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## Racially derogatory cartoons and racial vilification laws: Where to draw the line?

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### **Abstract:**

This article examines whether racially derogatory cartoons are capable of infringing Part IIA of the *Racial Discrimination Act 1975* (Cth). In particular, it examines the exemption of 'artistic work' in section 18D, which depends on the artistic work being published 'reasonably'. Courts have struggled to apply the concept of 'reasonableness' to cartoons, noting that cartoons are exaggerated by their nature and that they often convey political messages.

### **Keywords:**

Art, human rights law, media, discrimination, race issues, vilification

Racially derogatory cartoons, when published in a newspaper, may be grounds for a complaint under Part IIA of the *Racial Discrimination Act 1975* (Cth) (*RDA*).<sup>1</sup> For example, a cartoon drawn by Bill Leak and published in *The Australian* newspaper in August 2016 was the subject of a complaint to the Australian Human Rights Commission. The cartoon suggested that Indigenous fathers are neglectful alcoholics who cannot remember their child's name. It was published during public debate concerning the treatment of young Indigenous detainees at the Don Dale Youth Detention Centre in the Northern Territory.

Such cartoons raise difficult issues under Part IIA. On the one hand, Part IIA has a relatively low threshold for liability. Section 18C provides that conduct which is 'reasonably likely ... to offend, insult, humiliate or intimidate a person or group ... because of their race' is unlawful. However, courts have clarified that s 18C applies only to conduct causing 'profound and serious effects, not to be likened to mere slights'.<sup>2</sup>

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<sup>1</sup> This article focuses on national laws, rather than State and Territory based anti-vilification laws.

<sup>2</sup> *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 [16] (Kiefel J). See also *Eatock v Bolt* (2011) 197 FCR 261 [268] (Bromberg J).

Racially derogatory cartoons may infringe this standard. On the other hand, s 18D has several broad exemptions to liability, including an exemption concerning 'artistic work'.<sup>3</sup> To come within the exemption, the conduct must be done 'reasonably and in good faith', and this has been interpreted as requiring proportionality between the purpose of the conduct, and the harm it is likely to cause.<sup>4</sup> However, Gleeson CJ has questioned how courts can determine whether a cartoon, which 'of its nature is intended to lampoon or ridicule ... [and which] is an appropriate and very common form of political commentary', was done reasonably.<sup>5</sup>

This article argues that defamation law can provide guidance to courts in determining whether a satirical communication is published 'reasonably', because defamation law is similar to Part IIA in several significant ways. Both impose civil liability for expressive conduct, and the harms of defamation are similar to those of racial vilification. Also, the defences in defamation law are similar to the exemptions in s 18D, and both are supported by public interest grounds.

Most significantly, the concept of reasonableness is part of the *Lange* defence,<sup>6</sup> which concerns communications relating to politics and government. As indicated by Gleeson CJ's statement above, cartoons published in newspapers are often presented and understood as a form of political commentary. Clearly, there is a legitimate public interest in facilitating communication on political matters. However, *Lange* emphasises that accuracy of information is central to showing that a communication to a wide audience on a political issue is done 'reasonably'. Likewise, this article argues that ensuring reasonable accuracy of information is also central to the 'reasonably and in good faith' requirement in s 18D. This is because factually accurate information may be considered less likely to cause harm to target groups (and therefore to be found to be proportionate). Also, significant social harm can be caused by the dissemination of inaccurate racial stereotypes. Therefore, the artistic exemption in s 18D should be interpreted as requiring factual accuracy, as an aspect of reasonableness.

### Part IIA of the RDA

Part IIA contains s 18C, which defines certain conduct as unlawful, and s 18D, which exempts certain conduct from liability. Section 18C is unique among racial vilification laws in that it specifically focuses on the likely effect of certain conduct on members of

<sup>3</sup> RDA s 18D (a).

<sup>4</sup> *Bropho v Human Rights and Equal Opportunity Commission* (2004) 204 ALR 761 (*Bropho*).

<sup>5</sup> Transcript of Proceedings, *Bropho v Human Rights and Equal Opportunity Commission* [2005] HCATrans 9 (4 February 2005).

<sup>6</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

**Commented [A1]:** I'd say this is a big call. Think of Israel Folau's comments – he would regard them as accurate, others would not.

**Commented [A2R1]:** I am referring to factual accuracy, not merely honestly held opinions.

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the target group (the racial or ethnic group about whom the statements are made).<sup>7</sup> The legal test is whether a reasonable member of this group would be offended, insulted, humiliated or intimidated by the relevant conduct. The test is therefore objective, rather than being based on the subjective response of members of the target group.<sup>8</sup> In addition, the relevant conduct must be done 'because of the race' of the relevant person or group.<sup>9</sup> Again, this is determined objectively, by examining the respondent's conduct and the surrounding circumstances.<sup>10</sup> Finally, s 18C applies only to conduct that is done 'otherwise than in private'.<sup>11</sup> In effect, this means that the section applies only to conduct that is likely to be seen or heard by others.<sup>12</sup> These principles are similar to those for determining liability under defamation law.

Section 18C applies to conduct that is likely to offend, insult or humiliate or intimidate members of the target group, because of their race, and it does not require threatening conduct or even proof of a malicious motive.<sup>13</sup> Although it has been argued that s 18C sets the standard for liability too low,<sup>14</sup> this article will show that ridicule and insult are established grounds for liability in defamation law.<sup>15</sup> Defamation law specifically recognises that publications which ridicule or insult a person can cause significant reputational harm, and that a respondent's humorous intent does not necessarily preclude liability.

Scholars such as Jeremy Waldron<sup>16</sup> and Michael Chesterman<sup>17</sup> highlight the similarities between the purposes of defamation law and racial vilification laws, particularly regarding the types of harms they seek to prevent and remedy. In broad terms, racial vilification laws seek to address two distinct but related types of harms. First, such laws address the direct, discriminatory harms of conduct that designates members of target groups as inherently inferior or subordinate.<sup>18</sup> Katharine Gelber argues that racial

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<sup>7</sup> Racial vilification laws in other jurisdictions in Australia focus on the likely response of those who *witness* the relevant conduct, but who are not members of the target group. See, eg. *Anti-Discrimination Act 1977* (NSW) s 20C (1) (NSW ADA).

<sup>8</sup> *Eatock v Bolt* (2011) 197 FCR 261, [241] Bromberg J.

<sup>9</sup> RDA s 18C (1) (b).

<sup>10</sup> *Eatock v Bolt* (2011) 197 FCR 261, [303]-[308] Bromberg J.

<sup>11</sup> RDA s 18c (1).

<sup>12</sup> *Korczak v Commonwealth of Australia* [1999] HREOC 29 (Human Rights and Equal Opportunity Commission, Commissioner Innes, 16 December 1999) [48]-[52].

<sup>13</sup> As mentioned above, the respondent's reason for doing the relevant conduct is determined objectively. Although the heading to Part IIA refers to 'racial hatred', proof of such hatred is not required: *Eatock v Bolt* (2011) 197 FCR 261 [225] (Bromberg J).

<sup>14</sup> See Dan Meagher, 'So Far So Good? A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32(2) *Federal Law Review* 225.

<sup>15</sup> Considering the interpretation of s 18C as conduct that amounts to a significant public harm.

<sup>16</sup> Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012) ch 3.

<sup>17</sup> Michael Chesterman, *Freedom of Speech in Australian Law: A delicate plant* (Ashgate, 2000) 202-26.

<sup>18</sup> See, eg. Katharine Gelber, *Speaking Back: The free speech versus hate speech debate* (John Benjamins Publishing, 2002) 53-5.

**Commented [A4]:** Again, although this is part of your argument you have thus far failed to mention the interpretation of s18C as conduct that amounts to a significant public harm. This is misleading.

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vilification is 'used by powerful racially defined groups to limit the way less powerful racially defined groups can participate in society'.<sup>19</sup> She argues that racial vilification reinforces a 'systemic asymmetry between the speaker and members of the target group'.<sup>20</sup> This is consistent with s 18C's focus on the direct effect of particular conduct on members of the target group, and on protecting their dignity.<sup>21</sup>

The second type of harm of racial vilification is reputational, which relates to a person's standing in the community and how they are perceived by others. Defamation law recognises the seriousness of reputational harm, as it can result in stigmatisation and exclusion of targeted persons from society. This article will argue that this second type of harm is analogous to the harms of defamation. Therefore, defamation law may be relevant to interpreting Part IIA, and particularly, the exemptions in s 18D. This article will now highlight some further similarities with defamation law.

### Principles of defamation law in Australia

Defamation in Australia consists of any publication that is likely to lower the plaintiff's 'standing in the community', or to cause others to think less of him or her.<sup>22</sup> Defamation therefore concerns injury to a person's reputation, or disparagement or denigration of their character. In particular, defamation law recognises ridicule as a form of denigration. Defamation law also shares a number of significant similarities with s 18C.

First, defamation and s 18C both use an objective test. In defamation law, the standard is that of a 'reasonable, ordinary member of the audience'.<sup>23</sup> Under s 18C, the standard is that of a reasonable member of the target group.<sup>24</sup> Assessing conduct objectively involves examining the particular words used, and the surrounding circumstances. A respondent's intentions or motivation regarding the publication are strictly irrelevant to whether it is defamatory.<sup>25</sup>

Second, liability for defamation depends on the relevant material being 'published' to at least one person other than the person defamed. Similarly, s 18C applies only to conduct that is done 'otherwise than in private'. Therefore, defamation and s 18C both concern harm to a person's *public* standing, rather than their personal feelings.<sup>26</sup>

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<sup>19</sup> Ibid 73.

<sup>20</sup> Ibid 77, 87. Gelber emphasises that target groups are often vulnerable and marginalised racial groups.

<sup>21</sup> *Eatock v Bolt* (2011) 197 FCR 261 [225] Bromberg J.

<sup>22</sup> *Radio 2UE Sydney Pty Ltd v Chesterton* [2009] HCA 16 [36] per French CJ, Gummow, Kiefel and Bell JJ (*Chesterton*). In 2006, 'uniform' defamation laws were enacted in every Australian state and territory: see Patrick George, *Defamation Law in Australia* (LexisNexis, 3<sup>rd</sup> ed, 2017) ch 3.

<sup>23</sup> *Chesterton* (n 22) [31].

<sup>24</sup> *Eatock v Bolt* (2011) 197 FCR 261, [241] Bromberg J.

<sup>25</sup> *Lee v Wilson and McKinnon* (1934) 51 CLR 276, 288. However, a respondent's purpose may be relevant to certain defences to defamation, and exemptions in Part IIA.

<sup>26</sup> *Chesterman* (n 17) 205.

Third, defamation law recognises several defences to liability. Similarly, s 18D contains several exemptions to liability. The wording of some exemptions in s 18D pick up the wording of defences to defamation, such as 'reasonably' and 'public interest'. The defences to defamation, like the exemptions in s 18D, define conduct that has some public interest aspect.<sup>27</sup> Defamation defences that are relevant to political cartoons will now be examined.

### Ridicule and political comment in defamation law

Publications that expose a person to ridicule may be defamatory. In fact, a traditional definition of defamation is statements that expose a person to 'hatred, ridicule or contempt'.<sup>28</sup> Although this is not the current definition of defamation in Australia,<sup>29</sup> publications that expose a person to ridicule or contempt may nonetheless lower a person's standing in the community.

In 1998, Pauline Hanson obtained an injunction preventing a national radio station from broadcasting a satirical song about her.<sup>30</sup> Despite the song's satirical intentions, the Court regarded it as defamatory, as it exposed her to ridicule and contempt. The Court stated that the song contained 'grossly offensive imputations relating to the sexual orientation and preference of a Member of Parliament' which were not accurate and were simply a 'fairly mindless effort at cheap denigration'.<sup>31</sup>

Whether a publication is defamatory or not depends on the perspective of a reasonable audience member or reader, and not on the motivation or intention of the speaker or author. Therefore, comics and comedians face potential liability for defamation if a court determines that a reasonable audience member or reader may interpret their words as

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<sup>27</sup> In relation to defamation law, see Peter Cane, *The Anatomy of Tort Law* (Hart Publishing, 1997) 37, 66. In relation to Part IIA, see Meagher (n 14) 241.

<sup>28</sup> *Parmiter v Coupland* (1840) 6 M & W 105 at 108 (Parke B). The definition of vilification in the NSW ADA is based on this wording.

<sup>29</sup> *Chesterton* (n 22) [16].

<sup>30</sup> *Australian Broadcasting Corporation v Hanson* [1998] QCA 306 (Unreported, Supreme Court of Queensland, Court of Appeal, de Jersey CJ, McMurdo P and McPherson JA, 28 September 1998).

<sup>31</sup> *Ibid* [8]. This decision has been criticised on the grounds that the song constituted 'political discussion' regarding Senator Hanson and the policies of her party, One Nation. See Adrienne Stone, 'Freedom of Political Communication, the Constitution and the Common Law' (1998) 26(2) *Federal Law Review* 219, 382–3; Dan Meagher, 'What is "Political Communication"? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28(2) *Melbourne University Law Review* 438, 469–70; Chesterman (n 17) 149; Roger Magnusson, 'Freedom of Speech in Australian Defamation Law: Ridicule, Satire and other Challenges' (2001) 9 *Torts Law Journal* 269, 281.

serious factual statements.<sup>32</sup> Also, if *one* interpretation of the relevant words is defamatory, then it is irrelevant that another interpretation may not be.<sup>33</sup>

Descriptions of a person that present them as ridiculous may be defamatory. Examples would include describing an actor as 'hideously ugly',<sup>34</sup> or a professional rugby league player as 'fat' and 'slow'.<sup>35</sup> Attributing negative characteristics to a person, based on their appearance, is one type of conduct (among others) to which racial vilification laws may apply. Racial slurs (particularly in cartoons) often involve attributing negative characteristics to members of particular racial groups, who may be identifiable due to some aspect of their physical appearance.

For example, in *Carey v Nationwide News Pty Ltd*,<sup>36</sup> an Aboriginal sportsperson was described in a prominent newspaper as having an 'apeish' appearance and as 'Cro-Magnon'. The Court held that derogatory references to a person's appearance (rather than their conduct) may be defamatory, particularly if it exposed the plaintiff to ridicule.<sup>37</sup> The Court emphasised that statements ridiculing a person may lower their reputation in the community, particularly as they 'belittle[d] [the plaintiff's] achievements'.<sup>38</sup> Additionally, the descriptions exposed the plaintiff to contempt, as they described him as sub-human and animal-like,<sup>39</sup> which may cause others to shun or avoid the plaintiff.<sup>40</sup> The Court emphasised that the description of the plaintiff as 'apeish' was specifically linked in the publication to his Aboriginal heritage.<sup>41</sup>

Therefore, the target of a racial slur (including ridicule) may be entitled to a remedy under defamation law.<sup>42</sup> However, defamation law may offer no remedy in respect of a racially derogatory cartoon (such as Bill Leak's). One possible obstacle is the requirement that the defamatory publication be 'of or concerning' the plaintiff.<sup>43</sup> This

<sup>32</sup> See, eg, *Cornes v The Ten Group Pty Ltd* [2012] SASCFC 99 (Unreported, Kourakis CJ, Gray and Blue JJ, Supreme Court of South Australia, 24 August 2012), in which the Court determined that a 'joke' suggesting marital infidelity by a female celebrity, made by a well-known comedian on a television program, was defamatory.

<sup>33</sup> *Ibid* [113]. The Court referred to the principle that 'for a joke to be harmless [that is, not defamatory], it must be benign'.

<sup>34</sup> *Berkoff v Burchill* [1996] 4 All ER 1008.

<sup>35</sup> *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449.

<sup>36</sup> [2014] NSWDC 73 (Unreported, Gibson DCJ, New South Wales District Court, 20 June 2014).

<sup>37</sup> *Ibid* [9].

<sup>38</sup> *Ibid* [12].

<sup>39</sup> *Ibid*. See also *Trad v Jones* (No 3) [2007] NSWADT 318, in which the respondent was found to have breached the NSW ADA by describing male Lebanese youths as 'vermin'. The tribunal, at [174], stated that 'One of the most contemptuous forms of commentary on another person or group is to describe them in sub-human terms, such as likening them to insects, vermin or animals'.

<sup>40</sup> In *Chesterton*, the High Court held that 'matter might be defamatory if it caused a plaintiff to be shunned or avoided, which is to say excluded from society' [4].

<sup>41</sup> *Ibid* [20]. Therefore, in other contexts, referring to a person as 'apeish' may not be defamatory.

<sup>42</sup> Similarly, in *Patten v Moffatt* (Unreported, Supreme Court of New South Wales, Levine J, 27 February 1995), the Court held that calling an Aboriginal person a 'coon' could be defamatory.

<sup>43</sup> *Knuppfer v London Express Newspaper* [1944] AC 116, 121.

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**Commented [A8]:** I'm sorry but this is an inaccurate portrayal of racial vilification laws. It has nothing to do with appearance. And this is not how 'race' is defined in any Australian law (or international law either).

**Commented [A9R8]:** An example is given in the following paragraph. There is no reason why s 18C would not apply to this situation.

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**Commented [A11]:** This is simply not true. They may be identifiable in any number of ways, but their physical appearance is only one. Others include those with whom they associate, their language, their dress, their location, their school, and more.

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requirement generally prevents members of a group from suing for defamation in respect of a slur against the group (rather than against an individual).

Another possible obstacle is the existence of a defence under defamation law. Most relevantly, in *Lange v Australian Broadcasting Corporation*,<sup>44</sup> the High Court of Australia held that communications concerning 'government and politics' are generally immune from liability under defamation law. The scope of 'government and politics' is uncertain, however it includes statements concerning a person's conduct in public office and their fitness for such office, and matters that may affect voting decisions.<sup>45</sup> Cartoons concerning racial issues may be regarded as political communication, as they may influence voting decisions. However, the *Lange* defence also requires that the relevant publication is done 'reasonably', and this involves assessing what the respondent did to ensure the accuracy of the communication. 'Reasonableness' is therefore required for the protection of political communications from liability under defamation law (under *Lange*), and also for the exemptions in s 18D under federal anti-vilification law.

### The exemption of 'artistic work' in s 18D

Although s 18D contains several exemptions to liability, this article focuses on the exemption relating to the 'distribution of an artistic work',<sup>46</sup> as this relates most directly to cartoons published in the mainstream media.<sup>47</sup> This exemption is extremely broad in several aspects. First, although the exemption concerns 'artistic work', it has been interpreted as requiring no assessment of artistic merit, and it includes all forms of art, including literature and other forms of writing.<sup>48</sup> McCutcheon notes that 'it seems widely accepted ... that cartoons are artistic works.'<sup>49</sup> Also, unlike other exemptions, the one for artistic work does not require the conduct to be done for a particular purpose, such as an 'academic' or 'scientific' purpose. Finally, unlike the other exemptions, the artistic work does not need to be 'of public interest' or done 'in the public interest'.

In defamation law, there is no defence for artistic work per se, and the reasons are unclear for including this exception in s 18D<sup>50</sup> (and particularly an exemption of such

**Commented [A13]:** What about the defence for fair and accurate reporting, which is intended to protect journalism? Surely that would be highly relevant?

**Commented [A14R13]:** A cartoon would not be a 'report', but would more likely be an opinion.

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**Commented [A16]:** Please read Luke McNamara's extensive accounts of the development of this law, including his account of why the exemptions were introduced.

**Commented [A17R16]:** McCutcheon is the only author to examine this particular exemption, including the case law and parliamentary debate. McNamara examines the general reasons for including exemptions, but that is not the issue here.

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<sup>44</sup> (1997) 189 CLR 520.

<sup>45</sup> The implied freedom of political communication derives from ss 7 and 24 of the *Constitution*, which provide that members of the House of Representatives and the Senate must be 'directly chosen' by the Australian people.

<sup>46</sup> RDA s 18D (1)(a).

<sup>47</sup> While the defence of fair and accurate reporting might seem relevant, a cartoon would not be a report but more likely an opinion.

<sup>48</sup> See *Bryl v Kovacevic* [1999] HREOCA 11 (21 June 1999) [4.3] and *Corunna v West Australian Newspapers Ltd* (2001) EOC 93–146, 40. See Jani McCutcheon, 'The Artistic Speech Exemption in Australian Racial Discrimination Regulation' (2019) 23 *Media and Arts Law Review* 61, 74–8.

<sup>49</sup> *Ibid* 76.

<sup>50</sup> On these exemptions, see McCutcheon (n 48) and Luke McNamara *Regulating Racism: Racial Vilification Laws in Australia* (Sydney Institute of Criminology, 2002).

wide breadth).<sup>51</sup> It may be assumed that artistic works (including cartoons) are not as harmful as 'factually wrong statements'.<sup>52</sup> Further, scholars argue that artistic freedom is an essential part of political discussion and is supported by the democratic justifications for free speech.<sup>53</sup> Specifically, political cartoons may assist in holding public figures to account and they may challenge 'intolerant attitudes held in parts of the community'.<sup>54</sup>

In *Bropho*,<sup>55</sup> the Full Court of the Federal Court considered the exemption of 'artistic work' in s 18D, and in particular the requirement that the relevant conduct be done 'reasonably and in good faith'. The cartoon at issue in *Bropho*

lampooned the involvement of Aboriginal persons, including the appellant, in, and the connection to and the significance to them of, the return from the United Kingdom of the skull of Yagan, a prominent Aboriginal figure in the history of the colonial settlement in the State after 1829. Yagan was killed in 1833 in the course of conflict between Aboriginal inhabitants and colonial settlers.<sup>56</sup>

Significantly, the cartoon referred to the mixed ancestry of particular Aboriginal people who were involved in the return of Yagan's head to Australia in a way that suggested that they were not 'real' Aboriginals. Further, the cartoon suggested that these individuals were seeking to use public funds for personal pleasure.<sup>57</sup>

The Court held, by majority, that the cartoon was done 'reasonably and in good faith'.<sup>58</sup> French and Lee JJ held that this required proportionality between the purpose sought to be achieved by the respondent's conduct, and the degree of harm likely to be caused.<sup>59</sup> French J held that including comments that were 'gratuitously insulting or offensive' would negate proportionality and render the conduct 'unreasonable'.<sup>60</sup> Despite the cartoon's focus on the authenticity of the complainant's Aboriginality, and the suggested opportunism of the group's use of government funding, and on a dispute between the members of the relevant group,<sup>61</sup> French J did not find this disproportionate or

<sup>51</sup> Ibid. The Explanatory Memorandum simply states that the exemption includes 'comedy acts': Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) 11.

<sup>52</sup> McCutcheon (n 48) 71–2.

<sup>53</sup> Ibid 69. See generally Eric Barendt, *Freedom of Speech* (Oxford University Press, 2<sup>nd</sup> ed, 2007) ch 5.

<sup>55</sup> *Bropho* (2004) 204 ALR 761.

<sup>56</sup> Ibid [123] Lee J (dissent).

<sup>57</sup> Ibid [126] Lee J.

<sup>58</sup> French and Carr JJ, Lee J dissenting.

<sup>59</sup> French and Lee JJ agreed on the relevant legal test, although they reached different conclusions on the outcome of the case.

<sup>60</sup> *Bropho* (2004) 204 ALR 761 [81].

<sup>61</sup> Indeed, the notion of disunity is the punch-line of the cartoon. In the final panels, a child asks, 'Did [the return of Yagan's head] unite the Nyoongars, Uncle Colbung?'. The Uncle replied, 'Well, er...'. Yagan's head in a box says, 'Crikey ... give me a warm beer in a quiet pommie pub any day!..'. It is unclear whether the purpose asserted in the cartoon (promoting unity) was in fact the purpose of the Nyoongar Elders in seeking the return of Yagan's head.

Commented [A19]: They may also challenge tolerant ones. I don't see the relevance of this quotation.

Commented [A20R19]: My point exactly.

unreasonable. Lee J, on the other hand, held that proportionality required a respondent to exercise 'prudence, caution and diligence' to minimise the harm of the conduct.<sup>62</sup> Lee J held that the cartoon constituted a 'serious slur'<sup>63</sup> on members of the group, and it was 'at the most serious end of the spectrum'<sup>64</sup> of conduct caught by s 18C. He held that '[h]umiliation and intimidation' lowers other's regard, by 'demeaning the worthiness of the person or person's subjected to the conduct' and it exposes them to contempt.<sup>65</sup>

The majority judges emphasised the importance of public discussion and debate concerning the return of Yagan's head to Australia.<sup>66</sup> For these judges, the 'public interest' in this topic was demonstrated by the publication of a number of articles on this topic in the respondent newspaper. However, Indigenous scholars have noted that the Australian media often promotes negative stereotypes concerning Indigenous peoples,<sup>67</sup> with one scholar stating that 'no group exists under the media microscope as much as we do'.<sup>68</sup> The consistently negative portrayal of Indigenous groups in the mainstream media is not a recent phenomenon.<sup>69</sup>

#### **When will a racially derogatory cartoon be done 'reasonably'?**

Although racially derogatory cartoons raise difficult issues for the application of racial vilification laws, these are not insurmountable. This article argues that defamation law can provide assistance to courts in this area.

First, whether or not s 18C has been infringed involves an objective assessment of the likely impact of the conduct on a reasonable member of the target audience. The respondent's intention or motive (including any intention to be humorous) is not determinative. The words used by the respondent and all the surrounding circumstances are also considered. Likewise, in defamation law, publications that expose a person to ridicule or contempt may attract liability, and courts have stated that people who make humorously intended but defamatory statements do so at their own risk.<sup>70</sup>

In addition, the exemption of 'artistic work' in s 18D is not without limits. In particular, to be exempt, conduct must be done 'reasonably and in good faith'. This requirement

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<sup>62</sup> Ibid [144].

<sup>63</sup> Ibid [126].

<sup>64</sup> Ibid [136].

<sup>65</sup> Ibid [138].

<sup>66</sup> Ibid Carr J [183].

<sup>67</sup> Anita Heiss, *Am I Black Enough for You?* (Bantam, 2012) 167.

<sup>68</sup> Ibid 172.

<sup>69</sup> The Royal Commission into Aboriginal Deaths in Custody report, published in 1991, noted the frequently negative portrayal of Aboriginal Australians in the mainstream media, and the profound impact of this on public attitudes concerning Aboriginal Australians. See *Royal Commission into Aboriginal Deaths in Custody* (National Report, Volume 5, 1991) 208

<sup>70</sup> See, eg. *Cornes v The Ten Group Pty Ltd* [2012] SASFC 99.

applies specifically to the publication or distribution of the work, and not to its creation.<sup>71</sup> Therefore, it does not require an assessment of whether the work itself is reasonable, or consideration of the value (or otherwise) of artistic freedom. The question, rather, is whether it was reasonable to publish the work in the manner and circumstances that it was. When a cartoon is published in a newspaper, it is the *publisher* – not the *artist* – who must have acted reasonably.<sup>72</sup>

In *Lange*,<sup>73</sup> the High Court regarded the size of the audience as an extremely relevant factor in determining the standard of care required of a respondent media organisation. The Court noted that, ‘the damage that can be done when there are thousands of recipients of a communication is obviously so much greater than when there are only a few recipients.’ Although this was a defamation decision, the same principle applies to racial vilification laws. Therefore, when a cartoon is published to a large audience,<sup>74</sup> it potentially causes great harm to its targets. It follows that those publishing to large audiences must exercise great caution to minimise the harm of publishing racially derogatory works.

Finally, in relation to the likely harm caused, there is a significant difference between lampooning a public figure, such as a Member of Parliament, and vilifying members of a vulnerable minority racial group. First, it can be assumed that public figures have the resources to publicly respond to criticism, and that members of minority groups often do not. Further, members of such groups are more likely to be stigmatised and excluded by such conduct.<sup>75</sup> The public dissemination of negative racial stereotypes lowers the standing of members of targeted groups in the community, and it lowers their dignity.<sup>76</sup> In addition, the High Court indicated in *Lange* that there is no benefit to the public in inaccurate information on political topics.<sup>77</sup> Indeed, whereas the *Lange* defence seeks to enable the public to make informed political decisions, the dissemination of inaccurate racial stereotypes directly undermines this goal.

## Conclusion

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<sup>71</sup> McCutcheon (n 48) 85. As mentioned above, s 18C applies only to conduct that is done ‘otherwise than in private’. It does not apply to the often private act of creating the work.

<sup>72</sup> Therefore, the question is whether or not *The Australian* breached s 18C, not whether Bill Leak did.

<sup>73</sup> (1997) 189 CLR 520.

<sup>74</sup> The cartoon in *Bropho* was published in a widely circulated newspaper.

<sup>75</sup> The High Court of New Zealand has noted that ‘cartoon representations of Jews, often as physically deformed Shylock-like characters consistently acting against the good of the German people, formed part of the propaganda employed by the Third Reich and with inevitable consequences in terms of shaping public opinion against that particular racial group’: *Wall* (n 54) [87].

<sup>76</sup> Waldron (n 16) ch 3.

<sup>77</sup> In *Bropho*, French J considered an argument that, to be done reasonably, cartoons which comment on political issues may require a higher degree of accuracy than artistic works that involve no such commentary: *Bropho*, (2004) 204 ALR 761 [104]-[105]. McCutcheon also distinguishes between artistic works per se and such works that involve political commentary: McCutcheon (n 48) 76, 83.

This article has argued that defamation law can assist courts in determining whether racially derogatory cartoons are published 'reasonably' under s 18D of the RDA. Section 18D provides a broad exemption in relation to artistic works, which includes cartoons concerning race. However, s 18D depends on the conduct being done 'reasonably', and this is identical to the requirement of reasonableness under the *Lange* defence.

The *Lange* decision concerns communications relating to politics and government. As the quote by Gleeson CJ shows, cartoons concerning race are often presented and understood as forms of political commentary. In defamation law, communications to a large audience concerning political matters are immune from liability only if the respondent has acted 'reasonably', by ensuring the accuracy of any information presented. This article has argued that these principles should also apply to the artistic exemption in s 18D. This is because accurate information is less likely to cause harm to target groups (and therefore to be proportionate). Also, significant social harm can be caused by the dissemination of crude and inaccurate racial stereotypes.

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