ADELAIDE INSTITUTE

PO Box 3300
Adelaide 5067
Australia
Mob: 61+401692057
Email: info@adelaideinstitute.org
Web: http://www.adelaideinstitute.org

Online
ISSN 1440-9828

June 2011 No 571

Let's reflect some more on the use and abuse of Australia's Racial Discrimination Act – RDA, and discrimination action success in favour of Australia's Jews and not in favour of Australia's Aboriginals. Why the former and not the latter?
Is it: 'FOR FEAR OF THE JEWS?'

Bolt case reflects hollow commitment to free speech

Janet Albrechtsen: *The Australian* December 09, 2010 12:00AM - janeta@bigpond.net.au

THE courtroom is no place to shut down even the most offensive opinions.

"SORRY, Janet. To better defend my right to free speech, I should stay silent."

So said Herald Sun columnist Andrew Bolt recently when I asked him about the Federal Court action brought against him by Aborigines claiming that he "offended, insulted and humiliated" them in breach of the federal Racial Discrimination Act.

The case is due back in court on Monday and Bolt has been advised that the best way to defend his right to free speech is to not speak about the matter.

Welcome to the West's wacky commitment to free speech.

It gets worse. Many who have penned a defence of Bolt's right to express his opinion have offered up a sniggering, begrudging defence littered with a great deal more insult and offence than anything Bolt wrote in the columns now the subject of litigation.

And it gets still worse. A single judge will be asked to form an opinion as to whether Bolt, an opinion columnist, is entitled to express his opinion.

Bolt and his employer, Herald and Weekly Times Ltd, are not being sued for defamation. Neither is the allegation that they used words to incite violence. Quite rightly, the law will censor speech in such circumstances. No, Bolt simply expressed an opinion that there is a fashion for some light-skinned people to self-identify as Aboriginal which is divisive and has the unfortunate aim of entrenching racial differences.

In two columns written last year, Bolt says a number of people, often more European than indigenous, have been able to advance their careers by applying for positions, prizes and scholarships by self-identifying as Aboriginal. He says it is "sad that we harp on about differences and rights based on such trivial inflections of race". For expressing these opinions, Bolt must now front up to court.

Never mind that Bolt acknowledged that these people may have identified as Aboriginal for "the most heartfelt and honest of reasons". Never mind that Bolt expressly says he is not accusing them of opportunism. His aim is that we move "beyond black and white to find what unites us and not to invent such racist and trivial excuses to divide".

Yet the claimants are demanding an apology, a retraction "and any other redress as is deemed appropriate". Welcome, once again, to the wacky world of free speech in the West, where the law hinders open debate about the implications of people who choose to self-identify as Aboriginal.

Of course, if the law allows such claims to be made, no criticism can be made of those who exercise their legal right to sue. However, the law is, in this respect, undoubtedly an ass.

The inconsistent way such a law can be used only compounds its hypocrisies. For example, in a 2002 article in Good Weekend Magazine discussing the vexed issue of establishing Aboriginality, Larissa Behrendt, a well-known indigenous legal academic, said: "If that [issue] isn't resolved, you run the risk of having the parameters stretched to the ludicrous point where someone can say: 'Seven generations ago there was an Aboriginal person in my family, therefore I am Aboriginal.' "

We are entering dangerous territory if the case against Bolt succeeds. Too often, claims made under the plethora of human rights acts can appear to have the result - intentional or not - of shutting down particular views and, even more troubling, particular people who challenge the politically polite views of progressives.

Bolt, a white conservative man loathed by the Left, is sued. Behrendt, an indigenous progressive woman, is not. Instead, Behrendt is listed in the Australian Human Rights Commission complaint form as one of those likely to be "offended, insulted and humiliated" by Bolt's comments.

While the complainants in the Federal Court are no doubt well intentioned, and are perfectly entitled to exercise whatever rights the law gives them, ill-drafted statutes can hijack free speech in pursuit of special interest political agendas. Vaguely drafted provisions proscribing speech that is "offensive" "insulting" or "humiliating" scream out to be pressed into the service of stifling debate.

In Canada, Mark Steyn, another white conservative writer, was hauled in front of a human rights commission to defend his views about multiculturalism and the growing conflict between Islam and the West. In Germany on Friday, the politically moderate German Chancellor Angela Merkel made similar remarks. She said that multiculturalism had "failed, utterly failed" in Germany. It was time for people to integrate, she said. Will she be sued for offending those who haven't integrated?

Let's hope not. The courtroom is no place to determine even the most contentious political debates or to shut down even the most offensive opinions. The prosecution of Geert Wilders, the Dutch politician now facing a retrial ordered in October for inciting hate and discrimination against Muslims for criticising Islam, is political, not legal. There are no useful legal tests about hurt feelings or inciting hate. As Oliver Kamm wrote about Wilders, "the state has no business concerning itself with how its citizens feel".

It's unfortunate that this needs to be said again and again. Freedom of expression is meaningless if it does not include a right to be offensive. The real gem at the core of Western progress is the free market of ideas where better ideas triumph by exposing, challenging and contradicting the dud ones. Many views that were once regarded as too offensive to air have been vindicated. Hence Merkel's new-found courage to talk about integration, not multiculturalism.

Even if Bolt wins in court, we lose. Misguided racial discrimination and vilification laws can kill free speech slowly by threatening censorship. Create a bureaucracy and watch its empire blossom. Even some who supported the creation of human rights commissions are having second thoughts. A robust democracy is fuelled by debates that often offend some people. We sharpen our minds and bring clarity to ideas through open, reasoned discussion. By setting up empire-building bureaucracies to shut down offensive views proscribed by ambiguous laws and determined by a handful of judges, we import the standards of censorship found in countries across the Middle East.

That's why the case against Bolt is wrong. Before you say "She would defend him, wouldn't she?", remember that she also defended Phillip Adams when he was the subject of a racial vilification complaint. Adam's view after September 11 that the US was its own worst enemy was offensive. But the notion that he could be hauled before some bureaucracy to censor him is far more offensive to our liberty.

Sadly, some progressives have tried to bask in the sunlight of the high moral ground that comes from defending free speech while aiming a series of insulting slurs at Bolt. When you spend so much time dumping on Bolt, rather than arguing a straightforward defence of free speech, your commitment looks phony.

Free speech is not a Left v Right thing, as Steyn said. It's a free v unfree thing. The case against Bolt shows we are all unfree.

http://www.theaustralian.com.au/news/opinion/bolt-case-reflects-hollow-commitment-to-free-speech/story-e6frg6zo-1225967870360

***

From: Fredrick Toben toben@toben.biz
Sent: Tuesday, 29 March 2011 4:31 PM
To: janeta@bigpond.net.au
Subject: Andrew Bolt offended by lawyer who linked Nazi race laws to his column

Janet – In anticipation of what is to be aired in court in 2011 you write the column a year after I was released on 12 November 2009 from my three-month contempt-of-court prison stint. Before that you attended the day conference on 'free speech' in Sydney where I was also present.

Now why don't you break out of your cloistered mindset and tell the truth, Janet! Why don't you mention my case, Janet?

Don't suffer from a failure of moral and intellectual nerve, Janet! Surely you do not embrace the principle of 'Guilt by association' – or?

Have the moral and intellectual courage to make that link because years ago I informed Andrew Bolt and other journalists, et al, he would be next in court when in 1996 Jeremy Jones began proceedings against me in the Federal Court of Australia.

Cheers, Fredrick Töben, Adelaide.

Andrew Bolt 'offended' by Nazi link

HIGH-profile columnist Andrew Bolt angrily denied comparisons between his articles and Nazi Germany when he gave evidence in a racial vilification case against him. ***AAP*** **March 29, 2011 2:54PM**

The controversial News Ltd journalist had listened yesterday as Ron Merkel, QC, counsel for nine Aborigines bringing a class action against him, said Bolt's articles on racial identity had echoed the Nuremberg race laws of 1935.

After being warned by Federal Court Justice Mordecai Bromberg not to use his testimony as a public forum, Bolt vented his anger before his cross-examination today.

He said any statements linking him to the Nuremberg race laws and the Holocaust "were false and grossly offensive". "Mr Merkel crossed the line," Bolt said.

An earlier witness, Professor Larissa Behrendt, said Bolt had used a photograph of her in an article picturing her with dyed blonde hair and commenting on her German heritage.

But Professor Behrendt, 43, said that while her grandfather was born in England, she had no knowledge of German ancestors. She described herself as an Aborigine and said her father was an Aborigine and her mother was a white Australian. She told the court that she knew of a three-point test to decide if someone was Aboriginal in order to claim benefits.

It covered a person's Aboriginal descent, their acceptance among the Aboriginal community and their own self-identification of being an Aborigine.

She admitted that it would be ludicrous to say you were Aboriginal if you had to go back seven generations to find black heritage.

Nine people have taken a class action against Bolt under the Racial Discrimination Act, claiming Bolt implied in articles and blogs that that they were "professional Aborigines" who identified with the thinnest strand of their racial make-up to gain financial and other benefits to the detriment of other Aborigines.

Bolt denies he is a racist and says his articles were a comment on people who chose to be Aboriginal.

The case is continuing.

http://www.theaustralian.com.au/business/media/bolt-offended-by-nazi-link/story-e6frg9961226030129920

***

Aboriginal identity goes beyond skin colour

Dylan Bird, April 6, 2011

The charges laid against News Ltd columnist Andrew Bolt in his racial discrimination trial point to an enduring cultural legacy in Australia.

The issue of Aboriginal identity has a long and troubled political past in this country. Segregation and control, assimilation and forced removal policies were driven by assumptions about the possibility of "breeding out" the Aboriginal race. At the heart of such sentiment lies a vision of Aboriginal identity that relies primarily on skin colour, or "racial (im)purity", rather than familial and cultural ties and acceptance by members of an Aboriginal community.

The most outrageous element of Bolt's article is his subscription to these decidedly colonial views of Aboriginal identity. Essentially, he argues that a host of "light-skinned Aborigines", including Yorta Yorta brothers and academics Graham and Wayne Atkinson, Professor Larissa Behrendt and artist Bindi Cole, are driven to identify as Aboriginal for political purposes, rather than because of any "racial reality".

Viewed in light of the updated legal definition of Aboriginality, which has gradually shifted from biological determinism to emphasise social, community and cultural aspects, Bolt's writing appears to be overtly anachronistic. There is a danger, however, in assuming that his prejudiced understanding of Aboriginal identity is somehow an isolated phenomenon.

At the root of Bolt's argument is an idea that the state, genetics, or indeed himself, are better judges of deciding who is an "authentic" Aborigine than are Aboriginal people themselves. This sentiment is echoed in a number of instances involving formal recognition, perhaps nowhere more poetically illustrated than in the failed Yorta Yorta land rights case. In 1998, after four years of lengthy court proceedings, Justice Olney declared that the "tide of history" had washed away any ongoing connection with the land in question, thereby foreclosing any possibility of native title existing for the claimants. There are two main implications of this view: that "authentic" Aboriginal people once existed, but have now effectively assimilated to Western ways of seeing and knowing the world; and that the state has the final word on who might be deemed an "authentic" Aborigine.

The Yorta Yorta case highlights the limits of the formal recognition of difference within postcolonial societies. According to US anthropologist Elizabeth Povinelli, writing in her book The Cunning of Recognition, the pervasive multicultural agenda has created a situation whereby indigenous people are required to identify with "an impossible object of authentic self-identity" – that is, the "ideal", authentic Aborigine that exists in the social imagery. According to this view, and following the ruling of Justice Olney, such a vision of Aboriginality is a relic of the past, a vision of a indigenous culture in tune with nature and untouched by the colonial enterprise.

Povinelli's insights should serve as a caution for all who would seek to cut Bolt down too quickly. In making generalised affirmations about Aboriginal autonomy and cultural legitimacy – a long-term hallmark of the left, particularly throughout the self-determination era – there is a danger of falling into age-old stereotypes that do nothing for the everyday political struggles in which Aboriginal people are involved.

The impetus should be to pave a space for the broader society to accept the dynamic and varied nature of Aboriginal identity, as asserted and lived by a vast range of indigenous people. Ironically, it is the author Kim Scott – one of the "light-skinned Aborigines" Bolt mentions in his article – who, in his award-winning novel Benang, provides a poignant account of such a struggle to find one's unique Aboriginal identity. In the face of incessant attempts to make him the "first white man born", through a process of generational cleansing, the protagonist, Harley, undergoes a journey of self-discovery, encountering what it means to be

both white and Aboriginal in post-colonial Australian society.

Such stories can convey, in a unique fashion, the conflation of the personal and political struggles that are fought in the everyday, as distinct from the predominantly rights-based debates that dominate Aboriginal-related issues.

Should Bolt be found guilty, it may well be that a precedent is set for acknowledging a more fluid and dynamic conception of Aboriginality than that which is currently propagated by the mainstream media and other dominant institutions. At the very least, it would demand a higher standard of reportage from journalists, ensuring basic respect is upheld in their forays into the political issues of the day. To that end, the columnist's conviction would be a small price to pay.

Dylan Bird holds a chair on Council at the Institute of Postcolonial Studies.

***

Andrew Bolt offended by lawyer who linked Nazi race laws to his column

Norrie Ross *Herald Sun* March 29, 2011 2:13PM

Herald Sun columnist Andrew Bolt leaves the Federal Court in Melbourne. *Source:* AAP

HERALD Sun columnist Andrew Bolt told a court today he was grossly offended that a lawyer linked Nazi race laws and the holocaust to views he expressed in articles on Aboriginal identity.

Bolt said he took great care when researching material he used in the articles, which are now the basis of a racial vilification class action claim by nine individuals.

Opening the case for the nine in the Federal Court yesterday Ron Merkel QC referred to the Nuremburg race laws of 1935 and to eugenics, a supremacist movement which advocated selective breeding to reach racial purity.

"The holocaust started with words and ended in violence,'' Mr Merkel said.

Neil Young QC, for Bolt, asked the columnist what he thought of being linked to Nazis and to eugenics which stated biological descent determines a person's capacities.

"Not only is it false, it is grossly offensive,'' Bolt said.

"I have been a vigorous critic of eugenics in my columns and all my life.''

Mr Young told the court the case was about free speech and the protection to write material that might offend some people.

"This case is not about the holocaust. It is not about Hitler's race laws and it has nothing to do with eugenics,'' Mr Young said.

Nine individuals have taken a class action against Bolt under the Racial Discrimination Act.

They claim Bolt implied in articles and blogs that that they were "professional Aborigines'' who self-identified with the thinnest strand of their racial make-up to gain financial and other benefits to the detriment of other Aborigines.

Bolt's defence is that he is not a racist and his articles were a comment on people who chose to be Aboriginal, an undesirable social trend that emphasised racial differences rather than a common humanity.

The nine taking the action are activist Pat Eatock, former ATSIC member Geoff Clark, artist Bindi Cole, academic Larissa Behrendt, author Anita Heiss, health worker Leeanne Enoch, native title expert Graham Atkinson, academic Wayne Atkinson and lawyer Mark McMillan.

The articles complained of appeared under the headlines "It's so hip to be black'' in the Herald Sun on April 15, 2009 and "White fellas in the black'' on August 21, 2009. The nine have also complained about the contents of two online blogs based on the columns.

Ms Behrendt said she was stunned that Bolt referred to her as a "a professional Aborigine ", referred to her as "mein liebchen", highlighted an unknown German background and that a photo was used with the column where she had dyed blond hair.

She told Mr Young she speculated that because of her surname she may have a German connection with her family she had never regarded herself as being anything but Aboriginal. She agreed with Mr Young there was debate within the Aboriginal community about the test that should be applied before someone could call themselves an Aborigine.

Ms Behrendt also agreed that the census showed an increasing number of people, particularly in cities, identified themselves as being Aboriginal.

But she said the standard three-point test of descent, acceptance by community and self identification, was a fairly effective way of deciding the issue.

The hearing before Justice Mordy Bromberg is continuing.

http://www.theaustralian.com.au/news/nation/andrew-bolt-articles-akin-to-eugenics-court-hears/story-e6frg6nf-1226029661666

QUADRANT online

CHRONICLE

Keith Windschuttle

May, 2011

If you only get your news from the Fairfax press, you would have missed the most damaging scandal yet to have rocked Aboriginal affairs. The story was front-page treatment on News Limited newspapers, especially the *Australian*, when it broke on April 14, and for the following five days. Several television and online forums canvassed its consequences. But Fairfax editors regarded it as such a threat to their worldview they imposed a nationwide ban on the story. Not a word about it appeared on the pages of the *Sydney Morning Herald*, the *Age*, the *Australian Financial Review* or the *Sun-Herald*.

The incident began after the chair of the Northern Territory's Indigenous Affairs Advisory Council, Bess Nungarrayi Price, appearing on the ABC's *Q&A* television program, spoke favourably about the Howard government's 2007 intervention into Territory communities. "I've seen progress. I've seen women who now have voices," Price said. "Children are being fed, and young people more or less know how to manage their lives."

In response, Aboriginal academic Larissa Behrendt, sent a Twitter message to ABC radio presenter Rhianna Patrick, saying: "I watched a show where a guy had sex with a horse and I'm sure it was less offensive than Bess Price." (She later said she'd seen the sex-with-a-horse incident on an episode of *Deadwood* on ABC2.)

Behrendt's message exposed deep-seated differences within Aboriginal politics. In an op-ed piece in the *Australian*, academic Marcia Langton, who, like Price, grew up and lived a good part of her adult life in the outback, described Behrendt's message as:

an exemplar of the wide cultural, moral and increasingly political rift between urban, left-wing, activist Aboriginal women and the bush women who witness the horrors of life in their communities, much of which is arrogantly denied by the former … Behrendt and the other anti-intervention campaign maestros have assumed the role of superior thinkers whose grand education and positions in the metropolis qualify them to heap contempt on the natives of that faraway place where other Australians rarely tread foot and about which they sustain a romantic out-of-date mythological view.

Bess Price came to Sydney in late March with her husband Dave for speaking engagements with the Centre for Independent Studies and the Catholic organisation Catalyst for Renewal. On March 24 she was welcomed with applause at a *Quadrant* dinner to launch Gary Johns's book *Aboriginal Self-Determination: The Whiteman's Dream*, for which she wrote the Foreword. The ABC then invited her to appear on the *Q&A* panel on Monday April 11. On Wednesday, while Johns was writing an opinion piece on his book for the *Australian*, Dave Price alerted him to the Behrendt message. By Thursday morning, the story was all over the front page and Bess Price and her antagonist were national talking points.

The timing of this incident was revealing. For the previous two weeks, Behrendt had been in the news on a daily basis as one of the plaintiffs in the Federal Court case alleging racial vilification against *Herald Sun* journalist Andrew Bolt. After her counsel Ron Merkel's opening address, in which, outrageously, he accused Bolt of using the kind of racist language that produced the Holocaust (see Michael Connor's full report in this edition), Behrendt's moral ire and hubris came out on Twitter. She obviously thought she could get away with anything.

The Friday before, her current sexual partner, Michael Lavarch, had been boasting about their affair in the press: "Qantas loves us, absolutely loves us," Lavarch told the *Australian*. "Two out of four weekends I am in Sydney and then one out of four she is in Brisbane." What made this news was that Lavarch had been the Attorney-General in the Keating government that passed the Racial Hatred Act under which Behrendt was now prosecuting Bolt. Connections of this kind between parliamentarians and interest group identities became familiar tabloid fare in New South Wales under its late Labor government. Those old enough to remember the Whitlam government know such behaviour has been standard practice among federal Labor politicians for a very long time.

Until now, Behrendt's career has had a dream run. Her Aboriginality and what journalists obligingly call her "deep sense of justice" have given her privileges and kudos few other Australians could hope for. She is the current Australian of the Year for New South Wales and was Indigenous Person of the Year in 2009, the same year she won the Victorian Premier's Literary Award for her second novel, *Legacy*. She is a director of the Museum of Contemporary Art, chair of the Bangarra Dance Theatre, and serves on several government boards. Last month the Gillard government appointed her to head a review into indigenous higher education.

Never a brilliant student, as she herself admits, she nonetheless gained a coveted undergraduate place in the law school at the University of New South Wales. After graduating in 1992, she applied for and won a scholarship to Harvard University where she completed a masters degree and doctorate on Aboriginal policy. Returning to Australia aged just twenty-nine, she was made Professor of Law at the University of Technology Sydney and director of the Jumbunna Learning Centre for indigenous students.

Larissa Behrendt was born in 1969 and grew up mainly in the middle-class Sydney suburb of Gymea on Port Hacking in the Sutherland Shire where she went to Kirrawee High School. Neither she nor her parents

came from an Aboriginal community. Her part-Aboriginal father Paul was an air traffic controller and later an academic; her white mother Raema was an accountant.

In Sydney, girls from "the shire"—like the "valley girls" of Los Angeles—are notoriously obsessed with fashions, parties and boys, in that order. A shire girl from the shores of Port Hacking is about as culturally distant as it is possible to be from the sorry females in the blacks' camps of Alice Springs. A girl from *Clueless*would not be a credible character in *Samson and Delilah*.

Nonetheless, the Behrendts made their careers out of claiming to be victims of racist government policies. Both Larissa and her father Paul have long played up the claim that his mother, Lavinia Boney, was a member of the Stolen Generations. The archival evidence, however, reveals this is quite untrue.

According to Lavinia Boney's file in the New South Wales Aborigines Protection Board records, in 1917 when she was aged about thirteen and living at the blacks' camp at Dungalea Station, near Walgett, her mother died. Her father's whereabouts were unknown, so she was effectively an orphan. The Aborigines Protection Board found her a job as domestic servant on a pastoral station at Collarenabri. Her file says this was at "the girl's own request to get away from camp life". From 1921 to 1923 Lavinia was employed in domestic service in hospitals and private homes in Sydney and Parkes. She met the German editor Henry Behrendt at Parkes Hospital. They married and went to live at Lithgow. Lavinia eventually had nine children by him before she died in childbirth. In 1944 Henry placed five-year-old Paul and his surviving siblings in the Presbyterian Church's Burnside Homes at Parramatta.

Aged fifteen, Paul left Burnside and joined the Royal Australian Navy. He trained to become an air traffic controller, a profession he later followed in civilian aviation at Cooma and Norfolk Island before settling in Sydney. While convalescing from a heart attack in 1980, he decided to pursue his Aboriginal mother's history. His subsequently became known for his research abilities and his activism in Aboriginal politics. In 1988 the University of New South Wales appointed him inaugural director of its Aboriginal Research and Resource Centre. He was also the first chairman of the Aboriginal Studies Association.

In the 1980s, when I was employed at the University of New South Wales, my path crossed briefly with Paul Behrendt. Even in middle age he was a good-looking man and it was not surprising many women were attracted to him. Unless you knew, you would not have guessed he was of Aboriginal descent.

In the spectrum of Aboriginal politics, Paul was an ultra-leftist. In 1992, he argued that British colonisation of Australia was illegitimate and that Aborigines still held sovereignty over the continent. He was a joint author with Gerhard Fischer, Michael Mansell and others of the book *The Mudrooroo Muller Project* in which he demanded Aborigines be given a separate country, self-governing and with its own laws. Mansell used the book to make similar claims on behalf of the Aboriginal Provisional Government. At this time, Larissa Behrendt was also a member of the Aboriginal Provisional Government. In 1987 and 1988, Mansell had gone to Libya seeking funding for his organisation from the Libyan dictator Muamma al-Gaddafi. He also sought to join Gaddafi's Mathaba worldwide group of insurgents and terrorists.

About this time, after years of philandering, Paul deserted his family. He lived in a hippie commune before moving in with Bobbi Sykes, the black activist made famous in the 1970s at the Aboriginal Tent Embassy at Parliament House, Canberra. She was also a supporter of the Black Panthers movement. Sykes subsequently won herself a scholarship to Harvard University where she was described as its first Aboriginal graduate. However, her Aboriginal identity was later declared fraudulent by another Aboriginal activist, Pat O'Shane, the New South Wales magistrate, also from Sykes's birthplace, Townsville. Bobbi's father was not an Aborigine but a black American soldier stationed in North Queensland during the Second World War.

Sykes nonetheless became important in Larissa Behrendt's life by showing her how she could also get to Harvard. Sykes advised her on what to say. "She literally put the forms in front of me," Larissa told a *Sydney Morning Herald* journalist in 2010. Larissa admitted she was not the best qualified candidate. In her undergraduate degree, "I hadn't got particularly high marks." Yet she was preferred ahead of a university medallist, and the decision generated a complaint. In an age of affirmative action in higher education, however, she fitted the required profile. "I think Harvard saw a gap in their intake," she explained.

After one failed marriage to an American artist, Larissa today lives in a high-rise apartment in the Sydney CBD. She turned forty in 2009, and has no children. She enjoys a life not uncommon among highly-paid urban professionals. For one of her many newspaper and magazine profiles, she took a journalist to an upmarket Italian restaurant in the city, where she was on cheek-kissing terms with the waiters. As she walked in they cried out with delight: "Larissa!"

In the Aboriginal political community, however, she is likely to be seen as less delightful from now on. Many of those who have deferred to her qualifications and ability to influence careers will now regard her as a liability. Indeed, her obvious distaste for Aborigines with different political views may well generate a revival of the sentiments I recorded in *Quadrant* in December last year when discussing the author Sally Morgan's claim to Aboriginal identity. The activist Jackie Huggins had said that, even though people may have some Aboriginal ancestors, they could not be genuine Aborigines if they had been brought up in white suburbs without any engagement with an Aboriginal community.

For saying much the same thing, it should be remembered, Andrew Bolt went on trial last month under the Racial Vilification Act. Hence, whatever the outcome of the Bolt trial, Larissa Behrendt's Twitter outburst has ensured there will be more people in the future prepared to make the same point about the members of the Aboriginal political class who are enjoying a life as privileged as hers.

http://www.quadrant.org.au/magazine/issue/2011/5/keith-windschuttle

LAW

Andrew Bolt on Trial

Michael Connor

In an ABC interview in 2006, retiring Federal Court judge Ron Merkel, QC, said, "I found cases that would come before me where the actual outcome was something no one ever intended." *Eatock v Bolt* may come to illustrate his point. Everyone agrees that it is a very important case and already, at the time of writing and despite the matter being *sub judice*, there has been widespread commentary published about it. But, in a case which the prosecution argued was about Aboriginal identity while the defence maintained it was about free speech, just why it is important may not become clear until the judge's decision is handed down. Some of the plaintiffs have not held back from giving their points of view to the media and it seems everyone has commented except Andrew Bolt, who has been gagged by his legal advisers. Even Michael Lavarch wrote an article in the*Weekend Australian* defending the legislation the case rests on, the Racial Discrimination Act, which he had introduced as Attorney-General in the Keating government in 1995. Interestingly, his comments referred only to free speech.

The case against Andrew Bolt started its journey towards a trial in September 2010. It was based on two of Bolt's opinion articles published in the *Herald Sun* in April and August 2009. The essays, reprinted on his blog, dealt with a number of prominent light-skinned Aborigines whose choosing of Aboriginality, Bolt said, was self-serving and divisive. In his April article he wrote: "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?" And in August: "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." The complainants have asked that these articles be removed from the internet, not republished by the *Herald Sun*, and that the newspaper be banned from publishing any material with "substantially similar content".

The law firm Holding Redlich accepted the case *pro bono* and in September 2010 lawyer Joel Zyngier gave a newspaper interview in which he was quite clear on its aims:

> *We see this as a really important case. We see it as clarifying the issue of identity—who gets to say who is and who is not Aboriginal. Essentially, the articles by Bolt have challenged people's identity. He's basically arguing that the people he identified are white people pretending they're black so they can access public benefits … We're not seeking to make this a case about freedom of speech, because it's not. The issue is essentially about whether or not other people can define identity, and in particular Aboriginal identity, based on how you look.*

Set down for a four-day trial in December 2010, to be heard by Justice Finkelstein, the matter was held over until March 2011 and a new judge appointed—Justice Mordecai "Mordy" Bromberg. What became an eight-day trial began in Courtroom 1 of the Federal Court in Melbourne on Monday March 28. The action against Andrew Bolt and the Herald and Weekly Times for supposed offences against Articles 18C and 18D of the Racial Discrimination Act was brought by Pat Eatock, one of the women mentioned in the articles, and by the time it began eight other prominent Aborigines had become associated with the class action: Geoff Clark, Bindi Cole, Larissa Behrendt, Anita Heiss, Leeanne Enoch, Graham Atkinson, Wayne Atkinson and Mark McMillan.

In the 2006 radio interview which discussed his desire to pursue "strategic litigation", Ron Merkel said that he was interested in "picking up public interest cases or cases in indigenous Australia" that would help to move Australian law along the progressive lines he admired in other countries. Merkel, who was engaged to head the prosecution, may have seemed a wise choice for arguing the case Zyngier envisaged. He was the judge in a 1997–98 trial which dealt with the Tasmanian Aboriginal Centre's challenge to the eligibility of eleven ATSIC voters. That the hearing lasted two years, cost $1.2 million, and assembled 1000 pages of affidavits may also have operated in his favour.

The morning the case began in Courtroom 1 the junior lawyers for the prosecution and the defence wheeled in trolleys of white ring binders of papers which they began placing on two tables at the front of the court. Then they worried whether they were at the right tables and rearranged themselves. An elderly lawyer entered and looked disapprovingly at the new seating arrangements. It was a good look for a prosecutor. This was Herman Borenstein, SC, a barrister with an interest in human rights and experienced in industrial and discrimination cases. He had been chosen to lend his support to Merkel. When Andrew Bolt came into the courtroom he received a cold stare from his adversary. Bolt and the Herald and Weekly Times were represented by Neil Young, QC, a barrister with wide experience in commercial law who for two years had been a Federal Court judge. He was assisted by Dr Matthew Collins, who has published on defamation and the internet. Judge Bromberg had been a St Kilda football player and had previously stood, unsuccessfully, for pre-selection as an ALP candidate.

From the start, and until the end, the prosecution and the defence appeared to be taking part in different dramas. The prosecutors wanted to argue about Aboriginality, and not freedom of speech; the defence wanted to argue freedom of speech, and not Aboriginality. In the defence case the individual's claims to be Aboriginal were not disputed. At one point, after Neil Young had again insisted the case was not about Aboriginality the judge asked, "Is this not a debate about who is an Aboriginal?" Young reiterated that it was about the "consequences" of so identifying. Someone had picked up the wrong script, and it won't be until judgment is given that it is clear who was wrong.

Merkel's opening for the prosecution began with a sweeping view of Australian history which was not disputed by the defence: "So there was this huge eugenic focus on biological descent as somehow an identifier or a signifier of a person's capacities. That movement occurred in Australia, and it led to the removal of Aboriginal children."

After loading Australia with a eugenics past Merkel associated Andrew Bolt with the same disreputable association: "Mr Bolt, in his articles, has taken us back to that eugenic approach to Aboriginality." From eugenics Merkel sought to associate Bolt with the Holocaust: "The Holocaust in the 1940s started with words and finished with violence." The dramatic charges in his opening presentation made newspaper headlines around the country the following morning.

Bolt wrote of Australians of mixed heritage who identified themselves as Aborigines and have been accepted in the community as such. Those he discussed acknowledge their mixed heritage and he spoke of them as "part Aboriginals". Merkel called this usage "an insulting term" and "very insulting". His assertions were not disputed by the defence.

Strangely, it was the prosecution who insisted on noticing a skin colour distinction between other Aborigines and their clients. On day six, after a working weekend, the prosecution introduced a racial formula to describe the class of people they were representing:

> *We've given a lot of thought to this, your Honour, of what would be the broader group based on the material before your Honour, and it's Aboriginal persons of mixed descent who have a fairer rather than darker skin, who identified as Aboriginal persons in accordance with the popular meaning of those words and have done so since their formative years.*

Though they began the trial by insisting their clients were simply Aborigines, and the defence did not dispute this claim, Merkel introduced a racial formula which was repeated throughout the remainder of their closing submissions which insisted on a categorisation of Australians based on skin colour.

Merkel said, "time and again, your Honour will see lies in his articles". The evidence he cited to support this claim concerned Bolt's use of inverted commas. He had placed them around the words "Austrian Aborigines" in this sentence about academic Anita Heiss: "As it happens, her decision to identify as Aboriginal, joining four other 'Austrian Aborigines' she knows, was lucky, given how it's helped her career."

The two words came from an *Age* profile of Heiss by Martin Flanagan, and Bolt put them between inverted commas when he quoted them. Though Merkel placed the inverted commas as a central allegation of the prosecution case he said Bolt would not be cross-examined about them, and he wasn't. They reappeared in the prosecution's closing submission and were dealt with there as a major element of their case. Merkel's criticism of the inverted commas was put in the following way:

> *Mr Bolt, and this is a part of his style, part of his modus operandi in these articles, he lifts those words, puts them in quotation marks in the section dealing with Anita Heiss. The only relevance of the quotation marks that could possibly be is that they are a term attributed to her out of her mouth. Now, that's the sort of—she, in her statement, said, "I have not used those words." And when you look at the article you can see, your Honour, it isn't one of Mr Bolt's most noble gestures to have done what he did, to take those words in quotation marks.*

When Merkel later returned to the quotation marks in his closing summation he didn't describe them as being used for the purposes of lying, as he had previously done: "Why is it in quotation marks? Because he was quoting Martin Flanagan, an*Age* journalist. Your Honour, any reader would attribute those words in quotation marks to her." The final charge seemed to be that what Bolt has done is wrong because it is "derisory" of Heiss, not that it is a lie. It may be the first time in our history that a writer has found himself in court because of his inverted commas.

The term "white Koori", also in one of the Bolt articles, also in inverted commas, also taken from the *Age*, was not mentioned during the trial.

From quotation marks the prosecutor moved on to consider a slip Bolt made when talking about Leeanne Enoch. Merkel accused Bolt of confusing Welcome to Country and acknowledgment of traditional owners ceremonies. The lawyer linked this to anti-Semitism, Holocaust denial, and eugenics. The spelling is that of the official court transcript, the language is Merkel's:

> *Now, as Leanne [Enoch] points out in her witness statement, nothing can be more insulting to an Aboriginal person than saying, you are welcome to someone else's country. She never said anything of the sort. He twists in the public mind, the subtle difference may be not understood but he uses a very ordinary and nothing special type of statement and he makes it welcome to her country as if she's an elder on someone else's country. First of all, she says elders welcome to country, second of all she says that it wasn't her country. But, again, when your Honour sees it, it is part of this scenario to say, look, she's not real, what's going on here. Now, these gratuitous, misleading, selective references which we have picked out and we have itemised them in the further and better particulars by reference to the relevant paragraphs of the witness statements, they are critical to an understanding of this case. In Toben v Jones [the trial of a Holocaust denier for distributing anti-Semitic literature], before Branson J and the Full Court, there was a whole bundle of anti-sematic literature, said to be anti-sematic by the applicants, but its main theme was something along the lines of the Holocaust didn't really happen as the Jewish people think it did, much fewer people were killed, so forth and so on; a bit like the eugenics debate, a properly framed argument about saying the Holocaust and the slaughter of Jews was not as represented, it was a different figure and you can put some figures up.*

From there it was but a short walk to the gas chambers:

> *as I said before in the Toben case, if someone wanted to question the extent to which the Nazis exterminated people in gas camps [sic], that's fine, that's a permissible area of debate and Mr Bolt's view, which he sets out in paragraphs 87 and 88 of his defence, that's a view he is entitled to have. I said that earlier. We have no quarrel with him expressing his view, but that's not what he did in these articles.*

Bolt had used the words "part Aboriginal" and Merkel linked this to "quadroon"—with its overtones of eugenics:

> *If you walk up to an Aboriginal person in Melbourne and call them a quadroon, you are likely to be involved in a pretty quick fight. Call them part-Aboriginal; that is very insulting. So, it doesn't mean you can't use the terms but you have to be a bit sensitive to the response because these are highly offensive concepts and highly offensive terms.*

Bolt was further associated with Nazism when Merkel evoked what he called his "eugenics approach" and said, "It is interesting, your Honour, this kind of thinking led to the Nuremberg race laws in, I think it was, 1935."

The judge asked where the term "white Aborigine" came from and Merkel replied, "I think it's his term." During the trial there was evidence used which suggested it has been around for at least twenty-eight years. It appeared often during the trial and at one point Young described it as "terminology in common usage".

Merkel had difficulty specifying where the defamation and race hatred he was complaining of actually lay. It was a difficulty the prosecution continually encountered and which they attempted to evade with generalities such as this: "The articles have got to be read in their entirety, but hopefully I've given your Honour the kind of flavour we see that flows from these articles, and the offence they're likely to cause, and how gratuitous and untempered they really are." That admission appeared at odds with his conclusion: "I really want to emphasise that this case is not about free speech … The question really is not a challenge to Mr Bolt's, we say, flat Earth thinking, but he can have it, but it is the challenge to what he has actually written."

Continued in Newsletter No 572 -