Submission to the Parliamentary Joint Committee on Human Rights for the Inquiry "Freedom of speech in Australia"

By Russell Goldberg[1]

Summary

1. This submission only addresses item 1 of the Terms of Reference – "Whether the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) imposes unreasonable restrictions upon freedom of speech, and in particular whether, and if so how, ss.18C and 18D should be reformed".

2. I do not consider that Part IIA imposes unreasonable restrictions upon free speech. It has operated with little controversy since 1995. And the courts have applied and interpreted its provisions with due regard to the importance of freedom of expression balanced against the personal and public interest in individuals being able to live free from racial denigration.

Racial denigration and free speech

3. Racial denigration[2] can make victims feel inferior, fearful, unwanted and excluded from society. It can lead to a loss of dignity, self-respect and confidence, as well as discrimination, isolation, feelings of disempowerment, mental health issues, anger and violence. It affects the health and wellbeing not only of victims but also of society as a whole - damaging social harmony and cohesion. And if left to flourish, its perpetrators become empowered and emboldened to further act out their sense of racial superiority and entitlement, reinforcing as a social norm racial prejudice and discrimination.

4. Further, if individuals feel that they don't belong, that they are outsiders, and that they are excluded and discriminated against, they can lose their desire to contribute positively to society and may turn to anti-social acts.

5. There is an apt line in Ralph Ellison's novel 'Invisible Man' where the protagonist says – "Irresponsibility is part of my invisibility … to whom can I be responsible, and why should I be, when you refuse to see me?"

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[1] I am a retired lawyer having worked, amongst other areas, in private practice in Melbourne and London, as a corporate in-house solicitor in Melbourne, with the Australian Government Solicitor (for 9 years) and for Monash University. My work with the Australian Government Solicitor involved considerable statutory interpretation. I have a B.Com, LLB (Hons) and Diploma of Media, Communications and Information Technology Law, all from the University of Melbourne, and a BLitt from Monash University (majoring in philosophy).

[2] The term 'denigration' encompasses a range of acts that may include, but not be limited to - degradation, discrimination, insult, abuse, vilification, threat, intimidation, humiliation, hatred, contempt, and harassment. The term 'race' includes all the attributes referred to in s.18C of the *Racial Discrimination Act 1975* - race, nationality, colour, and ethnicity

6. The argument that some put (usually those from the majority racial group) that an individual can *choose* to be offended or insulted doesn't account for the stark reality faced by members of (often vulnerable) minorities who are regularly confronted by some form of racial denigration that gradually eats away at their self-esteem and weakens their ability to shrug it off and ignore it. And why should they? Shouldn't a tolerant and civilised society protect its minorities against those who wish to stir up hatred against them.

7. The issue of racial denigration is more serious today as a result of the Internet and social media. Nigel Warburton mentions four features identified by Richard Posner on how the Internet exacerbates irresponsible speech[3] –

- *Anonymity* – the anonymity of many communicators gives rise to a lack of accountability where individuals can say whatever they want without facing legal or social consequences
- *Lack of quality control* – when society relied on newspapers, magazines and books, the publishers had much more quality control over what was said
- *Much larger audience* – information over the Internet has a potentially vast audience
- *Antisocial people find their soul mates* – individuals with antisocial views are more easily able to find and communicate with each other, forming chat rooms and other groups that reinforce their views and actions.

8. Whilst it is important that individuals be able to live free from racial denigration, freedom of expression, or to use the shorthand "free speech", is also vitally important.

9. The three main arguments in support of free speech are that it: (i) promotes personal fulfilment and autonomy, (ii) facilitates a means by which the truth can emerge, and (iii) enhances democracy by enabling greater access to information and ideas and enabling electors to criticise and challenge those in power or who seek power.

10. The first and third of these arguments are also relevant to minimising racial denigration. Individuals will have greater prospects of self-fulfilment and autonomy if they are not subjected to racial denigration. And their ability and desire to participate in the democratic process will also be enhanced. Democracy is diminished if people are discouraged from participating, feel they are lesser participants, and have their views counted as less worthy.

11. The dilemma for liberal democratic societies is determining to what extent free speech should be constrained in the interests of minimising racial denigration? There is no clear answer. Ultimately a decision has to be made as to what is best overall for the functioning of society. And on that, people will have diverging views.

12. Nevertheless, if certain speech has no, or little, free speech benefit, but does involve serious racial denigration, then there is a reasonable argument that such speech should be constrained. For example, if someone hurls racial abuse at another

[3] Nigel Warburton, *'Free Speech – A Very Short Introduction'*, Oxford 2009, pp 82-85.

person, it is difficult to see how constraining that speech would diminish the value society gains from free speech.

Is there a problem with the current law?

13. In this submission I only intend to focus on the provisions of Part IIA of the Racial Discrimination Act ('RD Act') rather than the way in which those provisions and the RD Act are administered.

14. Part IIA has been in force since 1995 and has attracted very little controversy as to its application. The main exception has been the case of *Eatock v Bolt* (2011)[4]. The recent matter involving Queensland University of Technology students has been controversial (and I understand that it has yet to be finally resolved) but it appears that the most problematic aspects of that matter relate to the way in which it was dealt with administratively, not because of the provisions of Part IIA.

15. When reviewing any law, I would suggest that the following basic questions be considered –

(1) Is there a problem with the current law?
(2) If so, what is the problem?
(3) If there is a problem, how can it be fixed?
(4) Does the suggested solution create other problems?
(5) If such a solution would create other problems, would implementing the solution lead to a better or worse outcome overall?

16. For instance, there has been much talk about deleting the words "offend" and "insult" from 18C. But rarely have I heard what problem removing those words is intended to fix. Nor have I seen an analysis of how such a removal would fix any perceived problem and what the consequences would be.

17. There are some critics who suggest that "offend" and "insult" be deleted from 18C and who also disagree with the decision in the Bolt case. If they are suggesting those changes to 18C *because* they think that will fix the "problem" of the Bolt decision, then I would suggest they think again. As I point out in my discussion of that case below, even if those words had not been included in 18C, it is unlikely that the result in the Bolt case would have been different.

18. Moreover, those critics may not have considered how deleting "offend" and "insult" may open the door to racial denigration. For example, I discuss the Toben case below and point out that such a change to 18C could end up protecting Holocaust denial.

[4] *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) - http://www.austlii.edu.au/au/cases/cth/FCA/2011/1103.html

The Bolt case

19. In *Eatock v Bolt*, the journalist Andrew Bolt and the Herald and Weekly Times (publisher of the 'Herald Sun') were found to have contravened 18C in relation to articles written by Bolt alleging that some fair skinned individuals with Aboriginal descent unfairly claimed Aboriginality to seek welfare, prizes, jobs, awards and other benefits set aside for Aboriginal people. The judge found that because of the manner in which the articles were written (including that they contained errors of fact, distortions of the truth and inflammatory and provocative language) that the comments were not made "reasonably and in good faith" and therefore the exemptions in 18D did not apply. Bolt and the HWT chose not to appeal the decision.

20. The judge made no orders against Bolt so he was not required to apologise or pay any damages. And the HWT was only required to publish a corrective notice of the judge's findings and not republish the offending articles or substantial parts.[5]

21. Importantly, the judge found that Bolt's comments were not only reasonably likely to "offend" and "insult" fair skinned Aboriginal people, but in some cases would also "humiliate" or "intimidate" them.[6] So, even if "offend" and "insult" had not been included in the language of 18C, the judge in the Bolt case would probably still have found against Bolt and the HWT.

22. The Bolt case was a difficult case. But on balance I do not think the decision was wrong. To make up one's own mind on this one can read Bolt's articles at the end of the judgment and then read the dissection of them, including the errors of fact, as noted in the judgment. To assist in this regard I attach the two main articles with my annotations of some of the areas where the judge found errors of fact. Included in that attachment are summaries of the witnesses' testimonies from the judgment which give more detail on the background and upbringing of those witnesses and how they were affected by the articles written by Bolt.

23. Bibhu Aggarwal has written a good overview and analysis and concluded that, "the Bolt decision does not undermine freedom of speech in this country" but rather "the decision simply calls for higher journalistic standards and ensures that public debate is grounded in hard facts …".[7] And Professor Andrew Jakubowicz noted that the judge in the Bolt case, "is very conscious of the free speech argument, and is not averse to Bolt being able to explore issues of race and racial identity"[8].

24. The issues that Bolt raised were undoubtedly matters of legitimate public interest, but Bolt's problems arose from the manner in which they were raised

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[5] *Eatock v Bolt (No 2)* [2011] FCA 1180 (19 October 2011) - http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2011/1180.html

[6] See paragraphs 73, 74, 83, 86, 94, 96, 102, 105, 125, 129, 131, 141, 148-153, 164, 295, 302, 415 (see also paragraph 24 of the summary) - http://www.austlii.edu.au/au/cases/cth/FCA/2011/1103.html

[7] Bibhu Aggarwal, *'The Bolt Case: Silencing Speech or Promoting Tolerance?'*, in 'More or Less Democracy & New Media', 2012, pp 238-257, at pp 253-254 - http://www.futureleaders.com.au/book_chapters/pdf/More-or-Less/Bibhu_Aggarwal.pdf

[8] Andrew Jakubowicz, *'Andrew Bolt, racism and the internet'*, in 'The Conversation', September 29, 2011 - https://theconversation.com/andrew-bolt-racism-and-the-internet-3626

coupled with factual errors. Similar concerns would have been considered under a defamation action.

25. It is also worth noting that the judge indicated that the lawyers for Bolt and the HWT had not argued for exemption under 18D on the basis of the suggested unlawful inferences in the articles raised by Ms Eatock, but appeared to misdirect their argument to different inferences that they thought the articles conveyed. The judge said:

> "One of the difficulties with the s18D case advanced by Mr Bolt and HWT is that they put their submissions in the absence of any recognition that the Court may find s18C to have been satisfied by reference to one or more of the imputations upon which Ms Eatock relied. … Having taken that course, Mr Bolt and HWT made no specific submissions as to why, if the Court was to make a finding of s18C conduct on the basis of the imputations upon which Ms Eatock relied (or similar imputations), that conduct ought nevertheless be excused pursuant to s18D. … In essence, the s18D case put by Mr Bolt and HWT sought to justify behaviour cleansed of the s18C conduct which I have found occurred. As a result, much of what was put in reliance upon s18D by Mr Bolt and HWT simply addressed the wrong target."[9]

26. I don't consider the Bolt case warrants any change to the law. The exemptions in 18D for things said "reasonably and in good faith" and as "fair comment on any … matter of public interest" are broad. It is not too much to ask that a writer targeting people on the basis of their race does so reasonably and in good faith, which would include making reasonable efforts to check facts before going to print.

27. Ultimately though, no matter how this sort of legislation is worded, there will always be a matter of judgement involved in interpreting the law and applying it to the facts.

The Toben Case

28. Another significant case, and one that is particularly important for the Jewish community, is the case *Jones v Toben* (2002)[10], upheld on appeal in *Toben v Jones* (2003)[11].

29. Frederick Toben had a website under the name 'the Adelaide Institute' on which he published material which, among other things, suggested that –

(i) there is serious doubt that the Holocaust occurred;
(ii) it is unlikely that there were homicidal gas chambers in Auschwitz;

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[9] Paragraphs 359, 360 and 367 in *Eatock v Bolt (No 2)* [2011] FCA 1180 (19 October 2011) - http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2011/1180.html

[10] *Jones v Toben* (includes explanatory memorandum) [2002] FCA 1150 (17 September 2002) - http://www.austlii.edu.au/au/cases/cth/FCA/2002/1150.html

[11] *Toben v Jones* [2003] FCAFC 137 (27 June 2003) - http://www.austlii.edu.au/au/cases/cth/FCAFC/2003/137.html

(iii) Jewish people who are offended by and challenge Holocaust denial are of limited intelligence; and
(iv) some Jewish people, for improper purposes, including financial gain, have exaggerated the number of Jews killed during World War II and the circumstances in which they were killed.

30. The judge in that case confirmed that Jews were an ethnic group covered by 18C and found that Toben's comments carrying the above imputations were unlawful under that section. Not only did the judge find that the comments would "offend" and "insult" Australian Jewry[12] but she also considered that a smaller subgroup of vulnerable Australian Jews would also be "humiliated" or "intimidated"[13]. She described this smaller subgroup as "members of the Australian Jewish community vulnerable to attacks on their pride and self-respect by reason of youth, inexperience or psychological vulnerability". She reasoned that this vulnerable subgroup may "become fearful of accessing the World Wide Web to search for information touching on their Jewish culture because of the risk of insult from the material".

31. That decision was made in 2002 in the days when the Internet was still young. Given the extensive usage of the Internet these days and people's expectations of what they may find on it, it is not entirely clear whether a court today would still find that such a subgroup of vulnerable Jews would be "humiliated" or "intimidated" by accessing similar material on the Internet. They would probably still be likely to be "offended" or "insulted" by such material.

32. In the context of the current inquiry, what this means is that if the words "offend" and "insult" are simply removed from 18C (leaving only the words "humiliate" and "intimidate") then the publication of Holocaust denial material may not be considered unlawful under 18C particularly in relation to the wider Australian Jewish community.

The way 18C operates and is interpreted

33. There appears to be a belief amongst some critics that 18C is too 'soft' – that it is too easy to bring a successful claim and that accordingly 18C unreasonably impinges on free speech. But that is not the reality. There have been less than a handful of cases that have succeeded in court. And there are a range of factors relevant to the operation and interpretation of 18C that prevent or mitigate unreasonable impingements on free speech. Such factors include (this list is not intended to be exhaustive) –

- 18C only applies to acts done in public or communicated to the public
- it does not create a criminal offence
- complaints are mainly resolved through conciliation

[12] See paragraphs 93-95 - http://www.austlii.edu.au/au/cases/cth/FCA/2002/1150.html
[13] See paragraph 96 - http://www.austlii.edu.au/au/cases/cth/FCA/2002/1150.html

- if a complaint is not conciliated, a complainant has to decide whether to take the matter to court with all the attendant risks and costs that may involve

- 18C does not apply to religion – it only applies to race, nationality, colour and ethnicity. In a 2008 publication, the Australian Human Rights Commission noted -

  > "The Australian federal legislation does not protect individuals from vilification on the grounds of religion, except in so far as the act is done for a mixture of racial and religious motives … Some religious communities, such as Jews or Sikhs, may also be protected under federal law on the basis that they constitute a 'race' or 'ethnic group' with shared cultural history and geographic origins. However other religious groups such as Christians or Muslims, which encompass a diverse range of cultural and ethnic backgrounds, are unlikely to fall within this definition."[14]

- an objective test applies - it is not whether a complainant subjectively feels offended, insulted, humiliated or intimidated, but whether a hypothetical reasonable member of the relevant racial group or subgroup would be reasonably likely to be offended etc (often called the "reasonable victim test")

- the hypothetical reasonable victim is to be considered to have "characteristics consistent with what might be expected of a member of a free and tolerant society"[15]

- the judge in the Bolt case said that 18C is "primarily directed to serve public and not private purposes" and thus is directed at conduct "that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public's interest in a socially cohesive society"[16]

- conduct caught by 18C must be conduct which has "profound and serious effects, not to be likened to mere slights"[17]

- the judge in the Bolt case noted that the word "offend" is to be interpreted in a more limited sense that conforms with the other partnering words in 18C(1)(a). He said –

  > "The definitions of "insult" and "humiliate" are closely connected to a loss of or lowering of dignity. The word "intimidate" is apt to describe the silencing consequences of the dignity denying impact of racial prejudice as well as the use of threats of violence. The word "offend" is potentially

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[14] Australian Human Rights Commission, *'An International Comparison of the Racial Discrimination Act 1975 (2008)'*, paragraph 6.8.1 - http://www.humanrights.gov.au/publications/international-comparison-racial-discrimination-act-1975-2008-chapter-6-racial

[15] *Eatock v Bolt* [2011] (paragraph 255) - http://www.austlii.edu.au/au/cases/cth/FCA/2011/1103.html

[16] *Eatock v Bolt* [2011] (paragraph 263) - http://www.austlii.edu.au/au/cases/cth/FCA/2011/1103.html

[17] *Eatock v Bolt* [2011] (paragraph 268) - http://www.austlii.edu.au/au/cases/cth/FCA/2011/1103.html

wider, but given the context, *"offend" should be interpreted conformably with the words chosen as its partners"*[18] [my emphasis]

- the freedom of expression exemptions in 18D are very broad and protect most things said or done reasonably and in good faith.

34. Professors Luke McNamara and Katharine Gelber conducted an extensive study of Australia's hate speech laws and concluded that there is no evidence of such laws having a "chilling effect" on free speech.[19] Indeed they describe how difficult it is to bring a successful claim under Australia's hate speech laws (note that they are referring to Australia's hate speech laws generally, not just Part IIA of the RD Act, but most of what they say is relevant to Part IIA) -

> "… unlike many countries that have criminalised serious forms of hate speech (for example United Kingdom and Canada) Australia has taken a different path. The Australian model involves the creation of a civil wrong. This approach was adopted because criminal punishment is regarded as disproportionate to the nature of the harms and risk associated with hate speech, and incompatible with our commitment to freedom of expression.
>
> This means that it falls to individuals from a targeted community to initiate complaints about allegations of hate speech. … It is down to victims to "enforce" the law, and this is no easy task. Some complainants turn to hate speech laws in desperation because all other efforts have failed to stop a neighbour from subjecting them to appalling public racist abuse and no other legal redress is available.
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> Most hate speech complaints don't proceed any further than lodgement. Some are resolved by conciliation. Most are either withdrawn or abandoned.
>
> Many complainants just want to register their objection to the conduct. Even if they want to take it further, many do not have the time, resources, expertise, patience or confidence to do so. …
>
> Less than 2% of complaints are the subject of a binding determination by a tribunal or court. Complainants succeed in about half of these cases and the most common remedy is a court-ordered apology or correction, or removal of the unlawful material (eg from a website). Damages orders are rare and, where made, the amount of compensation is modest. No-one ever goes to jail."

Conclusion

35. Part IIA of the RD Act has been in force since 1995. It has worked well over this time and the jurisprudence around it has become well settled. It has successfully

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[18] *Eatock v Bolt* [2011] (paragraph 265) - http://www.austlii.edu.au/au/cases/cth/FCA/2011/1103.html

[19] Luke McNamara and Katharine Gelber, *'Explainer: how do Australia's laws on hate speech work in practice?'* , 'The Conversation', May 9, 2014 - http://theconversation.com/explainer-how-do-australias-laws-on-hate-speech-work-in-practice-26105

struck a good balance between protecting freedom of expression and the personal and public interest in individuals being able to live free from racial denigration. I don't consider it necessary or appropriate to change the law and am concerned that if any change is made it may have detrimental consequences to tolerance and social cohesion in our society.

Russell Goldberg

11th December 2016

Attachment to submission by Russell Goldberg

Annotated Bolt articles
Eatock v Bolt [2011] FCA 1103 (28 September 2011)
http://www.austlii.edu.au/au/cases/cth/FCA/2011/1103.html

The two articles referred to below "It's so hip to be black" and "White fellas in the black" are the online versions of the articles referred to in the Bolt case (the blogs have not been reproduced). Links to these articles are no longer operative. I have annotated the articles to identify some of the factual errors referred to by the judge.

Further below are summaries of the testimonies of nine witnesses, as recorded in the judgment, which indicate more of their background and how they were affected.

"It's so hip to be black"
by: Andrew Bolt, from 'The Advertiser', April 15, 2009
http://www.adelaidenow.com.au/news/opinion/its-so-hip-to-be-black/story-e6freal3-1225698790774

MEET the white face of a new black race - the political Aborigine. Meet, say, acclaimed St Kilda artist Bindi Cole, who was raised by her English-Jewish mother[20] yet calls herself "Aboriginal but white". She rarely saw her part-Aboriginal father[21] and could in truth join any one of several ethnic groups, but chose[22] Aboriginal, insisting on a racial identity you could not guess from her features.

She also chose[23], incidentally, the one identity open to her that has political and career clout[24].

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[20] "That statement is factually inaccurate because Ms Cole's Aboriginal grandmother also raised Ms Cole and was highly influential in Ms Cole's identification as an Aboriginal" (paragraph 402)
"the cultural reference suggests a non-Aboriginal cultural upbringing" (paragraph 396)
Eatock v Bolt [2011] - http://www.austlii.edu.au/au/cases/cth/FCA/2011/1103.html

[21] "That statement is factually incorrect. Ms Cole's father was Aboriginal and had been a part of her life until she was six years old. Ms Cole later lived with her father for a year whilst growing up" (paragraph 402)

[22] "in relation to most of the individuals concerned, the facts asserted in the Newspaper Articles that the people dealt with *chose* to identify as Aboriginal have been substantially proven to be untrue [my emphasis]. Nine of the eighteen individuals named in the Newspaper Articles gave evidence. Each of them had been raised to identify as Aboriginal and had identified as such since childhood. None of them made a conscious or deliberate choice to identify as Aboriginal" (paragraph 378)
"the absence of any significant cultural reference in the Newspaper Articles to the Aboriginal cultural upbringing of the individuals dealt with, leaves an erroneous impression. As I have found, each of the nine individuals who gave evidence have either always identified as Aboriginal or have done so since their childhood. They all had a cultural upbringing which raised them to identify as Aboriginal. The fact that this is not disclosed to the reader of the Newspaper Articles in any meaningful way creates a distorted view of the circumstance in which the individuals exemplified in those articles identify as Aboriginal" (paragraph 392).

[23] See footnote 3

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

And how popular a choice that now is.

Ask Annette Sax, another artist and - as the very correct Age newspaper described her - a "white Koori". Her father was Swiss, and her mother only part-Aboriginal.

Racially, if these things mattered, she is more Caucasian than anything else. Culturally, she's more European. In looks, she's Swiss.[25]

But she, too, has chosen[26] to call herself Aboriginal, which happily means she could be shortlisted for this year's Victorian Indigenous Art Award. Shall I go on? Not yet convinced that there is a whole new fashion in academia, the arts and professional activism to identify as Aboriginal?

Not yet convinced that for many of these fair Aborigines, the choice[27] to be Aboriginal can be considered almost arbitrary and intensely political, given how many of their ancestors are in fact Caucasian?

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

Yet her mother, who raised her in industrial Wollongong, is in fact boringly English[28], and her father has both Afghan and Aboriginal heritage. She could call herself English, Afghan, Aboriginal, Australian or just a take-me-as-I-am human being called Tara June Winch. Race irrelevant.

Instead, she's an official Aboriginal, and hired as such in a nation which now institutionalises even racial differences you cannot detect with a naked eye.

Larissa Behrendt has also worked as a professional Aborigine ever since leaving Harvard Law School, despite looking almost as German as her father.[29]

She, too, chose[30] to be Aboriginal, a member of the "Eualayai and Kammillaroi nations", and is now a senior professor at the University of Technology in Sydney's Indigenous House of Learning.

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[25] "the cultural reference suggests a non-Aboriginal cultural upbringing" (paragraph 396)

[26] See footnote 3

[27] See footnote 3

[28] "the cultural reference suggests a non-Aboriginal cultural upbringing" (paragraph 396)

[29] "To her knowledge, there is no German descent on either her father or mother's side of the family although she assumes that because of her father's Germanic surname, there may have been some German descent. Her paternal grandfather came to Australia from England. Mr Bolt also referred to her father as being white. Her father had dark skin. Her father was a prominent, well-respected member of the Aboriginal community. He was an expert on oral histories and his works are held by the Australian Institute of Aboriginal and Torres Strait Islander Studies." (paragraphs 118 - 119)

[30] See footnote 3

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

But which people are "yours", exactly, mein liebchen? And isn't it bizarre to demand laws to give you more rights as a white Aborigine that your own white dad? How much more of this can you take?

Now meet Associate Professor Anita Heiss, who says she's a "member of the Wiradjuri nation" who prays to Biami, the tribe's creator spirit.

Heiss's father was Austrian and her mother only part-Aboriginal[31]. What's more, she was raised in Sydney and educated at Saint Claire's Catholic College[32]. She, too, could identify as a member of more than one race, if joining up to any at all was important.

As it happens, her decision to be Aboriginal - one of the five "Austrian Aborigines" she says she knows - was lucky, given how it's helped her career.

Heiss not only took out the Scanlon Prize for Indigenous Poetry, but won plum jobs reserved for Aborigines at Koori Radio, the Aboriginal and Torres Strait Islander Arts Board and Macquarie University's Warawara Department of Indigenous Studies[33].

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

I'm saying only that this self-identification as Aboriginal strikes me as self-obsessed and driven more by politics than by any racial reality. It's also divisive, feeding a new movement to stress pointless or even invented racial differences we once swore to overcome. What happened to wanting us all to become colour-blind?

Of course, the white Aborigine - or "political Aborigine" - is not new. In 1972, Pat Eatock, founding secretary of the Aboriginal Tent Embassy, officially became the first Aborigine to stand for Federal Parliament in the ACT, even though she looked as white as her Scottish mother, or some of her father's British relatives.

Indeed, Eatock only started to identify as Aboriginal when she was 19[34], after attending a political rally[35], so little did any racial difference matter to her before her awakening to far-Left causes.

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[31] Ms Heiss's mother is Aboriginal, not part-Aboriginal (paragraph 67)

[32] "the cultural reference suggests a non-Aboriginal cultural upbringing" (paragraph 396)

[33] "Each of those assertions was erroneous. … One of the positions that Mr Bolt claimed Ms Heiss had won as a "plum job" was a voluntary unpaid position. The other two positions were not reserved for Aboriginal people but were positions for which Aboriginal people were encouraged to apply" (paragraph 381)

[34] See footnote 3

[35] "Mr Bolt also suggested … that she identified as an Aboriginal for political motives after attending a political rally ... That statement is untrue. Ms Eatock recognised herself to be an Aboriginal person

But she thrived as an Aboriginal bureaucrat, activist and academic[36], leading the way for Leeanne Enoch, who stood for Labor in last month's Queensland election as its "first Aboriginal candidate" in a winnable seat, despite looking as Aboriginal, or not, as Premier Anna Bligh.

The white Aboriginal artist, too, is more than 15 years old.

Kim Scott was hailed as the first Aborigine to win the Miles Franklin Award and calls himself a Noongar, despite conceding that the Aborigines who did not know him called him wadjila - a white.

That is now a question even for our most famous Aboriginal leaders. Geoff Clarke, the last chairman of ATSIC, the Aboriginal "parliament", had an English father.[37] Lowtija O'Donoghue, another ATSIC chairman, had an Irish father. Fair Michael Mansell, the Tasmanian firebrand, clearly has more European than Aboriginal ancestry.

Even Professor Mick Dodson, the Australian of the Year and a fierce advocate for a treaty between black and white, had a white father and from the age of 10 was a boarder at a Victorian Catholic school[38]. Treaty yourself, Mick. Or take the most prominent Yorta Yorta leaders - Melbourne University academic Wayne Atkinson[39] and Victorian Traditional Owners Land Justice Group co-chair Graham Atkinson[40]. Both are Aboriginal because their Indian great-grandfather married a part-Aboriginal woman.

I'm sad that we harp on about differences and rights based on such trivial inflections of race.

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from when she was eight years old whilst still at school and did not do so for political reasons" (paragraph 382).

[36] "The comment is unsupported by any factual basis and is erroneous. Ms Eatock has had only six to six and a half years of employment since 1977" (paragraph 382). "In 1996 she was granted a disability support pension which was later converted into a senior's pension. She has had some weeks of employment since that time, has done further studies and volunteered to promote various Aboriginal issues. She lives in a one bedroom Department of Housing flat in Sydney. She does not own a car or other significant assets and has no meaningful savings." (paragraph 161)

[37] "Mr Clark was raised as Aboriginal in a well-known Aboriginal community in Victoria" (paragraph 400) "His father and mother were not married and never lived together. He spent some Christmas holidays with his father until he was 15 years old but did not have extensive contact with him. His father had no role in, or influence on, Mr Clark's upbringing or influence on his identity. Mr Clark was essentially raised by his Aboriginal grandmother at Framlingham." (paragraphs 88-89)

[38] "the cultural reference suggests a non-Aboriginal cultural upbringing" (paragraph 396)

[39] "Dr Atkinson was raised in an Aboriginal fringe camp on the ancestral lands of his Aboriginal ancestors" (paragraph 400)

[40] "The facts given by Mr Bolt and the comment made upon them are grossly incorrect. The Atkinsons' parents are both Aboriginal as are all four of their grandparents and all of their great grandparents other than one who is the Indian great grandfather that Mr Bolt referred to in the article. Mr Bolt did not seek to deny the evidence of Aboriginal ancestry given by the Atkinsons but insisted that their ancestry was accurately conveyed by the statements made and extracted above" (paragraph 406)

Then we get fair-faced Dr Mark Rose, Victorian Aboriginal Education Association head, falsely claiming as "a member of the western Victorian Gundjitamara Nation" that the northern Australia didgeridoo is banned to women.

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

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

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

"White fellas in the black"
by: Andrew Bolt, from the 'Herald Sun', August 21, 2009
http://www.heraldsun.com.au/opinion/white-fellas-in-the-black/story-e6frfifo-1225764532947

AS you see, the two men above are from a tribe of people who face terrible racism just because of the colour of their skin.

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

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

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

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

McMillan has gone one better still: he's also won the Black Women's Action in Education Foundation Scholarship, originally intended to help educate black women, not white men.[41]

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

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[41] "[Mr McMillan] regards Mr Bolt's account as misleading because the scholarship was open to indigenous men and women." (paragraph 150)

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

You see, Mellor and McMillan[42] are representatives of a booming new class of victim you'd never have imagined we'd have to support with special prizes and jobs.

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

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

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

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

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

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

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

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

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

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

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[42] "Mr McMillan's father was born in Sussex, England. He was not Aboriginal. Mr McMillan's father was not involved in raising Mr McMillan. Mr McMillan was raised by his mother and his grandmother. Both have Aboriginal ancestry. Mr McMillan's great grandmother was the child of an Aboriginal woman and a non-Aboriginal man. Mr McMillan was raised by his mother until he was eight years old and then moved to Trangie where his maternal grandmother lived. From that point he was raised by his mother and grandmother. His family were all recognised as part of the Trangie Aboriginal community." (paragraph 142)

Now he's a researcher at Jumbunna Indigenous House of Learning at the University of Technology, Sydney - an "indigenous" outfit run by the very pale Prof Larissa Behrendt, who may have been raised by her white mother[43] but today, as a professional Aborigine, is chairman of our biggest taxpayer-funded Aboriginal television service.

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

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

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

St Kilda artist Bindi Cole, raised by her English mother[44], explored her own pain at being too white in a Next Wave Festival show, Not Really Aboriginal, for which she photographed herself with black powder all over her distressingly white face.

Blond Annette Sax, daughter of a Swiss immigrant, also identified[45] herself as a "white Koori", which fortuitously allowed her to make the shortlist for the Victorian Indigenous Art Award, alongside other Aboriginal artists as pale as a blank canvas.

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

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

For instance, how can Graham Atkinson be co-chair of the Victorian Traditional Owners Land Justice Group when his right to call himself Aboriginal rests on little more than the fact that his Indian great-grandfather married a part-Aboriginal woman?[46]

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[43] "The factual assertions made that Prof Behrendt was "raised by her white mother" … were also erroneous. Prof Behrendt's Aboriginal father did not separate from her mother until Prof Behrendt was about 15 years old. Her father was always part of her family during her upbringing, even after that separation" (paragraph 404)
"the cultural reference suggests a non-Aboriginal cultural upbringing" (paragraph 396)

[44] That statement is factually inaccurate because Ms Cole's Aboriginal grandmother also raised Ms Cole and was highly influential in Ms Cole's identification as an Aboriginal (paragraph 402)
"the cultural reference suggests a non-Aboriginal cultural upbringing" (paragraph 396)

[45] See footnote 3

[46] "The facts given by Mr Bolt and the comment made upon them are grossly incorrect. The Atkinsons' parents are both Aboriginal as are all four of their grandparents and all of their great grandparents other than one who is the Indian great grandfather that Mr Bolt referred to in the article. Mr Bolt did not seek to deny the evidence of Aboriginal ancestry given by the Atkinsons but insisted that their ancestry was accurately conveyed by the statements made and extracted above" (paragraph 406)

Yes, yes, I know. What business is it of anyone else how we identify ourselves? In fact, we're so refreshingly non-judgmental these days - so big-hugs-for-all - that the federal Human Rights Commission wants our laws changed so a man can even call himself a woman, should he feel like it.

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

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

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

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

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

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

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

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

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

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

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

And here's my other objection.

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

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

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

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

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

Feel that fracturing yourself?

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