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The Bolt Case: Silencing Speech or Promoting Tolerance?

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Words are powerful. They can forge bonds of mutual respect and understanding, as they did when a nation apologised to all Indigenous Australians for the profound grief, suffering and loss exacted by the mistaken policies of past governments. They can rouse a nation to action, as they did when, in our darkest hour, a defiant John Curtin called on all Australians to fight for our imperishable traditions. They can divide and provoke, as they did when a week of toxic talkback radio culminated in the Cronulla riots, an episode that forever blemished our reputation as a tolerant, multicultural society. Time and again, the devastating effects of a few well-chosen phrases have demonstrated the truth of the age-old adage that the pen is mightier than the sword.

Words are powerful. Yet despite the potential for words to be used to spread lies and inflict pain, we have always celebrated freedom of speech. Why? There are three often-cited reasons. First, freedom of speech is a crucial aspect of any democracy. Freedom of speech ensures that our political representatives can be held accountable; it allows all Australians to genuinely participate in the political process; and it may produce superior policies, as we can draw on the collective wisdom of the many rather than the narrow-minded views of

the few. Second, freedom of speech is an essential precondition to the search for truth.[1] Only in an unregulated marketplace of ideas, where views are vigorously challenged and propositions thoroughly tested, can we confidently distinguish between truth and falsehood. Finally, freedom of speech is seen as an 'integral part of the development of ideas, of mental exploration and of the affirmation of self'.[2] Democracy. Truth. Personal autonomy. This is what is at stake when we debate the dimensions and nature of the right to free speech.

Nevertheless, we have on occasion sought to restrict the right to free speech. While a healthy democracy must accommodate debate and disagreement, it need not provide an open forum for hate, prejudice and lies. This is so for precisely the same reasons we value free speech. First, hate, prejudice and lies undermine the Australian commitment to democracy. It shifts the focus of political debate from the merits of an argument, to character assassination; and it excludes those who wish to participate by capriciously devaluing their contributions. Second, rather than assisting in the search for truth, the spread of hate, lies and prejudice often leads us to embrace falsehoods, at least for a short while. And finally, while one's self-fulfilment is important, we are all equal partners in our great democracy; one person's autonomy cannot come at the expense of another's. In short, at the heart of a healthy democracy is not simply a right to free speech, but also mutual respect and understanding amongst its citizens.

The case of *Eatock v Bolt*[3] ('the Bolt case') threw these issues into sharp relief. The case centred on two articles, 'It's so hip to be black'[4] and 'White fellas in the black',[5] written by Andrew Bolt and published in the *Herald Sun* newspaper in 2009. On 28 September 2011, Justice Bromberg held that the articles violated provisions housed in the *Racial Discrimination Act 1975*. This conclusion was based on two key findings: first, that the articles were reasonably likely to have offended,

insulted, humiliated or intimidated fair-skinned Aboriginal people; and second, that the articles contained errors of fact, distortions of the truth and inflammatory language. The reaction to the decision has been mixed. Andrew Bolt boldly declared that 28 September 2011 was a 'terrible day for free speech in this country'.[6] He wasn't alone. Articles in major newspapers and on news websites across the country suggested that the decision will 'silence debate on irksome and uncomfortable topics'[7]; that it elevates the 'right not to be offended above the right to freedom of speech'[8]; that it will 'divide the nation'.[9]

This chapter seeks to evaluate these claims. The first part of this chapter examines the Bolt case — what Bolt wrote, what the law is, and Justice Bromberg's conclusions. This decision does not silence debate; it simply calls for higher journalistic standards. This decision does not dismiss or undermine freedom of speech; it simply acknowledges that the right to free speech must be balanced against other, equally important rights such as the right to be free from racial prejudice and intolerance. The second part of this chapter considers why we place such a high premium on freedom of speech. There are three reasons: the requirements of democracy, the search for truth, and the importance of personal autonomy. The final part of this chapter explores both the need to place limits on free speech, and the dangers that accompany attempts to do so. At times we are compelled to silence or sanction speech because of the potential for words to divide, belittle and mislead. What the Bolt case demonstrates is that the right to free speech is not absolute, and cannot and should not be exercised recklessly.

The Bolt Case

The articles

Let's begin by looking at what Andrew Bolt wrote. In his first article, 'It's so hip to be black', he asks why so many people are eager to proclaim their Aboriginality even when it is a small

part of their heritage. The reader is introduced to 16 people who Bolt suggests have deliberately chosen to identify as Aboriginal. There's Bindi Cole who Bolt describes as 'insisting on a racial identity you could not guess from her features'.[10] There's Annette Sax who Bolt indicates has 'chosen to call herself Aboriginal, which happily means she could be short-listed for this year's Victorian Indigenous Art Award'.[11] There's Larissa Behrendt who Bolt says 'chose to be Aboriginal' and now 'demands laws to give … [her] more rights as a white Aborigine than … [her] own white dad'.[12]

Bolt revisits these ideas in his second article, 'White fellas in the black'. However, here Bolt's critique is sharper, his tone more caustic. While renewing his attacks on a number of the 16 people named in his first article, Bolt also directs his attention to new targets. He mocks Mark McMillan's struggle with his cultural identity while suggesting that McMillan has received 'all the special help you once thought … would at least go to people who looked Aboriginal'.[13] He dismisses the 'blue-eyed and ginger-haired' Danie Mellor as a 'white and cosseted' man who was awarded an Aboriginal art prize even though his work 'shows no real Aboriginal techniques or traditions'.[14] The consistent theme is that of individuals who falsely claim to be Aboriginal to receive benefits that they are not entitled to.

Bolt's articles can be reduced to three lines of attack. First, Bolt believes that the choices made by these individuals to identify as Aboriginal are simply not justified when one looks at their ancestry and cultural upbringing. As he declares: 'I refuse to surrender my reason and pretend that white really is black'.[15] Second, the choice is characterised as opportunistic and political; one that is motivated by a desire to win awards and 'plum jobs' reserved for Aboriginal Australians.[16] Finally, Bolt argues that we must move beyond racial pride, and simply be proud of being human beings. As he puts it, we should be determined to find 'what unites us and not invent such racist and trivial excuses to divide'.[17]

The law

Pat Eatock, one of the individuals named in Bolt's articles, brought proceedings against Andrew Bolt and his publisher, the Herald & Weekly Times. She asserted that Bolt in writing the articles, and the Herald & Weekly Times in publishing them, had violated section 18C of the *Racial Discrimination Act 1975*. Section 18C provides that:

> (1) It is unlawful for a person to do an act, otherwise than in private, if:
>
> a. the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people; and
>
> b. the act is done because of the race, colour or national or ethnic origin of the other person or some or all of the people in the group.

Read on its own, this is an expansive provision that may catch a lot of what is written and said in the course of public debate surrounding issues of race. This is why Parliament explicitly included in the Act a list of conduct that is placed beyond the reach of section 18C. To this end, section 18D states that:

> 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.

When these two sections are read together, it becomes clear that the provisions of the *Racial Discrimination Act* do not seek to silence debate on controversial and sensitive topics, nor do they allow a phantom right not to be offended to trump freedom of speech. Instead, the provisions attempt to strike a balance between promoting free and open debate, and ensuring that individuals and groups have some protection against humiliating and hurtful remarks based on their race and cultural upbringing.

The decision — Section 18C: the articles were offensive to fair-skinned Aboriginal people

Eatock alleged that fair-skinned Aboriginal people were reasonably likely to have been offended, insulted, humiliated or intimidated by the articles. Justice Bromberg agreed and pointed to three factors. First, the articles deal with the sensitive issues of racial and cultural identity. However, Bolt addresses these issues in a superficial manner. He uses the simple fact that fair-skinned Aboriginal people are 'white' and do not fit the stereotypical image of an Aboriginal person, as a basis for challenging their cultural identity. A person's cultural identity is of crucial importance to their self-worth, self-image and personal dignity. It is who they are. It is only natural for us to reject attempts by others to challenge and define our cultural identity via shallow observations regarding our ancestry and skin colour. This is particularly so in the case of Aboriginal Australians who to this day carry with them the indelible scars of our narrow-minded policies of assimilation, policies that systematically denied the value and legitimacy of Aboriginal culture.[18]

Second, Bolt argues that fair-skinned Aboriginal people falsely choose to identify as Aboriginal for opportunistic and political reasons. Bolt's claims call into question the integrity and character of these individuals. It isn't just the assertion that these individuals are living a lie that is offensive, but also the

implication that fair-skinned Aboriginal people are 'snaffling' up 'special encouragements' that were intended for the truly disadvantaged.[19] Many of the individuals that Bolt singles out, including Professor Larissa Behrendt, the 2011 NSW Australian of the Year, are looked to as leaders within the Aboriginal community and have dedicated their careers to closing the gap between Indigenous and non-Indigenous Australians. It would be deeply insulting to someone who has fought so passionately for her community to be accused of 'elbowing out'[20] the truly disadvantaged and taking the spoils for herself.[21]

Finally, Bolt's articles are dripping with mockery, derision and sarcasm. Fair-skinned Aboriginal people are characterised by Bolt as a 'booming new class of victim you'd never have imagined we'd have to support'.[22] He deftly draws attention to skin colour by deploying vivid phrases such as the 'very pale' Behrendt and the 'distressingly white' Cole in an attempt to highlight the disjunct between the cultural identity these individuals claim for themselves and their physical appearance.[23] And he underscores his argument by adopting an incredulous tone throughout: 'you'd swear this is from a satire'; 'I refuse to surrender my reason and pretend that white really is black'; 'how much more of this madness can you take?'[24] When these three factors are considered together, the conclusion that these articles were reasonably likely to offend, insult, humiliate or intimidate fair-skinned Aboriginal people is irresistible.

Section 18D: the articles were factually inaccurate

The key contest in the Bolt case did not centre on whether Bolt had breached section 18C, but whether he could rely on the fair comment defence in section 18D(c). The fair comment defence provides journalists with significant scope to express their opinions however wrongheaded, provocative or obstinate they may be. As Justice Bromberg observed, the fair comment defence extends to protect even those opinions 'that reasonable people would consider to be abhorrent'.[25] However, the fair

comment defence requires that the comment be based on true facts.[26] In short, journalists can say whatever they like, provided they get their facts right. What section 18D asks the court to examine is not the offensive nature of the journalist's opinion, but rather their journalistic standards.

Unfortunately for Andrew Bolt, Justice Bromberg found that his articles were riddled with factual inaccuracies. Take for example Bolt's comments regarding Professor Larissa Behrendt. He declared that she looked 'almost as German as her father'.[27] However, to the best of Behrendt's knowledge, there is no German descent on either side of the family. Her father, far from being white, was in fact a prominent, well-respected member of the Aboriginal community.[28] Bolt asserted that Behrendt was 'raised by her white mother'.[29] Yet Behrendt's father was always part of her upbringing and her parents did not separate until she was about 15 years old. As Behrendt puts it, she has 'identified as Aboriginal since before I can remember'.[30]

Bolt suggested that Wayne and Graham Atkinsons' right to call themselves Aboriginal rests 'on little more than the fact that … [their] Indian great-grandfather married a part-Aboriginal woman''.[31] However, this couldn't be further from the truth. Both their mother and father are Aboriginal. All four of the Atkinsons' grandparents are Aboriginal. In fact, all of their great grandparents were Aboriginal apart from their one Indian great-grandfather.[32]

Bolt characterises Professor Anita Heiss' decision to identify as Aboriginal as 'lucky, given how it's helped her career'.[33] According to Bolt the decision allowed Heiss to win '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'.[34] However, the Koori radio role was not a 'plum job' at all; it was a voluntary and unpaid position. The other two positions were

not 'reserved' for Aboriginal people, but were simply positions for which Aboriginal people were encouraged to apply.[35]

Then there's Bolt's claim that Pat Eatock only started to identify as Aboriginal after attending a political rally when she was 19 years old.[36] Again, it's simply not true. Eatock began publically identifying herself as Aboriginal when she was aged 14. It was not a decision that was motivated by any political aspirations or opportunism; Eatock began to publically identify as Aboriginal because she did not want to be accused of hiding her racial background.[37] Bolt goes on to insinuate that this choice has enabled Eatock to 'thrive' as an Aboriginal bureaucrat, activist and academic.[38] Eatock currently lives in a one-bedroom Department of Housing flat in Sydney. She does not own a car and has no meaningful savings.[39] It is plainly apparent that Eatock's tireless commitment to Indigenous issues has not yielded the perks and material rewards that Bolt hints at.

I could go on. Justice Bromberg in his thorough 143-page judgment does. This was simply lousy journalism. How did Bolt attempt to explain away the impressive swarm of errors he made in each of the two articles? During the trial he either denied that he had made an error, or he pointed disingenuously to a lack of space in his columns.[40] Indeed, the day after the decision was handed down, Bolt spectacularly claimed that none of the mistakes identified by Justice Bromberg 'seemed to me to be of consequence'.[41] Bolt's articles explicitly criticised the choices made by individuals to identify as Aboriginal. He characterised these choices as weak, unjustified and opportunistic. It is surely of consequence that at least nine of the 'white Aborigines' he named in his articles never made a conscious choice to identify as Aboriginal, but rather had been raised to identify as Aboriginal.[42] The upbringing and ancestry of the individuals targeted by Bolt is surely relevant to his argument that these individuals were not Aboriginal enough. The precise nature of the 'plum jobs' and awards seized by these 'political

Aborigines' surely bears upon his charges of opportunism. It is absolutely dishonest for Bolt to claim that the mistakes identified by Justice Bromberg were of no consequence. They went to the very core of his argument.

The orders

These were poor articles. It seems only fair that Bolt be required to account for his indiscretions. However, we're not talking about fines, criminal sanctions or insincere apologies. Instead, Justice Bromberg made orders requiring that a notice outlining the outcome of the case be printed next to two of Bolt's (subsequent) columns and that the articles not be republished.[43] The orders did not punish Bolt so much as they sought to ensure that those who were most likely to have read the articles were informed that the articles breached the *Racial Discrimination Act*.

Why is the right to free speech important?

Justice Bromberg's reasons were balanced and thorough, and his orders were eminently reasonable. Nevertheless, the decision, and the laws on which it was based, have been widely criticised as a threat to freedom of speech.[44] This gives rise to a natural question: why is the right to free speech so important? Why are so many so willing to stomach lies, mockery and intolerance in its name? There are, at least, three often-cited reasons. First, freedom of speech is a necessary component of representative democracy. Second, it is an indispensable tool in our search for truth. Third, freedom of speech enables and promotes individual autonomy. These bald claims require further analysis, to which we now turn.

Free speech and representative democracy

Under a system of representative and responsible government, political leaders are accountable to the people for their actions, and have a responsibility to consider the views of their

constituency when making decisions.[45] Thus, the High Court has consistently held that the text of the Australian Constitution and the precise system of responsible and representative government that the Constitution sets up, gives rise to an implied freedom of political communication.[46] Freedom of speech secures democratic accountability, encourages widespread participation in the democratic process, and potentially produces superior policy outcomes. We can only hold our political leaders accountable if we are free to scrutinise their actions, question their policies, and challenge their views. By allowing us to openly voice our opinions, freedom of speech ensures that participation in the political process is open to all; and where participation in the democratic process is widespread, it is more likely that the government of the day truly reflects the rich diversity that thrives in our society, both in its policies and its composition. Finally, by permitting fierce, lively and constructive debate, freedom of speech may help produce better policies, which adeptly balance the competing interests of different sectors in our community.

Admittedly, these claims seem overstated in the current political climate. From 'stopping the boats', to a 'great big new tax', to 'moving forward', time and again we have seen important, complex issues reduced to simplistic slogans. Far from producing superior policy settings and encouraging widespread participation, the steep decline in the quality of political debate has threatened policy innovation and engendered public apathy. However, this has happened in spite of the right to free speech rather than because of it. We need only look to our recent political history to find examples where our open, transparent democratic process has produced positive results. Following a searching Senate inquiry, the government's claims that refugees had thrown their children overboard were proven to be false. The public outcry that greeted the radical Work Choices legislation ensured that a fairer industrial relations system took its

place. After passionate debate both within the community and at Labor's national conference, the Labor party finally abandoned its opposition to same-sex marriage. These were all instances where free and open public debate produced better policies and more accountable government. This is what free speech offers — the prospect, but not a guarantee, of better policy, wider participation and greater accountability.

Free speech and the search for truth

Free speech is seen as an essential precondition in the search for truth. In the unregulated marketplace of ideas, where opinions are freely expressed and competing ideas vie for supremacy, the truth will (eventually) out. As Milton famously observed, let truth and falsehood grapple; 'who ever knew Truth put to the worse, in a free and open encounter?'[47] However, there are countless examples where people have been persuaded, at least for a while, to embrace falsehood and shun facts. President Barack Obama was born in the United States of America. Yet a poll in the *New York Times* in April 2011 revealed that 45% of Republicans believed that Obama was born in another country.[48] Climate change is real. Nevertheless, between 2008 and 2010, when debate surrounding action on climate change dominated the headlines and the nation's consciousness, the percentage of people in Australia who believed that climate change was real and happening dropped 11 percentage points.[49] This is not to deny the role that free speech plays in the search for truth. In societies that suppress speech and silence debate, truth is often the first casualty. Equally, however, we should not underestimate the potential for lies, hate and prejudice to gain traction and muddy our search for truth, even in the face of rational argument.

The stronger case for why free speech is an indispensable instrument in our search for truth is the simple fact that we are fallible beings. We can never be certain that the opinion we are trying to suppress is false.[50] There is a real risk that by silencing

speech we are depriving ourselves of some truth;[51] a risk that far outweighs the possibility that lies, hate and prejudice catch on. We once believed that the Earth was flat, that continents never move, and that the Sun orbits the Earth. Today we know better. However, imagine if we had succeeded in suppressing the works of Galileo and Copernicus. Imagine if men and women had been prevented from entering the field of debate in subsequent years to lend their support to ideas that were once ridiculed. Freedom of speech is important because any attempt to suppress speech may be profoundly misguided; what is accepted as indisputable today may well be proved wrong tomorrow. The best we can hope for is that free and open debate will eventually expose fallacies of fact for what they are. As Justice McLachlin of the Canadian Supreme Court noted, 'while freedom of expression provides no guarantee that the truth will always prevail … it assists in promoting the truth in ways which would be impossible without the freedom'.[52]

Free speech and personal autonomy

The preceding two arguments position freedom of speech as a means to an end. However, it is also an end in itself. Freedom of speech is a crucial aspect of personal autonomy, the notion that individuals are entitled to make choices about how to live their lives and that those choices should be respected. We should be free to shape our own identity, form our own opinions, choose our own destiny. Yet we can do none of those things without freedom of speech.

What we say provides an insight into who we are. Thus, by limiting speech we force individuals to suppress a part of their true selves. Gagged by the dictates of cabinet loyalty, Penny Wong was for months forced to abandon her heartfelt support for marriage equality and publically defend the government's obstinate refusal to act. It was something she did not believe in and her credibility with the Australian public suffered as a result. Our views are influenced by what we hear. Hence, by

narrowing the field of debate we deny individuals the opportunity to develop fully informed opinions. Government-run newspapers in China have persistently peddled the myth that their currency is overvalued, not undervalued. Deprived of alternative views, the Chinese people have little choice but to accept as true that which offends fundamental economic principles. Finally, by creating categories of acceptable and unacceptable speech, we privilege institutional judgments and eschew individual choice and discretion, the lifeblood of personal autonomy. To put it simply, when we undermine free speech, we undermine personal autonomy.

Placing limits on free speech

The right to free speech engages concepts that are fundamental to our society. Democracy. Truth. Personal autonomy. However, while a healthy democracy must accommodate debate and disagreement on controversial issues, the strength of our union is only weakened when hate, prejudice and lies are given a public platform. This is why we rarely speak of the right to free speech as an absolute right. Sometimes we must place limits on freedom of speech, and this is so for precisely the same reasons we value freedom of speech.

A healthy democracy

The hallmarks of a healthy democracy are government accountability, widespread participation in the democratic process, and free and frank debate. Critics of the Bolt decision argue that by making people more reluctant to express controversial or unpopular opinions, the decision will have a 'chilling effect' on public debate, and limit participation in the democratic process to those who hold politically correct views.[53] However, the relevant provisions of the *Racial Discrimination Act* do no such thing. The Act does not oust controversial opinions; rather, it only catches offensive and inaccurate comments surrounding issues of race. Such

comments weaken the Australian commitment to democracy. They exclude and divide by denying individuals respect and dignity on the basis of false assertions regarding their inherent personal characteristics. Further, inaccurate and prejudiced comments do not contribute constructively to public debate; they only mislead and misinform. A democracy can only succeed when people show one another mutual respect. Race is a delicate and controversial issue. While it should not be placed beyond the realm of public debate, where an individual expresses views that are recklessly inaccurate and deeply offensive on an issue as sensitive as race, we are justified in silencing one voice to ensure the continued contribution of many.

Journalistic standards and the search for truth

Freedom of speech is an important instrument in our search for truth. However, where we are certain that a statement is wrong, its wide dissemination does little to further our quest for truth, and may even obstruct it. Admittedly, we are reluctant to limit speech based on what we believe to be false, because there is a risk that we inadvertently deprive ourselves of truth.[54] There is also some force in the argument that the 'fitting remedy for evil counsels is good ones'.[55] Rather than limiting speech, we should have faith in our ability to counter irrational, prejudiced and hateful opinions with logic and reason. However, the Bolt case demonstrates that these arguments have serious shortcomings. They expect regular individuals to defend themselves against vicious attacks launched by a popular journalist who has at his disposal a captive audience. These arguments come unstuck because they wrongly assume that we are all rational and we are all equal. Public debate is not driven by rational argument and facts alone. It is equally driven by powerful emotions; personal popularity and influence; and money. It is naïve to think that in the tussle between truth and falsehood, truth will always prevail. This is why the government must, on occasion, intervene in the marketplace of ideas. What Bolt wrote was wrong and unfair.

The Bolt decision does not obstruct our search for truth, but enhances it by insisting on fundamental journalistic standards. It does not deny Bolt the right to express his opinion; it simply asks that Bolt be honest with his readers and base his arguments on facts, not distortions.

Personal autonomy in a community

On an individual level, the freedom to develop and express our thoughts and ideas as we see fit is a crucial aspect of our personal autonomy.[56] However, as members of a community, we equally have a responsibility to respect the autonomy of others. Bolt's articles challenge the personal choice made by fair-skinned Aboriginal people to identify as Aboriginal. He implies that the choices made by these individuals were illegitimate and unjustified when one looks at their appearance and upbringing. Hence, Bolt launches a cruel attack on a fundamental aspect of personal autonomy — our right to articulate and nurture our cultural identity. The effects were felt deeply. As many of the individuals named in the articles testified, they felt humiliated and intimidated by the articles.[57] We are all equal partners in our great democracy. What critics of the Bolt decision have failed to explain is why Andrew Bolt's personal autonomy should be allowed to trump that of the individuals he named in his articles.

Conclusion

Andrew Bolt declared that 28 September 2011 was a 'terrible day for free speech' in Australia.[58] He was not alone. Journalists and commentators around the country joined him in warning of the destructive legacy of Justice Bromberg's decision. Debate will be silenced.[59] The nation will be divided.[60] And we will enter a tedious new era of political correctness.[61] However, these claims do not withstand scrutiny. This decision simply calls for higher journalistic standards and ensures that public debate is grounded in hard facts, not fantasy. This decision will

not divide the nation; rather it will ensure that our nation cannot be divided by lies, distortions and inflammatory language. This decision does not mark the beginning of a new era of political correctness, but the continuation of the great Australian tradition of respecting one another and embracing different cultures.

Above all, the Bolt decision does not undermine freedom of speech in this country. Freedom of speech is a fundamental aspect of our commitment to democracy, our search for truth, and our own personal autonomy. We are fortunate to be able to freely question our leaders, challenge our peers, and express our views. However, the right to free speech has never been absolute. Hate, prejudice and lies serve only to undermine our core democratic principles; obstruct our path to truth; and infringe on the personal autonomy of those who are marginalised by its effects. The two articles written by Andrew Bolt were littered with errors, mocking in tone, and offensive in content. They should never have been published. There is no room in our society for such callously irresponsible journalism. By infringing on Andrew Bolt's freedom of speech Justice Bromberg did not violate the principles that underpin this freedom; he bolstered them. The 28 September 2011 was not a terrible day for free speech in this country; it was just a terrible day for Andrew Bolt.

Endnotes

1 *R v Keegstra* [1990] 3 SCR 697.

2 TI Emerson, 'Toward a General Theory of the First Amendment' (1963) 72 *Yale Law Journal* 877, 879.

3 [2011] FCA 1103.

4 A Bolt, 'It's so hip to be black', *Herald Sun* (Melbourne), 15 April 2009.

5 A Bolt, 'White fellas in the black', *Herald Sun* (Melbourne), 21 August 2009.

6 K Quinn, 'True colours', *The Age* (Melbourne), 29 September 2011.

7 A Dodd, 'The Bolt decision will have implications for us all', Australian Broadcasting Corporation, 28 September 2011. Available at http://www.abc.net.au/unleashed/3026182.html

8 J Paterson, 'Bolt case highlights discriminatory act', Australian Broadcasting Corporation, 29 September 2011. Available at http://www.abc.net.au/unleashed/3035352.html
9 C Merritt, 'The Andrew Bolt decision means all of us have a problem', *The Australian* (Sydney), 29 September 2011.
10 A Bolt, 'It's so hip to be black', *Herald Sun* (Melbourne), 15 April 2009.
11 ibid.
12 ibid.
13 A Bolt, 'White fellas in the black', *Herald Sun* (Melbourne), 21 August 2009.
14 ibid.
15 ibid.
16 A Bolt, 'It's so hip to be black', *Herald Sun* (Melbourne), 15 April 2009.
17 ibid.
18 *Eatock v Bolt* [2011] FCA 1103, [291]–[293].
19 A Bolt, 'White fellas in the black', *Herald Sun* (Melbourne), 21 August 2009.
20 ibid.
21 *Eatock v Bolt* [2011] FCA 1103, [294]–[295].
22 A Bolt, 'White fellas in the black', *Herald Sun* (Melbourne), 21 August 2009.
23 ibid.
24 ibid.
25 *Eatock v Bolt* [2011] FCA 1103, [353].
26 ibid [354].
27 A Bolt, 'It's so hip to be black', *Herald Sun* (Melbourne), 15 April 2009.
28 *Eatock v Bolt* [2011] FCA 1103, [119].
29 A Bolt, 'White fellas in the black', *Herald Sun* (Melbourne), 21 August 2009.
30 *Eatock v Bolt* [2011] FCA 1103, [121].
31 A Bolt, 'White fellas in the black', *Herald Sun* (Melbourne), 21 August 2009.
32 *Eatock v Bolt* [2011] FCA 1103, [406].
33 A Bolt, 'It's so hip to be black', *Herald Sun* (Melbourne), 15 April 2009.
34 ibid.
35 *Eatock v Bolt* [2011] FCA 1103, [381].
36 A Bolt, 'It's so hip to be black', *Herald Sun* (Melbourne), 15 April 2009.
37 *Eatock v Bolt* [2011] FCA 1103, [157].
38 A Bolt, 'It's so hip to be black', *Herald Sun* (Melbourne), 15 April 2009.
39 *Eatock v Bolt* [2011] FCA 1103, [161].
40 ibid [403], [406].

41 A Bolt, 'Silencing me impedes unity, says Andrew Bolt', *Herald Sun* (Melbourne), 29 September 2011.

42 D Marr, 'In black and white, Andrew Bolt trifled with the facts', *The Sydney Morning Herald* (Sydney), 29 September 2011.

43 *Eatock v Bolt* (No 2) [2011] FCA 1180.

44 See generally A Dodd, 'The Bolt decision will have implications for us all', Australian Broadcasting Corporation, 28 September 2011. Available at http://www.abc.net.au/unleashed/3026182.html; J Paterson, 'Bolt case highlights discriminatory act', Australian Broadcasting Corporation, 29 September 2011. Available at http://www.abc.net.au/unleashed/3035352.html; C Merritt, 'The Andrew Bolt decision means all of us have a problem', *The Australian* (Sydney), 29 September 2011; P Kelly, 'Tony Abbott should seize free speech as election issue', *The Australian* (Sydney), 12 October 2011.

45 See generally *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

46 ibid.

47 J Milton, *Areopagitica: A Speech of Mr John Milton for the Liberty of Unlicenc'd Printing* (London, W. Johnston, 1644) 35.

48 DO Sears, 'Racial resentment at its root', *The New York Times*, 22 April 2011. Available at http://www.nytimes.com/roomfordebate/2011/04/21/barack-obama-and-the-psychology-of-the-birther-myth/racial-resentment-at-its-root.

49 Z Leviston et al., 'Australians' views of climate change', Garnaut Climate Change Review, 10 March 2011. Available at http://www. garnautreview.org.au/update-2011/commissioned-work/australians-view-of-climate-change.htm

50 *R v Keegstra* [1990] 3 SCR 697.

51 ibid.

52 ibid.

53 S Drill, 'Ruling against Andrew Bolt will harm healthy debate, say libertarians', *Herald Sun* (Melbourne), 30 September 2011.

54 *R v Keegstra* [1990] 3 SCR 697.

55 *Whitney v California* 274 U.S. (1927), 375–377.

56 *R v Keegstra* [1990] 3 SCR 697.

57 See generally *Eatock v Bolt* [2011] FCA 1103.

58 K Quinn, 'True colours', *The Age* (Melbourne), 29 September 2011.

59 A Dodd, 'The Bolt decision will have implications for us all', Australian Broadcasting Corporation, 28 September 2011. Available at http://www.abc.net.au/unleashed/3026182.html

60 C Merritt, 'The Andrew Bolt decision means all of us have a problem', *The Australian* (Sydney), 29 September 2011.

61 P Kelly, 'Tony Abbott should seize free speech as election issue', *The Australian* (Sydney), 12 October 2011.

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