of racist speech.[4] Under Part IIA of the *Racial Discrimination Act 1975 (Cth)* (RDA)

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[1] Almost all liberal democracies have some form of racial hate speech laws. See *Public Order Act 1986* (UK), *Racial and Religious Hatred Act 2006* (UK); *Human Rights Act 1993* (NZ); *Racial Discrimination Act 1975* (Cth); *Canada Act 1982* (UK) c II, sch B pt I ('*Canadian Charter of Rights and Freedoms*'); Code penal [Penal Code] (France) art 624-4. The notable exception is the United States by virtue of the First Amendment to the United States Constitution. See Frederick Schauer, '*The Exceptional First Amendment*,' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights*, (Princeton University Press, 2008).

[2] At an international level Australia is obligated to provide adequate measures to prohibit racist speech. Under Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR), any 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.' Under Article 4 of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) Australia is required to provide civil and criminal penalties for the incitement of racial hatred and discrimination.

[3] For example Canada has criminal laws to regulate racist speech, as do many of the European nations. In contrast, at a Federal level Australia relies on a civil complaints system under Part IIA of the *Racial Discrimination Act 1975* (Cth).

[4] As McNamara notes, 'there is no one universally accepted or applicable definition of what constitutes racial vilification'. See Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia*, (University of Sydney Law School, 2002) 9. However, the need for a workable definition of proscribed hate speech is central to determining the extent and reach of any racial vilification laws. The danger implicit in an overly low harm

Australia relies on a civil complaints system to regulate racist speech. Moreover, it does so without a statutory definition of racist hate speech.

However, the most striking feature of the jurisprudence that has emerged under Part IIA of the RDA, is the way in which 'hate' speech has consistently been found unlawful whereas the treatment of those forms of speech that are less hateful, but nonetheless contain aspects that can be regarded as racist, has been markedly less predictable.[5] What makes this remarkable is the fact that the wording of the provision that deals with offensive speech, section 18C(1)(a), is broad enough to encompass all manner of racist speech from the hateful to even that which is somewhat trivial.[6] However, in some instances the Federal Court and the Human Rights Commission appear to have engaged in a 'reading back' of Part IIA to prevent the statute from being overly stifling of public speech.[7] This tendency to protect free speech is understandable and in some instances laudable.[8] But in part it has added, along with other factors, to the 'incoherency' that now surrounds Part IIA. This is problematic because the laws relating to racial vilification need to be imbued with a degree of certainty. Where this certainty is lacking the law may wind up doing an injustice to the two interests that it initially sought to balance; the need for a significant measure of free speech in a liberal democracy and the need for the victims of racist speech to have some measure of redress.

After fifteen years of operation the time is now ripe for Part IIA to be re-evaluated and made relevant to contemporary society. There have been changes in the nature of racist speech,[9]

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threshold is that such laws may over-reach and affect the type of speech that is essential to a liberal democracy. As James Weinstein has stated:

> A major challenge to those who support bans on hate speech and pornography demeaning to women is finding a rationale for the suppression of this speech that can be applied in a principled fashion in future cases that will not dilute the strong protection currently afforded speech that denounces the status quo.

See James Weinstein, *Hate Speech, Pornography & Radical Attacks on Free Speech Doctrine*, (Westview Press, 1999) 161.

[5] See for example, *Toben v Jones* (2003) 199 ALR 1; *Jones v Scully* (2002) 120 FCR 243; *McMahon v Bowman* [2000] FMCA 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. In each of these cases the Federal Court had little trouble in finding racial vilification. Whereas other cases the path to an eventual finding that no racial vilification had occurred was decidedly less clear. See *Creek v Cairns Post* [2001] FCA 1007; *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2001] FCA 123; *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 109. The early writings on Part II and many subsequent commentaries have noted the serious inconsistencies surrounding the scheme and the jurisprudence. See further, Dan Meagher, 'So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32 *Federal Law Review* 225. See also McNamara above n 4.

[6] Section 18C(1)(a) provides that racist speech will be unlawful if it 'is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people.' McNamara, above n 4, 73 states that the moderate success rate for complainants 'suggests that the threshold of unlawful racial vilification is, in practice, substantially higher than appears from the face of the legislation.'

[7] See for example *Walsh v Hanson* Unreported, 2 March 2000; Arguably *Creek v Cairns Post* [2001] FCA 1007 could also be considered in this light in that Kiefel J showed a free speech sensitivity by elevating the harm threshold above ordinary meaning of the terms in the statute. In *Creek*, Keifel J also chose a restrictive test for causation by following the approach of McHugh J in *Waters v Public Transport Corporation* (1991) 173 CLR 349, 400-401, as opposed to the more flexible test advanced by Deane and Gaudron JJ in *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 176-177. See also *Bryl and Kovacevic v Nowra and Melbourne Theatre Company* [1999] HREOCA 11 (21 June 1999).

[8] See *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 109.

[9] 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).

the mediums by which such speech is communicated have grown,[10] and even the identity of racist speakers has changed in some instances.[11] For the most part the Part IIA scheme has somewhat fallen into abeyance. From 2005 to 2010 there were only three cases with substantial merit, *Campbell v Kirstenfeldt*,[12] *Jones v Bible- Believers Church*[13] and *Silberberg v Builder's Collective*,[14] that were brought before the Federal Court. But during the same period over 500 complaints of racial hatred were made to the Human Rights Commission.[15] The reasons for the decline may be complex.[16] But to some extent it would appear that where complainants are concerned the Federal Court is not regarded as desirable in relation to making a formal legal challenge to racist speech.[17] Reform is needed to make racist speech more amenable to a formal or even informal challenge, but at the same time the values of free speech cannot be sacrificed.[18] To borrow from the concepts developed by Robert Post in his argument against regulating racist hate speech, the task is to manage the proscription of racist hate speech, being that which seriously impinges on the 'decencies of controversy', without extending so far as to restrain disagreement which is merely motivated by 'dislike'.[19]

This article makes the argument that the values of free speech and the need of complainants for some measure of redress can be balanced by re-empowering the Australian Human Rights Commission[20] to act as a tribunal and to simply hear racial vilification matters and to deliver an advisory opinion only. Obviously, the Commission would lack the capacity to exercise Chapter III judicial power and would be unable to make any binding orders.[21] However, the Commission can make orders that are not final or conclusive, provided that the right of recourse to the courts is preserved.

[10] Cyber-racism is a growing concern in relation to racial vilification. See further, Josh Gordon, 'Government to beef up internet racism laws,' The Age, February 21, 2010. See also Australian Human Rights Commission, Report, *Cyber-racism: Racism on the Internet*, 2002.

[11] Gelber notes that the government has emerged as a racist speaker in recent years. See Katherine Gelber, 'Hate Speech and the Australian Legal and Political Landscape,' in Katharine Gelber and Adrienne Stone (eds), *Hate speech and freedom of speech in Australia*, (Federation Press, 2007). Gelber suggests that racist speech by government and political actors tends to be subtle and well-constructed.

[12] [2008] FMCA 1356.

[13] [2007]FCA 55.

[14] [2007] FCA 1512.

[15] See further Australian Human Rights Commission Annual Report 2005; Australian Human Rights Commission Annual Report 2006; Australian Human Rights Commission Annual Report 2007; Australian Human Rights Commission Annual Report 2008. Available at: <http://www.hreoc.gov.au/complaints_information/statistics/index.html> at 6 August 2009.

[16] See below n 185.

[17] For example, during the 2007-2008 reporting period 69 complaints were finalized on the basis that there was no reasonable prospect of conciliation. These complaints were not finalized on the basis that they lacked substance nor were they withdrawn by the complainants. The implication being that complaints that had some reasonable basis were not adequately resolved under the current system.

[18] The question at hand is how to regulate racist hate speech. For a discussion of free speech and hate speech see Robert Post, 'Hate Speech' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy*, (Oxford University Press, 2009).

[19] Ibid. By 'dislike' Post is referring to racism and homophobia.

[20] Formerly, the Human Rights and Equal Opportunity Commission (HREOC). HREOC's hearing powers were transferred to the Federal Magistrates Court pursuant to the *Human Rights Legislation Amendment Act 1999* (Cth).

[21] *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

The *Brandy* case established that HREOC decisions could not simply be enforced by the Federal Court and that the Commission could not exercise Chapter III judicial powers. However, the Commission would be able to at least provide an advisory opinion on racial vilification cases, even though any action would need to be fully pursued in the Federal Court if the complainant desires an enforceable outcome. But in this regard the Commission is a desirable low cost alternative to dispute resolution in matters where conciliation is not possible.

As McNamara notes conciliation has a low success rate and a 'complaint-driven and conciliation-focused' system may in fact be an 'imperfect tool' in combating racial vilification.[22] Offering the complainants a hearing at least allows them to publicly air their grievances and to challenge racist speech. It also serves an important role in public education, as the outcome of a complaint hearing would be a publicly available document whereas conciliations are generally confidential.[23] Moreover, the very limitation of the Commission with respect of Chapter III judicial power is a boon to the values of free speech in that the Commission can neither suppress nor injunct 'racist' speech.

But, in cases where the impugned conduct amounts to a serious racist assault, Holocaust denial or some other egregious form of racist speech, the complainant can seek an evaluation and enforcement of a decision of the Commission before the Federal Court. Indeed, in serious cases of racial vilification a complainant can bypass the Commission altogether and commence an action under Part IIA in the Federal Magistrates Court.[24]

In effect, the forum is as important as the rule, where the goal of protecting the values of free speech in relation to racial vilification law is concerned. The issues facing Part IIA are very much inter-related. Indeed, a thorough-going reform of Part IIA would have to give serious consideration to re-drafting key terms of the statute. For example, a definition of racial vilification which clearly demarcates the spectrum of proscribed conduct would be immensely useful. This issue is considered below in the context of achieving balance within the Part IIA scheme.

This article concentrates on the free speech debate and the way in which the use of an 'adjudicative' forum can balance and reflect the concerns of this debate in relation to racial vilification. The article first examines the jurisprudence under Part IIA and the inconsistencies that surround this area of the law. The article then examines the free speech debate and the utility of the free speech exception in s 18D.[25] The article then considers how balance can be achieved within the scheme to allow the victims of racism to be heard, but to also tolerate to some extent the existence of racist speech, that does not rise to the level of hate speech.

[22] McNamara, above n 4, 109.
[23] The reports of the Human Rights Commission do provide some limited case studies of racial vilification matters. But these are merely descriptions of the events that occurred and they contain no elucidation or analysis of the relevant legal concepts.
[24] Section 10 *Federal Magistrates Act 1999* (Cth).
[25] There is an argument that the debate on racial vilification has moved past the point of considering whether racial vilification laws are justified in light of free speech principles. However, where reforms to Part IIA are considered, particularly those that might alter the existing balance, the debate on free speech and racial vilification, is some-what re-enlivened. Moreover, in this context my analysis pertains to *balancing* freedom of speech and freedom from vilification through a change of forum.

II. THE PART IIA JURISPRUDENCE

The need to address the meaning of key terms of the statute is evident in even a cursory analysis of the Part IIA jurisprudence. McNamara has commented that his early writing on Part IIA noted 'considerable case-to-case variation as adjudicators endeavoured to apply the language and underlying values' of the Part IIA scheme.[26] It is not actually clear as to whether this situation has been resolved. In recent years the few cases that have come before the Federal Court have been quite clear-cut in terms of vilification.[27] But this does not mean that more controversial matters will not emerge. Nor does it mean that the uncertainties in the jurisprudence have been remedied.

As it presently stands, the jurisprudence under Part IIA is inconsistent at best. In part this situation owes itself to the drafting of the legislation wherein the low threshold in s 18C(1)(a) is juxtaposed with the use of the term 'hatred' in the title of Part IIA and the reference to 'extreme racist behaviour' in the Explanatory Memorandum.[28] In the early cases under Part IIA, HREOC's commissioners struggled to resolve this conundrum. In some early cases such as *Bryant*[29] and *Combined Housing*,[30] Commissioner Wilson elevated the importance of 'hatred' in assessing the harm threshold. Legally, this approach is largely correct as s 13(1) of the *Acts Interpretation Act 1901* (Cth) requires that consideration be given to the title of a statute's part in interpreting the provisions contained therein.

However, in *Creek v Cairns Post*,[31] Keifel J, as she then was, eschewed this approach. Justice Keifel made the observation that the title of Part IIA was originally intended to apply to criminal provisions, which never entered into law.[32] However, Keifel J then elevated the harm threshold above the ordinary meaning of the terms 'offend, insult, humiliate or intimidate' by suggesting that the terms require, 'profound and serious effects, not to be likened to mere slights.'[33] What is difficult here is determining where the line is between a minor insult and a profound and serious racist remark.[34] At issue in *Creek* was the implications drawn from the contrast between two photos, one favourably showing a white couple living in a house, the other unfavourably showing an Aboriginal woman at a tribal dance. The context related to a custody dispute over a child. The implication that the complainant gleaned from the photograph was the suggestion that she lived in tribal conditions whereas the white couple lived in a house.[35]

At best, the racist insult in *Creek* was an indirect slight.[36] Nevertheless, it satisfied the harm threshold, though the complaint eventually failed on the grounds of causation. Similarly, a

[26] Luke McNamara, *Human Rights Controversies*, (Routledge-Cavendish, 2007) 236.
[27] Above nn 12, 14.
[28] See *Explanatory Memorandum Racial Hatred Bill 1994* (Cth).
[29] *Bryant v Queensland Newspapers Pty Ltd* [1997] HREOCA 23 (15 May 1997).
[30] *Combined Housing Organisation Limited v Hanson* [1997] HREOCA 58 (16 October 1997). See further, Lawrence McNamara, 'The Things You Need: Racial Hatred, Pauline Hanson and the Limits of the Law' (1998) 2 *Southern Cross University Law Review* 92.
[31] *Creek v Cairns Post* [2001] FCA 1007. In *Jones v Toben* [2002] FCA 1150 Branson J at [92] effectively suggested that this was a narrowing of the range of proscribed speech.
[32] Above n 15.
[33] Above n 16.
[34] The subsequent case law sheds no real light on this issue.
[35] The complainant in fact lived in a house.
[36] In that the insult was not made directly to the plaintiff. As the discussion below n 75 suggests, where direct racial vilification is concerned the harm is more easily quantifiable.

cartoon in *Bropho*[37], which depicted an undignified struggle over the remains of Yagan,[38] was found to satisfy the harm threshold.

The insult in *Bropho* was similarly indirect and when the cartoon at issue is considered the insult is rather minor.[39] When the *Bropho* matter first went before HREOC as *Corunna v West Australian Newspapers*[40] Commissioner Innes took the view that the cartoon was 'a demeaning portrayal of (an) ancestor' and that the references in the cartoon to 'warm beer' and a 'quiet pommy pub' were derogatory references to the perceived relationship in some sections of the community between Aborigines and alcohol.[41] These are of course quite significant inferences to draw from a single cartoon.[42] Before both the Federal Court and HREOC the transgression of the harm threshold was cured by the application of s 18D. In some respects this suggests a balancing act within the provisions of Part IIA. But the decisions in *Creek* and *Bropho* illustrate the uncertainties surrounding key parts of the scheme.

It is worth considering whether *Creek* and *Bropho*, both cases containing a marginal racist insult, were matters that warranted review by the Federal Court. For similar matters, that cannot be resolved by conciliation, it may well be that the substance of the dispute should be publicly aired and contested in a less costly forum.

Notwithstanding, such borderline cases as *Creek* and *Bropho*, there were somewhat clearer cases of vilification where either the harm threshold was not triggered or where causation was not satisfied. In *Hagan*, the use of the word 'nigger' in radio broadcasts and on a sports ground was held not to be racial vilification.[43] The use of the word related to the naming of a stadium in Queensland the ES 'Nigger' Brown stadium. The man it was named after, ES Brown, either acquired the nickname in relation to his shoe polish[44] or in reference to his relationship with the local Aborigines. Either way, the nickname was of racist origins and still has serious racist connotations today. What makes the *Hagan* case such a confusing precedent is how easily it could have been, and most probably should have been, decided as a case of racial vilification.[45] When the matter was decided before a United Nations

[37] *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 109.

[38] Yagan was a West Australian Aboriginal leader. He was murdered by two English settlers. As French J noted in *Bropho*, 'the sequel to his death, the severing and smoking of his head and its removal to England for display in a museum, demonstrated a contempt for his humanity which is striking even at this historical remove.' (2004) 135 FCR 109, 1.

[39] The cartoon depicts the struggle of Yagan's descendants over the return of his skull from England. In the cartoon Yagan remarks that he would rather a 'warm beer' in a 'quiet pommy pub'

[40] *Corunna v West Australian Newspapers*, Unreported 12 April 2001.

[41] Above n 40, 36.

[42] In the sense that it effectively puts words into the mouth of the defendant.

[43] *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615. See also *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2001] FCA 123.

[44] Drummond J in *Hagan* [2000] FCA 1615, 11 cites a rugby league writer as stating, 'Edwin Brown's nickname would, for obvious reasons, never be countenanced today. The name had nothing to do with the colour of Brown's skin. It came about because of his snappy dressing and penchant for wearing deep brown shoes. This colour was known in the shoe shops as - `nigger brown'.' If this were to be true it would at least be evidence of a deeply ingrained casual racism. For a discussion of the word 'nigger' is a legal and political context see Randall Kennedy, *Nigger: The Strange Career of a Troublesome Word*, (Pantheon Books, 2002). See also Stephen Hagan, *The N Word:one man's stand* (Magabala Books, 2005).

[45] 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.

Committee there was little difficulty in finding the use of the name to be racist.[46] Similarly, in *Walsh v Hanson*[47] a statement in Pauline Hanson's book *The Truth* to the effect that 'Aborigines were savages who ate babies and Chinese people,' was found *not* to amount to vilification due to the causation requirement.[48]

Part IIA's jurisprudence suffers from a lack of clarity. This owes itself to the drafting of the legislation and the vagueness surrounding key terms. It is possible that where racism is concerned vagueness in relation to the terms used to identify it under the law is an inevitability.[49] The 'indeterminacy'[50] surrounding 18C tends to undermine the free speech values in s 18D. Even if s 18D ultimately plays a useful balancing role, if a defendant is required to go before the Federal Court to defend both their reputation and themselves from liability, then speech is hardly free. Bear in mind that the matter at dispute in *Bropho* commenced before HREOC as the *Corunna* matter in 1997 and was only concluded before the Full Court of the Federal Court in 2004. In other words it took a full seven years to determine that the publication of a cartoon that contained no direct derogatory image or direct racist insult did not in fact constitute racial vilification.

In stark contrast, those cases where direct racist abuse has been at issue, such as *Campbell v Kirstenfeldt*,[51] *Horman v Distribution Group*[52] and *McMahon v Bowman*,[53] have been easily found to be racial vilification. In each of these cases the racist abuse was directly made to the victim by the defendant. The racist abuse was also accompanied by vulgarity. In *Silberberg* the posting of a vulgar racist message on a discussion board was held to be vilification.[54] Furthermore, the Holocaust denial cases, *Jones v Scully*,[55] *Toben v Jones*[56] and *Jones v Bible-Believers Church*,[57] have also found to be racial vilification with little controversy.[58]

To further confuse the picture there are two cases where racist speech that was indirect and which were neither vulgar nor particularly comprehensive was found to offend under Part

[46] Hagan v Australia U.N. GAOR, Elim. of Racial Discrim. Comm., 62d Sess.' U.N. Doc. CERD/C/62/D/26/2002 (2003).
[47] *Walsh v Hanson*, Unreported, 2 March 2000.
[48] A decision which has been described as 'idiosyncratic' by McNamara above n 4, 55. The decision in *Walsh* is somewhat baffling given the context in which it was written. It is interesting to contrast the unwillingness of Commissioner Nader to inquire into the context of Hanson's writing by looking at her other statements as opposed to the willingness of Commissioner Innes in *Corunna* to draw somewhat tenuous conclusions about the context of the Yagan cartoon.
[49] See Meagher above n 5. Meagher at 230 suggested that 'racial vilification is hard to pin down'.
[50] Ibid.
[51] *Campbell v Kirstenfeldt* [2008] FMCA 1356.
[52] *Horman v Distribution Group* [2001] FMA 52 (15 August 2001).
[53] *McMahon v Bowman* [2000] FMCA 3.
[54] *Silberberg v Builders Collective of Australia Inc and Another* [2007] FCA 1512.
[55] *Jones v Scully* (2002) 120 FCR 243.
[56] *Toben v Jones* (2003) 199 ALR 1.
[57] *Jones v Bible Believers Church* [2007] FCA 55.
[58] For a discussion of Holocaust denial see Lawrence McNamara, 'History, Memory and Judgment: Holocaust Denial, The History Wars and Law's Problems with the Past' (2004) 26 *Sydney Law Review* 353. Also David Fraser, 'On the Internet Nobody Knows You're a Nazi': Some Comparative Legal Aspects of Holocaust Denial on the WWW,' in Hare and Weinstein above n 18. The leading international decision on Holocaust denial is the Canadian Supreme Court's decision in *R v Keegstra* [1990] 3 SCR 697. See also Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech*, (Princeton University Press,1995) 64-70. Also Lawrence Sumner, 'Hate Propaganda and Charter Rights,' in Wilfrid Waluchow (ed), *Free Expression: Essays in Law and Philosophy*, (Clarendon Press, Oxford University Press, 1994).

IIA. In both *McGlade v Lightfoot*[59] and *Warner v Kucera*,[60] it can be argued that though the complainant succeeded in claiming racial vilification, the insult in question differs in degree from the type of hate speech at issue in either the Holocaust denial cases or the direct racial abuse cases. In *McGlade* the defendant made racist comments about Aborigines in response to an interview with the Australian Financial Review (AFR). The AFR reported that the defendant stated:

> 'Aboriginal people in their native state are the most primitive people on earth'; and
>
> 'If you want to pick out some aspects of Aboriginal culture which are valid in the 21st century, that aren't abhorrent, that don't have some of the terrible sexual and killing practices in them, I'd be happy to listen to those.'[61]

Similarly, in *Warner* the defendant placed a sign on the door of her restaurant stating 'Not open due to destructive Aborigines.'[62] In response to her sign others had written further racist remarks including 'nigger' and 'Fuck the parents: take it out of their Abstudy.'[63] The remarks of Senator Lightfoot in *McGlade* and the shop-owner in *Warner* are no doubt racist. But, if the remarks are taken into account, then, excluding the graffiti added by others in *Warner*, they are not vulgar or comprehensive. They evince 'dislike' but not the intensity of dislike that rises to the level of hatred.

There is little consideration in *McGlade* of the legal requirements of s 18C(1)(a). Justice Carr re-stated the position of Keifel J in *Creek* and noted that it had been endorsed by Branson J in *Jones v Toben*[64] and provided the dictionary definitions of 'offend', 'insult', 'humiliate' and 'intimidate'. Justice Carr did note that the statements would offend or insult the complainants but not that it would humiliate or intimidate them.[65] In *McGlade* no defence was offered under the s 18D exemption. The result might have been different if a defence had been proffered. Nonetheless, *McGlade* and *Warner* suggest that the low threshold under s 18C(1)(a) can reach non-hateful forms of racist speech.

One might argue that the danger of decisions such as *McGlade* and *Warner* is that they weaken the level of political support for racial vilification laws. There are clear justifications for proscribing hate speech. Hate speech fosters and reinforces discrimination,[66] it may lead to violence,[67] it causes severe harm to its victims[68] and it infringes on the fundamental rights

[59] *McGlade v Lightfoot* [2002] FCA 1457.
[60] *Warner v Kucera*, Unreported 10 November 2000.
[61] Reproduced at [2002] FCA 1457 at [17].
[62] Above n 59.
[63] Ibid. Which aptly demonstrates the capacity of racist speech to attract further and more crude racist speech.
[64] [2002] FCA 1150 at [92].
[65] [2002] FCA 1457 at [62] and [64].
[66] Clay Calvert, 'Hate Speech and its Harms: A Communication Theory Perspective' (1997) 47(1) *Journal of Communication* 4. See also Katharine Gelber, *Speaking Back:the free speech versus hate debate* (J. Benjamins, 2002) 79.
[67] Sumner has stated, 'there have been a number of prominent instances of hate violence in recent years where the perpetrator has had a personal history of involvement with a hate group.' See Lawrence Sumner, 'Incitement and the Regulation of Hate Speech in Canada: A Philosophical Analysis,' in Hare and Weinstein above n 17, 211. Sumner cites the example of Benjamin Smith an adherent of a white supremacy group who in 1999 killed two people and wounded twelve people in a racist shooting spree in Indiana and Illinois. In Los Angeles in 1999 another white supremacist, Buford Furrow, shot five people at a Jewish community centre. After that attack Furrow shot and killed a Filipino postal worker.

of citizens to equality. But given the strength of the pro free speech arguments, and the continuing scepticism of many free speech academics in relation to hate speech laws,[69] any over-reaching by racial vilification laws might undermine their own standing. Furthermore, from a legal standpoint, the decisions in *McGlade* and *Warner* sit uneasily with the decisions in *Combined Housing*, *Walsh* and *Creek*.

Clearly, there is a rough demarcation line in the Part IIA scheme. However, it is one that is not represented in either the wording of the statute or the structure of the scheme. Even with the concerns of over-reaching in mind there does appear to be a very real need to allow the victims of racism in cases such as *Creek* and *Bropho* a forum within which to speak back and to challenge their opponents using the tools the law provides.[70] But arguably, such a scheme needs to be a bifurcated scheme with one set of laws for the serious and egregious matters, which are resolved before the Federal Court, and another set of rules for the less egregious matters.[71]

It could be argued that cases such as *Bropho* or *Creek* should not be settled before the Human Rights Commission, that they should not be sent to the Federal Court, and that they should instead be resolved through public debate. But, as will be discussed below, the access to speech in the public sphere is not equally available.[72] Some actors have a semi-monopoly position in relation to the dissemination of speech in the public sphere by virtue of their role as mainstream media commentators, whereas others are merely private citizens with few resources. It is somewhat instructive that both *Creek* and *Bropho* were cases where members of a marginalised community, Australian Aborigines, sought redress in formal legal forums, HREOC and the Federal Court, against defendants who came from both the mainstream media and the private sector. The contrast between financially well-resourced media outlets

[68] See below n 76.

[69] See Post above n 18. See also Schauer above n 1. See C. Edwin Baker, 'Autonomy and Hate Speech,' in Hare and Weinstein above n 18. See Weinstein above n 4.

[70] It was notable in *McGlade* that some of the witnesses who gave evidence in support of the complaint stated how Senator Lightfoot's insulting remarks brought back to them previous humiliations that they had suffered as Aborigines at the hands of white Australians. As Carr J stated [2002] FCA 1457 at [27]:

> The respondent's comments were offensive, insulting, humiliating and intimidating for him because they reminded him of a whole range of racist and degrading comments made, and events that occurred to him, over the years because he was an Aboriginal person. The respondent's comments took him back to memories of growing up. The racist laws and conditions he endured under government policies and the feelings of inferiority and humiliation 'returned in a big way'. Mr Taylor said that he was born in the 1930s and grew up on the Walebing Reserve, a government settlement, between Moora and New Norcia. He said that he still bore the scars and had memories of growing up there. He said that he lived in a shed made of tin and was forced by 'the white people' to eat with the dogs at the wood heap. The conditions on the settlement were degrading and dehumanising.

Another witness stated at [21]

> when she read the respondent's comments she was so shocked, '... I think that I was taken back to my childhood and youth where I was harmed in this way'. [The reference to being 'harmed in this way' was a reference to having learnt as a child 'the shamefulness that the dominant white Australian culture placed on Aboriginality', that it was bad and degrading to be an Aborigine and that '[T]he schoolyard of the 1970's defined this for me - I was one of them, an `Abo, boong, nigger'. The applicant could also remember being called racist names as a child and young adult.

It is clear that racist speech invokes memories of previous racist humiliations in its victims. An effective scheme would find a useful way of achieving some form of reconciliation, at least between the victims and the broader community, and would allow the victims to 'speak back'. Given Senator Lightfoot's pointed absence from the proceedings in *McGlade* 'conciliation' would not have been a useful option for resolving the dispute.

[71] See below Part V.

[72] See Schauer below n 103.

with regular access to large, or relatively large audiences, and an aggrieved community is telling. In this regard the virtue of the Human Rights Commission is its ability to provide a level playing field.

III. FREE SPEECH AND VILIFICATION

The debate on 'free speech versus hate speech laws' is well-travelled terrain. Nonetheless, it is worth re-canvassing this area in the context of amending the *Australian Human Rights Commission Act 1986* in order to allow the Commission to hold a public hearing and to provide advisory opinions. Particularly as the theoretical debate is concerned with the seemingly intractable conflict between free speech values on the one hand and the values of racial equality on the other hand, the nature and inherent limitations on the Commissions powers offers some comfort to both perspectives.

The passage of the Racial Hatred Bill 1994, which later became the *Racial Hatred Act 1995* (Cth), was marked by fierce debates over free speech and racial vilification laws.[73] There has traditionally been a dichotomy between free speech on the one hand and restriction on the other. Where this debate has been applied to hate speech liberal politicians, academics and others have struggled with the notion of restraining hate speech, and protecting others from vilification. The Parliamentary debates concerning Part IIA reflected this struggle. As Chesterman has noted:

> If racist speech – or racial vilification, as it is often called – goes unchecked within a community, equality between groups of citizens and the dignity and security of individual citizens are threatened. But legal restrictions on this type of speech inhibit freedom of speech: indeed they may significantly inhibit public discussion of a wide range of political, social and cultural issues.[74]

As stated, the harms of racial vilification are relatively well known. Chesterman notes that racial vilification can accentuate the weakness of a minority group in relation to the broader society.[75] Racist speech can create an environment conducive to racial violence and other forms of intolerance. Similarly, the adverse effects of racist speech are more or less internalized by the victims of such speech. Such marginalisation might not manifest itself in a visible or highly tangible outcome. For example, a Muslim woman who is abused in public for wearing a hijab might respond by staying home where possible. A child who is bullied and subject to racist taunts at school might choose to not attend or to drop out when possible. Rarely, do the victims of racist speech actually speak out. But the impact of racial vilification can be extremely traumatic. As Matsuda has noted:

> The negative effects of hate messages are real and immediate for the victims. Victims of vicious hate propaganda have experienced physiological symptoms and emotional

[73] See further Luke McNamara and Tamsin Solomon, 'The Commonwealth *Racial Hatred Act* 1995: Achievement or Disappointment,' (1996) 18 *Adelaide Law Review* 259. See also McNamara above n 4, 38-49.
[74] Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Aldershot, 2000) 193.
[75] Ibid 194. In relation to racial vilification Chesterman states, 'when this race is a minority one with relatively little power or influence in the community, its weakness will be further accentuated.'

> distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post traumatic stress disorder, hypertension, psychosis, and suicide.[76]

The harms of racist speech warrant a policy response. But this response has to be continually balanced against the countervailing considerations of free speech. On a legal and political level free speech also has a deep and important lineage in Australia's democracy. It is embedded within our legal and constitutional structures. In the United Kingdom, the English Civil War was in part fought over the freedom of Parliament to print what the King did not like.[77] Parliament's victory supported freedom of the presses. Our major ally, the United States, protects freedom of speech under the First Amendment. In the 1990's a series of cases established the implied freedom of political speech under the Australian Constitution.[78] These decisions of the High Court gave strength to the notion that free speech applied in Australia.[79]

Legally, at least, free speech under Australian law is in fact limited to the guarantee implicitly contained in the Constitution. However, the philosophical and political support for free speech within the Australian polity is more deeply entrenched.[80] As noted this was evident in the debates surrounding the racial vilification amendments. More recently, it has been seen in the debates concerning Victoria's *Racial and Religious Tolerance Act 2001* (Vic).[81]

Three observations may be made with respect of the free speech-restriction dichotomy. The first is that the three major justifications supportive of free speech are largely answered by the rationales supporting the restriction of racist speech. Though, given the centrality of free speech to a liberal democracy, race hate laws can only maintain their democratic legitimacy if they minimally impair speech. The second is that where free speech considerations are

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[76] Mari Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story,' (1989) 87 *Michigan Law Review* 2320, 2336. As Lawrence Sumner has stated in relation to Matsuda's argument:

> Even if there were no empirical evidence to support Matsuda's claims, they have a pretty secure footing in common sense. After all, hate messages directed at members of their target group are not meant to engage the audience in a rational debate or persuade them of some important truths. Rather, they are meant to hurt—by insulting, humiliating, or intimidating—and it would scarcely be surprising if they were often to succeed in this aim. Many of the immediate responses Matsuda describes are the ones all of us evince when subjected to abuse or insult, whether motivated by prejudice or not.

See further, Lawrence Sumner, 'Incitement and the Regulation of Hate Speech in Canada: A Philosophical Analysis,' in Hare and Weinstein above n 18, 208.

[77] For a history of the English Civil War see further Lawrence Stone, *The Causes of the English Revolution, 1529-1642* (Routledge, 2002). Also, Michael Braddick, *God's Fury, England's Fire: A New History of the English Civil Wars* (Penguin, 2009).

[78] See for example *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, *Theophanous v Herald & Weekly Times* Ltd (1994) 182 CLR 104, *Stephens v West Australian Newspapers* (1994) 182 CLR 211, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, *Levy v Victoria* (1997) 189 CLR 579.

[79] In this article I will deal with free speech on a theoretical level but I will address the relationship between the implied freedom and racist speech in another paper. For a general discussion of the constitutional issues facing Part IIA see Neil Rees, Katherine Lindsay and Simon Rice, *Australian anti-discrimination law* (The Federation Press, 2008) 538-539.

[80] Chesterman has suggested that the protection of free speech in Australia is 'delicate'. See further, Chesterman above n 73. Gelber has described it as 'partial and unsatisfactory'. See 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.

[81] See further, Simon Evans and Carolyn Evans, 'Parliamentary Deliberation about Religious Vilification Legislation' in Gelber and Stone above n 11.

concerned, section 18D does a reasonable job of balancing competing interests in relation to the terms of the section if not it's practical operation. The third is that presenting the debate as an all or nothing proposition between the freedom of speech or the total prohibition of any racist speech, overstates the matter and does not necessarily address the goal of most complainants in racial vilification matters.[82]

The Free Speech Rationales

There are three justifications that commonly support free speech. These are the search for truth, autonomy and democracy.[83] The search for truth argument suggests that where speech is truly free the truth can be discovered in the course of an unrestrained discourse. The argument would be that where more information is produced the ultimate goal of the attainment of truth is more likely to be satisfied. The opposing view is that racist speech, which is palpably false, does not advance this rationale. Theoretically, if racist speech were to occur in the context of a discourse aimed at discovering the truth it would be immediately disregarded. Regrettably, history suggests that racist speech has had little trouble entering into political discourse. The late-nineties phenomenon of ultra-right wing Australian politician Pauline Hanson, and some of her arguably racist utterances, provides an example of such speech subverting the truth.[84]

In her maiden speech to the Australian Parliament in 1996 Pauline Hanson stated:

> Present governments are encouraging separatism in Australia by providing opportunities, land, moneys and facilities available only to Aboriginals. … I talk about … the privileges Aboriginals enjoy over other Australians. …. Arthur Calwell said, "Japan, India, Burma, Ceylon and every new African nation are fiercely anti-white and anti one another. Do we want or need any of these people here? I am one red-blooded Australian who says no and who speaks for 90% of Australians." I have no hesitation in echoing the words of Arthur Calwell...I and most Australians want our immigration policy radically reviewed and that of multiculturalism abolished. I believe that we are in danger of being swamped by Asians.[85]

Pauline Hanson's maiden speech contained a number of blatant falsehoods. At no point has Australian Government policy ever advocated or supported separation with Aboriginals and any benefits directed at Indigenous Australians have been to remedy serious disadvantage. Hanson's comments on Asian immigration and her echoing of Calwell's appraisal of relations between Asian nations does not bear scrutiny. Hanson's maiden speech was roundly

[82] A key point that will be discussed below is that the complainants in most racial vilification matters receive very little in damages. Even where direct racial vilification is concerned the amounts tend to be rather small. As will be discussed below, whilst it is not possible to speak for every complainant, it can be speculated that what might really be at issue in many of these cases is the reputation of the group. That is, racial vilification is a type of group defamation, and the restoring of the group's reputation, rather than any financial benefit to an individual, might be more important.

[83] For a general discussion of free speech see Lawrence McNamara, 'Free Speech' in Des Butler and Sharon Rodrick, *Australian Media Law* (Lawbook, 2nd ed, 2004).

[84] For a discussion of Hanson in the context of racial vilification laws see further McNamara above n 1.

[85] Hansard, Parliamentary Debates, House of Representatives, 10 September 1996 at 3860-3862. Arthur Calwell was an Australian politician and opposition leader during the 1960s. Calwell is well known for having made racist statements in public debate.

criticised by many commentators.[86] Nevertheless, Hanson was able to garner political support within the community for her views. In the 1998 Queensland state election Hanson's One Nation Party garnered 11% of the popular vote.

Whilst, Hanson's support-base eventually dwindled, the political support that she did enjoy, and, the freedom that she had to articulate her views, would have marginalised many of the people that her speech targeted: Aborigines and Asian-Australians. If racist speech distorts the truth and divides the community the question should be whether it adds anything at all to political speech.[87] Writing in relation to racist hate speech Sadurski has noted:

> The traditional Millian justification, taken in isolation from other rationales, supports a distressingly narrow scope for free expression. Most probably, it would defeat any call for closer scrutiny of anti-racial-vilification-laws.[88]

Sadurski does not immediately discount the search for truth as supportive of arguments against anti-racial vilification laws. Sadurski notes Judge Easterbrook's view in *American Booksellers Association v Hudnut*[89] that 'the Constitution does not make the dominance of the truth a necessary condition of freedom of speech.'[90] However, allowing falsehood into public discourse has manifest dangers.[91] Further, the First Amendment jurisprudence of the United States should not dictate the terms of the free speech debates in other contexts.[92] It seems somewhat paradoxical that truth can be advanced as a rationale supporting free speech and that yet it can be suggested that truth is not a required outcome of free speech. This cannot be a strong argument against anti-racial vilification laws, where such laws are directed against a tangible social harm.

However, autonomy and democracy provide stronger support for free speech, and more difficult propositions for proponents of racial vilification laws.[93] The pursuit of individual freedom is an underlying tenet of liberal democracy. This freedom can be sensibly restrained where it would cause harm to others. Particularly in relation to autonomy, this theoretical justification for free speech needs to be located in Australia's constitutional framework. Australian law clearly provides that political communication can be restrained where the

[86] See Tony Abbott, Robert Manne et al, *Two Nations: The Causes and Effects of the Rise of the One Nation Party in Australia* (Bookman Press, 1998).
[87] But the High Court in the implied freedom cases has tended towards a rather broad definition of 'political speech'. In *Levy v Victoria* (1997) 189 CLR 579 at 561, Brennan CJ found that non-verbal conduct was 'capable of communicating an idea about the government or politics of the Commonwealth.' Similarly, the obiter remarks of McHugh J at 189 CLR 579, 623 in *Levy* suggest that in addition to reasoned speech, 'false, unreasoned and emotional communications,' will also be protected. Only Callinan J in *Coleman v Power* (2004) 220 CLR 1, 114 has suggested that 'it is only reasonable conduct that the implication protects. Threatening, insulting, or abusive language to a person in a public place is unreasonable conduct. The implication should not extend to protect that.'
[88] Wojciech Sadurski, 'Offending with Impunity: Racial Vilification and Freedom of Speech,' (1992) 14 *Sydney Law Review* 163, 173. See John Stuart Mill, *On Liberty* (JW. Parker, 1859). Mill wrote at 228, 'We can never be sure that the opinion we are endeavoring to stifle is a false opinion, and if we were sure, stifling it would be an evil still.'
[89] 771 F 2d 323 (7th Cir. 1985).
[90] Ibid 330. Cited in Sadurski above n 88, 174.
[91] Sadurski notes that the law has regulated false statements in other contexts.
[92] Sadurski above n 88, 174.
[93] See Baker above n 69.

relevant law is appropriate and adapted to the achievement of a legitimate end.[94] Laws against hate speech can be supported upon this basis.

Baker has argued that the legitimacy of any law will depend on the degree of respect that it shows for both equality and autonomy.[95] But Baker defines respect for autonomy under the formal law in such a way as to preclude any hate speech laws.[96] If autonomy is defined in this way then there can be no sensible compromise between the goal of racist hate speech regulation and the protection of free speech. So this approach is slightly unhelpful to any meaningful dialogue between the advocates of the two policy goals.

Autonomy within a liberal democratic state is not a simple dichotomy of complete autonomy on the one hand and complete restraint on the other. All liberal democracies, and their citizens, tolerate laws that impede the freedoms of citizens. The question then becomes one of degree. The imposition of a restraint, which attaches to legitimate, if slightly offensive, speech activities would go too far in interfering with individual autonomy. Baker offers a definition of substantive autonomy that may provide a basis for the type of 'balancing act' that racial vilification law attempts to achieve. Baker states:

> Substantive autonomy involves a person's actual capacity and opportunities to lead the best, most meaningful, self-directed life possible. Laws that advance one person's substantive autonomy—by allocating resources to her or providing her information, for example—often reduce the substantive autonomy of another person. In making policy choices, a state is properly influenced but not controlled by substantively egalitarian aims, welfare maximizing considerations, and various inevitably non-neutral collective self-definitional or majoritarian values.[97]

This encapsulates the underlying premise of racial vilification laws. These laws are intended to re-balance society so that the equality of injured individuals, who have been harmed by racist speech, is repaired by the operation of the laws. But at the same time, these laws, by restraining the speech of some, also causes injury. In other words, by enhancing the welfare and capacity for autonomy for the victim, racist hate speech laws concurrently diminish the autonomy of the defendant and others like her. Thus ultimately, if it is accepted that autonomy can be legitimately restrained, the question becomes one of degree. Once the law goes beyond the point of 'democratic legitimacy'[98] or becomes 'hegemonic',[99] in terms of compulsorily imposing one worldview on all citizens, then it has over-reached.

The democracy argument poses the strongest and most compelling challenge to the regulation racial vilification speech. The basic rationale is that free speech is necessary for self-governance and democracy. There are three points that arise in this context that must be addressed. Firstly, there is Oliver Wendell Holmes' concept of the marketplace of ideas.[100]

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[94] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[95] Baker above n 69, 142.
[96] Ibid. Baker states, 'the state only respects people's autonomy if it allows people in their speech to express their own values—no matter what these values are and irrespective of how this expressive content harms other people or makes government processes or achieving governmental aims difficult.'
[97] Ibid 143.
[98] Ibid.
[99] See Post above n 18. Also see below n 110.
[100] In *Abrams v United States* 250 U.S. 616, 630 (1919) Holmes J stated, 'the best test of truth is the power of the thought to get itself accepted in the competition of the market.'

Second, there is the question of access to information and democracy. Third, there is the observation by Sadurski that restriction would mislead lawmakers by presenting a false view of the polity.[101]

The marketplace of ideas argument suggests that opinions compete for primacy in the public arena and that the best opinions will emerge as the victors in such a competition. The basis of the argument is that any false idea will lose legitimacy.[102] Accordingly, legal restraint would be redundant given the workings of the market for ideas. This mirrors the search for truth argument and theoretically it is sound. The central weakness of this argument is that it pre-supposes equality of access to the marketplace. Schauer has noted that access to the marketplace may be unequal.[103] Where access is unequal, or denied in some way, this theory is frustrated, and the adverse outcomes that would result from the success of misconceived or false ideas becomes likely.

In the actual marketplace a choice has to be made by private commercials interests in relation to which speech act will be published and promoted. As Delgado notes:

> ... every speech act discriminates against ones left unsaid; every utterance aims at killing another, countervailing one. That is what speech does; its very conditions entail selection amongst points of view. The idea of a perfectly free marketplace of ideas in which un-committed observers dispassionately sample and choose ideas, some what in the manner of a diner selecting from a restaurant menu, is conceptual nonsense.[104]

The reality is that insofar as mainstream speech is concerned, the media outlets that distribute such speech have to make rational commercial decisions about the type of speech that they publish. If this is rationally followed then it does make sense to publish articles on occasion that pander to racist sentiments, provided that it is not blatant hate speech. The fact is that this occurs, and cases such as *Bropho* and *Creek* suggest that it does happen. Publishing slightly sensationalist articles even where they are somewhat offensive may boost readership. Were this to occur in a specific instance, it would be fanciful to suggest that an offended reader would automatically get a right of reply. They may be allowed to reply in some form or another. But crucially they may not be guaranteed the market-share or even the prestige, of the original publication.

However, restricting dissemination and thereby access to information, particularly in a liberal democracy, is fraught with dangers. Particularly within US First Amendment jurisprudence and literature there is a scepticism about the role of the government in mediating speech.[105]

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[101] Sadurski above n 88.

[102] See Eric Heinze, 'Viewpoint Absolutism and Hate Speech,' (2006) 69(4) *Modern Law Review* 543, 553. As Heinze states, 'ignorant ideas, unable to withstand rigorous scrutiny, need not be prohibited. They will perish under scrutiny.'

[103] See further, Frederick Schauer, 'Free speech in a world of private power,' in Wojciech Sadurski and Tom Campbell (eds), *Freedom of Communication* (Aldershot, 1994).

[104] Richard Delgado, 'Where is My Body? Stanley Fish's Long Goodbye to Law,' (2001) 99 *Michigan Law Review* 1370, 1376.

[105] For a discussion of theoretical underpinnings of the US First Amendment, and in particular a critique of the mistrust of government, see further Adrienne Stone, 'How to Think about the Problem of Hate Speech: Understanding a Comparative Debate,' in Gelber and Stone above n 3. See also Robert Post, 'Community and the First Amendment,' (1997) 29 *Arizona State Law Journal* 473.

Given the importance of maintaining democratic legitimacy in a hate speech context this is an important consideration for law-makers. Post has argued that government intervention is speech may amount to 'tyranny' and that it may represent the enforcement of 'social norms that represent the well-socialized intuitions of the hegemonic class that controls the content of the law.'[106] Post has warned:

> The purpose of communication within public discourse… is not to make decisions but to empower citizens to participate in public opinion in ways that will permit them to believe that public opinion will become potentially responsive to their views…Because influence in public debate is a matter of persuading others to one's point of view, the state can equalize influence on public debate only if it controls the intimate and independent processes by which citizens evaluate the ideas of others. Such efforts are intrinsically undesirable when performed by the state, both because ideas are not equal -- the very structure of public debate rests on the premise of distinguishing good ideas from bad ideas -- and because any such governmental efforts likely would verge on the tyrannical.[107]

Post's argument is that by limiting participation in public speech racist hate speech laws lose their democratic legitimacy. This would occur because the state is preventing certain citizens from exercising their democratic rights due to its objection to their viewpoints.[108] But in the context of racial vilification laws this argument is over-stated. Firstly, the degree of the restraint is open to contention and does not necessarily entail a complete ban on democratic participation. Secondly, Post's concern with tyranny and the imposition of the norms of a hegemonic class are slightly overstated.[109] A law, which minimally interferes with speech, cannot sensibly be regarded as tyranny. There is also the social or market reality of public speech with which to contend. As Heinze states:

> To be sure, a hegemonic class controls speech as much in the US as in Europe. On both continents, an elite exercises disproportionate control over informal, social spheres as well as formal, legal ones. In 2003, Cable News Network's (CNN) reporter Christiane Amanpour claimed that the network had been 'intimidated' by the Bush administration in its coverage of the war in Iraq'. She maintained that CNN had 'muzzled' her through 'a combination of the White House and the high-profile success of the controversial pro-war news network, Rupert Murdoch-owned Fox News'. Similarly, the BBC's director general, Greg Dyke, had been 'shocked' by 'how unquestioning the [US] broadcast news media was during this war'.[110]

There is a clear discrepancy in focusing on one perceived hegemonic group to the exclusion of another. Refusing to interfere in speech does not mean that it cannot be captured by sectional interests. Heinze makes the further point that the hegemonic elites to which Post

[106] Post above n 18, 132.
[107] 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, 29.
[108] There are instances where precisely this type of illegitimate misuse of the law has occurred. The Anwar Ibrahim trials in Malaysia, where the former deputy Prime Minister was subjected to a series of show trials, is an example of this problem.
[109] See Heinze above n 102 .
[110] Eric Heinze, 'Wild West Cowbody versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech,' in Hare and Weinstein above n 17, 188.

refers, are actually the 'governing elites in the official governing capacity.'[111] Nonetheless, the issue of viewpoint imposition is a genuine concern, but it is one that can be answered by limiting the extent of the 'intervention'. There is a third objection to Post's pro-free speech position which is that refusing to interfere in public speech inevitably entails losing touch with the social reality of public speech.[112] Free speech under the First Amendment has co-existed for long periods of US history with race-based social inequality, such as slavery and segregation, and also with the crimes committed by racist hate groups. The problem is that in certain contexts not regulating hate speech can be tantamount to allowing racism to run rife.

There would appear to be a 'culture of distrust'[113] underpinning the US approach to free speech.[114] The notion of a mistrust of government is not a strong part of Australia's legal and political culture. Stone has critiqued US and Canadian approaches to the free speech-restriction of hate speech debate and has suggested that the mistrust of government is a key factor in US law whereas it is mostly absent in Canada's political culture.[115] Moreover, as discussed there are unexplored assumptions in Post's statement about the nature of government intervention into the marketplace of ideas. As will be developed below, such 'intervention' need not be heavy-handed nor should such necessarily result in a distortion of the 'market.'

Furthermore, it is a central assumption of the debate on racial vilification laws, that where speech has been found to be unlawful that it must necessarily be restrained. This suggests that such speech must be removed from existence.[116] But in a democracy where people should be free to make up their own minds this is undesirable. The mere availability of racist speech should not immediately suggest that the readers or listeners automatically becomes racist themselves. As Sadurski has noted:

> The corollary of this argument is that the hearers are not responsible for the views, which they form in their own minds. They are being seen as thoughtless receivers of ideas imposed upon them by the speakers.[117]

Whilst speech does influence others, it is obviously facile to suggest that its mere availability automatically shapes opinions.[118] It is true that the listener should be free to evaluate ideas

[111] Ibid 189.
[112] As Heinze states that the ideals of formal neutrality and government non-preference, 'reveal little about the social and economic realities of a society whose legal regime has, throughout history, sustained colossal social and economic power imbalances.' Above n 110, 194.
[113] See Schauer above n 1, 46.
[114] See Pippa Norris (ed), *Critical Citizens: Global Support for Democratic Governance* (Oxford University Press, 1999). Also Joseph Nye Jr, Philip Zelikow and David King, *Why People Don't Trust Government* (Harvard University Press, 1997).
[115] Stone above n 104.
[116] Though I do not suggest that this is completely necessary or that it actually occurs in practice. Even where speech is found to be unlawful, it is likely to still be available in some form or another. This is particularly true where racist opinions are circulated on the internet.
[117] Wojciech Sadurski, 'On 'Seeing Speech Through an Equality Lens': A Critique of Egalitarian Arguments of Hate Speech and Pornography,' (1996) 16 *Oxford Journal of Legal Studies* 713.
[118] However, Calvert above n 66, 6, has noted that prolonged exposure to hate speech does influence opinions. Calvert states, 'It is a long-term, cumulative harm that accrues with repeated use of racist epithets directed at targeted minorities. The harm is the subordination of racial minorities, including the perpetuation and reinforcement of discriminatory attitudes and behaviors. In brief, use of racist expressions creates and maintains a social reality of racism that promotes disparate treatment of minorities.'

and decide for themselves whether an opinion is correct or not. Similarly, Sadurski also makes the point that prohibition confuses law-makers by giving them a false picture of nature of the polity.[119] That is, concealing racism can lead law-makers to believe that it does not exist thereby preventing them from seeing the need for any further efforts to reduce racism.

The answer to this point may be that where the democracy has voted on racial vilification laws it has already made its choice. That is, if democracy supports free speech. Then democracy should also support the choice of the electors to decide for themselves as to what types of speech are permissible and impermissible in their society.[120] But then, this argument may be slightly circular, and might treat the prohibition on racial vilification as self-reinforcing. A better argument, as made below, may be that the prohibition on racist speech need not be total. Indeed, in the digital era it is difficult for speech to disappear. Moreover, racist speech is a force for social exclusion, and what might be an exercise of one person's autonomy, is a diminution of another person's sense of well-being, citizenship and willingness to participate in the democracy.

On balance, the argument over free speech and the regulation of hate speech favours the latter. But the proponents of free speech have raised points that cannot be ignored, such as the concept of democratic legitimacy and the need to avoid imposing 'hegemonic' viewpoints. It is the successful negotiation of free speech values with the imperatives of racist hate speech regulation that determines the worth of such laws. Given that the threshold under s 18C is relatively low, the question then is whether s 18D plays a useful balancing role in the wider context of the free speech/hate speech debate.

IV. THE EFFICACY OF THE FREE SPEECH EXCEPTION

There was much concern when the Racial Hatred Act was debated that the implied freedom would be violated by laws that were too extensive.[121] Accordingly, the section 18D safeguard, which protects speech made reasonably and in good faith, was implemented.[122] The discussion of s 18D in the Explanatory Memorandum reflects the unresolved nature of the free speech debate in relation to racial vilification laws. The comments of the then Attorney-General Michael Lavarch are instructive:

> Proposed section 18D provides a number of very important exemptions to the civil prohibition created by proposed section 18C. The exemptions are needed to ensure that debate can occur freely and without restriction in respect of matters of legitimate

[119] Sadurski above n 88, 179.
[120] Anne Flahvin, 'Can Legislation Prohibiting Hate Speech Be Justified in Light of Free Speech Principles,' (1995) 18 *UNSW Law Journal* 327, 335. Also Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982) 40.
[121] See further , Maurice Byers, 'Free speech a certain casualty of race law,' *The Australian,* 21 November 1994.
[122] Section 18D provides:

> 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.

public interest.

> However, 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.[123]

The Explanatory Memorandum does suggest that an extreme view given reasonably and in good faith will be permitted under Part IIA. But if an 'extreme view' is understood to be one of racial hatred then this is troubling. Such a proposition is not consistent with the purpose of the scheme or the low threshold for offensiveness. The purpose of Part IIA is to defeat racial vilification[124] – but the exemption seems to suggest that a sophisticated type of hate speech can escape prohibition. It is worth considering whether this would this exempt Holocaust denial speech where the maker of the speech is very careful with what he says and appears to genuinely believe his argument? In practice, specifically in the case of *Toben v Jones*[125] this has not been the case.[126] But in cases such as *Toben* the speech at issue was invariably crude and contained anti-Semitic tracts, so this does not mean that the matter is fully settled.

Given the limited case law it is difficult to fully assess the efficacy of s 18D. Given the free speech discussion above, it can be suggested that s 18D is effective where it prevents s 18C from encroaching too far into speech that is legitimate within a liberal democracy. Similarly, it can be said that s 18D is effective where it does not prevent Part IIA as a whole from providing meaningful redress to complainants in cases of bona fide racial vilification.

Assessed in that context, s 18D has not prevented findings of vilification in the clear-cut cases of racist hate speech. In the Holocaust denial cases and the cases of direct racist assault the defendants were not able to utilise the s 18D defence. In the more borderline cases such as Bropho, s 18D was crucial in stymieing a finding of vilification. In *Bropho* a useful exposition of the s 18D defence by French J established, that of the two key terms, 'reasonably' and 'good faith', context and proportionality govern the interpretation of the former, whereas fidelity to the ideals of the scheme partly govern the contours of the latter. Of the term 'reasonably' 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.[127]

Of the term 'good faith' French J held:

[123] Explanatory Memorandum, *Racial Hatred Bill 1994* (Cth).
[124] By proscribing racist hate speech.
[125] [2003] 129 FCR 515.
[126] Meagher above n 5.
[127] *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 109.

> 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.[128]

One critique that might be offered of the terms 'reasonably' and 'good faith' is that they are imprecise terms.[129] The consequence of a lack of precision is that the application of these terms would need to be determined on a case-by-case basis. It would be difficult to assess beforehand, whether a court would assess the speech to be made reasonably or in good faith. The absence of certainty in this context, as there can be no bright-line rule derived from the use of imprecise terms, effectively stifles free speech in the sense that any plausible vilification claim brought before the Federal Court will need to be defended. From a free speech perspective this is undesirable. Whilst it should be accepted, given the sound policy basis for vilification laws, that racist hate speech should be proscribed, it is in the border-line cases where the danger arises of an imbalance against the type of speech required to preserve the democratic legitimacy of the vilification laws.

A second critique, and one that runs counter to the first critique, is that the use of the term 'good faith' places an emphasis on the use of external materials in order to negative a defence made under s 18D. That is, good faith requires an examination into the true motives of a speaker; these motives may not be readily discernable from a written text, wherein recourse to some other materials will be required. Writing in the context of Holocaust denial speech, Meagher has suggested that the requirements of s 18D would still expose a very sophisticated exposition of such hate speech.[130] Meagher states:

> 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.[131]

This requires that there must be something else produced that in some way gives away the true motive of the speaker. Whilst it is preferable to require that such evidence be produced, rather than to indulge the approach of Commissioner Innes in *Corunna* to s 18C where very serious inferences and even leaps of logic were employed to make out offensiveness,[132] it still places a very heavy burden on a complainant. The danger is that a carefully worded piece of hate speech, which may be just as damaging as blatant hate speech, might escape censure

[128] Ibid 131.
[129] See below n 164.
[130] Dan Meagher, 'Regulating History: Australian Racial Vilification Law and History Denial,' (2005) 24 *University of Queensland Law Journal* 499, 519.
[131] Ibid.
[132] See above n 40.

under s 18D. Elster has suggested that this is the 'civilising force of hypocrisy' in that hate speech is forced to adopt moderation and civility in order to avoid legal proscription.[133]

In relation to s 18D, Chapman has argued that the term 'reasonable' reflects the views of the dominant Australian social group, Anglo-Saxons, rather than the perspective of Indigenous claimants.[134] Chapman argues that the construction of 'reasonableness' in the Part IIA jurisprudence 'constitute exercises of legitimation by the Anglo-Australian political and legal system.'[135] This results in non-Indigenous viewpoints being 'prioritised' over Indigenous ones.[136] There is some force to this view. The treatment by the judiciary of Indigenous perspectives has varied, from the puzzling decisions of *Walsh* and *Hagan*, to the more sympathetic, if ultimately unsuccessful decisions in *Creek* and *Bropho*. In *Hagan*, the failure of the judiciary to properly contextualize and appreciate the racism behind the use of the term 'nigger' even in a casual sense, was counter-pointed by the more reasoned decision of the UN Committee on the Elimination of Racial Discrimination.[137]

McNamara has identified a free speech sensitivity in relation to s 18D.[138] Broadly, this entails a cordoning off of certain speech acts, those situated closer to the mainstream,[139] from the reaches of Part IIA. It also involves reading the s 18D defence in an expansive manner so that the exemption covers more speech acts than would otherwise be captured by a narrowly confined approach. But here again, as McNamara tacitly concedes, Part IIA's jurisprudence is indeterminate.[140] In *Walsh* and *Bryl* a broad reading of the free speech defence was advanced. But in *Fardig*[141] an elected official was held to a higher standard of accountability by virtue of his elected position.[142] McNamara has suggested that Commissioner Innes

[133] Jon Elster, (ed), *Deliberative Democracy* (Cambridge University Press, 1998) 111 cited in Gelber below n 65, 121.
[134] Anna Chapman, 'Australian Racial Hatred Law: Some Comments on Reasonableness and Adjudicative Method in Complaints Brought by Indigenous People,' (2004) 30 *Monash University Law Review* 27.
[135] Ibid 48.
[136] Ibid.
[137] See above n 42-45. See Hagan v. Australia, U.N. GAOR, Elim. of Racial Discrim. Comm., 62d Sess., U.N. Doc. CERD/C/62/D/26/2002 (2003). At paragraph 7.3 the Committee stated:

> the Committee considers that that use and maintenance of the offending term can at the present time be considered offensive and insulting, even if for an extended period it may not have necessarily been so regarded. The Committee considers, in fact, that the Convention, as a living instrument, must be interpreted and applied taking into the circumstances of contemporary society. In this context, the Committee considers it to be its duty to recall the increased sensitivities in respect of words such as the offending term appertaining today.

In contrast the transcript of the special leave application to the High Court in *Hagan* records an exchange between Gaudron J and Hagan's counsel within which the judge drew an analogy between the term 'nigger' and the term 'pinkie' in order to make a point on causation. Out of context this may appear inapposite. However, the issue that Gaudron J was seeking counsel to address was the trickier matter of causation under s 18(1)(b) in *Hagan*.
[138] See McNamara above n 4.
[139] For example *Bryl* and *Walsh* concerned speech acts, which whilst not necessarily 'mainstream' acts on their own, at least pertained to political and cultural discourses that are closer to the center of Australian socio-political life.
[140] Above n 136, 109.
[141] *Jacobs v Fardig* [1999] HREOCA 9 (7 April 1999).
[142] Commissioner Innes stated:

> Suggesting that a particular group of people, whether because of their race or not, should be shot is simply offensive. It is made more so when such a suggestion is made by the holder of a public office who has no doubt sworn an oath to appropriately serve all of the people in the ward which he

engaged in a 'double-counting' of free speech in *Corunna* by stating that free speech warranted inclusion in Part IIA by virtue of s 18D and by then requiring a broad definition of the s 18D terms.[143] However, the Federal Court in *Bropho, Toben* and *Scully* did not adopt a broad approach to the s 18D defence. Similarly, in *Kelly-Country v Beers,*[144] Brown FM rejected the broad approach as potentially undermining the scheme.

V. ACHIEVING A BALANCE BETWEEN FREEDOM AND EQUALITY

One of the fundamental purposes of racial vilification laws is to preserve equality.[145] Within an avowedly multiracial and multicultural society such as Australia this is essential. Further, equality is absolutely fundamental to a democratic society. As Matsuda has stated:

> If I were to give primacy to any one right … I would put equality first, because the right of speech is meaningless to people who don't have equality.[146]

The purpose of racist speech is to undermine equality. The disseminators of racist speech want to mark out other groups as inferior and to establish a position of dominance over them. Racial vilification laws work effectively when they take away the speech rights of the racists, and clear the public space for their intended victims.[147] That is, the vilification laws allow the victims to have a public environment that is free from racist speech.

It is submitted that neither freedom of speech nor equality should be secondary and subordinate to the other. One can partly agree with Matsuda. Freedom of speech is irrelevant if your equality has been taken away. The powerless can speak for all that it matters but whether they will be heard is a different question. Fundamentally, also, an individual has a right to expect that they can go about their daily business without being affronted by comments, slogans or insults on the basis of their race. Twenty-first century Australia is a sorry place if it cannot guarantee, by law or by the nature of the polity, that type of civility for all of its citizens. Moreover, once equality is diminished the vital foundation of a democracy is imperilled.

Those who wish to use speech to subordinate, vilify and otherwise belittle others are less deserving of freedom of speech.[148] The very fact that we have racial vilification laws in Australia supports this contention because these laws state that once a certain line has been crossed then the speech is unlawful. The freedom is not absolute. Equality does not entail an equal opportunity to harm others. Freedom of speech is important to a democracy, but unless it is informed by core values, it can be repugnant to the democracy itself. Consider, this in a

represents. Although this was not a meeting of the Council, the remark was made to two staff who were his subordinates and demonstrates a disregard for the office which Mr Fardig held.

[143] McNamara n 27, 241.

[144] [2004] FMCA 336.

[145] See Chesterman above n 74, 193-195.

[146] Mari Matsuda, 'The James McCormack Mitchell Lecture – Language as Violence v Freedom of Expression: Canadian and American Perspectives on Group Defamation,' 37 *Buffalo Law Review* 337 (1989) at 360.

[147] Sadurski above n 117 critiques Catharine MacKinnon's text *Only Words*. Sadurski at 714 suggests that 'what hate speech bans do is remove from certain people some opportunities to exercise their capacity to speak and be heard (namely, to make racist comments) in order to improve the availability of similar opportunities to others.' Sadurski refers to this as the silencing argument.

[148] In the sense that their freedom will be restrained in certain instances.

different context – take for example, the Australian notion of 'mateship' – if mateship were to be without values it could easily be repulsive. For example, mateship can be said to exist where a group of men engage in a common crime. But crime is not something that we should celebrate. Collectively as a society we want to do everything we can to remove crime. Similarly, racially victimizing others through speech is not something to be encouraged or celebrated – or even permitted.

A. Establishing a framework for balance

But though one might seek to balance equality and freedom of speech in the context of racism, it must be recognised that there are different gradations of vilifying speech. This has to be accommodated within the legal framework that is applied to racial vilification. Given what we know about racial vilification law, the impact upon victims and the importance of free speech, the framework for balance has to strive to satisfy divergent policy goals. Firstly, imprecision is a feature of Part IIA.[149] This may be an unavoidable reality of the extension of pre-existing legal concepts to the field of racist hate speech.[150] Secondly, failing to allow the victims of racist speech the opportunity to 'speak back'[151] or to impose meaningful penalties on hate speech is to leave serious social harm unaddressed. Thirdly, as discussed above, a high degree of free speech is necessary for democracy. Moreover, the continued existence of racist hate speech laws depends upon their democratic legitimacy.

The discussion above shows that the current arrangements under Part IIA are deeply imperfect. A key point is the disconnect between the amount of complaints received by the Human Rights Commission and the miniscule number of substantive cases going before the Federal Court.[152] In the early years of the Part IIA scheme some 14% of all racial vilification complaints went before the Federal Court.[153] In effect, the rate of complaints going through to some form of hearing has collapsed from 14% to 0.6%. It is not possible to state conclusively the reasons why the level of complaints has dropped some dramatically. There are alternative forums available under State and Territory legislation. Alternately, conciliation may have proved successful in some cases that would otherwise have gone to court. There does appear to be a consistent level of complaints, a rate of approximately 20%, which are terminated on the basis that there is no reasonable prospect of conciliation.[154] This suggests a problem and a failure to provide a sound public forum for complaints to be heard openly. At the same time the indeterminacy of the legal rules and the jurisprudence is troubling for both proponents of free speech and hate speech regulation. There is a clear need for the scheme to be revised and re-balanced.

A legal scheme that does not recognise and account for different degrees of offensiveness is ineffective. So too must the legal concept of offensiveness incorporate the totality of the conduct. A nuanced scheme, or one that is multi-tiered, may offer much more in terms of the regulation of racist hate speech than the current arrangements.[155] The regulation of racist speech does not need to be an all or nothing proposition.

[149] See Meagher above n 5. Also McNamara above n 4.
[150] See below n 160-162.
[151] See Gelber n 65.
[152] Approximately 500 complaints received as against three court cases. See discussion above n 15.
[153] McNamara above n 4, 66.
[154] See below n 185.
[155] For a criticism of the current arrangements see discussion below n 181.

But even if a particular speech act is to be unlawful under Part IIA there is still the question of how it should be dealt with. One of the fundamental questions that attaches to racial vilification law is whether restriction, or really prohibition, is actually necessary to combat racist speech. In theory why can't a simple finding of unlawfulness suffice? As will be discussed below, in practise the Federal Court and the Commission have applied penalties appropriately where vilification has occurred.[156] It is understandable that where speech contains actual hatred and incitements to violence that it must be restrained. Speech that might fall within the 'fighting words' category, to borrow from the US First Amendment jurisprudence, should be restrained. An individual should not be subjected to a verbal assault and speech that is likely to lead to violence is unacceptable in a civilized society.

But does speech that contains racist content, yet is of a lower level of offensiveness, have to disappear? Is this in fact possible? Consider the example of the clips of the black-face skit on *Hey Hey it's Saturday*[157] that were posted to YouTube immediately after the program.[158] These clips have been posted by YouTube users and no doubt they are accompanied by a lively internet debate on the merits of free speech and racism. But if a complaint were ever made and if the Federal Magistrates Court found that Channel Nine had breached Part IIA of the RDA, should the YouTube clips of the *Hey, Hey it's Saturday* skit then be taken down because they can offend? Surely it is possible to have a scheme where a finding of unlawfulness can be made but where removal or suppression is not strictly required. Further, it seems strange to require the suppression of content, particularly in the digital era, when it is next to impossible to actually suppress the impugned material.[159] Even were the materials to be removed from YouTube they would likely pop up again on some other video website. This issue, of a flexible scheme to cover racial vilification, is one that is addressed below.

B. Achieving balance

The fundamental question is not *whether* to regulate racial vilification, but rather *how* to regulate racial vilification so as to allow a substantial measure of free speech, to have appropriate penalties in place, to allow speech to be challenged in a formal or semi-formal setting[160] and to provide real redress where appropriate to the victims of racist speech. As

[156] See discussion below n 177.

[157] In 2009 on Australian television a program called the *Hey, Hey its Saturday! 20 Year Reunion Show* was aired on Channel Nine. On the show there was a skit involving a group of men in black faces with large afro wigs pretending to be the Jackson Five – the intended gag was that the man playing Michael Jackson was in white face. Harry Connick Jr who was a guest judge on the show complained that the skit was racist. Connick Jr stated that, 'I know it was done humorously, but we've spent so much time trying to not make black people look like buffoons, that when we see something like that we take it really to heart' Connick Jr was referring to the old vaudeville and show time acts where black actors were not allowed, and white actors portrayed them as infantile or devious. See 'Harry Connick Jr stands by his outburst against Hey, Hey skit,' *Sydney Morning Herald* 15 October 2009. The host of the show, Daryl Somers, realised that offence had been given. Somers apologised and allowed Connick Jr to say a few words at the end of the show. The men involved in the skit, who were doctors of various ethnic backgrounds, also apologised.

[158] For our purposes we should ignore the copyright law implications of this fact.

[159] As the music industry can relate from a copyright context, once a digital file exists it is next to impossible to stop it from appearing on various websites or from being traded from internet user to user.

[160] My contention here is that the victims of racist speech do not always have equal access to the forums by which such speech is disseminated. As Schauer notes access in the marketplace of ideas is unequal. In this regard the semi-formal Human Rights Commission setting allows an appropriate level playing field.

this statement indicates there are many competing goals that need to balanced against each other. It is likely that any resolution offered of the problem will be contentious.

The analysis of the free speech debate above demonstrates that there is no clear victory to either side in the conflict between freedom and restraint where racist speech is concerned. Each proposition favouring free speech can be counter-balanced by another proposition favouring the regulation of racial vilification, but neither side comprehensively defeats the other.

But given the jurisprudence that has emerged, and with consideration to the matters above, it is possible to suggest a reform option that might provide a measure of balance – not a *perfect* balance – but a *better* balance than the system currently allows. In effect, reforming the statutory rules on racial vilification and re-instating the Human Rights Commission's ability to hear complaints would go some way to achieving a satisfactory balance. Moreover, it is abundantly clear that the question of balance does not relate solely to the rules on racial vilification or the forums in which these matters are addressed. The issues that affect both the rules and the forums are inter-related in the way in which that impact on the question of balance. So any useful proposal for reform would have to address matters pertaining to both the rules and the forums.

(i) Proscribing hate speech

As a first step a definition of 'hate' speech is needed. By that I mean the type of seriously harmful racist speech that warrants consideration by the Federal Court and, if appropriate, suppression in some form.[161] But defining hate speech is a difficult task.[162] As Post notes:

> All legal attempts to suppress hatred, whether of racial groups or of the King, must face a profound conceptual difficulty. They must distinguish hatred from ordinary dislike or disagreement. Even those who believe that hatred should be punished because it is 'extreme' would readily concede that disagreement, even disagreement that stems from dislike, ought to be protected because it is the lifeblood of politics.[163]

This difficulty does exist. But it is not a reason to actually resile from the task of attempting a definition. Post's writing on this point overlooks a fundamental feature of the common law world. The terms that are used in Part IIA, terms such as 'reasonably likely', 'good faith', 'reasonably' and even 'because of', are all terms that over the course of the history of common law have not been susceptible a clear and precise expression.[164] As Justice French, as he then was, stated:

> Many common law rules use language such as 'reasonable' or 'unconscionable' or 'foreseeable' or 'remote' or 'good faith'. The use of words like these is not a new phenomenon...Such terms leave so much to judicial evaluation in their application that it is difficult to say that they have a single useful meaning.

[161] Such speech could suppressed either by an injunction, by an order for a retraction or by other means.
[162] See Meagher above n 5, 230.
[163] Post above n 18, 125.
[164] One only has to look at tort law before the commencement of the Civil Liability Acts to see much the same interpretative problems at play in the courts of the common law as those that face the Federal Court in relation to Part IIA of the RDA. Even in the field of contract law, seemingly straight-forward terms such as 'offer' and 'acceptance' have yielded differing results and treatments in various courts and contexts.

> The same phenomenon is found in statutes in which broad terms are used which are capable of application to a wide range of fact situations. It is left to the courts to work out the appropriate application case by case. That task must involve the development of subrules of application. So a new common law grows, derived from case by case interpretation of a broadly expressed legal rule.[165]

In this context terms such as 'offend', 'insult', 'humiliate' and 'intimidate' are similarly broad enough to yield a variety of meanings. They cover a broad range of speech acts. For the most part the common law's answer to the interpretive problem posed by some of its key terms has been to allow their meanings to develop on a case by case basis. Much the same thing could be said of the harm threshold under Part IIA. The courts have developed a common law of the statute, which though slightly concerning and even contradictory at certain points, does have a rough demarcation line in relation to harm. The case law does make it clear that a direct and vulgar racist assault, such as that in *Kirstenfeldt* or *McMahon*, will be unlawful. The case law also makes it clear that Holocaust denial, at least that which is accompanied by racist remarks as in *Toben* and *Scully*, will be unlawful. But on other types of racist speech, where some measure of subtlety is at play, the jurisprudence is less clear.[166]

There is a criticism here that the types of racist speech that are proscribed share the commonality of being vulgar and crude.[167] There is a danger that this approach will result in making unlawful the type of speech, that as Chesterman notes is characterised 'by incivility in the style and content of publication of racist material, not racist content as such.' [168] To privilege the speech of the educated and sophisticated, however malicious its underlying intent, and to police only the unsophisticated and crude, is unfair, and, perhaps, a very classist approach to the law. Thornton has suggested that this inequality is the, 'chilling of blue-collar muck and preservation of upper-crust mud.'[169] In critiquing the regulation of hate speech Post has made a similar observation as to the inequality problem.[170]

But this problem may be unavoidable.[171] To make speech unlawful and to order that it be suppressed, because it can be regarded as a sophisticated form of racist speech, in other

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[165] Justice French, 'Judicial Activists – Mythical Monsters,' (Speech delivered at the 2008 Constitutional Law Conference, 18 March 2010).

[166] See above n 26-29.

[167] See Chesterman above n 74, 226.

[168] Ibid.

[169] See Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Oxford University Press, 1990. Post, above n 18 makes a similar observation in relation to blasphemy.

[170] Post uses the British Parliamentary debates on blasphemy to make the point that hate speech laws may be unequal in practice. Post above n 18, 131 states:

> It was recognized that 'what it really comes to is that, where opinions are strongly held by an educated man, those opinions will be expressed in a way which the law cannot touch, while those expressed by an uneducated man, simply because he is uneducated, will come under the penalties of the law.'

[171] On this point the defenders of free speech should really account for the fact that such class-based discrepancies also occur in other areas of the law. For example, in criminal law people of lower socio-economic backgrounds constitute a higher proportion of defendants. There is much writing on this problem and it is a long-standing controversy. See for example, Daniel Lederman, Pablo Fajnyzlber, Norman Loayza, 'Inequality and Violent Crime,' (2002) 45(1) *Journal of Law and Economics* 1. But as sad as this correlation is – it is hardly a reason to abandon the enforcement of criminal law. Of more concern might be the differential *application* of the law. For example the lax enforcement of criminal laws relating to software piracy and music piracy might reflect classist attitudes. See Justina Fischer and Antonio Andres, 'Is Software Piracy a Middle Class Crime? Investigating the Inequality-Piracy Channel,' (August 2005). University of St. Gallen Economics Discussion Paper No. 2005-18. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=803244> at 2 February 2011.

words that which is less easily identifiable as racist, is go down a slippery slope. At some point the courts would stop proscribing harmful racist speech and would start proscribing controversial speech, simply because it is controversial.[172] The problem that Chesterman, Thornton and Post are identifying is not that the law is being *applied differently* to different groups of people but that a particular socio-economic group, those who are less educated, will be *more likely* offend a prescribed legal standard.[173] This is a valid and relevant social justice issue, but one cannot sensibly ask the victim of racist hate speech to forgive the perpetrator because he happens to be less educated.

Using the existing jurisprudence as a basis, Part IIA could be amended to insert a definition of the hate speech that will be suppressed.

(ii) Limit the available penalties

In those past cases where the Federal Court or the Commission has found racial vilification to be sustained under Part IIA, the penalties imposed have been appropriate. It is possible that some racist speech could even be classified as unlawful without being subject to an injunction or a retraction.[174] The existing definition is broad enough to capture a large range of racist speech acts. But the type of racist speech acts that urgently need to be suppressed is actually fairly narrow.

In cases like *McMahon* or *Kirstenfeldt* remedies such as damages and even a court-ordered apology might be appropriate a desirable. In *McMahon v Bowman* the complainant received $1500 in *Campbell v Kirstenfeldt* the complainant received $7 500. Both *McMahon* and *Kirstenfeldt* were cases of direct racial abuse where the victim was subjected to a type of verbal assault. In *Kirstenfeldt* the abusive behaviour was repeated several times and was directed at the victim and her child. In cases such as *Scully* or *Toben* the type of remedies that could be imposed would appropriately be damages and an order that such materials be removed from the internet. But there are difficulties here – ordering an apology from an unwilling defendant will only yield an insincere statement.[175] In the aftermath of the *Toben* cases the Australian Council of Jewry has struggled to get Fredrick Toben to remove racist materials from the internet.[176] Toben has even become something of a minor celebrity.[177] But at least a line has been drawn in relation to unacceptable racist conduct.

But in other cases, such as *Warner* and *Lightfoot*, even where unlawfulness is found, damages and the like may not be useful. In *Lightfoot*, the Senator had already apologised before the Senate. In *Lightfoot*, the defendant was ordered to pay the complainant's costs but no orders

[172] Post above n 18, 134 makes the observation that 'it is striking that in its actual operation hate speech regulation reaches only a very tiny subset of speech that actually has the tendency to cause the harmful effects of discrimination and violence.' Whilst this is true there is a limit to how far a liberal democracy can go in suppressing speech that might have harmful effects before it stops being a liberal democracy.

[173] Ibid.

[174] This is in fact the reality of every decision that HREOC made in favour of the complainants relation to racial vilification after the *Brandy* decision.

[175] Though an apology may be appropriate in many cases.

[176] See *Jones v Toben* [2009] FCA 354; *Jones v Toben* [2009] FCA 477. Toben continues to publish such material.

[177] Fredrick Toben was invited to Tehran by President Ahmadinejad to speak at a Holocaust denial conference. Germany, which has previously jailed Toben for Holocaust denial speech, has tried to arrest Toben for his writings. In 2008 he was arrested whilst in transit in Heathrow Airport under a European Arrest Warrant.

as to damages were made. Similarly, in *Warner*, the Commission, which would have had no power to enforce an award of damages at any rate, simply ordered the defendant to make an apology to the complainant.

It is not possible to speak for every complainant. However, in some vilification matters a finding of likely unlawfulness by the Commission, even with no recommendation of damages, might offer some measure of vindication to an aggrieved complainant. Given the low level of damages, even in the egregious cases, it seems quite unlikely that vilification cases are being pursued for financial reward. Instead, these cases may be more about 'speaking back'[178]

(iii) Adopt a bifurcated scheme

It is possible to amend Part IIA in such a way that there is a presumption that matters of 'hate' speech will be directed to the Federal Court whilst matters pertaining to racist speech generally will be addressed before the Human Rights Commission. At present a bifurcated scheme operates in relation to Part IIA. The Federal Court is available theoretically for all Part IIA matters but the overwhelming number of complaints of racial hatred that are received by the Commission either go to conciliation before the Commission or just fall away.

In sum the current arrangements are one of extremes with a full court hearing on the one hand and a conciliation process on the other. These are very different forms of dispute resolution.[179] What is missing is any form of public hearing offered by the Commission wherein the complainant can challenge racist speech without facing the hurdles associated with the formal legal process of the Federal Court. A formal hearing brings with it the risk that costs may be awarded against an unsuccessful complainant.[180] This happened in *Hagan*, though viewed objectively that case had merit and at least warranted a hearing in court.[181]

The argument that I make is that the Commission's public hearing powers should be partly reinstated. The limitation that I suggest is that the Commission should only be allowed to provide an advisory opinion. It would certainly be possible to amend the *Australian Human Rights Commission Act 1986* (Cth) so that matters pertaining to racial vilification law can be publicly and openly aired and discussed in a semi-formal proceeding. It would also mean that relatively few costs would be imposed on either side, that participation would still be voluntary and that there would be no legal power vested in the Commission to censor speech.

A public hearing allows the victims of racism to speak back. Particularly, in the borderline cases where free speech values and the social justice imperatives of race hate speech laws are under the most pressure, the Commission's hearings offer the best compromise solution. In effect, the victims of racism can be heard, but the authors of impugned speech cannot be penalised. This suggestion draws heavily on the concept of 'speaking back' as developed by Gelber. As Gelber states:

[178] See Gelber above n 65.
[179] See Julian Gruin, 'The rule of law, adjudication and hard cases: The effect of alternative dispute resolution on the doctrine of precedent,' (2008) 19 *Alternative Dispute Resolution Journal* 206.
[180] See Hon. Murray Gleeson AC, 'The Purpose of Litigation,' (2009) 83 *Australian Law Journal* 601.
[181] See above n 43.

> Within a capabilities framework, the primary task of social policy is support-oriented (as opposed to punishment or restriction-oriented). This means a capabilities-oriented speech policy would invoke institutional, material and educational support to overcome the impact of hate speech. This means providing an assisted response to those who would seek to contradict and counter the effect of hate-speech-acts. This means that citizens would be empowered to respond to, and to seek to contradict, the impact of and the discrimination embodied in the utterance.[182]

Gelber's suggestion can be applied to the Commission's complaints hearings. The speech can be challenged without the result being that damages have to be paid or that any other sanctions be imposed. Providing the forum within which to speak back is the appropriate type of assistance that the state should provide in this context. If the Part IIA jurisprudence proves anything it demonstrates that the various community groups and individuals are in fact articulate enough to bring forward crucial and relevant racial vilification complaints. But where the system has failed them is with respect to the post-2000 amendments to the Commission's powers.[183]

This is not to suggest that conciliation should be abandoned in its entirety. Under some circumstances conciliation may be a very useful form of dispute resolution.[184] It does offer the advantage of requiring the defendant to listen to the perspective of the victim. But in instances where the defendant is unwilling to comply or where the matter cannot be resolved amicably conciliation is less effective. Conciliation has three major drawbacks. Firstly, it does not cater to cases where a mutually agreed resolution between the parties is not possible. The statistics that are publicly available from the Commission suggest that in all complaints under the RDA the rate of complaints that are terminated with no reasonable prospect of conciliation is approximately 20%.[185] In the Commission's 2006 Report the number of complaints terminated with no reasonable prospect of conciliation was 23%, in 2007 the rate was 20% and in 2008 the rate was 19%. The rate of conciliated complaints was 26% in 2005; 19% in 2006; 22% in 2007 and jumped to 54% in 2008. The Commission's publicly available statistics do not deal with expressly with racial hatred complaints on this matter they are instead included in the general statistics under the RDA. Notwithstanding the rise in successful conciliations in 2008, the date of the last available report on the Commission's website, there does appear to be a consistent level of complaints with grounds that are not conciliated.

Secondly, conciliation does not result in any jurisprudence thereby offering little value in terms of public education about human rights or in terms of the development of key legal terms. The Commission's Reports do offer a summary of selected matters that have been conciliated. But this is not a substitute for a publicly available document stipulating the reasons for the Commission's findings on a particular matter. Thirdly, the confidentiality that

[182] Gelber above n 65, 119.
[183] See *Human Rights Legislation Amendment Act 1999* (Cth).
[184] For a discussion of conciliation see Mary-Jan Ierodiaconou, 'Conciliation, Mediation and Federal Human Rights Complaints: Are Rights Compromised?' (2005) Melbourne Law School, Legal Studies Research Paper No 113. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=689981> at 2 February 2011.
See also Lawrence McNamara, 'Tackling Racial Hatred: Conciliation, Reconciliation and Football,' (2000) 6(2) *Australian Journal of Human Rights* 5.
[185] See Australian Human Rights Commission Annual Report 2006; Australian Human Rights Commission Annual Report 2007; Australian Human Rights Commission Annual Report 2008. Available at: <http://www.hreoc.gov.au/complaints_information/statistics/index.html> at 6 August 2009.

attaches to conciliation limits the ability of the victims of racist speech to really 'speak back' outside of the confines of the conciliation process itself.[186] That is, the complainant may speak within the Commission's process but they may not be heard in a wider public context.

In terms of the best compromise solution for racist speech the Human Rights Commission, with its inherently limited powers, offers the best solution for providing redress for the victims of racist speech without undermining the democratic legitimacy of vilification laws by unduly impeding free speech. A public hearing allows the victims of racist speech to be heard. An advisory opinion on the law, even where that opinion is only that of likely unlawfulness, does offer some form of vindication from the harm of group defamation that racist speech imposes. At the same time the more serious and more clear-cut cases of racist hate speech can be pursued before the Federal Court.

It is important that we recognise the advantages of the Human Rights Commission in this context. The Commission cannot compel a defendant to appear before it. As such a defendant who genuinely believes that a complaint has no merit cannot be compelled to appear unless the complaint is accepted by the Federal Court. The Commission cannot award damages nor enforce any award. The Commission cannot order an apology nor can it order a retraction. Thus in cases where speech is impugned as racist, the Commission's ability to interfere is minimal at best. If hate speech is quarantined to the Federal Court, then all the other type of Part IIA matters, such as cases like *Bropho*, *Creek* and *McGlade* can be heard before the Commission. This is a preferable vilification scheme than the current arrangements, which would require that such cases be brought before the Federal Court and where the risk that costs may be awarded against the complainant exists.

In terms of whether the public would partake of such a scheme, it should be noted that even after the High Court's decision in *Brandy v HREOC* which established that HREOC was not a Chapter III court and could not award enforceable damages HREOC still heard and delivered findings in over 52 cases of racial discrimination. In each of the cases the matter could be re-heard or challenged before the Federal Court. Clearly, there is some likelihood that potential complainants would avail themselves of a complaint hearing in the Human Rights Commission.

In summary, my reform proposal is that (i) Part IIA should be amended to define hate speech; (ii) matters pertaining to racist hate speech should be heard by the Federal Court; (iii) all other complaints pertaining to racist speech should be directed to the Human Rights Commission; and the Commission would be able to hold either a public hearing or a conciliation process. The advantage of this is that it offers a compromise between restoring speech opportunities to victims of racism and not unduly impeding public speech, even where such speech may be offensive. It also brings in a rough degree of clarity to the Part IIA scheme, such as which arguably already exists, but in a more clearly defined way.

VI. CONCLUSION

Ultimately, a decision on whether to limit speech, or to allow it to proceed unrestrained, is a political and legal choice. Restraining hate speech seems simple enough. But the other

[186] See Thornton above n 169, 151. See also Nicholas Mulcahy, 'Conciliation and Race Complaints,' (1992) 3(1) *Alternative Dispute Resolution Journal* 21.

categories of racist speech, particularly those that are more subtle, are more difficult to assess within the parameters of the free speech debate. As such the degree of restraint has to be minimal if democratic legitimacy is to be preserved. But at the same time a vilification scheme that fails to offer meaningful redress to the victims of racist speech, as the current Part IIA arrangements arguably does, fails to engage with a substantive policy problem. There are a multitude of different vilification schemes in different jurisdictions. But Australia's civil complaints scheme, subject to some modification, can serve as a useful model for managing the balance between free speech and the restraint of hate speech.