Jones v Scully - [2002] FCA 1080

FEDERAL COURT OF AUSTRALIA

Jones v Scully [2002] FCA 1080

HUMAN RIGHTS – racial discrimination – racial hatred – publication and distribution of leaflets – proceedings to enforce determination of Human Rights and Equal Opportunity Commission – *de novo* hearing – whether publication and distribution of leaflets was reasonably likely to offend, insult, humiliate or intimidate Jews in Australia – objective test to be applied – relevance of evidence of persons actually being offended, insulted, humiliated or intimidated – relevance of truth or falsity of leaflets – offensive behaviour – whether act done "because of" race, colour or national or ethnic origin – meaning of "ethnic origin" – whether Jews in Australia are a group of people with an "ethnic origin" – whether leaflets were published and distributed reasonably and in good faith – whether leaflets were published and distributed for any genuine purpose in the public interest – whether any leaflets were a "fair and accurate report" – whether any leaflets were "fair comment"

CONSTITUTIONAL LAW – *Racial Discrimination Act 1975* (Cth) Part IIA – whether invalid – freedom of communication concerning political or government matters – whether Racial Discrimination Act effectively burdens freedom of communication about government or political matters – whether reasonably appropriate and adapted to serve a legitimate end – legitimate end sought to be achieved

DEFAMATION – applicable principles in determining whether material conveys pleaded imputations – whether imputations would be conveyed to an ordinary reasonable reader of the leaflets – characteristics of ordinary reasonable reader

EVIDENCE – historical evidence – admissibility as to facts in issue – general principles – evidence in books and videos – discretion to limit use of evidence – *Evidence Act 1995* (Cth) s 136

WORDS AND PHRASES – "because of" – "offend" – "ethnic origin"

Racial Discrimination Act (1975) (Cth) Part IIA, s 18B, 18C, 18C(1)(a), 18C(1)(b), 18D, 18D(a), 18D(b), 18D(c)(i), 18D(c)(ii)
Trade Practices Act 1974 (Cth) s 52
Racial Hatred Bill 1994 (Cth)
Evidence Act 1995 (Cth) s 136
Crimes Act 1914 (Cth)

Universal Declaration of Human Rights Article 19

Jones v Scully (2001) 113 FCR 343 referred to
Harris v Caladine (1990-1991) 172 CLR 84 considered, applied
Australian Communist Party v Commonwealth (1951) 83 CLR 1 applied
Ritz Hotel v Charles of the Ritz (1987) 14 NSWLR 107 considered
Bellevue Crescent v Marland Holdings (1998) 43 NSWLR 364 considered
Hagan v Trustees of the Toowoomba Sports Ground Trust [2000] FCA 1615 applied
Creek v Cairns Post Pty Ltd [2001] FCA 1007 applied

ACCC v Optell Pty Ltd (1998) ATPR 41-640 considered
Patrick v Cobain [1993] 1 VR 290 applied
Worcester v Smith [1951] VLR 316 considered
Ball v McIntyre (1966) 9 FLR 237 considered
King-Ansell v Police [1979] 2 NZLR 531 applied

Mandla v Dowell Lee [1983] 2 AC 548 referred to
Commission for Racial Equality v Dutton [1989] 1 QB 783 referred to
Miller v Wertheim [2002] FCAFC 156 followed
Hagan v Trustees of the Toowoomba Sports Ground Trust (2001) 105 FCR 56 applied

Amalgamated Television Services Pty Ltd v Marsden (1998) 43 NSWLR 158 cited
Versace v Monte [2002] FCA 190 cited
Irving v Penguin Books Ltd [2000] EWHC QB 115 applied
Nationwide News Pty Ltd v Wills (1992) 177 CLR 1 referred to
Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 106 referred to
Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104 referred to
Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 applied
Koowarta v Bjelke-Petersen (1982) 153 CLR 168 considered
Brandy v HREOC (1994-1995) 183 CLR 295 considered
Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh (1994-1995) 183 CLR 273 cited
Oberoi v HREOC [2001] FMCA 34 cited

Watson, Blackmore, Hosking *Criminal Law (NSW)* Vol 2
Fleming *The Law of Torts* 9th Ed. 1998

JEREMY JONES v OLGA SCULLY

N 154 OF 2001

HELY J
2 SEPTEMBER 2002
SYDNEY (HEARD IN LAUNCESTON AND SYDNEY)

IN THE FEDERAL COURT OF AUSTRALIA

N 154 OF 2001

NEW SOUTH WALES DISTRICT REGISTRY

BETWEEN:	**JEREMY JONES** **APPLICANT**
AND:	**OLGA SCULLY** **RESPONDENT**
JUDGE:	**HELY J**
DATE OF ORDER:	**2 SEPTEMBER 2002**
WHERE MADE:	**SYDNEY (HEARD IN LAUNCESTON AND SYDNEY)**

THE COURT ORDERS THAT:

1 It be declared that the respondent has engaged in conduct rendered unlawful by Part IIA of the *Racial Discrimination Act 1975* (Cth) by having distributed the following leaflets in letterboxes in Launceston, Tasmania and by selling or offering to sell such leaflets at a public market in Launceston being the leaflets described as:

(a) "The Inadvertent Confession of a Jew";
(b) "The Jewish Khazar Kingdom";
(c) "Russian Jews Control Pornography";
(d) Untitled document appearing at page 25 of applicant's affidavit;
(e) "The Most Debated Question of Our Time – Was There Really a Holocaust?";
(f) Untitled document appearing at page 30 of applicant's affidavit; and
(g) Untitled document with handwritten annotations appearing at page 35 of applicant's affidavit.

2 The respondent be restrained from repeating or continuing such conduct.

3 The respondent be restrained from distributing, selling or offering to sell any leaflet or other publication which is to the same effect as any of the leaflets referred to in Order 1.

4 The respondent pay the applicant's costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA

N 154 OF 2001

NEW SOUTH WALES DISTRICT REGISTRY

BETWEEN: **JEREMY JONES**
APPLICANT

AND: **OLGA SCULLY**
RESPONDENT

JUDGE: **HELY J**

DATE: **2 SEPTEMBER 2002**

PLACE: **SYDNEY (HEARD IN LAUNCESTON AND SYDNEY)**

REASONS FOR JUDGMENT

1. On 21 September 2000 the Human Rights & Equal Opportunity Commission ("the HREOC") determined that Mrs Olga Scully had engaged in conduct rendered unlawful by Part IIA of the *Racial Discrimination Act (1975)* (Cth) ("the RDA") by "distributing anti-Semitic literature in letter boxes in Launceston, Tasmania, and by selling or offering to sell such literature at a public market

in Launceston". The HREOC made declarations that Mrs Scully should not repeat or continue the unlawful conduct and that she should apologise for her unlawful conduct by writing a letter of apology to the complainants in the terms specified in the decision.

2. By application filed on 21 February 2001 Jeremy Jones instituted proceedings in the Court to enforce that determination. The proceedings were styled:

> *"Jeremy Jones for himself and for the members for the time being of the Committee of Management of the Executive Council of Australian Jewry".*

For reasons which I gave on 13 July 2001 (*Jones v Scully* (2001) 113 FCR 343) I directed that the reference in the title to the proceedings to "Members for the time being of the Committee of Management of the Executive Council of Australian Jewry" should be struck out, leaving Mr Jones as the sole applicant. I held that the proceedings were properly constituted even though Mr Jones is the sole applicant.

3. For the reasons which I there explained, the application falls to be determined in accordance with the provisions of s 25ZC of the RDA notwithstanding the later repeal of that section.

4. Section 25ZC(2) provides that if the Court is satisfied that the respondent has engaged in conduct or committed an act that is unlawful under the RDA, the Court may make such orders (including a declaration of right) as it thinks fit. Section 25ZC(5) provides:

> *"In the proceedings, the question whether the respondent has engaged in conduct or committed an act that is unlawful under this Act is to be dealt with by the Court by way of hearing de novo, but the Court may receive as evidence any of the following:*
> *(a) a copy of the Commission's written reasons for the determination;*
> *(b) a copy of any document that was before the Commission;*
> *(c) a copy of the record (including any tape recording) of the Commission's inquiry into the complaint."*

5. The applicant placed before me, on the hearing of this application:

- the reference dated 23 March 1997 from the Race Discrimination Commissioner to the HREOC for an inquiry under s 24E of the RDA, and accompanying documents.;
- the transcript of the proceedings before Commissioner Cavanough QC on 16 November 1998 in Launceston;
- the exhibits in the proceedings before Commissioner Cavanough including witness statements on behalf of Mr Jones, Dr Goldschmied, Mr Goldsteen and Mr Schlesinger; and
- the decision of Commissioner Cavanough given on 21 September 2000.

All of the persons who supplied a witness statement in the proceedings before the Commissioner were called for cross-examination in the proceedings in this Court.

6. Pursuant to directions which I gave prior to the hearing, the applicant filed a document styled "Particulars of Unlawful Conduct" which sets out the documents allegedly published by the respondent, the publication of which the applicant contends constituted unlawful conduct, stating the imputations on which the applicant relies to support the contention of unlawful conduct. Even though the document does not identify which imputation(s) arises from which leaflet, it nonetheless provides a useful framework for the consideration of the issues which arise in these proceedings, hence it is convenient to set it out in full:

> *"1. The Applicant alleges that after 13 October 1995 the respondent offered for public sale and/or placed or was responsible for placing copies of material, outlined below, in letterboxes in the Launceston area namely the material being:*
>
> *(a) The Inadvertent Confession of a Jew;* [Jones p 10]
>
> *(b) The Jewish Khazar Kingdom;* [Jones p 19-23]
>
> *(c) Russian Jews Control Pornography;* [Jones p 24]
>
> *(d) Most Debated Question of Our Time – Was There Really a Holocaust?;* [Jones p 26-29]
>
> *(e) Untitled list of books synopses on which it is written 'Books on sale at Hart St Markets';* [Jones p 31]
>
> *(f) Untitled excerpt which begins with the words 'The arguments against classroom sex education can best be summarised under three heads ...';* [Jones p 32-33]
>
> *(g) Untitled excerpt on which it is written 'Our Christian – Israelite Laws';* [Jones p 34]
>
> *(h) Untitled excerpt on which it is written in long had 'THE WHITE CHRISTIAN NATIONS ARE THE TRUE SEED OF ISRAEL. 'THE SYNAGOGUE OF SATIN (sic) WHO SAY THEY ARE THE JUDEAN – BUT ARE LYING FRAUDS' ARE TRYING TO FORCE THE WHITE RACE TO MONGRELIZE. For good books come to the Hart Street Market – Sundays, 8.30 a.m. – 200 pm (SHOWGROUND)'.* [Jones p 35]

[my additions]

> *2. The applicant claims that the aforesaid publications impute to persons who are Jewish because of that fact per se attributes being:*
>
> *(a) That they are anti-democracy, anti-freedom, pro-tyranny;*
>
> *(b) That the philosophy and teachings and practice of Jews is based upon a learning (the Talmud) which:*
>
> *(i) ought be stamped out;*
>
> *(ii) promotes sodomy and paedophilia;*
>
> *(iii) is worse than a satanic cult;*
>
> *(c) that contemporary Jewry is due for a terrible judgment because of its racial origin and the law commands all to own guns and to stamp out Judaism and, by implication, contemporary Jewry;*
>
> *(d) that Jews, per se, are anti-decent living in the sense that they, by their nature control pornography both in America and Russia;*
>
> *(e) that Jews, per se, exhibit a moral attitude which is antithetical to Australian values (described as 'anti-Christian');*

(f) that the ethnic group who live as Jews have perpetuated and are perpetuating a 'myth' for their own political purposes, being the Holocaust perpetrated by the leaders of the Nazi Party in Germany, which allegation by the respondent imputes that Jews, per see, are fraudulent, liars, immoral, deceitful and part of a conspiracy to defraud the world (or the remainder of it);

(g) that part of the conspiracy of World Jewry was the Bolshevik Revolution in 1917 and that Jews perpetrated the purges in the Soviet Union thereafter; and

(h) that Jews are seeking to control the world, or already have gained that control, with the intention of destroying 'White Christian Civilisation' and that Jews are 'lying frauds ... trying to force the White race to mongrelize.'

3. That publications of the same kind or in or to the same effect and/or imputing the same attributes continue to be published by the Respondent.

4. That the publication and distribution of the documents referred to above and /or the publication and/or distribution of documents containing the imputation as to attributes referred to above is conduct rendered unlawful by Part IIA of the Racial Discrimination Act 1975 ."

7. During the course of his evidence, Mr Jones said that the documents referred to in subparagraphs 1(f) and (g) of the particulars are not documents in relation to which he now makes a complaint. The additions which I have made to par 1 of the particulars in square brackets are a reference to the page in the affidavit of Mr Jones of 18 April 2001 where the leaflet in question is reproduced. There are two other leaflets which were the subject of the HREOC complaint and which were relied upon by the applicant in these proceedings. They are the untitled leaflets which appear at p 25 and p 30 of Mr Jones' affidavit. Those leaflets were not separately listed in the affidavit apparently because of an erroneous belief that the leaflet at p 25 was part of (c) above, and the leaflet at p 30 was part of (e) above. That is the way they were described in Mr Jones' affidavit. During the course of the proceedings the applicant accepted that the leaflet at p 25 was not connected with the leaflet at p 24, nor was the leaflet at p 30 connected with the leaflet at p 31. Each is a separate document.

8. The particulars omitted the leaflets at pp 11-16 ("A Lesson in Culture") and pp 17-18 ("MFP – What are Japan's Motives?") of the applicant's affidavit from the list of documents on which the applicant relies in these proceedings. Those leaflets were relied upon before the HREOC, but not in this Court.

Part IIA of the RDA

9. Part IIA was introduced into the RDA in consequence of the passage of the *Racial Hatred Bill 1994* (Cth) ("the Racial Hatred Bill"). Part IIA of the RDA commenced operation on 13 October 1995. It is headed "**Prohibition of Offensive Behaviour based on Racial Hatred**". The presently relevant provisions are ss 18B, 18C and 18D, which are as follows:

*" **Reason for doing an act***

18B If:

(a) an act is done for two or more reasons: and

(b) one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act);

then, for the purpose of this Part, the act is taken to be done because of the person's race, colour or national or ethnic origin.

Offensive behaviour because of race, colour or national or ethnic origin

18C (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 a 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.

(2) ...

(3) ...

Exemptions

18D 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."

10. It is not an offence to do an act, or agree with another person to do an act that is unlawful by reason of a provision of Part IIA: s 26.

11. The Racial Hatred Bill also provided for the amendment of the *Crimes Act 1914* (Cth) to create criminal offences in relation to threats made to people because of their race, colour or national or ethnic origin, and in relation to threats made by a person to damage property because of those reasons, and in relation to the intentional incitement of racial hatred. As Kiefel J noted in *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 (at [15]) these proposed offences did not survive the federal legislative process, and were not introduced into the Crimes Act .

The parties

12. The applicant lives in Sydney and is an active member of the Australian Jewish community. He has held various offices with the Executive Council of Australian Jewry ("the ECAJ"), and is currently its president. The ECAJ has served as the elected representative organisation of the Australian Jewish community since its formation in 1944.

13. The respondent was born in Russia in 1942. Her family had suffered under the Soviet regime. Soon after the respondent was born, her family fled to Germany, which was then under Nazi control, and devastated by World War II.

14. The evidence of Mr Sladd, the respondent's brother, is that the journey was a hazardous one, and that the family were dependent upon the goodwill of German soldiers and the German people en route. On arrival in Germany, the family was accommodated in a displaced persons' camp where they remained for about four years.

15. The respondent lives in Launceston. She is a retired school teacher. The respondent has not received any formal education in the Jewish religion, nor has she had any lessons in relation to that religion from a practising Jew.

Distribution of the leaflets

16. The respondent is not the author of the leaflets the subject of these proceedings. It was common ground, however, that she distributed those leaflets. Some of the leaflets bear handwritten annotations made by the respondent which were placed on the leaflets prior to their distribution. The respondent distributed the leaflets by putting them in people's letter boxes in Launceston. The letter boxes were chosen at random. The leaflets were distributed in 1995 and 1996 whilst the respondent was a school teacher, but in her spare time.

17. The respondent received some complaints from people to whom the leaflets were distributed. She received some requests that she not distribute that material again. The respondent's evidence was that "once or twice" she distributed further leaflets to persons who had requested her not to distribute them, but this occurred "by mistake".

18. The respondent conducts a stall at the Hart Street Market in Launceston. Some of the leaflets were available at that stall. The respondent also sold books at this stall. The books on sale at the stall included books about Jews.

The HREOC proceedings

19. Mrs Scully placed written material before the HREOC but, on the day fixed for the hearing of the proceedings she withdrew, giving as her reason for so doing that she had not been given an assurance that "truth is a defence in this case". The Commissioner took the view that as Mrs Scully had withdrawn, none of the witness statements or attachments previously filed by her should become exhibits. Notwithstanding that withdrawal, Mrs Scully was permitted to lodge written submissions with the Commission, which she did.

20. Commissioner Cavanough made the following findings of fact:

- Jews in Australia form a group with a common ethnic origin for the purposes of Part IIA of the RDA (this was not in dispute before the HREOC);
- the respondent placed or was responsible for placing copies of the leaflets in letter boxes in the Launceston area after 13 October 1995 (the date of commencement of Part IIA of RDA) and distributed or sold the leaflets, or some of them, at the Hart Street Market in Launceston;
- the respondent regularly and frequently distributed material of the same general kind as the leaflets between 13 October 1995 and the time of lodgement of the complaint on 7 August 1996, and that she continues to do so;
- the leaflets have a consistent theme being the vilification of Jews as such and the imputations referred to in par 2 of the "Particulars of Unlawful Conduct" referred to above are a fair characterisation of the imputations in the leaflets;
- the material distributed by the respondent had caused a great deal of distress to Jewish and other recipients;
- the respondent's activities are properly described as a campaign of disseminating anti-Jewish propaganda;
- the respondent's contention that she makes a clear distinction between "Talmudic/Zionist/Communist Jews" and "good" Jews is rejected. For the most part, the leaflets make no such distinction. They attack Jews generally;
- in any event, the so-called distinction would not lessen the offensiveness, to Jews particularly, of the imputations conveyed by the leaflets. The message remains that Jews, in particular, are people who by their very nature and culture are, or have been drawn to or involved in, the alleged evils of Communism, Zionism and Talmudism.

21. Having made those findings, the Commissioner said:

> *"... I do not overlook Mrs Scully's claims that her campaign should be seen as an effort by her to defend the honour and reputation of the Russian and German people against alleged misinformation and alleged historical inaccuracy spread by others. However, some of the material in question does not even mention the Russian or German people, and even where it does, the content of the material and its inflammatory tone (of outright hostility towards and vilification of Jews) are such that the material would remain deeply offensive to many Jewish people even if they could also see in it expressions of a genuine belief in the truth of the statements made or expressions of a genuine belief that the Russian or German people had been misrepresented."*

22. The Commissioner made the following specific findings in relation to ss 18C and 18D of the RDA:

- the respondent's distribution of the material represents an act done "otherwise than in private" within the meaning of s 18C(1);
- taking into account the imputations against Jews conveyed by the leaflets, and their inflammatory tone, it is reasonably likely that the respondent's distribution of the

material would, in all the circumstances, offend, insult, humiliate and intimidate Jewish persons who received the material or who became aware of the material, especially those living in or near Launceston, and accordingly s 18C(1)(a) was satisfied;

· that the authors of the documents (including the respondent, to the extent of her annotations and highlighting on the documents) disparaged the persons referred to in the documents because those persons were Jewish. The Jewishness of the persons vilified is not a mere "background factor". It brought about the vilification. By distributing, selling and offering to sell the documents, Mrs Scully became responsible for their contents, and accordingly became a party to the disparaging of particular persons and groups of persons because they are Jews. Accordingly, the respondent's acts were done "because of the … ethnic origin of the person or some or all of the people in the group" within the meaning of s 18C(1)(b);

· that the leaflets do not bear on their face the appearance of reasonableness, good faith or genuineness of purpose. Rather, the leaflets appear to be intended to defame and injure Jews, whether or not they have any other purpose. If they are so intended, reasonableness, good faith and genuineness of purpose would not be found for the purposes of Part IIA of the RDA;

· there is nothing which amounts to "evidence before the Commission" that any part of the respondent's campaign of anti-Jewish propaganda has been carried on "reasonably and in good faith", for genuine purposes and otherwise in such a way that s 18D is or may be applicable: see s 25W of the RDA;

· in any event, the burden of proof under s 18D is on the respondent, and Mrs Scully had not established that her campaign of distributing anti-Jewish propaganda was done "reasonably and in good faith" in, or in the course of, the doing of any of the things listed in s 18D(a), (b) or (c);

· that a racial vilifier could not be heard to say that he or she is acting in good faith for the purposes of s 18D merely because he or she honestly or sincerely believed that persons of the race (or ethnic group) concerned are inferior or evil by nature and that they should be made to suffer for that reason;

· that nothing in the material lodged by the respondent persuaded the Commissioner that the respondent's actions had been carried out "reasonably";

· that none of the leaflets in question was an "artistic work" within the meaning of s 18D(a);

· that none of the respondent's activities were carried out for any "genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest" within the meaning of s 18D(b);

· that leaflets of the kind in question, even if they were "fair and accurate", are not "reports" within the meaning of s 18D(c)(i); and

· it was doubtful that any of the publications represents a "comment" within the meaning of s 18D(c)(ii);

In summary, the Commissioner found that the respondent had breached s 18C of the RDA, and that none of the exemptions in s 18D were made out.

The proceedings in this Court

23. As noted above, s 25ZC(5) provides that the question whether the respondent has engaged in unlawful conduct under the RDA is to be dealt with by way of hearing *de novo*, subject to the

Court's entitlement to receive specified types of documents as evidence. The nature of a hearing *de novo* was described by Dawson J in *Harris v Caladine* (1990-1991) 172 CLR 84, 124 as follows:

> *"An order made by a Registrar is reviewable by way of a hearing* de novo. *That means that the court reviewing the order begins afresh and exercises for itself any discretion exercised below by the Registrar. The parties commence the application again, subject to any restrictions in the rules upon the calling of evidence or provisions relating to the use before the court of evidence called before the Registrar. A hearing* de novo *involves the exercise of the original jurisdiction and 'the informant or complainant starts again and has to make out his case and call his witnesses'".* (citations omitted)

24. It is therefore necessary for me to have regard to the evidence which was adduced before the HREOC, as well as that introduced for the first time in this Court.

Applicant's evidence before the HREOC

25. In a witness statement filed before the HREOC dated 6 May 1998, the applicant gave evidence that he receives "on a regular basis telephone calls, letters and electronic communication from individuals complaining of the anti-Jewish propaganda distributed in Tasmania by the respondent". He said that recipients of such material communicated to him that they found the material "offensive, insulting and distressing". The material was received by both Jewish and non-Jewish people, and was unsolicited.

26. Annexed to his witness statement are copies of leaflets received by individuals in their homes in Launceston, which were passed on to the applicant. Some of these leaflets are the subject of the present proceedings, and are discussed below. The applicant describes the leaflets as "unambiguously anti-Jewish and stridently anti-Semitic" and states they contain "untrue and offensive comments". The applicant also states that the ECAJ has received a number of complaints regarding the receipt of similar material since the date the complaint was lodged by him with the HREOC. He further stated that it is his contention that the material "clearly seeks to insult, offend and create ill will towards individuals because they are Jewish".

27. In oral evidence given before the HREOC, Mr Jones said that the material taken together evidenced a theme of a Jewish conspiracy, and sought to portray Jews as having dishonestly concocted a conspiracy. The applicant said the material "basically identifies any anti-social behaviour with something to do with Jews".

28. Dr Felix Goldschmied also gave evidence for the applicant before the HREOC. Dr Goldschmied is an orthodontist who conducts his practice in Launceston. In a witness statement sworn on 3 May 1998 and filed before the HREOC, Dr Goldschmied said that he had received "unsolicited offensive and anti-Semitic material" in his letterbox. As a survivor of the Holocaust, he said he was "deeply offended and hurt by the continued distribution of such prejudiced anti-Semitic material".

29. Dr Goldschmied also gave oral evidence before the HREOC that some of his staff (who were not Jewish) complained to him about material they had received in their letterboxes. He said that his staff told him that they found the material offensive. Dr Goldschmied referred in particular to a document entitled "The Jewish Khazar Kingdom", which he says he received on 17 February 1998. He said he could not recall the dates he received other documents, but said he received such documents on an "intermittent basis" within the three years leading up to November 1998. Such

material was said to be received by him once every four to six months. In his oral evidence, Dr Goldschmied said that he found the material "offensive and hurtful" and said he perceived an "anti-Semitic, anti-Jewish" sentiment in the material.

30. Mr George Hans Goldsteen also gave evidence for the applicant before the HREOC. In a witness statement sworn on 3 May 1998, Mr Goldsteen stated that he has been a member of the Jewish community in Launceston since 1985, and from 1986-1992 held a variety of elected positions on the Board of Management of the Launceston Hebrew Congregation. He said he first became aware of the activities of the respondent when he received one of her pamphlets in his letterbox. He subsequently started to receive telephone calls from non-Jewish Launceston residents who had also received material from the respondent in their letterboxes. Mr Goldsteen said that these people expressed their disgust about the material, and forwarded the material on to him. He said that the material first arrived in his letterbox during 1991.

31. Mr Goldsteen said that the respondent's material mostly consisted of pamphlets, but that the respondent also "regularly dropped audio tapes" in peoples' letterboxes. He said he also received some video tapes, and managed to obtain some booklets that were purchased from the respondent's stall at the Hart Street market. Mr Goldsteen said that the majority of this material was "grossly anti-Semitic". According to Mr Goldsteen, the respondent's activities are aimed at discrediting the Jewish people and making derogatory generalisations about them. In his oral evidence, Mr Goldsteen said that the material distributed by the respondent has a detrimental effect on him, and is inciting hatred and dislike of Jewish people. He said he was "very upset, insulted and disgusted" and often became depressed by the respondent's material.

32. Mr Thomas Bernard Schlesinger also gave evidence for the applicant before the HREOC. In a witness statement sworn on 6 May 1998, he said that he had been a businessman in Tasmania for decades and is well-known throughout the state of Tasmania. He said that among the materials that the respondent has sold and distributed are "many allegations that Jewry deals in an underhand manner with other people and is not to be trusted". He found the material as being likely to affect his standing both as a businessman and as a private individual, and as an office bearer of the Jewish community in Tasmania. He further stated that he found it "most offensive" that the material distributed by the respondent reproduced misleading information about the Holocaust, in particular concerning the number of Jews who died in the Holocaust.

33. In his oral evidence before the HREOC, Mr Schlesinger said he had not received material distributed by the respondent personally, but had seen such material when it was passed on to him by friends in Launceston. He also said that he had a conversation with the respondent, who admitted that she was the person who was distributing the material. Mr Schlesinger said that he found the material to be "disgusting".

34. Much of the applicant's evidence before the HREOC suffers from the deficiency that it lacks particularity. It does not identify the specific leaflets alleged to have been distributed by the respondent, nor does it attempt to explain why particular passages of those leaflets are said to be offensive to the applicant or to others. Instead, the applicant and the witnesses called by the applicant gave evidence as to why the respondent's material as a whole was offensive. Neither the applicant, nor the witnesses called on the applicant's behalf, gave any reasons before the HREOC for coming to the subjective conclusions which they expressed. This deficiency was to some extent rectified by the evidence given by the applicant before me. I deal with this evidence below.

The applicant's evidence before the Court

35. In oral evidence before the Court, the applicant said that he found the respondent's material deeply offensive, hurtful, and a challenge to his right to participate in Australian society as a full and equal citizen. The applicant said that he believed that the material was designed to inflame the opinions of other Australians against him and against other Jewish Australians. He said that other people who had seen the material had been hurt, offended and upset by it. When asked in cross-examination for his definition of the term "anti-Semitism", the applicant replied that he believed the term referred to the behaviour of people who were seeking to diminish the right of Jewish people to participate fully and equally in society. As to the leaflets generally, the applicant said that in his opinion, the leaflets say that "if there is something with which [the respondent] finds disagreeable, there is going to be a Jewish person behind it".

36. Mr Schlesinger was also called to give oral evidence. Mr Schlesinger said that the comments in his witness statement as to the offensiveness of the materials distributed by the respondent related in particular to the documents that are the subject of these proceedings.

37. Dr Goldschmied also gave evidence. Although he could not recall having seen the document entitled "Was There Really a Holocaust?", Dr Goldschmied gave evidence that he found the other documents that are the subject of these proceedings offensive and anti-Semitic. Dr Goldschmied also tendered a further document which he said named him personally, and was written by the respondent. The document, which became Exhibit 1 in the proceedings, reproduces a newspaper article written by Dr Goldschmied in The Examiner newspaper and the respondent's handwritten response to that newspaper article. The applicant did not seek to rely on Exhibit 1 in the course of submissions or to explain its significance.

38. Dr Goldschmied gave oral evidence that the material offended him because he found it anti-Semitic, and said that the dissemination of the material is hurtful to him especially given his background as a Jewish person who escaped Europe in World War II. Without going to particular leaflets, Dr Goldschmied said that he found the "tone" of all of the respondent's publications and unsolicited material offensive and described the material as "anti-Semitic, vilifying, hate material".

39. Mr Goldsteen also gave oral evidence. Without going into any detail about the material distributed by the respondent, Mr Goldsteen simply relied on his witness statement sworn on 3 May 1998 (referred to above). Many of the questions asked of Mr Goldsteen in cross-examination were rejected by me as they were completely irrelevant to the proceedings. Of the questions that were allowed and were answered, very few had relevance to the present complaint and the content of the evidence given does not need to be reproduced here.

The respondent's evidence

40. The respondent neither gave, nor called evidence before the HREOC as she withdrew from the proceedings in the manner described earlier in these reasons.

41. The respondent filed an affidavit in these proceedings sworn on 21 May 2001. The affidavit is some 111 pages in length. The whole of the affidavit was objected to by counsel for the applicant. Little, if any, attempt is made in the affidavit to establish the relevance or admissibility of much of the material contained in it, or even in many cases, what the material is, or where it came from. To take one example, p 5 appears to be a copy of, or a compilation of, one or more

unidentified documents containing an assertion that "JEWS ARE THE WORST MASS MURDERERS THE WORLD HAS EVEN SEEN". Clearly that is not a matter of which the respondent is able to give evidence. Pages 4–111 consist of a voluminous amount of seemingly unconnected material. It is almost impossible to summarise the material in or annexed to the affidavit, and I will not attempt to do so here.

42. There are sections of the affidavit which might be of some relevance. One section (p 10) is headed "My defence" and other sections commencing at pp 13, 30, 46, 65, 76, 97 and 103, address the particular leaflets the subject of these proceedings, although even these sections of the affidavit suffer from the deficiencies referred to earlier, and are argumentative rather than probative in character.

43. Bearing in mind that material even if otherwise inadmissible, might be admissible in relation to the respondent's defences under s 18D of the RDA, I formed the view that the fairest course was to receive the whole of the affidavit over the applicant's objection, and to indicate as part of my final decision what if any reliance I placed upon it.

44. The respondent was cross-examined as to her views of Jewish people. When asked for her definition of "Jew", the respondent said that the term includes a range of people who do not necessarily adhere to Judaism as a religion. She said that the term included Talmudic Jews, and defined "Talmudic Jew" as a person who was raised under Talmudic traditions. As to the particular attributes she ascribed to Jewish people, the respondent gave evidence that:

- Jews are the descendents of Esau and the Edomites, and are accordingly due for Biblical punishment;
- they are anti-democratic, anti-freedom, and pro-tyranny;
- Jews control pornography in both the United States and Russia and do so because the Talmud instructs them to;
- Jews and world Jewry are seeking to control the world and have already gained large parts of it;
- Jews have the intent of destroying white Christian civilisation;
- Jews in powerful positions are lying frauds trying to force the white race to mongrelise;
- Jews as a group have perpetrated the myth of the Holocaust and in so doing are acting fraudulently; and are lying, acting immorally, and are deceitful;
- a "significant part" of the Jewish leadership is part of a conspiracy to defraud the world; and
- Jews take on Christianity in order to deceive.

45. Further, in the respondent's opinion, the Bolshevik Revolution in Russia was a conspiracy of world Jewry, and she believes that Jews as a group perpetrated the purges in the Soviet Union, and that the "vile deeds of Communism" perpetrated on the Russian people were done by Jews. The respondent also gave evidence that in her opinion, World War II was fought by the Allies at the behest of Jews who controlled western civilisation, and that Jews were the only beneficiaries of World War II.

46. The respondent also gave evidence that she believed that the philosophy and teaching and practices of Jews is based on the Talmud, and that those philosophies, teachings and practices

ought to be stamped out; promote paedophilia; and are worse than a Satanic cult. She admitted, however, to having no formal education in the Jewish religion, that she was not an expert in the Talmud, and that she had not spoken to any experts.

47. As to her views on Jews and the attributes she ascribed to Jews listed above, the respondent said that she confined some of these views only to Jews in "powerful positions" or to the "Jewish leadership" and did not ascribe all of those attributes to all Jews or to Jews as a group. She said that the context of the leaflets always limits the references to certain people. The respondent said on a number of occasions in cross-examination that she never targeted Jews as a whole, but only certain Jews. However, to the extent that these attributes were restricted only to Jews in powerful positions or the Jewish leadership, it was difficult to discern from her answers which attributes were so confined, and many of the attributes seemed to have been given by the respondent to Jews as a group. For example, on p 18 of Mrs Scully's affidavit it is "Jews" and "World Jewry" who are said to be responsible for the matters there complained of.

48. The respondent also called four witness to give evidence on her behalf. Each witness provided a statutory declaration or a witness statement which were only provided to the Court and to the applicant on the second day of the hearing. This occurred despite directions given by me on 12 October 2001 that any further affidavits on which the respondent proposed to rely were to be filed by 30 November 2001. None of the respondent's witness statements relate to any of the particular leaflets distributed by the respondent.

49. The respondent sought to expand on the contents of the witness statements in her examination-in-chief. In general, each examination-in-chief consisted of the respondent asking each of her witnesses open-ended questions relating to general themes which were of the respondent's choosing. It is not easy to discern, let alone summarise, what the respondent was seeking to obtain from each of her witnesses. The applicant's counsel objected to the statutory declarations provided by the respondent's witnesses and to many of the questions asked by the respondent of her witnesses, largely on two bases; first, that the evidence was not probative of any issue before the Court; and secondly, on the basis that the witnesses were not competent to give the evidence that was adduced in their witness statements or that was sought to be adduced in oral evidence.

50. The first witness called by the respondent was Mr Kenneth James McCaffery. Mr McCaffery is a retired pensioner and a resident of Tasmania who describes himself as being of "partial Jewish descent". In a statutory declaration dated 29 April 2002, Mr McCaffery states that the respondent has been known to him since 1996. He said he first came across the respondent at the time the respondent had a general vendor stall at the "Launceston Sunday Markets". Mr McCaffery said he was attracted to the respondent's literature, which he describes as covering general topics, including finance reform; inoculation of children; Jewish power in banking circles and politics in Australia and overseas; the Holocaust; and Biblical archaeology. He states that he has also had several conversations with the respondent and has checked on her statements and their historical veracity and has "always found them to be truthful and verifiable in all degrees, particularly her statements concerning the 'Holocaust', which ... has been seriously and dangerously overblown by a Jewish controlled media".

51. Mr McCaffery also gave oral evidence at the hearing. Many of the questions asked of Mr McCaffery by the respondent were objected to and rejected by me on the basis of the competence of Mr McCaffery to answer the questions that he was asked, as well as on the grounds of relevance. Much of the admissible evidence given by Mr McCaffery related to his opinions

concerning the truth of the material distributed by the respondent. Mr McCaffery said he believed the material to be "honest and absolute history"; that the respondent does not just concentrate on criticising Jews and Jewish policy, but also disseminates information relating to other topics, including "inoculation of young children, anti-homosexual activities and things like that"; and that the respondent does not specifically target Jews. Mr McCaffery also gave evidence that the respondent "seems to be very well liked in the community despite all this propaganda telling ... what a terrible person" she is, and seems to have "tremendous friends everywhere".

52. Mr Michael Sladd also gave evidence for the respondent at the hearing. Mr Sladd is a resident of Hobart who describes himself as a retired scenic artist. In a witness statement dated 30 April 2002, Mr Sladd states that he was born in Russia in 1935 but fled to Germany in 1944 and resided in a "Displaced Persons" camp from 1945 to 1949. He said that the camp also housed former inmates of concentration camps, including Auschwitz. Mr Sladd said that "I never heard anything from them about gas chambers or mass executions of any kind". He said that he came to Australia in 1949 and continued his close contact with many camp survivors, but in the early 1960s began "hearing stories about extermination of Jews by gassing in gas chambers and it puzzled me very much". Mr Sladd further stated that he believed that the respondent "is doing a great service to the community in exposing lies which have been recorded as history".

53. In his oral evidence, it was revealed that Mr Sladd is in fact the respondent's brother. He said that some members of his family were killed by Russian revolutionaries who he believed were Jewish. He also said that he believed that German concentration camps were not exclusively occupied by Jews, but that Jews were only a small minority. Mr Sladd was asked many questions by the respondent in examination-in-chief, but again many of these questions were rejected by me on the basis that the questions asked were not within Mr Sladd's personal knowledge, or were not relevant to the proceedings.

54. Mr Denis Wilfred Collins was also called to give evidence. Mr Collins is a resident of Launceston and is semi-retired. In a statutory declaration sworn on 29 April 2002, Mr Collins states that he is a former Assistant Principal of Alice Springs High School and was a member of the Legislative Assembly of the Northern Territory from 1980-1994. Mr Collins describes himself as a student of history, "particularly Biblical history, also Biblical prophecy with a particular interest in what has happened to the Israelite peoples". He said that he became very keen to understand the term "anti-Semitic" when he was accused by an ABC journalist of being anti-Semitic, and details some of the studies that he has done into the term and into the history of the "Israelite people".

55. Many of the questions asked of Mr Collins by the respondent were objected to by the applicant's counsel and rejected by me on the grounds that they were irrelevant, or that Mr Collins was not competent to answer the questions. As to the admissible evidence given by Mr Collins, he said that he had not been offended by the literature that the respondent has distributed. He also said that his view of the respondent is that "she is one of the bravest people that I have ever met. She has the courage of her convictions to spread information. She is a watchman of Israel. She is spreading what I believe most assuredly is the truth and whether people accept it or reject it, that is totally their right but I have the highest regard and I believe she is doing a great service to the freedom of speech and the God given rights of the people of this country".

56. The last person called to give evidence for the respondent was Mr Leon Philip Gregor. In a statutory declaration sworn on 29 April 2002, Mr Gregor describes himself as a veteran pensioner. He was a soldier in the Australian Regular Army from 1961-1967, and worked in the

construction industry for approximately 20 years and as a taxi driver for some 9-10 years before he retired in May 1999. He states that he has read a great deal of literature, including material which is the subject of the present proceedings, "which reveal and trace the sources to the present day maladies particularly endured in the western nations". He says he believes that the respondent acts with "high moral purpose" and without any racist intent.

57. Again, many of the questions that were asked of Mr Gregor by the respondent were objected to and rejected on the grounds of relevance, or because Mr Gregor was not competent to answer the questions. When asked of his opinion of the respondent, Mr Gregor replied that it was his conviction that what she was doing "is a proper duty and function under the ... Christian law."

Videos tendered by the respondent

58. The respondent also tendered in evidence a number of videos, being:

- *"David Cole interviews Franciszek Piper";*
- *"Holocaust Revisionism for Beginners";*
- *"Photographic Evidence";*
- *"Judea declares war on Germany";*
- *"Eisenhower's Death Camps";* and
- *"The Other Israel".*

59. The respondent said that she tendered these videos because they formed part of the basis upon which her views were formed, and which led to the leaflets being published. In cross-examination, the respondent said that the videos were only a small portion of the wide range of materials that she had upon which she formed her opinions, but given that some of the videos postdate 1996, it was possible that she came to possess some of the videos after the leaflets were distributed. It seems as though the respondent also sought to tender the videos on the basis that the people interviewed in the videos were experts in their particular field, and that their evidence was therefore expert evidence.

60. With the consent of both parties, the case was conducted on the basis that the admissibility of these videos would be determined as part of my final decision, rather than as they were tendered. It was particularly necessary to adopt this course because of the duration of the videos and the stage of the proceedings at which they were tendered. I was then sitting in Launceston to hear the evidence of Tasmanian witnesses. I have now viewed each video. To the extent that it is possible, I have attempted to summarise their contents below.

(a) "David Cole interviews Dr Franciszek Piper"

61. This video, narrated by Mr David Cole, is concerned with the labour camps maintained by the Germans in World War II in which Jews and other enemies of the Third Reich were interned. Mr Cole tells us that the purpose of the video is to raise for debate the issue "how do we know if the Holocaust happened?". For most of the video, which is set at the Auschwitz Concentration Camp, Mr Cole takes viewers on a "guided tour" of the camp, and puts forward a number of assertions, the gist of which is that the proof presented in support of the Holocaust has an innocent explanation, namely that the camps were labour camps (and not extermination centres) and that many of the inmates died from malnutrition and disease particularly when conditions in Germany broke down towards the end of the War. The video also consists of a study of the gas chamber and the crematorium at Auschwitz by Mr Cole. This study is based

upon the proposition that the gas chamber was not a gas chamber at all, but was rather a building which was reconstructed after the War and made to look like it was a gas chamber. The study also includes a number of interviews between Mr Cole and tour guides at Auschwitz, including an interview between Mr Cole and Dr Piper, who is described as the Head Curator of the Auschwitz complex. The respondent alleges that the statements made by Dr Piper in his interview with Mr Cole confirm that there was never a gas chamber at all at Auschwitz during World War II.

62. This video seems to have been made in 1992. There is almost nothing in the video apart from the films of Auschwitz and plans of the camp, and assertions made by Mr Cole coupled with statements made by Dr Piper which Cole attempts to refute. It is clear that very selective parts of the interview have been used. At no stage is there any direct enquiry of Dr Piper designed to provoke an answer to the question as to whether or not the Holocaust occurred. The respondent said that she relied on the fact that Dr Piper was the Head Curator of the Auschwitz complex as a matter upon which she relied as constituting his expertise, and also as the basis upon which she sought to tender this video as admissible evidence.

63. The applicant objected to this video on a number of bases; first, on the basis that it did not go to issues in the proceedings; secondly, that there was no evidence that the persons interviewed or doing the interviewing are in any sense persons who have the competence to make the comments they make; third, none of those persons were called as witnesses in the proceedings; and fourth, that the video does not prove the premise upon which it is said to be relevant, which is that Jews are party to a world wide conspiracy which is the hoax of the Holocaust.

(b) "Holocaust Revisionism for Beginners"

64. This video is narrated by Mr David McCalden, who describes himself as a Holocaust revisionist. It consists of three parts. In the first part, Mr McCalden attempts to present a number of propositions and historical "facts" which he alleges prove that the concentration camps in Germany were not places of extermination, but were rather labour camps. Mr McCalden also takes viewers on a tour of Auschwitz, where he said he went in 1987. Aspects of the gas chamber are filmed and there is a commentary by Mr McCalden to the effect that the physical construction and features of the building are inconsistent with its use as a gas chamber.

65. The second part of the tape is headed "Free Speech". It presents a number of interviews by Mr McCalden with a Mr Bradley Smith, who is apparently an author and bookseller at a bookstore in Hollywood Boulevard. The theme of the interview is that whilst Christians are not opposed to the discussion of revisionist scholarship, Jewish groups and individual Jews are. Mr Smith says that Jewish people suppress the expression of revisionist thought and cannot understand why anyone would question the Holocaust.

66. The third part of the video consists of Mr McCalden being filmed at a number of former concentration camps in what is now Poland. These camps include Majdanek, Belzec, Treblinka and Sobibor. Mr McCalden asserts that much of the evidence given by Holocaust historians in relation to these and other camps, and the claims of Holocaust survivors, are inconsistent with the physical evidence that Mr McCalden puts forward as the truth. The respondent has stated that this video, like the previous video, disproves the existence of homicidal gas chambers in wartime Germany and Eastern Europe.

(c) "Photographic evidence"

67. This video takes the form of a discussion between a Mr Ernst Zundl and a Mr John Ball, who is said to be a geologist and air photograph interpreter. Mr Zundl is from an organisation known as "Voice of Freedom". Mr Ball tells Mr Zundl that his examination of aerial photographs taken of the Auschwitz and Treblinka camps in 1944 show that the photos have been altered in order to make the camps look like extermination camps. Mr Ball also discusses an area known as Babi Yar ravine, which was said to be an exhumation and cremation site during World War II. Mr Ball asserts that his photographic study of the ravine proves that there is no evidence of mass cremations taking place at this site during World War II. Again, the respondent states that this video disproves the existence of homicidal gas chambers being used by the Germans in World War II. She also said that she relied on Mr Ball's expertise in photographic analysis as a basis for the admissibility of the video.

(d) "Judea Declares War on Germany"

68. This is a film presented by Dr Toben of the "Adelaide Institute". Its general theme is that stories told of life in the Nazi death camps in World War II have been proved to be totally false. Dr Toben takes viewers on a tour of Auschwitz which he conducted in 1997. He tells us that the evidence that he examined at Auschwitz proves that the Holocaust was a hoax. Dr Toben then conducts a number of interviews with various persons including an unnamed cremation expert, and conducts a number of "experiments", which interviews and experiments are said to disprove many of the claims made by Holocaust historians and survivors.

(e) "Eisenhower's Death Camps"

69. This video is a BBC documentary concerned with the internment camps apparently built by the US Army to house German prisoners during and after World War II. The respondent stated that this video shows pictorial evidence of the death camps established by US President Eisenhower in which mass deaths occurred due to deliberate starvation and neglect.

(f) "The Other Israel"

70. This video is narrated by a Mr Ted Pike, who introduces the video by saying that he proposes to examine the causes of conflict between Arabs and Jews. In order to resolve that conflict, Mr Pike has recourse to and comments on Jewish scriptures, including the Talmud, and the Jewish Encyclopaedia. Mr Pike selects certain parts of the Talmud and the Jewish Encyclopaedia in order to demonstrate that the teachings of the Jews permit, among other things, the seduction and marriage of three year old girls and sexual practices by adults on young boys. The Talmud is also said by Mr Pike to teach that Gentiles are classed as barbarians and are forever beneath the Jew. The video then goes on to give what is described as an historical account of Jewish involvement in (among other things), the French Revolution in 1789, the Russian Revolution in 1917, the formation of Communism in Russia in 1919, and the involvement of Jews in various movements and organisations in America. Mr Pike concludes the video by saying that his study of the Talmud and the Jewish Encyclopaedia shows that there is a tendency towards Jewish domination of society throughout history.

71. All of these videos are inadmissible as proof of the underlying matters referred to in them. Insofar as they have relevance to the proceedings, they consist of assertions by people who were not called to give evidence in the proceedings, and whose alleged expertise has not been established by the respondent. What is said by persons in the videos is hearsay. Further, in relation to the first video, the respondent stated in cross-examination that she was aware of Dr

Piper's allegation that the video misrepresented what it is he said to Mr Cole. The respondent also said that she was aware that Mr Cole recanted the position that he put in relation to Auschwitz in the video. It is clear that many of the views put forward in the videos are polemical in character, and that the presenters are attempting to push a particular point of view from a very one-sided and unbalanced perspective. Apart from establishing that some people talk about the subject matter comprising the videos, and express views similar to views expressed in some of the leaflets, none of the videos can be received as proof of any underlying matters that are asserted in them. Although the Court is not bound by technicalities in proceedings of this type, (see s 46PR of the *Human Rights & Equal Opportunity Commission Act 1986* (Cth)) there is nothing that the respondent has put to me in relation to the videos that persuades me that I can or should receive them as proof of any of the underlying matters which are asserted in them.

72. By a document dated 26 June 2002 and filed with the Court on 1 July 2002 the respondent put submissions in relation to a list of 15 videos. The 6 videos referred to above form part of that list. The other videos were not tendered by Mrs Scully, and I have not taken into account the submissions she has made in relation to them.

Newspaper extract by Winston Churchill

73. The respondent tendered a photocopy of an article entitled "Zionism versus Bolshevism – Struggle for the Soul of the Jewish People" written by Winston Churchill. She stated that this article was photocopied from the "Illustrated Sunday Herald" of 8 February 1920. This article became Exhibit B in the proceedings. The article is said by the respondent to document the "Jewish creation of Bolshevism by a writer who can hardly be accused of being a 'Nazi'". The respondent has asked me to receive this article in evidence as a document upon which she relied in forming the opinions she expresses in the material she distributed. It was received by me on that basis. The applicant objected to the article's tender if it was sought to establish the truth of its contents. I agree with the applicant in this respect. Simply because an article has been written on a particular topic by a particular person, even by Winston Churchill, does not establish the truth of what is stated therein.

Books tendered by the respondent

74. The respondent also tendered the following books at the hearing:

- *The Zionist Connection – What Price Peace?;*
- *Red Over Black – Behind the Aboriginal Land Rights;*
- *The Holocaust Industry – Reflections on the Exploitation of Jewish Suffering;*
- *The Path of the Righteous Gentile;* and
- *The Thirteenth Tribe.*

75. The respondent sought to tender these books on the basis that they, like the videos, formed the basis of opinions which she held and which were expressed in the leaflets. The applicant objected to the admissibility of these books on similar grounds to those on which it was contended that the videos were not admissible. Again, with the consent of both parties, the case was conducted on the basis that a determination of the admissibility of these books form part of my final decision rather than as the books were tendered.

76. A brief synopsis of the books tendered by the respondent is as follows:

(a) "The Zionist Connection – What Price Peace?" by Alfred Lilienthal (1978)

77. In this book Alfred Lilienthal, a self-proclaimed "author/historian", outlines the supposed background to the wars that have taken place in the Middle East since the creation of the State of Israel. Lilienthal also outlines what he perceives as the increasing involvement of the US in the Arab/Israeli conflict, and seeks to explain this involvement by the influence of Jewish individuals in the White House and in the US media.

(b) "Red Over Black – Behind the Aboriginal Land Rights" by Geoff McDonald (1982)

78. This book attempts to outline what the author describes as the "Marxist manipulation of the Aboriginal 'Land Rights' movement". According to the author, who states that he is a former member of the Communist Party, communism in Australia has a long-term strategy for the establishment of an Aboriginal republic under communist control.

(c) "The Holocaust Industry – Reflections on the Exploitation of Jewish Suffering" by Norman Finkelstein (2000)

79. This book is put forward as an "interrogation of the place the Holocaust has come to occupy in American culture". The author asserts that it was not until the Arab/Israeli war of 1967 that "memory of the Holocaust began to acquire the exceptional prominence it enjoys today". Leaders of America's Jewish community are said to have exploited the Holocaust to deflect any criticism of Israel and its supporters. The author asserts that the "Holocaust industry" has become an "outright extortion racket".

(d) "The Path of the Righteous Gentile" by Chaim Clorfene and Yakov Rogalsky (1987)

80. This book outlines what are described as the "Seven Universal Laws" or the "Seven Laws of the Children of Noah". The Jewish people are said to have received these laws, as well as the duty of teaching them to the rest of the world.

(e) "The Thirteenth Tribe" by Arthur Koestler (1976)

81. This book is said to be an historical work that traces the history of a people known as the Khazars. The Khazar Kingdom, which was located in modern day Russia, flourished in the 7th to 11th centuries, but was wiped out by the armies of Genghis Khan. According to the author, the Khazars were originally of Turkish origin, but converted to Judaism in the 8th century. The Khazars are said to have emigrated to Poland from Russia and there "formed the cradle of western Jewry".

Historical evidence and admissibility

82. There is very little by way of either case law or text book commentary on the admissibility of historical evidence. However, the most authoritative case on the subject is *Australian Communist Party v Commonwealth* (1951) 83 CLR 1. At 196, Dixon J sets out what have come to be regarded as the principles to be followed in deciding whether a particular historical work is admissible under the common law. His Honour says that the courts "may use the general facts of history as ascertained or ascertainable from the accepted writings of serious historians ... and employ the common knowledge of educated men upon many matters and for verification refer to standard works of literature and the like". Dixon J further states that such historical facts may be

"ascertained or verified, not from the polemics of the subject, but from serious studies and enquiries and historical narratives".

83. *Australian Communist Party* was applied in *Ritz Hotel v Charles of the Ritz* (1987) 14 NSWLR 107. In that case, McClelland J was concerned with a 1938 book entitled "Cesar Ritz – Host to the World", which was a memoir of the life of Cesar Ritz written by his widow. The plaintiff sought to have the book admitted as evidence of the facts stated therein. In deciding whether the book was admissible, McClelland J applied Dixon J's principles, holding at 112 that the events described in the book were neither "general facts of history" nor were they "within the common knowledge of educated men". Further, his Honour said that the book itself was not among the "accepted writings of serious historians" nor was it a "standard work".

84. *Ritz Hotel* was considered in *Bellevue Crescent v Marland Holdings* (1998) 43 NSWLR 364. In that case, Young J examined the admissibility of evidence of historians regarding life in the 19th century, or what his Honour termed "social history". Young J said that such evidence did not constitute expert opinion evidence for the purposes of s 79 of the *Evidence Act 1995* (NSW) . In addition, at 371 his Honour stated that it seemed to him that "there was a distinction in *Ritz Hotel* be tween the facts of history and what might be called social history. Whilst courts may obtain the base or facts such as when a particular war broke out or other matters of record from reputable histories, analyses as to why certain things happened and generally how people behaved is not a matter which can be proved by the evidence of people who were not there but have ascertained the historical facts and then have analysed them to work out a conclusion."

85. It should be clear from the above summaries of the books that, like the videos, they are very much polemical in nature. Although it may be that the respondent is convinced of the historical accuracy and the truth of the information that is contained in the books, she has not established that they contain anything more than one person's point of view on a particular topic or topics. In addition, the respondent has failed to establish that the historical evidence said to be contained in the books are "general facts of history" that are within the "common knowledge" of educated persons; nor has the respondent established that the books sought to be admitted by her are among the "accepted writings of serious historians" or that they are "standard works of literature". Accordingly, the books cannot be admitted as proof of any underlying matter that is asserted in them. I reject all of the books as inadmissible for that purpose.

The applicant's submissions

86. In general, the applicant submits that:

- each of the leaflets has a consistent and overriding theme, relating to the actions of Jews as such and the characteristics of Jews as such, and is "stridently anti-Semitic";
- each of the imputations conveyed by the leaflets represent the views of the respondent, as is made clear from answers given by her in cross-examination; and
- the material annexed to the respondent's affidavit of 21 May 2001 "adheres to, repeats and embellishes upon" the leaflets, and has "one clear consistent theme being the vilification of Jews by virtue of their adherence to that culture and/or membership of that ethnic group".

87. In relation to s 18C of the RDA, the applicant submitted:

- the words "offend, insult, humiliate or intimidate" in s 18C(1)(a) are ordinary English words and ought not be given any technical meaning;
- each of the applicant's witnesses, all of whom are Jewish, was offended, insulted, humiliated and intimidated by the leaflets, and there was no suggestion that the reaction of any one of the witnesses was atypical or was not a reasonable reaction to the material distributed by the respondent;
- applying the objective test in s 18C(1)(a), it is clear that the respondent's action are "reasonably likely" to offend, insult, humiliate or intimidate Jews as a group;
- although s 18C(1)(a) requires an objective standard to be met, the ethnic group in question must be taken as one finds it: *Jordan v Burgoyne* [1963] 2 QB 744;
- the publication and distribution of the leaflets was done by the respondent "because of" the ethnic origin of Jews as per s 18C(1)(b), in the sense that the ethnic origin of Jews was a "material factor" in the distribution of the leaflets;
- "Jews" constitute a race for the purpose of s 18C(1)(b) as, according to dictionary definitions, a "Jew" is "one of the Hebrew or Jewish people" and as a "people" are therefore part of a "community, tribe, race or nation";
- Jews are also an "ethnic group" for the purposes of s 18C(1)(b), as the Explanatory Memorandum to the *Racial Hatred Bill 1994* (Cth) makes express reference to the broad interpretation of the term "ethnic origin" in comparable jurisdictions; and
- in any case, there is evidence before the Court that Jewish people see themselves as a distinct community; that Jews are bound by common customs and beliefs; have a common language; and have common characteristics.

88. In relation to s 18D of the RDA, the applicant submitted the following:

- the requirement of reasonableness and good faith is a threshold requirement in s 18D, and both elements must be satisfied before the issues raised in s 18D(a), (b) and (c) can be considered;
- the respondent did not adduce any evidence that the publication and distribution of the leaflets was done "reasonably and in good faith" as is required by s 18D;
- the nature and extent of the leaflets and their common theme shows malice on the part of the respondent, such that even if an individual leaflet might otherwise come within s 18D, the publication and distribution of all of the leaflets shows a lack of genuineness on the part of the respondent;
- lack of good faith on the respondent's part is constituted by an improper motive, being the intention to injure the applicant and members of the Jewish ethnic group, which is shown by the manner and extent of the leaflets;
- none of the defences or exemptions outlined in s 18D(a), (b) or (c) are available to the respondent;

- in particular, with respect to s 18D(b), the respondent's actions were not done "in the course of any statement, publication, discussion or debate made or held for any ... genuine purpose in the public interest", as there is no evidence of any activity of Jews in Australia or elsewhere which has invited public criticism or discussion; and

- the abstract generalisation of "truth in history" is not the kind of justification embodied in s 18D, and to the extent that the respondent relies upon the public interest in "historical truth", no evidence has been adduced to show the historical truth of anything published by the respondent.

The respondent's submissions

89. The respondent accepts the applicant's submission that the theme of the publications relates to the actions of Jews. She submits that "it is the specific evil actions that are brought to light in the publications". However, the respondent refutes the applicant's submission that the theme of the leaflets relates to the "characteristics of Jews as such". She says that when discussing the topics in her leaflets, "it is too difficult and clumsy to keep referring to the specific leaders of World Jewry and/or to the particular criminal groups of Jews [who] are participants in the fraud, crime and giant conspiracies". She submitted that, for example, "when it is said that 'Russian Jews control pornography' of course it is understood that this general statement must, of necessity, refer only to the Jews who are actually involved. The particular leaflet lists the specific individuals who were involved at the particular time and place". Further, the respondent submitted that "the theme of the material published focuses on the action of specific members of people who are known as Jews. All Jews are never implicated."

90. Although the respondent has not articulated her argument in the following terms, it appears as though the respondent is attempting to argue that s 18C(1)(b) of the RDA is not applicable to her actions as her actions were not done "because of" the race, colour or national or ethnic origin of Jews. Instead, the respondent seems to be asserting that her leaflets were distributed to highlight the "specific evil actions" of people who happen to be Jewish. In addition, the respondent appears to submit, contrary to the concession made on her behalf before the HREOC, that s 18C(1)(b) is not applicable because Jews do not constitute a racial or ethnic group for the purposes of the RDA. She stated that "ethnically there is no such thing as a Jew". The respondent further submitted that "in Australia, as elsewhere in the world, Jews do not exist as a group by race, colour or national or ethnic origin. Genetically, the Ashkenazi are mainly Turks with a mixture of Japhethite-Esau-Edomite-Canaanite-Pharisaical blood".

91. In relation to s 18C(1)(a), the respondent submitted that the applicant "has at no time pinpointed any statement contained in the leaflets which offended, insulted, humiliated or intimidated him ...". In addition, the respondent has submitted that neither the applicant nor any of the applicant's witnesses have cited any specific instances of them being offended, insulted, humiliated or intimidated by her leaflets. Instead, the respondent submits that the applicant and the applicant's witnesses did nothing more than engage in "moaning and groaning about non-specific anti-Semitism and anti-Jewish offence and hurt". The respondent asserts that there was no specific reference to any particular leaflet by the applicant or his witnesses. In addition, in relation to

s 18C, the respondent submitted that for the RDA to be valid, s 18C must be limited to personal insults, personal defamation and physical harm – not acts that are "likely" to insult or offend (as is the wording in s 18C).

92. The respondent also asserted that she is protected by s 18D of the RDA in the distribution of her leaflets. In particular, the respondent submitted that the exceptions contained in s 18D(b) and (c)(i) protect her. Section 18D(b) provides an exemption for an act that is done reasonably and in good faith 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. Section 18D(c)(i) provides an exemption for an act done reasonably and in good faith in making or publishing a fair and accurate report of any event or matter of public interest. In particular, the respondent asserted that "it is in the interest of all people, especially Jews, to see why so many of the leaders of crime come from among their ranks. The influence of the Talmud which is so intensely studied by the young students and Rabbis is the probable reason for this crime and immorality". The respondent also submitted that the discussion of current affairs and history are matters of public interest and are protected by s 18D. Further, the respondent submitted that the applicant "has failed to specify how the leaflets in question would fail to be in the public interest, or of no genuine academic or scientific purpose, or not a fair and accurate report of a matter of public interest done reasonably or in good faith". In this sense, the respondent seems to be asserting that the onus is on the applicant to show that the respondent has not published the leaflets reasonably and in good faith and for the purpose of a matter of public interest.

93. The respondent also appears to submit in her written submissions that she has more general defences available to her, beyond the scope of s 18D. The respondent has submitted that:

- she distributes the leaflets "for the purpose of combating racial discrimination which is harming certain sections of the Australian community";
- all of the leaflets have been previously published by other sources, and some have been published and republished without any repercussions;
- there is "overwhelming evidence" to prove the general truth of the applicant's imputations, and that the imputations are "clearly wrong"; and
- no offence was possible, let alone intended.

94. The respondent also submitted that the RDA should be declared unconstitutional as, in the respondent's submission, it is impossible to apply the RDA to all groups equally, and because it infringes the "freedom to communicate political matters".

Section 18C of the RDA

95. I have set out s 18C at par [9] above. In order for a contravention of s 18C to be made out, three elements must be satisfied:

(a) the relevant act must be done "otherwise than in private";
(b) the act must be "reasonably likely" to "offend, insult, humiliate or intimidate"; and
(c) the act must be done "because of" the race, colour or national or ethnic origin of a person or group of people.

96. The Explanatory Memorandum to the Racial Hatred Bill noted that this civil prohibition "on offensive behaviour based on racial hatred" would be placed within the existing jurisdiction of the HREOC to conciliate and/or determine complaints alleging breaches of the RDA. The Explanatory Memorandum continues:

> *"This victim-initiated process is quite different from the criminal offence regime where the initiative for action generally involves police and prosecution authorities."*

As earlier explained, the criminal offence regime for which the Bill provided was not passed into law.

(a) "Otherwise than in private"

97. The Commissioner found that it was clear that the respondent's distribution of the leaflets represents an act done "otherwise than in private" within the meaning of s 18C(1). There was no issue in the proceedings before me on this point. The respondent did not challenge the HREOC's finding in this respect.

(b) "Reasonably likely"

98. **Following paragraph cited by:**

Ibrahim v Australian Dental Council (20 September 2012) (Nicholls FM)
and Jones v Scully [2002] FCA 1080 at [98] per Hely J)

The use of the words "reasonably likely" in s 18C(1)(a) sets up an objective test or standard: see *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615; *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 at [12] . In *Hagan*, Drummond J stated at [15]:

> *"It is apparent from the wording of s 18C(1)(a) that whether an act contravenes the section is not governed by the impact the act is subjectively perceived to have by a complainant. An objective test must be applied in determining whether the act complained of has the necessary offensive, insulting, humiliating or intimidatory quality for it to be within the sub-section. The question so far as s 18C(1)(a) is concerned is not: how did the act affect the particular complainant? But rather would the act, in all the circumstances in which it was done, be likely to offend, insult, humiliate or intimidate a person or a group of people of a particular racial, national or ethnic group?"*

99. **Following paragraph cited by:**

Eatock v Bolt (28 September 2011) (Bromberg J)

242. The assessment required by s 18C(1)(a) is obviously to be conducted objectively and not subjectively: *Bropho* [66] (French J); *Hagan* at [15] (Drummond J); *Creek* at [12] (Kiefel J); *Scully* at [99] (Hely J); *McGlade* [42]-[45] and [47] (Carr J).

Burns v Laws (16 May 2008) (O'Connor K - DCJ (President); Grotte E - Judicial Member; Nemeth de Bikal L - Non Judicial Member)

See for example, Jones v Scully at [99]

Silberberg v The Builders Collective of Australia Inc (02 October 2007) (Gyles J)

21. The test or standard in s 18C(1)(a) of the Act is objective: see *Jones v Scully* (2002) 120 FCR 243 at 268-269; *Hagan v Trustees of Toowoomba Sports Grounds Trust* [2000] FCA 1615; *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at [12]. It is for the Court to determine whether the act, in all the circumstances in which it was done, would be reasonably likely to offend, insult, humiliate or intimidate another person or a group of people of a particular racial, national or ethnic group: see *Hagan* [2000] FCA 1615 at [15]. As Hely J remarked in *Scully* (2002) 120 FCR 243 at [99]:

> *"it is not necessary for an applicant to prove that any person was actually offended, insulted, humiliated or intimidated by the conduct in question ...* [but] *evidence, for example, that a member of a particular racial group was offended by the conduct in question would be admissible, on, but not determinative of, the issue of contravention."*

Catch the Fire Ministries Inc v Islamic Council of Victoria Inc (14 December 2006) (Nettle, Ashley and Neave, JJ.A.)

65. Arguably, that may mean no more than that, because the witnesses were upset by Pastor Scot's statements, it was more probable that the statements were sufficiently vehement to invoke hatred or other relevant emotion of or towards Muslims on the basis of their religious beliefs. If so, the reasoning would be unexceptionable. But I think it unlikely that that is what it means; for, immediately after making those observations, the Tribunal continued, as follows:

"The extent to which such evidence can be used was discussed by Hely, J. in *Jones v. Scully*. His Honour observed that people affected by what was said and done was subjective, but was admissible to the limited extent that a Court or Tribunal can use such evidence, but it is not determinative of the actual result. Therefore it may be used in a narrow fashion. Furthermore, even if the three individuals did not attend the seminar, it would not prevent the complaint from being made to the Equal Opportunity Commission, and to this Tribunal subject to proof." (See the comment in *Jones v. Scully* at paragraph 99).

Kelly-Country v Beers (21 May 2004) (Brown FM)

91. As the test to be applied is an objective one, it is not necessary for an applicant to prove that any person was actually offended, insulted, humiliated or intimidated by the conduct in question. [12] However, in this case, clearly Mr Kelly-Country feels that he has been offended, insulted, humiliated and intimidated by Mr Beers' performances. But, it is not necessary for him to bring forward other evidence from other people who share his social background as an Aboriginal Elder as to their offence. However, in applying

the reasonable victim test, the Court must have regard to the likely cultural sensitivity of the group to which Mr Kelly-Country belongs.

via

[12] See *Jones v Scully* [2002] FCA 1080 at paragraph 99

As the test is an objective one, it is not necessary for an applicant to prove that any person was actually offended, insulted, humiliated or intimidated by the conduct in question. But the analogy provided by the cases on s 52 of the *Trade Practices Act 1974* (Cth) suggests that evidence, for example, that a member of a particular racial group was offended by the conduct in question would be admissible on, but not determinative of, the issue of contravention. In the s 52 context, idiosyncratic evidence from consumers about how they reacted when reading documents said to be misleading is not to be ignored, but it is not determinative. The Court must make an objective assessment of the position itself: *ACCC v Optell Pty Ltd* (1998) ATPR 41-640 at 41,082 . Whether that evidence is of any, and if so, what weight depends upon the circumstances. However, in his second reading speech on the Racial Hatred Bill the Attorney-General said:

> *"The Bill requires an objective test to be applied by the Commission so that community standards to behaviour rather than the subjective views of the complainant are taken into account."*

100. In *Hagan*, Drummond J at [28] treated as admissible evidence from persons of Aboriginal descent of their own views, and as to the views of the wider Aboriginal community of which they formed part, as to the acceptability of the use of the word "Nigger" in the context there in question. That evidence was both direct evidence by members of the relevant group that they were not offended by the conduct in question and opinion evidence as to the likely response of other members of the group which was admissible under ss 78 and 80 of the *Evidence Act 1995* (Cth) .

101. The applicant tendered evidence as to the subjective effect of the distribution of the respondent's leaflets on each of the applicant and his witnesses. For the reasons just given, that evidence is admissible, but is not determinative. As I have noted above, with some exceptions in the case of Mr Jones, such evidence was in general terms, and related to the overall and general effect of the leaflets as a whole, rather than being directed to any particular leaflet or to any passages of particular leaflets. There is force in the respondent's submission that the applicant and his witnesses were non-specific about the particular way or ways in which offence or insult was caused by the leaflets. In the result this evidence as to the objective reaction to the distribution of leaflets by the respondent is of very limited assistance.

To offend, insult, humiliate or intimidate

102. **Following paragraph cited by:**

ILIJEVSKI v Commonwealth of Australia (As Represented BY the Commissioner of the Australian Taxation Office) (02 November 2016) (Judge Jones)

Jones v Scully at [102]

ILIJEVSKI v Commonwealth of Australia (As Represented BY the Commissioner of the Australian Taxation Office) (02 November 2016) (Judge Jones)

> the terms of the section and not to reach to 'mere slights' in the sense of acts which, for example, are reasonably likely to cause technical, but not real, offence or insult (see also Jones v Scully per Hely J at [102])

Clarke v Nationwide News Pty Ltd (27 March 2012) (Barker J)

> Jones v Scully at [102]

Clarke v Nationwide News Pty Ltd (27 March 2012) (Barker J)

> the terms of the section and not to reach to 'mere slights' in the sense of acts which, for example, are reasonably likely to cause technical, but not real, offence or insult (see also Jones v Scully per Hely J at [102])

Eatock v Bolt (28 September 2011) (Bromberg J)

> 268. It is for those reasons that I would respectfully agree with the conclusion reached by other judges of this Court, that the conduct caught by s 18C(1)(a) wi ll be conduct which has "profound and serious effects, not to be likened to mere slights": *Creek* at [16] (Kiefel J); *Bropho* at [70] (French J); *Scully* at [102] (He ly J); or, as Branson J put it in *Jones* at [92] "real, offence".

Kelly-Country v Beers (21 May 2004) (Brown FM)

> 101. The words "*offend, insult, humiliate or intimidate*" are to be given their ordinary English meanings. [18] Their definition in the shorter Oxford English Dictionary include:
>
> > *"offend – to vex, annoy, displease, anger, now especially to excite personal annoyance, resentment, or disgust (in anyone) (now the chief sense)."*
> >
> > *"insult – to assail with scornful abuse or offensive disrespect; to offer indignity to; to affront, outrage..."*
> >
> > *"humiliate – to make low or humble in position, condition or feeling, to humble...to subject to humiliation; to mortify."*
> >
> > *"intimidate – to render timid, inspire with fear; to overawe, cow, now especially to force to or deter from some action by threats or violence."*
>
> *via*
>
> [18] See *Jones v Scully* (supra) at paragraph 102

McGlade v Lightfoot (26 November 2002) (Carr J)

> 50. In *Jones v Toben* [2002] FCA 1150, Branson J in referring to the above passage in *Creek* sounded a note of caution at [92] :
>
> > *"... I do not understand her Honour to have intended by the above observation to imply that a gloss should be placed on the ordinary meaning of the words that*

Parliament chose to include in s 18C of the RDA. Rather, I understand her Honour to have found in the context provided by s 18C of the RDA a legislative intent to render unlawful only acts which fall squarely within the terms of the section and not to reach to "mere slights" in the sense of acts which, for example, are reasonably likely to cause technical, but not real offence or insult. (See also Jones v Scully per Hely J at [102]). It would be wrong, in my view, to place a gloss on the words used in s 18C of the RDA."

Jones v Toben (17 September 2002) (Branson J)

92. In *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at [16] Kiefel J observed:

"To "offend, insult, humiliate or intimidate" are profound and serious effects, not to be likened to mere slights."

I do not understand her Honour to have intended by the above observation to imply that a gloss should be placed on the ordinary meaning of the words that Parliament chose to include in s 18C of the RDA . Rather, I understand her Honour to have found in the context provided by s 18C of the RDA a legislative intent to render unlawful only acts which fall squarely within the terms of the section and not to reach to *"mere slights"* in the sense of acts which, for example, are reasonably likely to cause technical, but not real, offence or insult (see also *Jones v Scully* per Hely J at [102]). It would be wrong, in my view, to place a gloss on the words used in s 18C of the RDA .

To "offend, insult, humiliate or intimidate" denotes profound and serious effects, not to be likened to mere slights: *Creek* at [16] . In his second reading speech, the Attorney-General said that the HREOC was familiar with the scope of such language and has applied it in a way that deals with serious incidents only: *Hansard* (15 November 1994) p 3341. In the absence of any statutory definition of the words "offend, insult, humiliate or intimidate", it is appropriate that the words be given their ordinary English meanings.

103. **Following paragraph cited by:**

Eatock v Bolt (28 September 2011) (Bromberg J)

262. Lastly, it is necessary to consider the words "offend, insult, humiliate or intimidate". Hely J in *Scully* at [103] (as well as Carr J in *McGlade* at [52] ; Branson J in *Jones* at [90]; and French J in *Bropho* at [67]) identified the ordinary meaning of these words by reference to their dictionary definitions:

Dictionary definitions of the terms used in s 18C are as follows:

Offend

•"1.To irritate in mind or feelings; cause resentful displeasure in.
2. To affect (the sense, taste, etc) disagreeably."
(Macquarie Dictionary 3rd Ed)

• In its chief sense "to hurt or wound the feelings or susceptibilities of; to be displeasing or disagreeable to; to vex, annoy, displease, anger; to excite a feeling of personal annoyance, resentment or disgust in (any one)."

(Oxford English Dictionary)

Insult

•"To assail with offensively dishonouring or contemptuous speech or action; to treat with scornful abuse or offensive disrespect; to offer indignity to; to affront, outrage."
(Oxford English Dictionary)

Humiliate

• "To lower the pride or self respect of; cause a painful loss of dignity to; mortify."
(Macquarie Dictionary)

•"To make low or humble in position, condition or feeling; to humble."
(Oxford English Dictionary)

Intimidate

•"1. To make timid, or inspire with fear; overawe; cow.
• 2. To force into or deter from some action by inducing fear."
(Macquarie Dictionary)

•"To render timid, inspire with fear; to overawe, cow; in modern use especially to force to or deter from some action by threats or violence."
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  (Oxford English Dictionary)

Insult

- "To assail with offensively dishonouring or contemptuous speech or action; to treat with scornful abuse or offensive disrespect; to offer indignity to; to affront, outrage."

  (Oxford English Dictionary)

Humiliate

- "To lower the pride or self respect of; cause a painful loss of dignity to; mortify."
  (Macquarie Dictionary)
- "To make low or humble in position, condition or feeling; to humble."

  (Oxford English Dictionary)

Intimidate

- "1. To make timid, or inspire with fear; overawe; cow.
- 2. To force into or deter from some action by inducing fear."
  (Macquarie Dictionary)
- "To render timid, inspire with fear; to overawe, cow; in modern use especially to force to or deter from some action by threats or violence."
  (Oxford English Dictionary)

104. The fact, if it be a fact, that assertions made in the leaflets may be wrong or inaccurate does not of itself establish a contravention of s 18C: *Creek* at [6] . A true statement, or one which might be shown in some way to be true, does not mean that the statement is incapable of being offensive: *Patrick v Cobain* [1993] 1 VR 290 at 294 .

105. In *Worcester v Smith* [1951] VLR 316, O'Bryan J held that behaviour, to be offensive within the context of "behaves in an offensive manner" in s 25 of the *Police Offences Act 1928* (Vic) must be such as is calculated to wound the feelings or arouse anger, resentment, disgust or outrage in the mind of a reasonable person. His Honour held that the mere expression of political views contrary to those probably held by the majority of the community, even when made in the proximity of the offices of those whose views are attacked, does not amount to such offensive behaviour. A banner bearing the inscription "Stop Yank Intervention in Korea" was regarded by his Honour as an inoffensive statement of political views, even when carried outside the offices of the United States Consul.

106. For the reasons explained by Wilcox J in *CEPU v Australian Postal Corporation* (1998) 85 FCR 526 at 534-535, criminal cases on offensive behaviour, whilst not determinative of the question which arises in the present case, do provide some general insight into the question of offensiveness. In particular, they support the proposition that the expression or dissemination of views contrary to those held by a section of the community or even by a majority of the community will not necessarily be offensive (although in some circumstances it may), even if the expression of those views is hurtful to those who hold a different opinion. As the outline in the Explanatory Memorandum to the Racial Hatred Bill states (p 1), the RDA: "is not intended to prohibit people from having and expressing ideas". In the context of the summary offence of offensive behaviour, conduct or language to be offensive must be such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person: Watson, Blackmore and Hosking *Criminal Law (NSW)* at [9.7990]. In *CEPU* (supra) at 534 Wilcox J quoted the following observation by Kerr J in *Ball v McIntyre* (1966) 9 FLR 237 at 241 :

> *"Some types of political conduct may offend against accepted views or opinions and may be hurtful to those who hold those accepted views or opinions. But such political conduct, even though not thought to be proper conduct by accepted standards, may not be offensive conduct*

within the section. Conduct showing a refusal to accept commonly held attitudes of respect to institutions or objects held in high esteem by most may not produce offensive behaviour, although in some cases, of course, it may."

107. At p 243 in *Ball v McIntyre,* Kerr J said:

"... behaviour to be offensive behaviour must be calculated to produce a stronger emotional reaction in the reasonable man than is involved in indicating difference from or non acceptance of his views or values. The behaviour to be offensive would normally be calculated to wound the feelings, arouse anger, resentment, disgust or outrage in the mind of a reasonable man."

108. **Following paragraph cited by:**

Prior v Queensland University Of Technology and Ors (No.2) (04 November 2016) (Judge Jarrett)

Scully at [108]

Prior v Queensland University Of Technology and Ors (No.2) (04 November 2016) (Judge Jarrett)

Scully at [108] (Hely J)

Eatock v Bolt (28 September 2011) (Bromberg J)

247. The distinction utilised by the law on misleading and deceptive conduct is based upon reasoning which, in my view, applies with equal force to s 18C(1)(a). Whilst the decided cases on s 18C(1)(a) have not expressly drawn attention to the law on misleading and deceptive conduct, that the same approach is to be taken in relation to s 18C(1)(a) is implicit in the reasoning of those cases: *Creek* at [13] (Kiefel J); *Scully* at [108] (Hely J); *McGlade* at [52], [60] and [88] (Carr J).

Eatock v Bolt (28 September 2011) (Bromberg J)

253. Mr Bolt contended that the objective nature of the assessment required by s 18C(1)(a) imported an objective assessment of community standards and that the same standard applied irrespective of whether group offence or personal offence was alleged. Acceptance of that contention would see a reasonable person test substitute the reasonable representative test and result in the perspective clearly required by the words of s 18C(1)(a) to be ignored. For the reasons I have just outlined, that contention must be rejected. It is the values, standards and other circumstances of the person or group of people to whom s 18C(1)(a) refers that will bear upon the likely reaction of those persons to the act in question. It is the reaction from their perspective which is to be assessed: *Creek* at [16] (Kiefel J); *Scully* at [108] (Hely J) . Further, to import general community standards into the test of the reasonable likelihood of offence runs a risk of reinforcing the prevailing level of prejudice. To do that would be antithetical to the promotional purposes of Part IIA. Such an approach has been rejected in relation to sexual harassment: *Ellison v Brady* 92 4 F.2d 872 (9th Cir. 1991) at 878-879 ; *Stadnyk v Canada (Employment and*

Immigration Commission) (2000) 38 CHRR 290 at [11]; and see *Corunna v West Australian Newspapers Ltd* (2001) EOC 93-146 at [75467]-[75468]. Sexual harassment legislation is the arena from which the words "offend, insult, humiliate or intimidate" were deliberately borrowed: see Explanatory Memorandum at 10 and the Second Reading Speech to the RDA at column 3341.

In assessing whether the respondent's actions offend s 18C(1)(a), it is necessary to consider the perspective from which these actions are to be viewed, namely the hypothetical person in the applicant's position, or the group of which the applicant is one. The perspective suggested by the applicant's counsel in submissions is that of a "Jew in Australia". Considering that the leaflets have what the respondent admits to be a theme that "relates to the actions of Jews", and that the leaflets were distributed in Australia (notwithstanding that they may have also been distributed or published elsewhere), I consider such a perspective to be appropriate.

109. The relevant "act" is the publication and distribution of the leaflets, together with the annotations placed upon them by the respondent. Whether an Australian Jew, or Australian Jews as a group would feel offended, insulted, humiliated or intimidated by that act necessarily involves a consideration of the individual leaflets which is undertaken later in these reasons.

(c) Act done because of race, colour or national or ethnic origin

"Ethnic origin"

110. The respondent submits that Jews do not exist as a group by race, or ethnic origin in Australia or elsewhere, as, in her opinion, historical evidence shows that Jews are "mainly Turks" with a mixture of other races or nationalities who converted to Judaism in the 8th century AD. Leaving aside the historical accuracy of the respondent's sources (which evidence I have in any event rejected as proof of the underlying "facts"), the respondent's approach involves giving an unduly narrow construction to the expression "ethnic origin" where used in the RDA.

111. **Following paragraph cited by:**

Altaranesi v Administrative Decisions Tribunal (28 February 2012) (Campbell JA at [1], Meagher JA at [2], Handley AJA at [104])
and Jones v Scully [2002] FCA 1080; (2002) 120 FLR 243 at [111]

The meaning of "ethnic origins" was considered in *King-Ansell v Police* [1979] 2 NZLR 531. In that case the New Zealand Court of Appeal held that Jews in New Zealand formed a group with common ethnic origins within the meaning of the *Race Relations Act 1971* (NZ). Richardson J said at p 543:

> *"... a group is identifiable in terms of its ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what is biological terms is a common racial stock. It is that combination which gives them an*

historically determined social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents."

That passage was approved by the House of Lords in *Mandla v Dowell Lee* [1983] 2 AC 548 at 564 . See also *Commission for Racial Equality v Dutton* [1989] 1 QB 783, 799 . In *Miller v Wertheim* [2002] FCAFC 156 at [14] , a Full Court said, on the basis of *King-Ansell* , that it can readily be accepted that Jewish people in Australia can comprise a group of people with an "ethnic origin" for the purposes of the RDA.

112. That position is confirmed by the Explanatory Memorandum circulated in relation to the Racial Hatred Bill. At pp 2 - 3 the following appears:

"The terms 'ethnic origin' and 'race' are complementary and are intended to be given a broad meaning.

The term 'ethnic origin' has been broadly interpreted in comparable overseas common law jurisdictions (cf King-Ansell v Police *[1979] 2 NZLR per Richardson J at p. 531 and* Mandla v Dowell Lee *[1983] 2 AC 548 (HL) per Lord Fraser at p. 562). It is intended that Australian courts would follow the prevailing definition of "ethnic origin" as set out in* King-Ansell *. The definition of an ethnic group formulated by the Court in* King-Ansell *involves consideration of one or more of characteristics such as a shared history, separate cultural tradition, common geographical origin or descent from common ancestors, a common language (not necessarily peculiar to the group), a common literature peculiar to the group, or a religion different from that of neighbouring groups or the general community surrounding the group. This would provide the broadest basis for protection of peoples such as Sikhs, Jews and Muslims.*

The term 'race' would include ideas of ethnicity so ensuring that many people of, for example, Jewish origin would be covered. While that term connotes the idea of a common descent, it is not necessarily limited to one nationality and would therefore extend also to other groups of people such as Muslims."

113. **Following paragraph cited by:**

NAEN v Minister for Immigration and Multicultural and Indigenous Affairs (19 March 2003) (Sackville J)

72. If that is the relevant right for the purposes of s 10(1) of the *Racial Discrimination Act* , it is difficult to see how, on the material before me, the applicant has been denied equal treatment by the RRT or the courts. The reason that her application for a protection visa failed was that, on the facts before the RRT, Australia does not owe her protection obligations. That in turn is because Israel's *Law of Return,* according to the RRT, entitles her to effective protection in that country. It is, however, not only Jews who are affected by the principle that Australia owes no protection obligations to a refugee who can receive effective protection in a third country. The same principle applies to persons of different ethnic origin (assuming Jews to be persons of a particular ethnic origin: cf *Jones v Scully* [2002] FCA 1080, at [113]).

The difficulty facing the applicant is created by Israel's *Law of Return* which attracts the effective protection principle. In other words, the Commonwealth law which excludes the applicant from a protection visa (ss 36(2) and 65(1) of the *Migration Act*) cannot be characterised as discriminatory.

Jews in Australia are accordingly a group of people with an "ethnic origin" for the purposes of the RDA. There is evidence that Jewish people see themselves as a distinct community; that Jews are bound by common customs and beliefs; have a common language; and share other common characteristics. The views which Mrs Scully expressed as particular attributes she ascribed to Jewish people (see [44] and [45] above) really assume that this is so.

"Because of"

114. **Following paragraph cited by:**

Eatock v Bolt (28 September 2011) (Bromberg J)

308. The test has been expressed in different but not inconsistent ways:

- "whether anything suggests race as a factor in the respondent's decision to publish": *Creek* at [28] (Kiefel J); *Scully* at [114] and [116] (Hely J); *Jones* at [99] (Branson J);
- Did considerations of race actuate or motivate the conduct?: *Creek* at [28] (Kiefel J);
- Was the act "plainly calculated to convey a message about" or concerned with the racial group?: *Jones* at [99]-[100] (Branson J); *Toben* at [38] (Carr J), [65] (Kiefel J), [154] (Allsop J); *Scully* at [117]-[118] and [224] (Hely J); *McGlade* at [66] (Carr J).

Toben v Jones (03 July 2003) (Carr, Kiefel and Allsop JJ)

24. The primary judge adopted the approach taken to this question by Kiefel J in *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at 359 as applied by Hely J in *Jones v Scully* [2002] FCA 1080 at [114] . That was to inquire whether "anything suggests race as a factor in the respondent's decision to publish" the work in question. The primary judge reasoned as follows:

> *'99. In my view, it is abundantly clear that race was a factor in the respondent's decision to publish the material set out in [81] above. The material includes many references to Jews and events and people characterised as Jewish. It is particularly concerned with the Holocaust and with the conduct of German forces during World War II, matters of particular importance to Jewish people. It is, in my view, plainly calculated to convey a message about Jewish people (see Jones v Scully per Hely J at [116]-[117]).*
>
> *100. I am satisfied that the act of publishing on the World Wide Web the material set out in [81] above was done because of the ethnic origin, namely the*

Jewishness, of the people in the groups which I have identified above (see [95] and [96]).'

Toben v Jones (03 July 2003) (Carr, Kiefel and Allsop JJ)

58. In *Jones v Scully* [2002] FCA 1080 at [114] , Hely J observed that the phrase 'because of' requires consideration of the reason or reasons for which the relevant act was done (and see *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2001) 105 FCR 56 at 60, at [23] (Full Court)). It was important to note, his Honour considered, that pursuant to s 18B , if an act is done for one or more reasons, it is enough that one of the reasons is the race, colour or national or ethnic origin of the person or a group of people, whether or not it is the dominant purpose or the substantial reason for doing the act. It was submitted before his Honour that the test to be applied under s 18C(1)(b) was whether race is a 'material factor' in the performance of the act in question. His Honour followed the approach I had outlined in *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, namely to inquire whether 'anything suggests race as a factor in the respondent's decision to publish the work in question'. Her Honour also followed that course. Her Honour found (at [99] and [100]):

'In my view, it is abundantly clear that race was a factor in the respondent's decision to publish the material set out in [81] above. The material includes many references to Jews and events and people characterised as Jewish. It is particularly concerned with the Holocaust and with the conduct of German forces during World War II, matters of particular importance to Jewish people. It is, in my view, plainly calculated to convey a message about Jewish people (see Jones v Scully *per Hely J at [116-117]).*

I am satisfied that the act of publishing on the World Wide Web the material set out in [81] above was done because of the ethnic origin, namely the Jewishness, of the people in the groups which I have identified above (see [95] and [96]).'

Toben v Jones (03 July 2003) (Carr, Kiefel and Allsop JJ)

149. The appellant submitted that an interpretation of par 18C(1)(b) has been expressed by Judges of this Court which was, on the plain words of par 18C(1)(b), too broad, and so, in error. Reference was made to the discussion by Kiefel J in *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 where her Honour said at 359 [28] :

...the question is whether anything suggests race as a factor in the respondent´s decision to publish the photograph.

Hely J followed that approach in *Jones v Scully* [2002] FCA 1080 at [114] . The learned primary judge here referred to that which Hely J had said in *Jones v Scully* and, like Hely J, expressly followed the approach of Kiefel J in *Creek* .

Jones v Toben (17 September 2002) (Branson J)

98. In *Jones v Scully* at [114] Hely J said:

> *"The phrase "because of" requires consideration of the reason or reasons for which the relevant act was done:* Hagan *(Full Federal Court) (2001) 105 FCR 56 at 60 . It is important to note that if an act is done for one or more reasons, it is enough that one of the reasons is the race, colour or national or ethnic origin of a person or group of people, whether or not it is the dominant reason or a substantial reason for doing the act: s 18B. The applicant submits that the test to be applied in a consideration of s 18C(1)(b) is whether race is a "material factor" in the performance of the act. In* Creek *, Kiefel J notes at pars [19] – [27] that there have been differences of opinion expressed about the meaning of phrases such as "on the ground of" and "by reason of" in the context of discrimination legislation. It is not necessary for me to repeat what her Honour said there, except to say that, at the end of her discussion of the relevant authorities, her Honour adopted an approach to s 18C(1)(b) which enquired into whether "anything suggests race as a factor in the respondent's decision to publish" the work in question. I respectfully propose to follow that approach."*
>
> I also propose to adopt the approach adopted by Kiefel J in *Creek v Cairns Post Pty Ltd* .

The phrase "because of" requires consideration of the reason or reasons for which the relevant act was done: *Hagan* (Full Federal Court) (2001) 105 FCR 56 at 60 . It is important to note that if an act is done for one or more reasons, it is enough that one of the reasons is the race, colour or national or ethnic origin of a person or group of people, whether or not it is the dominant reason or a substantial reason for doing the act: s 18B. The applicant submits that the test to be applied in a consideration of s 18C(1)(b) is whether race is a "material factor" in the performance of the act. In *Creek* , Kiefel J notes at pars [19] – [27] that there have been differences of opinion expressed about the meaning of phrases such as "on the ground of" and "by reason of" in the context of discrimination legislation. It is not necessary for me to repeat what her Honour said there, except to say that, at the end of her discussion of the relevant authorities, her Honour adopted an approach to s 18C(1)(b) which enquired into whether "anything suggests race as a factor in the respondent's decision to publish" the work in question. I respectfully propose to follow that approach.

115. As I have noted above, the respondent appears to assert that s 18C(1)(b) is not applicable to her actions as her actions were not done "because of" the race, colour or national or ethnic origin of Jews. Instead, the respondent submits that she was motivated in distributing the leaflets by what she perceived as a need to highlight the "specific evil actions" of people who happen to be Jewish. Further, she said in cross-examination that she never targeted Jews as such. She also submitted that the context of the leaflet always limits the references to certain people, and that where she ascribed certain attributes to Jews, such attributes were confined to the "Jewish leadership" or to Jews in "powerful positions". She further submitted that the material focuses on the actions of specific people who are known as Jews, and that all Jews are never implicated.

116. The applicant submits that "it is clear from the theme of the material published and/or distributed that the publication and/or distribution of said material has been performed because of the ethnic origin of Jews or some or all of Jewry". Adopting the approach of her Honour in *Creek* , in my opinion there are many things about the publications which "suggest race as a factor" in

the respondent's decision to publish and distribute the material. These things include the fact that the leaflets, in large part, specifically refer to Jews both in their title and in their contents ("The Inadvertent Confession of a Jew"; "Russian Jews Control Pornography"; "The Jewish Khazar Kingdom"); that the leaflets discuss matters that are of particular importance to, or specifically relate to, Jewish people ("Was There Really a Holocaust?"; "The Jewish Khazar Kingdom"; untitled list of book synopses; untitled documents at pages 25 and 30 of the applicant's affidavit); and that some of the leaflets contain prominent annotations that were written by the respondent that draw attention to what the respondent sees as the point of the leaflets (such as, for example, the word "JEW" written across the forehead of the picture of Lenin in the leaflet containing the book synopses; and the annotation on the untitled document at p 35 of the applicant's affidavit which reads "THE WHITE CHRISTIAN NATIONS ARE THE TRUE SEED OF ISRAEL. 'THE SYNAGOGUE OF SATAN – WHO SAY THEY ARE JUDEAN – BUT ARE LYING FRAUDS' ARE TRYING TO FORCE THE WHITE RACE TO MONGRELIZE"). It may well be true that a reason in the respondent's decision to publish the material was because of her perceived need to highlight what she sees as the "specific evil actions" of people who are Jewish. However, it is enough to contravene s 18C(1)(b) that one reason for the respondent publishing the material was because of the message which the material conveys about Jews.

117. Thus, to take an example, the first of the leaflets has as its subject matter, gun ownership. But it is headed "The Inadvertent Confession of a Jew" and recounts an interview with a person identified as a "Jew". The leaflet asserts that "nearly all Jews are un-American, anti-freedom, anti-gun ownership". It may be that a reason for circulating the leaflet was to say something about gun ownership and anti-gunners. Even if that be so, it is patent on the face of the article that another reason for circulating the leaflet was to say something about Jews and Jewish involvement in the anti-gun movement. At least one of the reasons the leaflet was distributed was to say something (derogatory) about Jews, hence the requirements of s 18C(1)(b) are satisfied.

118. I reject the respondent's argument that she never targeted Jews as a group, and that it should be understood that general statements in her leaflets must of necessity refer only to Jews who are actually named or who were actually involved. The leaflets attack Jews generally, and are not limited either by their words or by the impression they give to particular individuals. It will be necessary to turn to specifics later in these reasons, but in general terms the message conveyed by the leaflets is that Jews have common features that ought to be condemned, ridiculed or despised.

119. Mrs Scully's affidavit provides some support for this conclusion. For example, p 9 refers to the "lying Jewish press"; it is the "Jewish lawyers" who are "onto a nice little earner with native title claims"; it is Jews who "vilify Australians". And on pp 17 and 18 it is Jews or world Jewry who are described as having been responsible for both World Wars. On p 16 there is a photo of Nelson Mandela with Joe Slovo. Mr Mandela's photo has been endorsed by Mrs Scully with the handwritten word "Mandela", whereas Mr Slovo's photo has the handwritten endorsement "Jew".

120. Mrs Scully was cross examined as to these annotations at T p 181 as follows:

> *"I see. And is it you that wrote the word 'Jew' across Mr Slovo's picture? --- That's right, yes.*
>
> *And is it you that put the word, or the words, 'Slovo is a Jew', at the end of the paragraph under the photograph? --- That's right.*
>
> *And is it you that put in the word 'Jew' on a number of occasions next to names in the right hand column? --- That's right, yes.*

And can you explain to me why it is in the case of Nelson Mandela you used a name and in the case of Mr Slovo you used the term of Jew? --- I believe that probably because Mandela is a well-known name and people would have recognised him as the person I'm referring to, but if I'd written Slovo on the other man that would not – that name is not known in the community and it would not have significance."

121. I do not accept this explanation. "Jew", in the hands of Mrs Scully, is and is intended to be, a pejorative term condemnatory of any person to whom she applies that description.

The leaflets and the particularised imputations

122. The applicant's approach to the demonstration of a contravention of s 18C of the RDA was akin to a defamation pleading, in that the applicant seeks to identify particular imputations which the applicant says are conveyed by the leaflets, and contends that if the leaflets convey those imputations, then they, on their face, contravene s 18C of the RDA, without the need for any independent evidence in relation to the subject matter of each leaflet. Those imputations are set out in par [6] above.

123. This approach necessarily involves the proposition, as was accepted by the applicant's counsel, that a leaflet which discussed matters such as, for example, the history of the Khazar Kingdom or the Holocaust, does not necessarily in itself attract the operation of s 18C of the RDA, or take the matter outside the exemptions in s 18D. Rather, it is the identified imputations that are said to be conveyed by each leaflet which produces that result.

124. In the circumstances of the present case, the applicant's approach provides a useful tool for considering the issues which arise, provided it is borne in mind that it is only a tool, and not a substitute for the statutory test.

125. In the law of defamation, the principles which apply in determining whether material conveys a pleaded imputation were summarised in *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 by Hunt CJ at CL (with whom Mason P and Handley JA agreed) at 165-166, where his Honour said:

"The ordinary reasonable meaning of the matter complained of may be either the literal meaning of the published matter, or what is implied by that matter, or what is inferred from it: ... In deciding whether any particular imputation is capable of being conveyed, the question is whether it is ***reasonably*** *so capable (*Defamation Act*, s 7A, reflecting the common law: ...), and any strained or forced or utterly unreasonable interpretation must be rejected: ... The ordinary reasonable reader (or listener or viewer) is a person of fair average intelligence ..., who is neither perverse ..., nor morbid or suspicious of mind ..., nor avid for scandal: .... That person does not live in an ivory tower but can and does read between the lines in the light of that person's general knowledge and experience of worldly affairs: ...*

The mode or manner of publication is a material matter in determining what imputation is capable of being conveyed: ... The reader of a book, for example, is assumed to read it with more care than he or she would read a newspaper. The more sensational the article in a newspaper, the less likely is it that the ordinary reasonable reader will have read it with the degree of analytical care which may otherwise have been given to a book ..., and the less the degree of accuracy which would be expected by the reader: ... The ordinary reasonable reader

of such an article is understandably prone to engage in a certain amount of loose thinking:... There is a wide degree of latitude given to the capacity of the matter complained of to convey particular imputations where the words published are imprecise, ambiguous, loose, fanciful or unusual: ...

What must be emphasised is that it is the test of reasonableness which guides any court in its function of determining whether the matter complained of is capable of conveying any of the imputations pleaded by the plaintiff. In determining what is reasonable in any case, a distinction must be drawn between what the ordinary reasonable reader, listener or viewer (drawing on his or her own knowledge and experience of human affairs) could understand from what the defendant has said in the matter complained of and the conclusion which the reader, listener or viewer could reach by taking into account his or her own belief which has been excited by what was said. It is the former approach, not the latter, which must be taken: .... The publisher is not held responsible, for example, for an inference which the ordinary reasonable reader, listener or viewer draws from an inference already drawn from the matter complained of, because it is unreasonable for the publisher to be held so responsible:..."

(emphasis in original)

126. The above principles were recently followed in this Court by Tamberlin J in *Versace v Monte* [2002] FCA 190 at pars [144] – [146]. At [145] his Honour said:

"In determining what will be conveyed to an ordinary reasonable reader, listener or viewer of fair average intelligence, one must not look at the statement or matters complained of in isolation. Rather, they must be considered in the whole context of the material in which they are published: John Fairfax & Sons Ltd v Hook *(1983) 72 FLR 190 at 195 . The reference to the "context" of the publication is a broad reference which embraces all the attendant circumstances, including both the surrounding matter and the mode of publication."*

Section 18D of the RDA

127. **Following paragraph cited by:**

Clarke v West Australian Newspapers Ltd (20 July 2010) (Raphael FM)

7. His Honour made reference to the decision of Branson J in *Jones v Toben* [2002] FCA 1150 where her Honour said at [23] :

"In my view, the placing of material, whether text, graphics, audio or video, on a website which is not password protected is an act which causes words sounds images or writings to be communicated to the public in the sense they are communicated to any person who utilises a browser to gain access to that website. ....

And at [75]:

"I further conclude that the act of placing text and graphics on a website which is not password protected is an act of publication."

However Gyles J did not specifically adopt the view, which had been expressed by Branson J in the context of an undefended summary judgment application. The respondent in the instant case wishes to argue that the matter is still live and deserves consideration and determination by a court at the same level as those other decisions. The applicant would prefer me to find that the matter was not considered in *Silberberg* and to follow *Jones v Toben* (supra) but concedes that the issue is complex and would prefer that it be decided by a court which did not feel constrained by the possibility that it might be bound by these decisions of the Federal Court. The respondent also argues that the question of who bears the burden of proof of the exemption under s. 18D of the RDA is also a live issue. Although it has been held to be that of the respondent; *Jones v Scully* [2002] FCA 1080 [127] ; *Jones v Toben* (supra) at [101] , *McGlade v Lightfoot* [2002] FCA 1457 at [67 – 69] the first matter only made a reference to the second reading speech and the last two matters were uncontested. The respondent points to the views expressed by French J, as he then was, in *Bropho v The Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 when his Honour said at [75] (obiter):

> "While the incidence of the burden of proof of the exemption is not contested on the appeal it is not, in my opinion, a question that should be regarded as settled."

In the instant case the applicant would argue that the burden of proof lies upon the respondent.

Jones v Toben (16 April 2009) (Lander J)

101. Moreover, the argument put does not assist the respondent in the proceeding because the respondent has not tendered any evidence at all and there is no evidence that would bring the respondent within s 18D of the Racial Discrimination Act . The onus was on the respondent to establish an entitlement to an exemption under s 18D of the Racial Discrimination Act ; *Jones v Scully* (2002) 120 FCR 243 at [127] and [230] .

Burns v Laws (16 May 2008) (O'Connor K - DCJ (President); Grotte E - Judicial Member; Nemeth de Bikal L - Non Judicial Member)

See for example, Jones v Scully at [127], [128]

McGlade v Lightfoot (26 November 2002) (Carr J)

68. Hely J in *Jones v Scully* at [127] and [128] appears to have assumed that the onus of proof with respect to an exemption provided for by s 18D rested on the respondent. Branson J in *Jones v Toben,* at [101] said:

> *"The onus of proof with respect to an exemption provided by s 18D rested on the respondent (* Jones v Scully *per Hely J at [127]-[128])."*

The Explanatory Memorandum to the Racial Hatred Bill makes the following observations in relation to the proposed s 18D (pp 10–11):

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

However, the operation of proposed section 18D is governed by the requirement that to be exempt, anything said or done must be said or done reasonably and in good faith. It is not the intention of that provision to prohibit a person from stating in public what may be considered generally to be an extreme view, so long as the person making the statement does so reasonably and in good faith and genuinely believes in what he or she is saying.

...

It is for the complainant, in relation to the civil prohibitions, to establish that the respondent's act was reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group, and that the act was done because of the race, colour, or national or ethnic origin of the complainant or group of people of which the complainant is a member. However, if so established, the onus then rests on the respondent to show, on the balance of probabilities, that his or her action falls within one of the exemptions in section 18D."

The individual leaflets and ss 18C and 18D

128. I now turn to the question of whether each of the alleged imputations are conveyed by the leaflets distributed by the respondent. I also deal with whether, if those imputations are so conveyed, the leaflets contravene s 18C of the RDA, and whether the respondent has any defences under s 18D.

(a) "The Inadvertent Confession of a Jew"

129. This leaflet is undated. According to a handwritten annotation appearing on it, the leaflet was received on 29 July 1996. It reproduces a transcript of an interview with Mr Aaron Zelman, who is reported as having formed a new organisation called "Jews for the Preservation of Firearms Ownership (JPFO)". The headnotes to the interview state that the interview first appeared in a publication known as the "American Survival Guide" in November 1989, and was reprinted in June 1990 in an issue of "S.W.A.T." magazine under the heading "JPFO in Defense of Firearms Ownership". The leaflet's theme is that Jews, who have a strong influence in the US media and government, are on the whole, anti-gun ownership. Jews are variously described as "left wing, liberal anti-gunners" whose ultimate political goal, through disarmament, is "the total control of peoples' lives and destiny".

130. I have reproduced below selected portions of the leaflet of which the applicant makes particular complaint, although the whole of the leaflet is relied upon:

"A: Jim, it is obvious that one of the major problems we gun owners face is the heavy influence (some call it a stranglehold) of <u>left wing, liberal Jewish anti gunners</u> in the media and government.

JPFO can do what needs to be done: forcefully challenge these individuals without the fear of being labelled anti-Semitic. The other pro-gun groups do excellent work, but they must daily tip toe around the truth for fear of the anti-

Semitic label, which would be used by the liberal media in a blink of the eye and without mercy.... To emphasise my point: can you imagine a representative of any pro-gun group saying what I have just said in this interview, even though it is the truth? It's not that they would not want to, it's just they're afraid of being clobbered by the "anti-Semitic weapon!"

Q: What are your personal reasons for starting JPFO?

A: There are a small percentage of Jews, like myself, who are staunch supporters of gun ownership, but our side of the story is censored by the liberal Jews who hea vily influence the mass media and government.

Another reason for forming JPFO is to combat the growing anti-Semitism in America, partly caused by anti-gun Jews.

...

The possibility of a violent anti-Semitic act being perpetuated should not be discounted. I believe that gun haters would stop at nothing to achieve their goal. There is a growing body of information that strongly suggests the possibility that the Stockton schoolyard killings by Patrick Purdy may have been orchestrated by high government officials with the help of certain anti-gunners.

...

Q: What do you think are some of the causes of Jewish involvement in the anti-gun movement?

A: The most vocal of liberal Jewish anti-gunners do indeed understand why they want Americans disarmed, as it is a crucial step for total control of people's lives and destiny, which is the ultimate goal of the liberal political agenda. ...

Liberal Jewish anti-gunners also make up a large percentage of the writers, directors and producers that create the anti-gun message or most of the mindless pap that appears on television or other forms of electronic programming. ...

A disarmed America would be a weak America and a weak America cannot help Israel continue to survive, much less any other democracy. Once Americans are disarmed, a political party could come to power in America that is hostile to Jews and Israel."

(underlining in original)

There are also some typed comments in the column on the far right of this leaflet. They read as follows:

"Mr Zelman has already stated nearly all Jews are un-American, anti-freedom, anti-gun ownership, unappreciative, are pro-tyranny, pro-people control and pro-big brother government and that they most likely will never change."

The following comments also appear in the respondent's handwriting on the side of the leaflet:

> *"THE JEW - MR AARON ZELMAN SUGGESTS THAT THE STOCKTON SCHOOLYARD KILLINGS BY PATRICK PURDY MAY HAVE BEEN ORCHESTRATED BY HIGH GOVERNMENT OFFICIALS WITH THE HELP OF CERTAIN ANTI-GUNNERS!*
>
> *COULD THE PORT ARTHUR KILLINGS HAVE ALSO BEEN ORCHESTRATED BY ANTI-GUNNERS?"*

131. The applicant says that this leaflet conveys the imputation contained at 2(a) of its particulars, being that Jews are "anti-democracy, anti-freedom, pro-tyranny".

132. The words "anti-freedom" and "pro-tyranny" are themselves used in the leaflet, and are thus conveyed by the leaflet. The word "anti-democracy" is not itself used in the leaflet, but the applicant contends that, "on a consideration of the whole article", the leaflet conveys the imputation that Jews are "anti-democracy". "Democracy" is defined in the *Concise Oxford Dictionary* 10th Ed, 1999, as "a form of government in which the people have a voice in the exercise of power, typically through elected representatives; control of a group by the majority of its members". The leaflet repeatedly refers to the "heavy influence" of "left wing, liberal Jewish anti-gunners" in the media and government (presumably in the US). In my opinion, merely because a group is said to have a "heavy influence" in the context of a political system that is democratic does not necessarily mean that the group is itself "anti-democratic"; it may just mean that the group is taking advantage of the established democratic system by successfully lobbying within it. However, the leaflet also states that the "ultimate goal of the liberal political agenda" (which is said to be controlled by Jews) is the "total control of peoples' lives and destiny"; and the typed commentary on the interview refers to Jews as *inter alia,* "pro-people control" and "pro-big brother government". Although the term "big brother" is now a colloquial phrase that has recently been popularised by "reality TV" shows of the same name, it was made famous by George Orwell in *Nineteen Eighty Four* to describe the leader of a tyrannical system of government whose hallmark was the control of the majority by the few through a reign of terror. In this sense, the phrase refers to a system of government that is antithetical to democratic beliefs. I am of the view that an ordinary reasonable reader would understand that the description of a group of people as "pro-big brother government" conveys that those persons are indeed "anti-democratic".

133. Accordingly, I find that imputation 2(a) is conveyed by the leaflet. But it is necessary to address s 18C in terms for the reasons earlier explained, and for the reason that whereas the law of defamation has as its focus the lowering of a person in the estimation of his/her fellows, the RDA includes within its focus, the likely effect of the conduct upon members of the ethnic group itself.

134. I now turn to the question of whether this leaflet contravenes s 18C. Neither side called any evidence, apart from the leaflet itself, on the topic of "anti-gunners". I therefore do not know whether or not the "facts" asserted in the leaflet are true. But, for the reasons earlier explained, that is not determinative of the question of contravention.

135. In my view, a leaflet that conveys an imputation that Jews are "anti-democracy, anti-freedom, pro-tyranny" is reasonably likely, in all the circumstances, to offend or insult a Jewish person in Australia. In coming to that conclusion, I have had regard to a number of factors, including the fact that Australia (like the US) is a western democracy whose people, both Jewish and non-Jewish, value their freedom and democratic institutions. In effect, the leaflet says that Jews do not

adhere to those values, and are instead characterised by the descriptions given to them by the imputations. In addition to these factors, the leaflet also seems to suggest, albeit tangentially, that Jews, who are described throughout the leaflet as "anti-gun ownership" or "anti-gunners", may have been responsible for orchestrating the Port Arthur killings in 1996, presumably in order to promote their own political agenda. This suggestion is conveyed by the handwritten annotation on the leaflet. An allegation that a group of people are responsible for organising a mass murder is reasonably likely to offend or insult members of the group.

136. As to whether the leaflet was published "because of" the ethnic origin of Jews, there are many things about the leaflet that suggest race as a factor in the respondent's decision to publish this leaflet. The leaflet specifically refers to Jews both in its title and its contents; and it contains prominent annotations that specifically highlight the fact that the person being interviewed is Jewish. It may well be that a reason for the respondent's decision to publish was to express her views on gun ownership in Australia. However, it also appears that one of her reasons for publishing was a desire to express her views on what she sees as the attitude held by a particular ethnic group (namely Jews) towards gun ownership. As I consider that this was one reason behind her decision to publish the leaflet, it follows that this leaflet contravenes s 18C of the RDA unless s 18D applies.

137. In relation to s 18D, the respondent has submitted that the leaflet "was twice published for a genuine purpose in the public interest" and was distributed by her "for the same genuine academic purpose". Presumably, the respondent's reference to the leaflet being "twice published for a genuine purpose" refers to the fact that the leaflet was previously published in the two magazines described above. However, it is clear that s 18D does not provide a defence based on republication. Accordingly, to the extent that the respondent asserts a defence based on this ground, it is rejected. As to her claim that the leaflet was distributed by her for a "genuine academic purpose", the respondent presented no evidence as to the historical or intellectual veracity of the leaflet. Nor did she present any evidence as to what the genuine academic purpose was.

138. The respondent's affidavit (p 13) includes a section headed: "Legal reasons why I have the right and the duty to distribute this article". In that section the following appears:

> *"The would-be tyrant, Jeremy Jones, is seeking to prevent me from distributing information which was written by a leader of a Jewish organisation, and which has been published twice in popular American magazines.*
>
> *My rights as an Australian citizen should not be any less than the rights of American citizens.*
>
> *Like Mr Zelman, I have every right to expose the heavy influence of left wing liberal Jewish antigunners in the mass media and government. The following page reveals just how heavy Jewish influence has been in the American government. In choosing his cabinet, the president discriminated against conservative Christian men. This discrimination has serious ramifications for Australia as our young men and women have been called to military duty in the Middle East where they have invariably sided with the American forces against the Semite race of Arabs.*
>
> *My actions are covered by Section 18C(a), (b) and (c).*

Gun ownership remains an important issue in our nation, as more and more people are realising that the official story about the Port Arthur massacre clashes with the facts of what really happened.

Mr Zelman's statement that a schoolyard massacre may have been orchestrated by high government officials with the help of antigunners, is a statement of great interest to Australians who know that there are major faults in the official Port Arthur reports. Massacres of this sorts have occurred very conveniently in nations whose freedom is being curtailed."

That is followed by what appear to be extracts from unidentified publications which:

- assert that America's rulers are all Jews (p 14);

- list "Clinton's Jewish appointees as of mid 1999" underneath a statement which invites the reader to:

  > *"Consider the following alphabetized* (sic) *list along with their titles and consider the impossibility that* ***all of these*** *peop le could not be part of a Zionist world wide conspiracy to control the United States and sell the country into military defeat."* (p 15);

- suggest that the ANC in South Africa, headed by Nelson Mandela, is part of the Communist Party of South Africa, headed by Joe Slovo; according to Mrs Scully's handwritten endorsement "Slovo is a Jew" (p 16);

- assert that Jews were mainly responsible for World War I and that World Jewry was directly responsible for World War II (pp 17 and 18);

- "expose" various "anti-German lies" told by Jews (p 19);

- contain purported quotations about Jews "by the Jews themselves" all of which, in one way or another, denigrate Jews (p 20);

- assert that the Sydney Jewish Museum is guilty of "knowingly promoting racial hatred" (p 21);

- assert that "Schindlers List" when originally published carried a notation that it was a work of fiction, a notation which was excluded from the second and third editions, which proves that "Jewish liars vilify the German people" (p 22); and

- contain miscellaneous observations about Jews and their attitudes to Christians (pp 23 – 24).

139. This necessarily brief summary of the materials included in this section of the respondent's affidavit reveals the following:

- the matters relied upon are incapable of sustaining a defence under s 18D;

- if and insofar as the matters relied upon relate to the leaflet, they negative, rather than establish, that the respondent was acting reasonably and in good faith in disseminating the leaflet;

- that the respondent's actions are motivated by the respondent's strongly held anti-Jewish views, even if it be accepted (as I do accept) that she genuinely believes that Jews are responsible for many of the world's ills. The respondent's position in this respect, as appears from p 3 of her response to the applicant's particulars of unlawful conduct dated 12 November 2001 ("RPOUC") is that:

"Judaism should be stamped out simply by exposure."

(b) "The Jewish Khazar Kingdom"

140. This leaflet is also undated but has a handwritten annotation on it which indicates that it was apparently received on 17 October 1995. It reproduces a five page article entitled "The Jewish Khazar Kingdom" by Curtis Clair Ewing. At the end of the article there is a typed annotation which notes that the article was reprinted for distribution in Australia by "Christian Identity Ministries", PO Box 146, Cardwell Qld. The leaflet purports to be an essay whose subject is the history of the "Khazar Kingdom". This kingdom is said to have existed in what is now Southern Russia, and was at the height of its power in the late 8th century AD, during which time it converted from paganism to Judaism. Using this fact the essay's author seeks to draw a number of conclusions, one of which is that Jews do not have a legitimate claim to Palestine as they are not "true Israelites".

141. The applicant makes particular complaint about the following paragraphs that appear in the article:

"Professor Lothrop Stoddard, the world-renowned authority on ethnology, published an article in The Forum magazine for March 1926, in which he stated: 'There are two sharply contrasted types of so-called Jews:

(1) Ashkenazim, those from Eastern Europe, short in stature, round-headed, with typical Jewish noses;

(2) Sephardim, those from Afro-Asia (the Mediterranean), slender in figure, long-headed, with fine-cut noses, an harmonic type.'

He further states: '... the Semitic Jews are long-skulled.' It is his learned position that the Ashkenazim is neither Jewish nor Semitic. And, using estimates from the Jews themselves, he states that 82% of Zionists are Ashkenazim, and that their claim to Palestine has no racial or historical foundation. He further agrees that probably nine-tenths of the world's Jews are predominantly of Ashkenazim blood, and that the same proportion is found in America today.

...

First, this evidence would certainly explode the JEWISH RACE theory. For, if they are a mixture of Esau-Edom-Hittites, Khazar-Ashkenazim, Sephardim plus Ethiopian blacks and Orientals, and plus a very charitable concession that a few real Judahites are among them, who has the temerity to call them a race, much less the purest race on earth, as many ignorant

Christians have done? All that may be said of them is they are a religious community and then they are as much divided into denominations as Protestants.

Second, the claim that they are the only representatives of the Israel people on earth is the greatest hoax of all time. They are not a good representative of Judah, much less the other tribes of Israel ...

...

Third, their claim to Palestine or the land of the Middle East deeded to the descendants of Abraham by covenant promise is a false claim which will certainly be exposed in time. And if, as we suggested, Esau-Edom is found is world Jewry, and the Jewish Encyclopaedia (1925 Ed), article EDOM, states after the Jews had overcome Edom: 'From this time the Idumeans ceased to be a separate people ...' then we may look for Obadiah to be fulfilled in the near future, especially verses 17-18, which read as follows: 'But upon Mount Zion shall be deliverance, and there shall be holiness; and the house of Jacob shall possess their possessions. And the house of Jacob shall be a fire, and the house of Joseph a flame, and the house of Esau for stubble, and they shall kindle in them, and devour them; and there shall not be any remaining of the house of Esau: for the LORD hath spoken it.'

If the present occupants of Palestine are not true Israelites, much less Judahites, then we may look for a house-cleaning and terrible judgment to come upon them, or else the above scripture has no meaning.

Once we find out who the Israelites are not, it is a very easy job to locate Israel provided one is honest and really wishes to know the truth enough to study the evidence. They will find that the marks of Israel are on the Anglo-Saxon-Celtic and related people."

142. In relation to this article, the applicant says that it conveys the first part of the imputation pleaded at par 2(c), being:

> (c) That contemporary Jewry is due for a terrible judgment because of its racial origin.

143. The applicant also submitted that the leaflet conveys the imputation that "the claim that Jews are the only representatives of the Israel people on earth is the greatest hoax of all time". As can be seen from a reading of the leaflet, the author presents a number of propositions relating to the supposed historical origins of Jews and then seeks to draw a number of conclusions from these propositions. Among these conclusions are the two propositions that form the basis of the imputations. Having regard to the fact that the imputations are drawn directly from the statements that are made in the leaflet itself, it is an unavoidable conclusion that the imputations would be conveyed to an ordinary reasonable reader.

144. Although I consider that the imputation that "contemporary Jewry is due for a terrible judgment because of its racial origin" is capable of being conveyed by the leaflet, in order to determine whether the imputation (and therefore the leaflet) contravenes s 18C it is necessary to assess the context in which the statement is made. The author of the leaflet makes the statement that "we may look for a house-cleaning and terrible judgment to come upon" Jews in order to offer his interpretation of a passage in "Obadiah", one of the books of the Old Testament. Read in this way

(that is, as one person's interpretation of a passage of scripture), the leaflet does not say that contemporary Jewry is due for a terrible judgment because of anything that is inherently bad or wrong about contemporary Jewry. Rather, the leaflet says that contemporary Jewry is due for a terrible judgment because a certain scripture says so. If one does not accept the author's interpretation of the scripture, then it is difficult to see how one could be offended, insulted, humiliated or intimidated by the leaflet. Accordingly, I find that s 18C is not contravened in relation to this imputation.

145. The imputation that "the claim that Jews are the only representatives of the Israel people on earth is the greatest hoax of all time" is, in my opinion, in a different category. This imputation, through its use of the word "hoax", suggests that Jews, in asserting this claim, have deliberately set out to deceive. I consider that such an imputation is reasonably likely to offend and insult Jewish people. In saying this, I make no comment on the truth of the author's claims as to the descendancy of Jews, as I have no admissible evidence on this. I also consider that this leaflet was published by the respondent "because of" the ethnic origin of Jews. The leaflet, in its title and in its contents, is specifically concerned with Jews; and, more particularly, was published in an attempt to outline the author's views of Jews in light of the "historical evidence" that is presented by the leaflet.

146. In relation to s 18D, the respondent asserts that the leaflet has been published hundreds of times by hundreds of authors because it is of "public interest". She asserts that, because of this, it is "therefore covered by s 18D(b), (c)(i) and (c)(ii)". Apart from making that assertion, the respondent' s affidavit does not contain any other material specifically directed towards this leaflet (T 500). However, it is clear s 18D does not provide a defence based on republication. Merely because a work has been published "hundreds of times by hundreds of authors" does not entitle the respondent to a defence under s 18D. Accordingly, to the extent that it is asserted that the respondent has a defence based on this ground, it is rejected.

147. One of the books tendered by the applicant was the "Thirteenth Tribe" by Arthur Koestler. That book deals with the same subject matter as the leaflet, and is admissible on the s 18D defence, as it may go to show that the general subject matter of the leaflet has been the subject of public discussion and controversy. It is appropriate to limit the use of this book to the s 18D defence pursuant to s 136 of the *Evidence Act 1995* (Cth) . But that falls short of establishing that the respondent acted reasonably and in good faith in accusing Jews of perpetrating the greatest hoax of all time. Nor has it been established that pars (b) or (c) of s 18D are satisfied.

(c) "Russian Jews Control Pornography"

148. This leaflet reproduces two articles and one "letter to the editor". It is noted as being received on 16/17 March 1995. The first article is entitled "Russian Jews Control Pornography". It reproduces a story relating to the conviction of "pornographer Reuben Sturman" for "avoiding millions in income taxes by hiding his assets overseas". The article says that Sturman controls "a majority of the pornographic production and distribution companies in America". It also refers to the fact that Sturman is a "leader in the Cleveland Jewish community and is honoured at the top of their social ladder". The article also refers to the "Jewish control of the pornographic business". It concludes by saying:

> *"If anyone needs a final reason for opposing Jewish immigration – THEN THIS IS IT."*

149. The next article reproduced in this leaflet is entitled "Behind The Pornographic Flood – Pornography – Jewish 'Contribution' to America". Among other things, this article refers to the "exclusively Jewish dominated business which is springing up all over America ... called pornography". It also refers to pornography as being a "totally Jewish-controlled business in America".

150. A "Letter to the Editor" is also reproduced in this leaflet. It is unclear where this letter has come from, or who the Editor is to whom it is addressed. It reads as follows:

> *"Dear Jimi,*
>
> *I used to be one of those who scoffed at the international banking conspiracy. Well no more after I read that rural male suicide had increased by 600% in one generation. Caused on the whole by the robber banks' extortion tactics. And Ms Irene Moss declaring in the* Weekend Australian *that her husband was 'a lovely Jewish banker', now Ms Moss is urging Australians to accept the Mabo perfidy.*
> *I now have my own conspiracy theory:*
> *(1) the rural folk are being forced off their land and into the cities in order to strengthen the red feds' grip on the electorates.*
> *(2) These clearances are really ethnic cleansing and the land will be turned over to the blacks and Asians as part of [a] capitulation treaty.*
> *(3) The land will be bought back from the bankers at hugely inflated prices with taxpayers' money to increase the robber banks' already usurious profits.*
> *(4) This ethnic cleansing will eliminate the Christian conservative resistance to the red feds' fifth-columnism, hastening the republic and change of the flag.*
>
> *(5) Paul Cheating will be made president for life and Australia's name will be changed to the Socialist Republic of Mongroidia."*

151. The applicant contends that this leaflet conveys the imputations pleaded at pars (d), (e) and (h), namely:

> (d) that Jews, *per se*, are anti-decent living in the sense that they, by their nature control pornography both in America and Russia;
> (e) that Jews, *per se*, exhibit a moral attitude which is antithetical to Australian values (described as 'anti-Christian');
> (h) that Jews are seeking to control the world, or already have gained that control, with the intention of destroying 'White Christian civilisation' and that Jews are 'lying frauds ... trying to force the White race to mongrelise'.

152. The first two articles that are reproduced in this leaflet ("Russian Jews Control Pornography" and "Behind the Pornographic Flood – Pornography – Jewish 'Contribution' to America") contain clear and unambiguous statements that Jews are behind, and control, the pornographic industry in the US. The body of the articles cite a number of examples of Jewish ownership of pornographic businesses in the US, and by these examples seek to convey that Jews, in general, are responsible for a business that is depraved and immoral. The respondent asserted that "Jews *p er se* are not being blamed" in the articles (RPOUC p 3(d)). However, no attempt is made in the

articles to limit the attribution of blame to individuals; rather, Jews as a group are blamed. The imputation that "Jews, *per se*, are anti-decent living in the sense that they, by their nature control pornography in both America and Russia" would be conveyed to an ordinary reasonable reader by this leaflet.

153. Imputations (e) and (h) are not conveyed by the leaflet. The leaflet makes no mention of Jews exhibiting a moral attitude that is antithetical to Australian values and that is described as "anti-Christian"; nor does it convey an inference along those lines. The two articles relating to the Jewish control of pornography are apparently aimed at the US and not Australia. In addition, apart from the reference to Ms Moss' husband as "a lovely Jewish banker", nowhere is the supposed moral attitude of Jews discussed or implied in the "Letter to the Editor", and I do not see that an ordinary reasonable reader would read such a meaning into the Letter to the Editor. The same equally applies to imputation (h). Accordingly, I am of the view that imputations (e) and (h) are not conveyed by the leaflet.

154. An imputation that Jews are "anti-decent living in the sense that they, by their nature, control pornography both in America and Russia", is reasonably likely to offend or insult a Jewish person living in Australia. As I stated above, despite the respondent's assertions to the contrary, no attempt is made in the leaflet to limit the attribution of blame to individuals; rather, Jews as a group are sought to be held responsible for the ownership and control of pornography. Accordingly, I am of the view that s 18C is contravened by this leaflet, subject to the availability of a defence under s 18D.

155. The respondent asserts in her affidavit that the leaflet was "distributed in the public interest; 18D (b)". She says:

> *"When attention is drawn to the identity of those who are involved in a most despicable business, there will be a decrease in that business and more safety for our little children."*

(Affidavit p 2, leaflet (f))

In RPOUC p 3 the respondent says:

> *"The references to Jewish control of pornography are very specific. Many names and details are given. Jews* per se *are not being blamed, but of course the evil influence of the Talmud must be of concern to all people ..."*

156. On p 30 of the respondent's affidavit, she says:

> *"It is not surprising that so much pornography in America and elsewhere is controlled by Jews. This evil influence probably comes into the Jewish communities through their Rabbis who spend many years studying the filthy Talmud which instructs the Jews to hate Christians and to harm them in every possible way.*
>
> *The Talmud is itself pornographic.*
>
> *It claims that sodomy is not sodomy if committed with a child under the age of nine. Much detail is given to support that criminal notion. Likewise it proclaims that men can have sex with little girls as long as they are under the age of three years. (see photocopy from Talmud).*
> *In one passage it explains that sexual intercourse with a gentile baby is acceptable. This is one of the thousands of passages which reveal Talmudic hatred for other races, yet Mr Jones has the gall to bring charges of racism against me.*

The article which I distributed was full of facts which had been published in American newspapers. It names names, gives details of convictions for tax evasion and money laundering.

This article which so 'offended' Jeremy Jones is presented here along with some other clippings from various newspapers."

(underlining in original)

157. A miscellaneous, and mainly unidentified, list of "clippings" is incorporated in this section of the affidavit. One cannot satisfactorily summarise this material, but I give a few examples. On p 34 it is asserted that "White 'Gentile' women sex slaves have been/are being sold at auction in Israel" and the question is posed "How long have the Jews known about sex slavery in Israel?" On p 36: "... Jews of Los Angeles who, like 99.9% of Jews everywhere, enable the perversions in Israel". On p 41: "The most important religious texts of the Jews (collectively known as the Talmud) authorise the Jews to kidnap, rape and murder White 'Gentiles'." On p 42: "Jews Seize Control of Walt Disney Studios to Churn Out Filth"; "Jews Ruin Walt Disney Pictures"; "Jewish controlled Hollywood has stepped up its promotion of homosexuality as an acceptable 'alternative lifestyle'".

158. Much of this material repeats and embellishes upon the material contained in the leaflet about which the complaint is made. The material confirms the impression which one derives from the leaflet itself, namely that the respondent, in distributing the leaflet was intending to denigrate Jews as a group, rather than simply to expose criminal or immoral conduct on the part of particular individuals. I do not accept the respondent's assertion that "Jews *per se* are not being blamed". The extract from her affidavit quoted above makes it plain that in the respondent's view, Jews have a propensity for involvement in pornography because of the teachings of their Rabbis and of the "filthy Talmud".

159. I am not satisfied that in distributing this leaflet, the respondent was acting either reasonably, or in good faith. The leaflet employs sensationalised headings which place the blame for pornography upon Jews *per se*. Pornography is described as "the Jewish contribution to America", and the leaflet states "If anyone needs a final reason for opposing Jewish immigration – THEN THIS IS IT". The other reasons are not stated, but it is implicit in the article that the fact that a person is a Jew is a sufficient reason for not allowing the person to settle in America. The leaflet vilifies Jews because they are Jews, and for that reason its distribution is neither reasonable, nor in good faith.

(d) Untitled document appearing at page 25 of the applicant's affidavit

160. This leaflet appears to reproduce two pages from a larger document, but neither party submitted that the fact that the leaflet appears to be part only of a larger document was of any significance. A handwritten annotation appearing at the top of the leaflet states that it was received in a mailbox "around February 1996".

161. The leaflet's theme is the dangers posed to the US by what the author describes as the "sin of race mixing". Jews are said to be responsible for promulgating "race mixing". The main danger is said to be that race mixing will cause the "White race to disappear leaving the world in the control of the anti-Christ Jews". Race mixing is said to be part of a Jewish plan for world conquest.

162. The applicant has made particular complaint about the following paragraphs that appear in the leaflet:

"The sin of race-mixing is one of the greatest dangers our nation faces today, although most Christian ministers make light of it. If God allows this church approved sin to continue, within a few generations the White race will disappear leaving the world in the control of the anti-Christ Jews who have been foremost in promulgating race mixing, knowing that history proves that bastard races are easier to control.

In America, this has become an increasing threat due to several reasons:

(1) the heavy influx of Black Hispanic, Asiatic and Jewish people, strongly promoted by Zionist interests in our government.

...

(3) The promotion of 'racial equality', by the media, which in business and social situations always stresses race mixing, has encouraged Christians to do the same, even though the Word of God strongly condemns it.

...

(6) The attack on the Bible, Christian virtues, the home and the sacredness of marriage, is all part of the over-all plan of the anti-Christs. A few nights ago I watched TV evangelist Pat Robertson, as he decried this attack against Christianity in what he titled ATTACK ON FAITH! He mentioned such anti-Christian organisations as the ACLU, but never hinted that they were led and controlled by anti-Christ Jews. Of course he could not do this, since as a Christian Zionist his interests lay in an 'Israeli first' policy. He calls these Canaanite enemies of Christ, the Chosen People while knowing they are His enemies. What utter hypocrisy!

(7) There is a conspiracy under way, Virginia! Whether you want to accept it or not. It is a conspiracy that had its start in the dusty halls of Babylon, for world conquest, and has carried on during the last 2000 years in what it openly states is a campaign of ultimately destroying 'White Christian Civilisation'.

163. The applicant contends that this leaflet conveys the imputations pleaded at pars (b), (c), (e) and (h):

(b) that the philosophy and teachings and practice of Jews is based upon a learning (the Talmud) which:
  (i) ought to be stamped out;
  (ii) promotes sodomy and paedophilia;
  (iii) is worse than a satanic cult;

(c) that contemporary Jewry is due for a terrible judgment because of its racial origin and the law commands all to own guns and to stamp out Judaism and, by implication, contemporary Jewry;

(e) that Jews, *per se*, exhibit a moral attitude which is antithetical to Australian values (described as 'anti-Christian');

(h) that Jews are seeking to control the world, or already have gained that control, with the intention of destroying 'White Christian Civilisation' and that Jews are 'lying frauds ... trying to force the White race to mongrelise'.

164. Imputation (b) is said to arise, not through any direct reference to the Talmud, but through the reference to the "dusty halls of Babylon" in par (7) of the second column of the leaflet. The applicant contends that "the Talmud originated in Babylon during the exile of the Jews". I do not

consider that this connection between Babylon and the Talmud would be made by an ordinary reasonable reader. In addition, there is no direct reference in the leaflet to the philosophy, teachings or practices of Jews, nor any suggestion that it ought to be stamped out, promotes sodomy and paedophilia, or that Judaism is worse than a satanic cult. Nor, in my opinion, can these suggestions be inferred from the leaflet. Accordingly, I am of the view that imputation (b) is not conveyed by the leaflet.

165. I do not consider that imputations (c) and (e) are conveyed by the leaflet. There is no mention of contemporary Jewry being due for a terrible judgment because of its racial origin; no mention of the law commanding all to own guns; and no mention of Jews exhibiting a moral attitude which is antithetical to Australian values. Although there are a number of references to "anti-Christ Jews" in the leaflet, the leaflet does not mention Australia or its supposed values; rather, the leaflet appears to have been written from an American perspective, and to the extent that it attempts to contrast the alleged moral attitude of Jews with the attitudes of any other group, it is the values of white Christian Americans that are so contrasted. Imputations (c) and (e) would not be conveyed to an ordinary reasonable reader reading this leaflet.

166. As to imputation (h), the leaflet specifically makes mention in par (7) of there being "a conspiracy under way" that "had its start in the dusty halls of Babylon, for world conquest, and has carried on during the last 2000 years in what it openly states is a campaign of ultimately destroying 'White Christian civilisation'". The leaflet also makes mention of the white race disappearing, "leaving the world in the control of the anti-Christ Jews who have been foremost in promulgating race mixing ...". An imputation that Jews are "seeking to control the world with the intention of destroying White Christian civilisation", would be conveyed to an ordinary reasonable reader by these passages. Such an imputation would also be reasonably likely to offend or insult Jews in Australia albeit part of the particularised imputation, namely "Jews are lying frauds ... trying to force the white race to mongrelise", is not made out. The leaflet makes sensationalised claims that seem clearly intended to provoke Jews and incite opposition to their beliefs (or the author's perceptions of those beliefs). In relation to s 18C(b), the leaflet is specifically directed towards what it perceives as Jewish attitudes towards the "sin of race-mixing", and makes numerous references to Jews. It seems clear that at least one of the reasons behind the leaflet being published was to express the author's opinions on Jews and their supposed beliefs.

167. In the respondent's affidavit, she says that "this leaflet about the Israelite identity of the European Christian people is of genuine public interest thus covered by 18D(b). As this information will combat racial discrimination against all white societies, all of whom are being forced to become multi-racial states, it comes under the protection of s 18D(c)(i)".

168. On p 65 of the respondent's affidavit, she says:

> *"The leaflet traces the story of Abraham and his son Isaac, and Rebecca and Rachel and Joseph in Egypt. The writers believes that the descendants of this Biblical family are the white Christian nations and that the Laws of God have been given to them to live by.*
>
> *He believes that there is a Jewish conspiracy which is destroying the Christian Israelite societies by promoting race-mixing, immorality, and a regression of America to a Third World status.*
>
> *In the following pages there is ample evidence to prove that such a conspiracy does exist.*

If there are any factual errors in my evidence I would like to have them pointed out. But if my materials are correct then they are in the public interest and I am protected by the Australian Constitution, by the Laws of God and even by the Racial Discrimination Act which allows matters of public interest to be discussed.

It is the hateful lies which cause offence. Historical and contemporary TRUTH can only be offensive to the liars."

169. The "ample evidence" to which the respondent refers consists of extracts from various articles by persons about whom little, if anything, is known interspersed with what are said to be quotations from various sources. The extracts do not prove anything in a legal sense. Nor do the quotations, even if accurate, prove the truth of what is said. Again, it is impossible to summarise this material. But the general thrust of much of it is to assert the existence of a Jewish plan to deliver the whole world to the "Jewish cause" by promotion of intermarriage between races. For example on p 70, under the heading "Satan stamps over Europe", the following appears:

"Do those, who hate other peoples, want to destroy them?
By genocidal immigration?
Perfecting the world means to Jewry, surviving as a racial entity and destroying the Aryan entities by racial blending in order to rule them in racial superiority!"

170. All that the respondent's "evidence" establishes is that she is not the only person in the world to engage in the vilification of Jews, and that there are others who profess to hold views similar to her own. The "evidence" does not establish a s 18D defence. The justification which the respondent proffers for her conduct in her affidavit is sufficient, of itself, to negative the availability of a s 18D defence.

(e) "The Most Debated Question of Our Time – WAS THERE REALLY A HOLOCAUST?"

171. This leaflet reproduces an article written by Dr E R Fields. It appears to be a photocopy from a publication known as "The Truth At Last". It is four pages in length. There is a handwritten annotation at the top of the article noting that it was "received in March 1996".

172. The article begins by asserting that the Holocaust "has become the greatest instrument of sympathy which any nation has ever been able to use to gain support for wars, expansion and foreign aid: this has made Israel the world's sixth strongest military power. The gravest threat to all this wealth and influence is the growing doubt over the question of whether or not a real holocaust of six million Jews ever actually took place". The author then goes on to state what he contends are a number of facts which he says disproves that there was really a Holocaust.

173. The applicant has complained about the whole leaflet, but in particular complains about the following paragraphs in the article:

" What experts say about the Holocaust

Dr Harry Elmer Barnes, eminent historian, author of 40 books, many standard college texts, noted in Rampart Journal, 1967 'It has been demonstrated that there had been no systematic extermination in those camps'.
Thies Christophersen, a German soldier and author: 'I was at Auschwitz! There was no gas

chamber there'.
Paul Rassiner, historian and anti-Nazi activist, who served a prison sentence in Buchenwald and the Dora camps stated in 1962 "The claim that a holocaust took place is an historic lie - the most tragic and most macabre imposture of all time'.
Prof Robert Faurisson, a specialist in Document Analysis at the University of Lyon, France, stated on April 25, 1979 'The holocaust lie, which is largely of Zionist origin, has made an enormous political and financial fraud possible, whose principal beneficiary is the State of Israel'.

Why the Holocaust campaign?

Hardly a week goes by when there are not stories in the press, on TV news or movies about the alleged holocaust. What is the long range design for this constant attempt to fill Germans and indeed all Christians with a feeling of guilt over a holocaust which never occurred?

- *Bernard Postal wrote in Jewish Week, July 14, 1979 'Not until after the Holocaust, did anti-Semitism become taboo. There was a time when anti-Semitic speeches were an open factor in national campaigns. The Holocaust puts a taboo on overt anti-Semitism among upper-level statesmen and publicists!'*
- *S. E. D. Brown of South Africa, a noted journalist writes, 'The holocaust instils a guilt complex in those said to be guilty and spreads the demoralisation, degeneration and eventually the destruction of the natural racial elite among a people. This transfer effective political control to the lowest elements who will cowtow to the Jews'.*
- *Zionist spokesmen often boast of: 'The shattering effect of the holocaust on the Christian conscience resulting in a feeling of collective indebtedness to the Jews'.*
- *Massive, unending, US Foreign Aid to Israel is made possible because anyone who dares oppose these outrageous giveaways is condemned as being "anti-Semitic" and "insensitive" to holocaust victims.*
- *The Jews hold an unnatural violent hatred for the German people. Jews seek to turn all other peoples of the world against Germans and keep that nation divided for all time to come. That is why no peace treaty has ever been signed as yet with Germany and they still live under allied military occupation laws.*

...

A question of fund raising

The Wall Street Journal quotes the Jewish professional fund-raising consultant firm of Milton Goldin Co, as saying that the main theme of Jewish fund-raising is the holocaust and has been for 38 years. When they don't use the holocaust the money collection sharply drops off. Thus the more the press, TV and Hollywood promotes the holocaust the more money the United Jewish Appeal and other Zionist funds can extract from gullible people.

Holocaust silences opposition

Jewish leaders have discovered that by repeating holocaust stories over and over again they can instil a guilt complex within all Gentiles. This effectively silences most critics of Zionist political goals."

174. The applicant contends that this leaflet conveys the imputation pleaded at par 2(f), being:

> (f) that the ethnic group who live as Jews have perpetuated and are perpetuating a "myth" for their own political purposes, being the Holocaust perpetrated by the leaders of the Nazi Party in Germany, which allegation by the respondent imputes that Jews, *per se*, are fraudulent, liars, immoral, deceitful and part of a conspiracy to defraud the world (or the remainder of it).

175. In this leaflet, the author attempts to put forward a number of "facts" which he asserts prove that the Holocaust could not have occurred. The leaflet contains statements that there are "real doubts" about whether a "holocaust of 6 million Jews ever actually took place", and makes reference to the "alleged holocaust" and "a holocaust which never occurred". Using these "facts" the author then goes on to state what he believes are the motives behind Jews perpetuating the "holocaust lie". Among those alleged motives are making anti-Semitism taboo; instilling a guilt complex in those said to be guilty; and for fund raising for both Jewish groups in the US and for Israel itself. To state that Jews have invented an historical event in order to profit from it clearly imputes that Jewish people are fraudulent, liars, immoral, deceitful and part of a conspiracy to defraud the world (or the remainder of it). That is made explicit by the quotation attributed to Professor Faurisson:

> *"The holocaust lie, which is largely of Zionist origin, has made an enormous political and financial fraud possible whose principal beneficiary is the State of Israel."*

Accordingly, I find that imputation 2(f) is conveyed by this article.

176. **Following paragraph cited by:**

Jones v Toben (17 September 2002) (Branson J)

> 89. As Hely J pointed out in *Jones v Scully* at [176] it is not for the Court in a case of this kind to seek to determine whether or not the Holocaust occurred. No doubt it is for that reason that no attempt was made in this case to lead evidence on that topic. The role of the Court is to determine whether the applicant has substantiated his complaint that the respondent engaged in conduct rendered unlawful by s 18C of the RDA . However, it is appropriate to note, as the document headed *"About the Adelaide Institute"* itself recognises, that it is generally accepted in Australia and elsewhere that the Holocaust did occur.

I am not in a position to determine, as a matter of fact, whether the claim made by the author of the pamphlet that the Holocaust never occurred is true or not. I do not have the evidence which would be needed to enable me to make that determination, assuming that the matter is

susceptible of proof in a court. As Gray J observed in *Irving v Penguin Books Ltd* [2000] EWHC QB 115 at [1.3], that is a task for historians whose role it is to provide an accurate narrative of past events; whereas my role is to determine whether the public dissemination of the leaflet by Mrs Scully in Launceston contravenes s 18C of the RDA.

177. In my view, a leaflet that conveys an imputation that Jews are fraudulent, liars, immoral, deceitful and part of a conspiracy to defraud the world is reasonably likely to offend, insult, humiliate or intimidate Jews in Australia. This would be so regardless of whether or not the leaflet made mention of the Holocaust. However, the fact that the imputation arises in the context of a debate about the Holocaust makes it even more likely that the leaflet would cause offence. This is particularly so owing to the inflammatory language used in the leaflet, as well as the fact that it is unambiguously dismissive of the Jewish view of the Holocaust. I therefore find that this leaflet contravenes s 18C.

178. In par 22 of the respondent's written submissions the following appears:

> *"If Jews were really stuffed into gas chambers and gassed by the millions, then some type of proof should be made available. In the* Irving-Lipstadt *case in London, Judge Gray was surprised that so little evidence was presented for the existence of gas chambers. He had expected a lot of evidence, but was given none. The* Lipstadt *side were not even able to produce a photo of the holes in the roof through which the pellets could have been thrown."*

179. The following comments should be made about that submission. First, the issue before Gray J was whether Professor Lipstadt's book, "Denying the Holocaust - The Growing Assault on Truth and Memory", libelled David Irving. The book accused Irving (*inter alia*) of being a spokesperson for Holocaust denial, who frequently denied that the Nazis embarked upon the deliberate planned extermination of Jews, and who asserted that it is a Jewish deception that gas chambers were used by the Nazis at Auschwitz as a means of carrying out such exterminations. The book also accused Irving, in denying that the Holocaust happened, of misstating evidence, misquoting sources, falsifying statistics, misconstruing information and bending historical evidence so that it conforms to his neo-fascist political agenda and ideological beliefs. A defence of justification was upheld.

180. Gray J concluded, in a judgment of 202 pages at [13.91]:

> *"... no objective, fair-minded historian would have serious cause to doubt that there were gas chambers at Auschwitz and that they were operated on a substantial scale to kill hundreds of thousands of Jews."*

and at [13.9] and [13.51] found that Irving had misrepresented and distorted the historical evidence which was available to him. In the light of these findings, I am unable to accept that the respondent gains any assistance or comfort from the decision of Gray J in *Irving*.

181. In the respondent's affidavit (page 46), the following justification is offered in relation to this leaflet:

> *"Any one who cares to read this leaflet will see that there has been solid information available for decades to cast doubt on to the accepted version of "The Holocaust". The essence of the argument is really whether or not homicidal gas chambers were used to kill any people. In the*

*next several pages I provide enough information to prove that **NO! THERE WERE NO GASCHAMBERS AT AUSCHWITZ OR AT ANY OTHER GERMAN DETENTION CAMP***

.

I am also submitting 8 hours of video evidence and numerous books.

But as a defence against accusations of racial vilification etc, I must make the point that many, many hateful lies have been made against the German people for nearly 90 years. Whenever a gross lie is exposed as a lie there is never an apology to the victim nation (usually Germany) and no apology to the families of the innocent individuals who suffered imprisonment and torture and execution for crimes not committed.

Then the job of publicising the exposure of the gross historical lie falls on to self-funded groups of historians and individuals such as me who struggle against the inertia of government-funded 'academics' who are too cowardly to admit that they have been peddling lies for decades.

HISTORICAL LIES ARE VERY HURTFUL TO INDIVIDUALS OF VICTIM NATIONS SUCH AS GERMANY.

*One of the most abominable books of lies if Hitler's Willing Executioners by the Jew Daniel Goldhagen. It contains no research or scholarship, just **SHEER NONSENSE and it is WORTHLESS.***

SO, HOW COME IT IS PERMISSIBLE FOR SHEER NONSENSE AND WORTHLESS SCHOLARSHIP TO CONTINUE ITS VILIFYING SLANDER AGAINST ALL GERMAN PEOPLE?

That vile book which deliberately vilifies all German people continues to be sold, promoted and discussed as though it is scholarly, and only very, very rarely is its true aim revealed – the aim of denigrating all German people.

Somehow German people have lost the right to be hurt by lying slander. But under our laws of Equal!! Rights, Jews are able to promotes (sic) *their hideous lies, and we the truth-tellers are not allowed to question their hideous lies."*

(bold and underlining in original)

182. One may "cast doubt on the accepted version of 'The Holocaust'" without contravention of s 18C. The leaflet goes beyond that objective, because of the imputation which I have found the leaflet conveys. The balance of the paragraphs quoted above appear to assert that it is legitimate to engage in racial vilification of the Jews because some persons who are Jews have engaged in real or imagined slander of the German people. There is no merit in this contention.

183. The respondent contends that the leaflet:

- was distributed for a genuine academic purpose (s 18D(b));
- is "overwhelmingly fair and accurate s 18D(c)(i)"; and

- is also covered by s 18D(c)(ii) "because it will combat the racial discrimination and prejudice currently suffered by the German people who are vilified by Jewish film directors such as Steven Spielberg who promote hatred of the German race."

[Affidavit p2(g)]

184. The videos to which I earlier referred and the book "The Holocaust Industry – Reflections on the Exploitation of Jewish Suffering" touch on or cover the same general subject matter as this leaflet. I declined to accept those sources as evidence of the facts, but they may be admissible on the s 18D defence to show that the general subject matter of this leaflet is a matter of public interest, and that some other persons profess to hold views on the general subject matter similar to those expressed in the leaflet, but I would limit their use to that extent.

185. There is a line between legitimate criticism, and prejudicial vilification of the Jewish race and people. Jews are as open to criticism, and their beliefs are as open to scrutiny, as much as is the case with any one else. I accept that the views expressed in the leaflet accord with the respondent' s subjective opinions on the topics covered by the leaflet. But this is insufficient of itself to establish a defence under s 18D.

186. I do not accept that the respondent distributed the leaflet reasonably, or in good faith for a genuine academic purpose. Her affidavit does not establish that this is so, but rather it suggests that it is not. If, as Mrs Scully says, available information only "casts doubt" on the accepted version of the "Holocaust", then distribution of a leaflet conveying the imputation which I have found is neither reasonable nor in good faith, nor can it be in legitimate pursuit of any academic purpose. At p 54 of her affidavit, an extract from an unidentified publication refers to the "Holocaust extortion racket" and to "Holocash" engaged in by "Holocaust Swindlers". This is amongst the materials on which the respondent relies as justifying her distribution of the leaflet. That confirms the impression gained from a reading of the leaflet itself, and from the whole of the evidence, that Mrs Scully is a person who holds strongly anti-Jewish views, and that this leaflet was distributed with the intention of vilifying Jews. In the context of the RDA, if that was the intention underlying the distribution of the leaflet, then reasonableness, good faith and genuineness of purpose would not be found.

187. Nor is the leaflet a "report" in the sense that this expression is used in s 18D(c)(i) of the RDA (that is, as referring to the media reporting of a current event [see Explanatory Memorandum p 11]), nor is it fair, as it is the product of the respondent's anti-Jewish bias. The notion of a "fair comment" is derived from the law of defamation. The law of defamation distinguishes between a comment, and a statement of fact. It is not always easy to draw that distinction: see for example, Fleming, *Th e Law of Torts* 9th Ed. 1998 at pp 648-649. The imputation which I have found is a factual allegation that Jews have invented the Holocaust for their own financial gain, rather than a comment upon some substratum of fact.

(f) Untitled document appearing at page 30 of the applicant's affidavit

188. This document appears to be an extract from a letter written by an unnamed person to a Rabbi Fox. It is one page in length and contains two columns. It is described in the respondent's affidavit as "an odd page out of some newsletter" (p 76). It has a handwritten annotation stating that it was received in a mailbox on 6 April 1996. It was not submitted by either party that the fact that the letter appears to be an extract only from a larger document was of any significance. The

leaflet accuses Jews of promoting the dissolution of "all things Anglo/Australian" through immigration and the assimilation of ethnic communities. It also accuses Jewish teachings of promoting sodomy and intercourse with infants, and describes Judaism as "worse than a Satanic Cult".

189. The applicant complains about a number of paragraphs that appear in this leaflet. In the first column, the following paragraph appears:

> *"Further in the article it would seem that Galatians 3:28 is an affront to Jews and a myriad of non-Christians; but nary a word that the flourishing of other faiths in this Christian country might be more than a mere superficial affront; it is in fact a downright threat to the continued existence of Christianity. That to you, Rabbi Fox, is clearly to be approved of, as you show concern only about every other faith – not least your own. In other words Christianity must make room for all-comers, and soon there will be no place anywhere for Christianity in Australia.*

The applicant also makes complaint about the following paragraphs that appear in the right hand column of the leaflet:

> *"With the exception of the Asian and other very different looking peoples, the ethnic communities will assimilate; (including your own, though for cultural reasons to a lesser extent, for which assimilation is some genuine anguish on your part) and this to the accompaniment of much insincere solicitous concern from the likes of you, as the non-Jewish ethnics themselves are as expendable as are two-legged cannon fodder to a field commander in the drive to abolish as a viable concept the Anglo-Australian ..."*
>
> *"To something not derived from the article: I have a book by one, Elizabeth Dilling (1894-1966) '*The Jewish Religion: Its Influence Today*' from the Heritage Bookshop. I turn to page 22 and it says, 'When a grown man has intercourse with a little girl it is nothing, for when the girl is less than this – that is, less than 3 years old – it is as if one puts the finger into the eye – tears come to the eye again and again, so does virginity come back to the little girl under 3 years. (See Exhibit 136, Kethoboth 11b of the Talmud.) This is the standard doctrine of the whole Talmud on baby girls. Sodomy and intercourse with babies is the prerogative of the adult Talmudic man, in contrast to Christ's beautiful teachings concerning little children.'*
>
> *There is much, much more of an equally repellent nature on this and other Talmudic topics in her priceless book.*
>
> *I cannot understand why anyone could continue to adhere to this worse than a Satanic Cult that you call Judaism when they read this. What do your women say about it? Do they approve? Or is the truth about your 'religion' carefully hidden from them also?*
>
> *But you, Rabbi Fox, can't not know about it, so why are you still a rabbi? If you are not active in having such advocacy of unspeakable crimes against infant girls expunged for all eternity from your approved Talmud, then you must be in agreeance with such 'sacred' teachings. That comment, of course, would be equally applicable to the rest of you rabbis, planet wide."*

190. The applicant contends that imputations (b), (d), (e) and (h) are conveyed by this leaflet:

(b) that the philosophy and teachings and practice of Jews is based upon a learning (the Talmud) which:
  (i) ought to be stamped out;
  (ii) promotes sodomy and paedophilia;
  (iii) is worse than a satanic cult;
(d) that Jews, *per se*, are anti-decent living in the sense that they, by their nature control pornography both in America and Russia;
(e) that Jews, *per se*, exhibit a moral attitude which is antithetical to Australian values (described as 'anti-Christian');
(h) that Jews are seeking to control the world, or already have gained that control, with the intention of destroying 'White Christian Civilisation' and that Jews are 'lying frauds ... trying to force the White race to mongrelise'.

191. In relation to this leaflet, the respondent contends that:

> *"In an age when thousands of babies and toddlers are being raped to death in front of video cameras, it is of paramount public interest to protect all children from such torture. Section 18D(b) gives protection to the distribution of this leaflet, because a filthy source of 'religious' literature which promotes this horrific practice needs to be exposed in the public interest."*

(Affidavit p 2 par (h))

192. Imputations (b)(ii) and (iii) are drawn directly from the leaflet itself. The passage that quotes Elizabeth Dilling's book refers to "a grown man [having] intercourse with a little girl", and is said by Dilling to be "the standard doctrine of the whole Talmud on baby girls. Sodomy and intercourse with babies is the prerogative of the adult Talmudic man ..." Following on from this passage, the author of the leaflet describes Judaism as "worse than a Satanic Cult". Accordingly, I find that imputations (b)(ii) and (iii) would be conveyed to an ordinary reasonable reader. However, in relation to imputation (b)(i), I do not consider that an imputation that the Talmud itself, or the philosophy, teachings and practices of Jews "ought be stamped out" arises from this leaflet.

193. Imputation (d) is framed in terms of Jews being anti-decent living *in the sense that* they, by their nature, control pornography in both America and Russia. In other words, the imputation is specific as to the way in which Jews are said to be "anti-decent living". However, no mention is made of Jews controlling pornography anywhere, let alone in specific countries. Whilst it is true that the leaflet does ask the question: "Why can't such Talmudic writings be classed as child pornography ...?", this is quite a different thing to suggesting that Jews control pornography. Imputation (d) would not be conveyed to an ordinary reasonable reader of this leaflet.

194. As to imputation (e), the imputation suggests that the leaflet uses the term "anti-Christian" to describe the moral attitude of Jews. However, nowhere in the leaflet is the word "anti-Christian" used. Nor is such a meaning implied. Furthermore, nowhere in the leaflet is the alleged moral attitude of Jews contrasted specifically with Australian values. It is, instead, contrasted with values and beliefs that the author seeks to attribute to Christians in Australia, which is not the same thing as contrasting it with Australian values. In so contrasting Jewish attitudes with Christian values, the author does not do so in a way that Jewish attributes are described (or implied) as "anti-Christian". I do not consider that imputation (e) would be conveyed to an ordinary reasonable reader.

195. I do not consider that imputation (h) would be conveyed to an ordinary reasonable reader of this leaflet. The leaflet does not suggest that Jews are seeking to control the world, or that they have the intention of destroying White Christian civilisation. It is true that the leaflet makes reference to what Jews (or at least one member of the Jewish community in Australia, namely Rabbi Fox) apparently "want to see happen" – namely, "the complete dismantling/dissolution of all things Anglo-Australian..." but this of itself does not suggest that Jews are seeking to control the world or have the intention of destroying White Christian civilisation. I do not think that imputation (h) would be conveyed to an ordinary reasonable reader of this leaflet.

196. As to s 18C, the applicant gave evidence in cross-examination as to his understanding of the passage reproduced in the leaflet that purports to quote an extract from the Talmud. His evidence was that he had never read such a passage in the Talmud, but had seen it referred to in books that sought to give the passage the same interpretation as that given by Elizabeth Dilling. However, no Jewish person he had ever come across adopted that interpretation. Mr Jones also said that, in any event, taken in context passages of this kind relate not to the status of the perpetrator of the act but rather to the status of the victim – how somebody who has been raped as a child can then re re-integrated fully within the Jewish community; and that it is both his view, and his understanding of the views of Jews in general, that the idea of a grown man having sex with a child would be regarded as "completely repugnant and horrific behaviour".

197. Although the applicant is not, and does not profess to be an expert on the Talmud, I accept his evidence as to his understanding of Jewish views on such practices as paedophilia. As he said Jews consider such practices to be completely repugnant and horrific, it follows that a piece of literature that seeks to attribute to Jewish teachings the promotion of such practices, is reasonably likely to both offend and insult Jews in Australia. The same can be said for an imputation that Judaism is "worse than a Satanic Cult". By its clear words, such an imputation attributes to Judaism and its followers that their religion is worse than a cult that practices the worship of Satan. To the extent that the leaflet conveys an imputation that compares the worship of Satan to the practices of Judaism, I consider that it is reasonably likely to offend and insult Jews. I also consider that the leaflet was published in order to comment specifically on the author's belief as to Jewish practices. In this sense, the ethnicity of Jews was a factor in the respondent's decision to publish the leaflet. I accordingly find that this leaflet contravenes s 18C, subject to the availability of a defence under s 18D.

198. As to s 18D, the respondent contends that "Section 18D(b) gives protection to the distribution of this leaflet, because a filthy source of 'religious' literature which promotes this horrific practice needs to be exposed in the public interest". The respondent has had no formal education in the Jewish religion, she is not an expert in the Talmud, nor has she spoken to any experts. Neither Mr Jones, nor any Jewish person he has ever come across, treats anything in the Talmud as conveying the message described by Elizabeth Dilling. In those circumstances, it cannot be said that the respondent was acting reasonably in distributing the leaflet in question. Nor am I satisfied that in so doing she acted in good faith. The leaflet may reflect views which the respondent holds but her purpose in disseminating the article was to vilify Jews as part of her campaign to "stamp out" Judaism.

199. For the same reasons, the publication was not made for any genuine purpose in the public interest, but as a result of the respondent's anti-Jewish prejudices.

(g) Untitled list of book synopses

200. This leaflet, of one page in length, was received in a mail box on 12 April 1996. It reproduces synopses of some 21 books. A handwritten annotation appearing on the side of the leaflet advertises that the books are "on sale at Hart Street Market". The respondent has admitted that this handwriting is hers. In the middle of the page there is a picture of Vladimir Lenin, with the word "Jew" handwritten across his forehead. The respondent has also admitted that this handwriting is hers and that the leaflet was distributed with the handwritten annotations on it.

201. The respondent stated in cross-examination that she did not herself do the synopses of each book, but rather photocopied the synopses from a newspaper called "The Truth at Last". The respondent stated that this newspaper is published in Marietta, Georgia, USA. She also said that she had read at least ten of the books described in the leaflet.

202. The applicant complains of, in particular, ten of the synopses appearing in this leaflet. The first three synopses of which complaint is made appear on the far left hand column of the leaflet, under the heading "Books by Jewish Writers". The first of these books is entitled "You Gentiles" by Maurice Samuel. The synopsis reads as follows:

> *"A Jew describes 'why we are not loyal citizens'. Also 'why we destabilise nations' and how Jews are disciplined to the detriment of the Goyim."*

203. The second synopsis is entitled "The Protocols of the Learned Elders of Zion". The synopsis reads:

> *"Original minutes of the Jews' secret plan for the New World Order, first revealed in Russia in 1905 …."*

204. The third synopsis is entitled "Behind Communism" by Frank Britton. The synopsis describes this book as:

> *"the single greatest book ever written exposing the Jews behind the world Communist conspiracy."*

205. The next two synopses appear in the second column of the leaflet under the heading "Actual Origin of the Jews – Who Are These People Who Call Themselves Jews?". The first title under this heading is "The Thirteenth Tribe" by Arthur Koestler. The synopsis states that the book "proves that today's 'Jews' never resided in ancient Palestine. They originated in Khazaria, in South Russia and converted to Judaism in the year 800 AD. They make up 82% of world Jewry. Koestler says they have no historic claim to Israel." The second book under this heading is entitled "Facts are Facts" by Benjamin Freedman, who is described in the synopsis as "a wealthy Jewish Wall Street banker in the 1950s". The synopsis states that "he details why the Jews are not related to the 'Chosen People' of the Bible. Freedman says they are Khazars from South Russia and are not true 'Jews'".

206. The next synopsis describes a book called "The New Crowd" by Barry Rehfeld. This synopsis states: "A Jewish author boasts about how upstart Jews seized control of Wall Street in the 1980s". Following this synopsis is a synopsis of the book "Merchants of Debt" by George Anders. In particular, this synopsis states that the book reveals "more secrets of Jewish businessmen".

207. In the third column of the leaflet, appearing below the picture of Lenin described above, is a synopsis for the book "Lenin" by D Volkogonov, who is described as a former KGB official. The synopsis states that the book "reveals Lenin as the diabolical founder of the murderous Gulag system. Proof that Lenin was a Jew. How he seized power over Russia". The fourth column of the leaflet contains a synopsis of the book "The Hidden Empire" by William Dudley Pelley. The synopsis states: "how the Jewish 'State within a State' controls the government". In the fifth column, there is a synopsis of the book entitled "Iron Curtain Over America" by Colonel John Beaty, US Military Intelligence Officer. The synopsis describes, among other things, "how they [Jews] founded Communism, why World War II was unnecessary, how the Jews infiltrated and seized control of the Democratic Party".

208. The applicant contends that this leaflet conveys the imputations pleaded at pars (a), (b), (d), (e), (g) and (h), namely:

(a) that Jews are anti-democracy, anti-freedom, pro-tyranny;
(b) that the philosophy and teachings and practice of Jews is based upon a learning (the Talmud) which:
  (i) ought to be stamped out;
  (ii) promotes sodomy and paedophilia;
  (iii) is worse than a satanic cult;
(d) that Jews, *per se*, are anti-decent living in the sense that they, by their nature control pornography both in America and Russia;
(e) that Jews, *per se*, exhibit a moral attitude which is antithetical to Australian values (described as 'anti-Christian');
(g) that part of the conspiracy of World Jewry was a Bolshevik Revolution in 1917 and that Jews perpetrated the purges in the Soviet Union thereafter; and
(h) that Jews are seeking to control the world, or already have gained that control, with the intention of destroying 'White Christian Civilisation' and that Jews are 'lying frauds ... trying to force the White race to mongrelise'.

209. Imputation (a) is presumably said to be conveyed by this leaflet through the various references in it to Jews being "behind the world communist conspiracy". I say "presumably" because no specific submissions were made by the applicant on how this imputation is said to arise from the leaflet. The applicant submitted that this conspiracy is a conspiracy to inflict communism on the world. Presumably too, the imputation of Jews being "pro-tyranny" is said to be conveyed by the reference to Lenin being a Jew. However, there are no specific references to Jews being anti-democracy, anti-freedom or pro-tyranny. Nor, in my opinion, can inferences be drawn from the leaflet along the lines of those specific imputations, or imputations that are substantially similar to those imputations. To do so would be to give to the leaflet a strained or artificial meaning. I do not think that imputation (a) is conveyed by the leaflets.

210. The same can be said for imputations (b), (d) and (e). In relation to (b), although one of the synopses refers to the Talmud ("The Talmud Unmasked"), no reference is made in that synopsis to the fact that the Talmud ought to be stamped out, promotes sodomy and paedophilia, or that Judaism is worse than a satanic cult. Similarly, none of the synopses describes Jews as anti-decent living because they control pornography; nor does any synopsis describe Jews as exhibiting a moral attitude which is antithetical to Australian values. Most of the books are described as being written by American authors, and to the extent that Jewish values are contrasted with another

group's values, it is American (and not Australian) values that are so contrasted. Imputations (b), (d) and (e) are not conveyed by this leaflet.

211. The leaflet does not contain any assertion that Jews have the "intention of destroying White Christian civilisation" or that Jews are "trying to force the White race to mongrelise" which form part of imputation (h).

212. It has to be recalled that the leaflet in question is a list of books which are on public sale, and a synopsis of those books. The synopsis for one book asserts that the book "exposes the Jews behind the world Communist conspiracy". The synopsis for another describes Lenin as a Jew, and asserts that he was the founder of the murderous Gulag system. The synopsis for a third contains a description by a Jew as to "why we destabilise nations". In a general sense, the leaflet is anti-Jewish in character, inasmuch as it lists books which are available for sale, which, if the synopses are correct, are themselves likely to be anti-Jewish.

213. However, in my view, it is an exaggeration of any message which the leaflet conveys to assert that it conveys an imputation in terms of (g) or the balance of (h). I do not think that it is appropriate to combine statements in the various synopses so as to treat the leaflet as conveying an imputation arising from that mosaic. Even if such combination were appropriate, it falls short of conveying the particularised imputation.

214. In my view, contravention of s 18C has not been established in relation to this leaflet.

(h) Untitled document with handwritten annotations

215. This leaflet appears to be an extract from a larger article or book. Neither party submitted that the fact that the document appears to be part only of a larger document was of any significance. A handwritten annotation appearing at the top of the leaflet states that it was received on 3 June 1996.

216. The leaflet purports to describe how the US has come under the control of "International Zionist Jews" who are said to have acted to the detriment of "White Christian Americans" through the establishment of the Federal Reserve System, the relaxation of immigration laws, and through involving the US in wars on their behalf.

217. The applicant has objected to the whole article, but has taken exception to particular paragraphs which I will set out in full below:

> *"But something drastic and terrifying took place in the early days of the 20 th century. White Christian Americans lost control of their country. The international Zionist Jews took over the economies of America in 1913, when they put their alien, Babylonian Federal Reserve System into operation. This system was not Federal by any twist of the imagination, but was made up of eight privately owned banks, controlled by the anti-Christs of Talmudic Judaism.*
>
> *Since that time, these alien 'leeches' have 'bled off' trillions of the Lord's money, as they have subtly changed our laws to allow a flood of aliens to invade our shores. Even 'brain-washed' Christians have been caught up in this surge of 'national suicide' until today, in 1995, we are in danger of losing our majority status, and our control of the country which was once Christian America!*

One of the main 'front' organisations for the International Zionists, who openly declared their intention of 'destroying White Christian Civilisation' was the Council on Foreign Relations (CFR), founded in 1921, by a group of Zionist controlled Internationalists. By the time America became embroiled in World War II, and against the expressed will of the majority of our people, the Democratic Party and FDR who had become 'Zionist puppets' were in control of our national destiny, while the Republican Party was well on its way to falling under this same control. Today the Zionists have been so successful, that an Israeli government official can openly brag: 'We now have the best Congress money can buy'!

While America has appeared on the surface as a 'lovable peace-loving giant', our government in reality has become the worst 'war monger' in the world's sordid history! The Jewish International bankers have used Christian decency and goodness as a cover for their predatory tactics, and have supported both sides and made countless billions off the suffering and blood-shed of every war we have fought in the last century. No wonder their leaders can say: 'Wars are the Jews' harvests!'"

Further down the page, the following paragraphs are reproduced:

"In the psychological war waged by the communist world against the USA they perpetuated a gigantic hoax to the American people, which cost us hundreds of billions of dollars and the lives of some of our finest youth, all backed by International Zionism, in their ages-old effort of One World controlled via their New World Order.

Today the question of Revelation 13:4 is a logical one as we ask: '... who is like unto this Jewish beast, and who can make war against them?'

...

I remember wondering what my hero, General George Patton meant when he said in North Africa: 'We're fighting on the wrong side in this war. Communism is much worse a danger to the world than Germany will ever be'. Now I understand what he meant. For we fought against our own kinsmen, under Jewish direction! The Rabbi who stated that 'Wars are the Jews harvests', back in 1859, before our War between the States, elaborated when he said: 'through wars we kill off Christians and obtain control of their gold. We have already killed 100 million of them, and the end is not yet!' Yet our stupid, 'brain-washed' Judeo-Christian clergy, still insist that these anti-Christs are God's Chosen.

218. There is also a handwritten annotation appearing along the side of this leaflet which reads as follows:

"THE WHITE CHRISTIAN NATIONS ARE THE TRUE SEED OF ISRAEL. 'THE SYNAGOGUE OF SATAN – WHO SAY THEY ARE JUDEAN – BUT ARE LYING FRAUDS' ARE TRYING TO FORCE THE WHITE RACE TO MONGRELIZE. For good books come to the Hart Street Market – Sundays 8.30-2 pm. (SHOWGROUND)."

The respondent admitted in cross-examination that this handwriting was hers.

219. The applicant contends that imputations (a), (d), (e), (g) and (h) are conveyed by this leaflet:

(a) that Jews are anti-democracy, anti-freedom, pro-tyranny;

(d) that Jews, *per se*, are anti-decent living in the sense that they, by their nature control pornography both in America and Russia;

(e) that Jews, *per se*, exhibit a moral attitude which is antithetical to Australian values (described as 'anti-Christian');

(g) that part of the conspiracy of World Jewry was a Bolshevik Revolution in 1917 and that Jews perpetrated the purges in the Soviet Union thereafter; and

(h) that Jews are seeking to control the world, or already have gained that control, with the intention of destroying 'White Christian Civilisation' and that Jews are 'lying frauds ... trying to force the White race to mongrelise'.

220. The respondent has stated in relation to this leaflet:

> *"As the White race is the only race being forced to become multi-racial, it is in their interest to know that their destruction has been planned for more than a century. The quotations are either Biblical or from Jewish sources. The knowledge of truth is of public interest and is thus covered by 18D(b) and (c)(i) and (ii)."*

221. The applicant has not taken me to any specific passages in the leaflet that are said to convey imputation (a). There are no specific references in the leaflet to Jews being anti-democracy, anti-freedom, or pro-tyranny. Although there are references to "international Zionist Jews" taking over the economies of America, embroiling the US in various wars, and taking control of the US Congress, I do not think that these references necessarily convey the imputation sought to be given to them by the applicant. To say that Jews are in control of the US does not, in my opinion, necessarily mean that they are anti-democracy or anti-freedom, nor does it mean that they are pro-tyranny. I do not think that these imputations would be conveyed to an ordinary reasonable reader.

222. The applicant has also not taken me to any passages that are said to convey imputations (d), (e) or (g). Again, there are no specific references to Jews controlling pornography in the US or Russia; to Jews exhibiting a moral attitude which is antithetical to Australian values; or to Jews instigating the Bolshevik Revolution in 1917 or the purges in the Soviet Union thereafter. As to imputation (e), like other leaflets distributed by the respondent, this leaflet appears to have been written by an American author, and does not advert to so-called Australian values. As to imputation (g), although the leaflet does refer to "International Zionism" backing Communism, it does not implicate Jews in the Bolshevik Revolution in Russia in 1917 or in the purges in the Soviet Union thereafter. Accordingly, imputations (d), (e) and (g) would not be conveyed to an ordinary reasonable reader of this leaflet.

223. Imputation (h) is drawn directly from the typed text and the handwritten annotations that appear on the leaflet. In the third paragraph of the leaflet there is a direct reference to "International Zionists" openly declaring "their intention of 'destroying White Christian Civilisation'". The handwritten annotation refers to the "'Synagogue of Satan – who say they are Judean – but are lying frauds' are trying to force the White race to mongrelise". Although this handwritten annotation does not mention Jews directly, I consider that an ordinary reasonable reader would conclude from the words "Synagogue of Satan" that the author of the annotations was referring to Jews, as an ordinary reasonable reader of fair and average intelligence would be aware that a Jewish place of worship is called a synagogue. As to that part of the imputation that refers to Jews "seeking to control the world, or already have gained that control", I consider that such an

imputation would be conveyed by the reference to "International Zionism" having an "ages old effort of One World control via their New World Order". I accordingly find that imputation (h) would be conveyed by the leaflet.

224. As to s 18C, I consider it to be self-evident that a leaflet that conveys an imputation that Jews have the intention of destroying White Christian civilisation, are lying frauds, and are trying to force the White race to mongrelise, is reasonably likely to offend and insult Jews in Australia. I also consider it self-evident that at least one reason for the leaflet being published was to express the author's views about Jews. The theme of the leaflet is how Jews have apparently taken control of the US, and the attendant problems this has caused for that country and for the world. These problems are all attributed to the "International Zionist Jews". I find that s 18C is contravened by this leaflet.

225. The applicant relied on *Jordan v Burgoyne* [1963] 2 QB 742, in relation to this leaflet. The UK Court of Appeal took the view on the facts of that case that reasonable citizens would be provoked beyond endurance by a speech which asserted that they were mere tools of the Jews and had fought on the wrong side of the War. However, although this leaflet contains some statements to that effect, they are not included in the list of imputations on which the complaint is founded.

226. In the respondent's affidavit (p 103) she accepts that this leaflet "does make some harsh statements about Zionist Jews who inflicted such pain and sorrow onto my homeland, Russia". However, she then goes on to say that "if the Jews can name the German people as the perpetrators of their calamities, then I, too, can name the perpetrators of the calamities suffered by my people". That is not, however, what the leaflet does.

227. This leaflet suffers from the same problem as other leaflets, in that the respondent has not established that she published the leaflet either reasonably or in good faith. The leaflet is openly hostile to Jews. It uses terms such as "alien leeches", "anti-Christs" and "lying frauds" to refer to Jews and seems to be specifically aimed at provoking Jews and inciting opposition to them. As the leaflet was not published either reasonably or in good faith none of the defences in ss 18D(b) or 18D(c)(i) or (ii) can be made out.

General Defences

228. I now turn to consider the more general defences raised by the respondent. These defences are listed at pars [93] and [94] above. The respondent's first argument is that she distributes the leaflets "for the purpose of combating racial discrimination". That may well be the case. However, as I have explained above, in order for an act to contravene s 18C of the RDA, if there are a number of reasons for doing an act, it is enough that at least one of those reasons is the race, colour or national or ethnic origin of a person, whether or not it is the dominant reason or a substantial reason for doing the act. In relation to each of the respondent's leaflets (except the book synopses), I have found that at least one of the reasons behind the respondent's decision to publish those leaflets was because of the ethnic origin of Jews. Accordingly, the respondent's assertion that she distributed the leaflets for the purpose of combating racial discrimination is, in the context of Part IIA, irrelevant.

229. Her second argument is that all of the leaflets have been previously published by other sources, and some have been published without any repercussions. As I have explained above, s 18D does not provide for a defence of republication. In any event, it would be somewhat strange if a person were to have a defence to s 18C based purely on the fact that a particular work had been

previously published without complaint. The wording of s 18C makes it clear that an act will be unlawful if the act is reasonably likely to offend "in all the circumstances". A Court is thus required to assess the objective impact of the act in the circumstances of the particular complaint. The fact that the same act may not have caused offence or given rise to a complaint in another place or at another time is irrelevant to such an assessment.

230. The respondent's next argument is that there is "overwhelming evidence" to prove the truth of the applicant's pleaded imputations. However, she also asserts that the imputations are "clearly wrong". These two arguments are contradictory. By saying that the imputations are "clearly wrong", the respondent appears to be asserting that they are not conveyed by the leaflets. However, to say that there is "overwhelming evidence" to prove the imputations, the applicant appears to accept that such imputations are conveyed by the leaflets, and that she can prove that they are true. In any event I have determined that, in relation to each leaflet except the book synopses, at least one of the imputations contended for by the applicant is conveyed. In addition, the respondent has not established the truth of any of the imputations. However, even if she were to do so, this would still not exempt her leaflets from s 18C, as s 18D does not provide a defence of truth. Thus, even if her leaflets are true, in order to satisfy s 18D the respondent must prove that her leaflets were published reasonably and in good faith, as well as proving that they fall within one of the categories in s 18D(a) – (c). As I have determined above, the respondent did not satisfy me that any of her leaflets fall within these exemptions.

231. The respondent also submitted that "no offence was possible, let alone intended". As to her claim that no offence was possible, I have found that each of the respondent's leaflets except the book synopses, is reasonably likely to offend and insult Jews in Australia for the particular reasons stated. As to the respondent's claim that no offence was intended, as I have explained above, s 18C does not inquire as to the intention of the person committing the act complained of, but rather the section employs an objective test that assesses the likely effect of the act on the recipient or on the group of which the recipient is a member. Accordingly, this argument is rejected.

232. The respondent further submitted that "the discussion of current affairs and history are matters of public interest and protected by s 18D". Although current affairs and history may well in most cases be matters of public interest, s 18D does not provide a defence based on public interest alone. Rather, as well as being reasonable and in good faith, an act that is purportedly done in the public interest must also fulfil one or other of the specific criteria in s 18D(b) or (c)(i) or (ii) before it can be exempted from s 18C. Because of this, an argument based on public interest alone will not establish a defence under s 18D.

233. The respondent also made some submissions in relation to the validity of s 18C. She stated that in order to be valid, s 18C must be limited to "personal insults", "personal defamation" and where physical harm was involved – not acts that are likely to insult or offend. However, the clear wording of s 18C is that it is unlawful for a person to do an act where the act is "reasonably likely ... to offend, insult, humiliate or intimidate ...". The respondent's submission is thus contrary to the wording of s 18C, which does not limit the section in the ways proposed by the respondent. Nor has such a limitation been placed on s 18C by the Courts who have interpreted the section. I reject this argument.

234. The respondent further submitted that the RDA should be declared unconstitutional as, first, it is "impossible to apply [the RDA] to all groups equally"; and secondly, "for the sake of freedom to

communicate political matters" (p 12 respondent's submissions). As to her first argument, two points should be made: one, the fact (if it be a fact) that it is impossible to apply the RDA to all groups equally does not, of itself, establish a basis for declaring the RDA unconstitutional. There are a number of bases for declaring a Commonwealth Act invalid, including that it is beyond the power of the Commonwealth Parliament to legislate in respect of the subject matter of the legislation; or that it infringes one of the implied constitutional freedoms. However, a Commonwealth Act cannot be declared unconstitutional merely on the basis that it is impossible to apply the Act to all groups equally. To the extent that a Commonwealth Act is prohibited from discriminating between persons, it is only laws with respect to taxation that are expressly prohibited from discriminating, and even then the prohibition is on the Act discriminating "between States or parts of States": *Constitution* s 51(ii) . The second point that should be made is that, in any event, the respondent has not established that the RDA is in fact impossible to apply to all groups equally. Apart from her bare assertion, she presented no evidence to establish that the RDA operates in such a way. I accordingly reject this argument.

235. Her next argument is that the RDA should be declared unconstitutional "for the sake of freedom to communicate political matters". It is now well established that the Constitution protects the freedom of communication between people concerning political or government matters: see *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates: *Lange* at 559 . This freedom cannot be curtailed by Commonwealth legislation. However, the freedom of communication which the Constitution protects is not absolute: *Nationwide News* at 51, 76-77, 94-95 ; *Lange* at 561. Rather, it is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution . In *Lange* at 561-562 the High Court said:

> *"... the freedom will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies two conditions. The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government or the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people which the Constitution prescribes. The second is that the law is reasonably appropriate and adapted to achieving that legitimate object or end."*

236. When a law of a State or Federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of political communication, two questions must be answered before the validity of the law can be determined:

> *"... First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect ? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people ... If the first question is answered 'yes' and the second is answered 'no', the law is invalid."*

(*Lange* at 567-568)

237. The applicant submitted that the terms of the RDA are constitutionally valid, having been made under the provisions of s 51(xxix) of the Constitution , citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 as authority for this proposition. However, the High Court in *Koowarta* were not concerned with the constitutional validity of the RDA *per se*, but only with the validity of ss 9 and 12. A majority of the High Court held that ss 9 and 12 were valid laws with respect to external affairs within s 51(xxix) of the Constitution . The applicant has also drawn my attention to *Brandy v HREOC* (1994-1995) 183 CLR 295 , which was concerned with the constitutional validity of ss 25ZAB and 25ZAC of the RDA. In *Brandy* , the High Court held that those sections purported to vest judicial power in the HREOC, contrary to Chapter III of the Constitution , and hence were invalid. Section 25ZC was also held to be invalid as it depended on s 25ZAC. Nowhere in either *Koo warta* or *Brandy* is the constitutional validity of the RDA as a whole discussed. However, my attention has not been drawn to any cases that have impugned the validity of the RDA in general or Part IIA in particular. I accordingly proceed on the basis that Part IIA of the RDA is valid.

238. The applicant also submitted that he relied on the comments of Commissioner Cavanough regarding the constitutional validity of Part IIA of the RDA. At page 11, after considering the test set out in *Lange* at 567-568 noted above, the Commissioner stated:

> *"It is conceivable that the restrictions imposed by s.18C(1) of the RDA might in certain circumstances effectively burden freedom of communication about government and political matters. However, it seems to me that, bearing in mind the exceptions or exemptions available under s.18D, Part IIA as a whole is 'reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the system of government prescribed by the Constitution'.*
>
> ...
>
> *The 'legitimate end' of the law is, or includes, the fulfilment of Australia's international obligations under the International Convention on the Elimination of All Forms of Racial Discrimination which is scheduled to the RDA, especially Article 4 thereof. In my view, this end is compatible with the maintenance of the system of government prescribed by the Constit ution ."*

239. **Following paragraph cited by:**

Cottrell v Ross (19 December 2019) (His Honour Chief Judge Kidd)

[79] However, the preponderance of views in the authorities support the position that anti-vilification or anti-discrimination legislation of this kind does not burden the freedom of communication about government and political

Cottrell v Ross (19 December 2019) (His Honour Chief Judge Kidd)
Sunol v Collier (No 2) (22 March 2012) (Bathurst CJ at [1]; Allsop P at [55]; Basten JA at [75])

The conclusion I have reached is consistent with that reached by Hely J in Jones v Scully supra at [239]

Eatock v Bolt (28 September 2011) (Bromberg J)

The protection of reputation and the protection of people from offensive behaviour based on race are both conducive to the public good: Scully at [239] (Hely J)

Although the RDA does not contain any rule that prohibits an elector from communicating with other electors concerning government or political matters relating to the Commonwealth, it nevertheless could effectively burden the freedom of communication about those matters insofar as it requires electors to submit to penalties for the publication of communications or leads to the grant of injunctions against such publications (cf *Lange* at 568). That being so, the critical question is whether the RDA is reasonably appropriate and adapted to serving a legitimate end that is compatible with the maintenance of representative and responsible government, without unnecessarily or unreasonably impairing the freedom of communication about government and political matters protected by the Constitution . I agree with Commissioner Cavanough that a "legitimate end" of the RDA includes the fulfilment of Australia's obligations under the Convention. Stated more broadly, the legitimate end sought to be obtained by the RDA is the elimination of racial discrimination. It is not to be supposed that the elimination of racial discrimination is a purpose that is incompatible with the requirement of freedom of communication imposed by the Constitution . In addition, the constitutionally prescribed system of government does not require an unqualified freedom to publish offensive matter or perform offensive acts that are based on race. Indeed, in the same way that the protection of the reputations of those who take part in the government and political life from false and defamatory statements is conducive to the public good (see *Lange* at 568), so too is the protection of persons from offensive behaviour based on race.

240. **Following paragraph cited by:**

Sunol v Collier (No 2) (22 March 2012) (Bathurst CJ at [1]; Allsop P at [55]; Basten JA at [75])
balance between the legitimate end of preventing homosexual vilification and the requirement of freedom to discuss and debate government or political matters, required by the Constitution: Cf Jones v Scully supra at [240]

Eatock v Bolt (28 September 2011) (Bromberg J)

209. Other judicial statements have identified the underlying purpose of Part IIA as intending to regulate conduct which stimulates contempt or hostility between groups of people within the community by lowering regard for, and demeaning the worthiness of, the person or persons subjected to the conduct: *Bropho* at [138] (Lee J); or as seeking to control "socially corrosive conduct": *Bropho* at [138] (Lee J); or as seeking to eliminate racial discrimination: *Scully* at [240] (Hely J); and as seeking to promote racial tolerance: *McGlade v Lightfoot* (2002) 124 FCR 106 at [90] (Carr J).

The next question is therefore whether the RDA is reasonably appropriate and adapted to achieve the elimination of racial discrimination having regard to the requirement of freedom of communication about government and political matters required by the Constitution . I agree with the Commissioner that, bearing in mind the exemptions available under s 18D, Part IIA of

the RDA is reasonably appropriate and adapted to serve the legitimate end of eliminating racial discrimination. Section 18D, by its terms, does not render unlawful anything that is said or done "reasonably and in good faith" providing that it falls within the criteria set out in subs (a)–(c). I consider that those exemptions provide an appropriate balance between the legitimate end of eliminating racial discrimination and the requirement of freedom of communication about government and political matters required by the Constitution . I accordingly reject the respondent's argument that the RDA should be declared unconstitutional "for the sake of freedom to communicate political matters".

241. On p 3 of the respondent's affidavit, under the heading "Further Legal Justification", the following appears:

> " *The Constitution of Australia* – *The implied right to freedom of speech* (Lange v A.B.C.)
>
> *The Ultimate Authority* - ***"Ye shall know the Truth and the Truth shall set you free"*** *Our Lord Jesus Christ.*
>
> *Sir Ronald Wilson* – *"If truth be our measure we have nothing to fear from the Human Rights Commission".*
>
> *PM John Howard* - *"There is no human right to lie or mislead to to* (sic) *be ignorant, whether deliberately or by omission to find out the facts".*
>
> *Article 19 of the Universal Declaration of Human Rights – Everyone has the*
>
> *right to freedom of opinion and expression; this right includes freedom to hold opinion without interference and to seek, receive and impart infor mation and ideas through any media regardless of frontiers.*
>
> ***IF TRUTH IS OUTLAWED THEN LIES WILL CONTINUE TO FLOURISH"***
>
> (bold and underlining in original)

242. I have already dealt with her purported argument concerning the Constitution . In addition, her "justifications" based on what is said in the Bible, and what has been said by Sir Ronald Wilson and John Howard, do not establish that she is entitled to any exemptions from the operation of s 18C. The same can be said for her purported reliance on Article 19 of the *Universal Declaration of Human Rights*. A Convention or treaty ratified by Australia does not become part of Australian law unless its provisions have been validly incorporated into municipal law by statute. Although it is now settled that ratification in itself may provide an adequate foundation for a legitimate expectation that administrative decision-makers will act conformably with the Convention or treaty (see *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* (1994-1995) 183 CLR 273), the present case is not concerned with administrative decision-making. Rather, it is concerned with the application of a valid Commonwealth statute to certain actions of the respondent that are

said to contravene that statute. In those circumstances, it is difficult to see how the *Universal Declaration of Human Rights* is relevant to these proceedings.

Relief

243. The applicant seeks the following orders:

1. A declaration that the respondent has engaged in conduct rendered unlawful by Part IIA of the *Racial Discrimination Act 1975* (Cth) by having distributed the following literature in letterboxes in Launceston, Tasmania and by selling or offering to sell such literature at a public market in Launceston being the literature described as:
   (a) "The Inadvertent Confession of a Jew";
   (b) "The Jewish Khazar Kingdom";
   (c) "Russian Jews Control Pornography";
   (d) Untitled document appearing at page 25 of applicant's affidavit;
   (e) "The Most Debated Question of Our Time – Was There Really a Holocaust?";
   (f) Untitled document appearing at page 30 of applicant's affidavit;
   (g) Untitled list of book synopses; and
   (h) Untitled document with handwritten annotations appearing at page 35 of applicant's affidavit.

2. An order that the respondent be restrained from repeating or continuing such conduct and the publication or distribution of the said material in or to the same effect.

3. An order that the respondent forthwith deliver to the applicant, Jeremy Jones, a written statement of apology, signed by the Respondent, in the following terms:

   "I, Mrs Olga Scully, do hereby unreservedly apologise to you and to the Hobart Hebrew Congregation for my conduct in distribution anti-Semitic literature in letterboxes in Launceston, Tasmania, and by selling or offering to sell such literature at a public market in Launceston in contravention of the *Racial Discrimination Act 1975* (Cth) ".

4. An order that the respondent pay the applicant's costs.

5. Such further or other orders as the Court may deem appropriate.

244. In relation to the proposed orders, the applicant submits:

- the Court is empowered to make orders (*Human Rights and Equal Opportunities Commission Act 1986* (Cth) s 46PO(4) as amended) requiring a respondent to perform "any reasonable act or course of conduct to redress any loss or damage suffered by an applicant". State legislation makes

specific reference to the publication of an apology (see for example, *Anti Discrimination Act (NSW)* s 113(1)(b)(iiia));

- further, sections 22 and 23 of the *Federal Court of Australia Act 1976* (Cth) grant power to the Court to make any orders which would resolve the issues between the parties. If an apology is not appropriate because there is no "genuine contrition" (to take from the area of contempt) then the Court clearly does have the power to order the publication of a retraction in the same or similar terms; and

- if neither a retraction nor apology were available then the only appropriate order (other than the declaration and injunction) would be damages, which would need to be compensatory but could include aggravated (as distinct from exemplary) damages.

Apology and retraction

245. **Following paragraph cited by:**

Reurich v Club Jervis Bay Ltd (17 August 2018) (Markovic J)

(Jones v Scully) at [245] that "the idea of ordering someone to make an apology is a contradiction in terms"

Miller v Director-General, Department of Community Services (No2) (25 June 2007) (Britton A - Deputy President; Bolt M - Non Judicial Member; Martin M - Non Judicial Member)

56 As the respondent points out, courts are reluctant to order parties to apologise because, as Hely J said in *Jones v Scully* (2002) 71 ALD 567 at [245] , 'the idea of ordering someone to apologise is a contradiction in terms'. In *Burns v Radio 2UE Sydney Pty Ltd & Ors* (No 2) [2005] NSWADT 24, a decision of the Equal Opportunity Division of the ADT, the Tribunal commented (at [29]):

> We agree that if an apology is understood, as it is commonly understood, to be a statement that reflects a person's own feeling of regret for conduct that has caused offence or harm, then of its nature it cannot be ordered to be made, unless the feeling is in fact held and it is only its expression that is ordered. In submissions the applicant, however, says that an apology for purposes of s113(1)(b)(iiia) should be understood as being associated with a legal requirement, rather than "genuine and voluntary". The Anti-Discrimination Act 1977 makes clear that there is power to order an apology in respect of a vilification complaint. The apology is acknowledgement of the wrongdoing and, seen as fulfilment of a legal requirement rather than as a

statement of genuinely held feelings, it can properly be compelled by way of order. There would be a welcome extra dimension to the apology if it reflected that the person actually regrets the conduct.

Tallong Park Association Inc v Sutherland; Sutherland v Tallong Park Association Inc (EOD) (16 April 2007) (Hennessy N - Magistrate (Deputy President); Rice S - Judicial Member; Bolt M - Non Judicial Member)

For example, in Jones v Scully (2002) 120 FCR 243 at [245], a case in which the respondent was found to have contravened Part IIA of the

Jones v The Bible Believers' Church (02 February 2007) (Conti J)

'...*I do not consider it appropriate to seek to compel the respondent to articulate a sentiment that he plainly enough does not feel. As Hely J pointed out in* Jones v Scully *at [245]* , "prima facie the idea of ordering someone to make an apology is a contradiction in terms"...'

Sunol v Collier (27 September 2006) (Hennessy N - Magistrate (Deputy President); Rees N - Judicial Member; Nemeth de Bikal L - Non Judicial Member)

For example in Jones v Scully (2002) 120 FCR 243 at [245], a case in which the respondent was found to have contravened Part IIA of the

Burns v Radio 2UE Sydney Pty Ltd & Ors (No 2) (02 April 2006) (Rice S - Judicial Member; Alt M - Non Judicial Member; Bolt M - Non Judicial Member)

4 To this end the orders that can be made are each capable, to different degrees, of being all or any of compensatory, preventative and remedial. We have already said that, in the circumstances, we do not consider an order for the payment of damages under s113(b)(i) is appropriate. The need for an order under s113(b)(iv) voiding an agreement does not arise. We agree with the observation of the Federal Court in *Jones v Scully* [2002] FCA 1080 at [245] that "a retraction is only appropriate where it has been established by an applicant that what has been published or disseminated by a respondent is false". In this matter, as in *Jones v Scully* , the issue was not the truth or falsity of what was said, but whether what was said was reasonably likely to incite serious ridicule. In these circumstances an order for a retraction under s113(b)(iiia) is not appropriate.

Jones v Toben (17 September 2002) (Branson J)

106. I do not understand the applicant to have pressed his claim for an apology. In any event I do not consider it appropriate to seek to compel the respondent to articulate a sentiment that he plainly enough does not feel. As Hely J pointed out in *Jones v Scully* at [245] , "prima facie *the idea of ordering someone to make an apology is a contradiction in terms*". The applicant did press for an order requiring a "retraction" by the respondent. I understood the applicant to be seeking a statement of retraction by the respondent. In the circumstances, it seems to me that the practical distinction between an apology and a statement of retraction is slight. I do not consider it appropriate to order the respondent to issue any statement of retraction.

During the course of submissions I suggested to the applicant's counsel that, *prima facie*, the idea of ordering someone to make an apology is a contradiction in terms. Mr Rothman accepted this. Although an apology has been ordered in proceedings of this type in the past (see, for example, *Oberoi v HREOC* [2001] FMCA 34), I do not think that an order that the respondent publish an apology is appropriate in these proceedings. Nor do I consider that ordering the publication of a retraction is appropriate. In my opinion, a retraction is only appropriate where it has been established by an applicant that what has been published or disseminated by a respondent is false. The present proceedings were not concerned with the truth or falsity of what was distributed by the respondent; rather, it was concerned with whether her leaflets were reasonably likely to offend, insult, humiliate or intimidate Jews in Australia. Although I appreciate that the truth or falsity of what is contended in the respondent's leaflets is relevant to this question, as I have explained above at [104] the fact that false assertions are made in a leaflet does not of itself establish a contravention of s 18C. In addition, the applicant's case was that it was the imputations that arose from the leaflets that were said to cause the requisite offence rather than the leaflets themselves. In those circumstances, it has not been necessary for me to determine whether what is said in the respondent's leaflets is in fact true or false. In those circumstances, a retraction is not appropriate.

Damages

246. The applicant has not specified the loss that he is said to have suffered as a result of the publication and dissemination of the leaflets, nor has he provided me with a quantification of any such loss. I do not consider that damages would be either an adequate or an appropriate remedy in these proceedings.

Orders

247. I accordingly make the following orders:

1. It be declared that the respondent has engaged in conduct rendered unlawful by Part IIA of the *Racial Discrimination Act 1975* (Cth) by having distributed the following leaflets in letterboxes in Launceston, Tasmania and by selling or offering to sell such leaflets at a public market in Launceston being the leaflets described as:
   (a) "The Inadvertent Confession of a Jew";
   (b) "The Jewish Khazar Kingdom";
   (c) "Russian Jews Control Pornography";
   (d) Untitled document appearing at page 25 of applicant's affidavit;
   (e) "The Most Debated Question of Our Time – Was There Really a Holocaust?";
   (f) Untitled document appearing at page 30 of applicant's affidavit; and
   (g) Untitled document with handwritten annotations appearing at page 35 of applicant's affidavit.
2. The respondent be restrained from repeating or continuing such conduct.

3. The respondent be restrained from distributing, selling or offering to sell any leaflet or other publication which is to the same effect as any of the leaflets referred to in Order 1.

4. The respondent pay the applicant's costs.

I certify that the preceding two hundred and forty-seven (247) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Hely.

Associate:

Dated: 2 September 2002

Counsel for the Applicant:	Mr S Rothman SC
Solicitor for the Applicant:	Geoffrey Edwards & Co
	The respondent appeared in person
Date of Hearing:	29, 30 April, 1, 2 May 2002 and 11, 12, 13 June 2002
Date of Judgment:	2 September 2002

Cited by:

Parry v Firth [2020] NTSC 37 (18 June 2020) (Blokland J)
Wanambi v Thompson (1994) 120 FLR 243

Parry v Firth [2020] NTSC 37 (18 June 2020) (Blokland J)
Counsel for the respondent drew this Courts attention to Wanambi v Thompson[17] where in response to a similar ground of appeal concerning a sentence for charges of unlawful entry and associated offending Kearney J said:

Parry v Firth [2020] NTSC 37 (18 June 2020) (Blokland J)
Counsel for the respondent drew this Courts attention to Wanambi v Thompson[17] where in response to a similar ground of appeal concerning a sentence for charges of unlawful entry and associated offending Kearney J said:

Cottrell v Ross [2019] VCC 2142 (19 December 2019) (His Honour Chief Judge Kidd)
Jones v Scully (2002) 120 FCR 243

Cottrell v Ross [2019] VCC 2142 (19 December 2019) (His Honour Chief Judge Kidd)
[79] However, the preponderance of views in the authorities support the position that anti-vilification or anti-discrimination legislation of this kind does not burden the freedom of communication about government and political

Cottrell v Ross [2019] VCC 2142 -
Ekermawi v Nine Network Australia Pty Limited [2019] NSWCATAD 29 (15 February 2019) (Dr R. Dubler SC, Senior Member, A. Lowe, General Member)
Jones v Scully (2002) 120 FCR 243 Khan v Commissioner, Department of Corrective Services

Ekermawi v Nine Network Australia Pty Limited [2019] NSWCATAD 29 (15 February 2019) (Dr R. Dubler SC, Senior Member, A. Lowe, General Member)
and in several other cases such as Jones v Scully (2002) 120 FCR 243 at [111]-[112] and

Ekermawi v Nine Network Australia Pty Limited [2019] NSWCATAD 29 (15 February 2019) (Dr R. Dubler SC, Senior Member, A. Lowe, General Member)
: see Jones v Scully [2002] 120 FCR 243 at 272, [113]

Prins v News Corp Australia Pty Ltd [2018] FCCA 3597 (06 December 2018) (Judge Jarrett)

31. In *Prior v Queensland University of Technology & Ors (No.2)* [2016] FCCA 2853 I set out some principles governing the application of s. 18C of the Racial Discrimination Act . In the subsequent application for an extension of time within which to appeal and leave to appeal, my recitation of those principles attracted no adverse comment:

> *30. There are a number of cases that have been decided concerning s.18C of the Racial Discrimination Act . From those authorities, the following propositions can be derived:*
>
> *a) s. 18C is constitutionally valid as an exercise of the external affairs power of the Commonwealth: Toben v Jones (2003) 129 FCR 515 at [21], [50] and [145] ;*
>
> *b) neither the heading to Part IIA – "Prohibition of offensive behaviour based on racial hatred" – nor the legislative history of that Part or of s. 18C in particular supports the proposition that the operation of Part IIA is restricted to racist behaviour based upon racial hatred or behaviour calculated to induce racial violence. It should not be read down so as to encompass only the expression of racial hatred: Toben v Jones at [28], [50], and [145]; Eatock v Bolt (2011) 197 FCR 261 at [196] ;*
>
> *c) the assessment required by s.18C(1)(a) is an assessment of the reasonable likelihood of a person or group of people being offended, insulted, humiliated or intimidated by the act of another person. That requires an assessment of the reasonably likely reaction of the person or people within the group concerned: Eatock v Bolt at [241];*
>
> *d) whilst relevant to the question of whether offence was reasonably likely, the fact that a person has actually been offended in the way contemplated by s. 18C(1)(a) is not to the point. What is to the point is the likelihood or risk of a person or a member of a particular group of people being affected in the way contemplated by s. 18C(1)(a) . "Proof of actual offence for a particular person or group is neither required nor determinative...": Eatock v Bolt at [241]. See also Jones v Scully (2002) 120 FCR 243 at [9*

9]-[101] ; Hagan v Trustees of the Toowoomba Sports Ground Trust [2000] FCA 1615 at [28] and McGlade v Lightfoot (2002) 124 FCR 106 at [44]-[45] ;

e) an objective test must be applied in determining whether the act complained of has the necessary offensive, insulting, humiliating or intimidatory quality for it to be within s.18C(1)(a). "The question so far as s.18C(1)(a) is concerned is not: how did the act affect the particular complainant? But rather would the act, in all the circumstances in which it was done, be likely to offend, insult, humiliate or intimidate a person or a group of people of a particular racial, national or ethnic group?": Hagan v Trustees of the Toowoomba Sports Ground Trust [2000] FCA 1615 at [15]; Bropho v Human Rights & Equal Opportunity Commission (2004) 135 FCR 105; Creek v Cairns Post Pty Ltd (2001) 112 FCR 352 at [12]; Jones v Scully at [98]-[100]; Eatock v Bolt at [243]; Clarke v Nationwide News Pty Ltd trading as The Sunday Times (2012) 201 FCR 389 at [46];

f) the assessment needs to be undertaken by reference to a "person or group of people". Section 18C(1)(a) does not identify the persons or group of persons that should be considered as the possible victims for the purpose of deciding whether the impugned act was reasonably likely to cause offence Eatock v Bolt at [243];

g) "... the reference to a "person" must be intended as a reference to an identified person (or persons) that the conduct in question was directed at. In that respect, the provision is addressing an act directed to an identified individual or individuals. In contrast, the reference to "a group of people" is dealing with a class to whom the conduct was directed in a general sense. That distinction facilitates what logic suggests are the different approaches to be taken in the assessment process between a claim of personal offence and a claim of group offence.": Eatock v Bolt at [246];

h) "Where allegedly offensive conduct is directed at both an identified person and a group of people and the claim made is that both the identified person or persons and the group of people were offended, the conduct should be analysed from the point of view of the hypothetical representative in relation to the claim that the group of people were offended, and in relation to each of the identified persons where a personal offence claim has been made. If no claim of personal offence is made and only a claim of group offence is made, the conduct is to be analysed from the point of view of the hypothetical representative of the group, despite the fact that the conduct is directed at both identified individuals and the group of people of which they form part.": Eatock v Bolt at [250];

i) "The assessment as to the likelihood of people within a group being offended by an act directed at them in a general sense, is to be made by reference to a representative member or members of the group.": Eatock v Bolt at [251]. An "ordinary" or "reasonable" member or members of the relevant group are to be isolated: Campomar Sociedad Limitada v Nike International Ltd (2000) 202 CLR 45 at [102]; National Exchange Pty Ltd v Australian Securities and Investments Commission [2004] FCAFC 90 at [24]; Eatock v Bolt at [251];

j) it is the values, standards and other circumstances of the person or group of people to whom s.18C(1)(a) refers that will bear upon the likely reaction of those persons to the act in question. It is the reaction from their perspective which is to be assessed: Creek at [16]; Scully at [108]; Eatock v Bolt at [253];

k) the objective nature of the assessment required by s.18C(1)(a) does not import an objective assessment of community standards into the test of the reasonable likelihood of offence for the purposes of s.18C(1)(a): Eatock v Bolt at [253];

l) however, "...the burdens created by Part IIA were not imposed for the benefit of persons whose intolerance to the points of view of others is the true cause of the offence, insult, humiliation or intimidation that those persons experienced. In those situations it

may be properly said that it is the intolerance of the receiver of the message rather than the intolerance of the speaker that is responsible for causing the offence.": Eatock v Bolt at [256];

m) the phrase "in all the circumstances" in s.18C(1)(a) requires that the social, cultural, historical and other circumstances attending the person or the people in the relevant group be considered when assessing whether the relevant act was reasonably likely to have the proscribed effect: Eatock v Bolt at [257];

n) in s. 18C(1)(a) , the phrase "reasonably likely" ought to be construed as speaking "of a chance of an event occurring or not occurring which is real – not fanciful or remote": Eatock v Bolt at [260];

o) to "offend, insult, humiliate or intimidate" are profound and serious effects, not to be likened to mere slights: Creek v Cairns Post at [16]; Clarke v Nationwide News at [65] -[76]; Eatock v Bolt at [268];

p) "... "offend, insult, humiliate or intimidate" were not intended to extend to personal hurt unaccompanied by some public consequence of the kind Part IIA is directed to avoid. That public consequence need not be significant. It may be slight. Conformably with what I regard as the intent of Part IIA, a consequence which threatens the protection of the public interest sought to be protected by Part IIA, is a necessary element of the conduct s 18C is directed against. For the reasons that I have sought to explain, conduct which invades or harms the dignity of an individual or group, involves a public mischief in the context of an Act which seeks to promote social cohesion.": per Bromberg J in Eatock v Bolt at [267];

q) to determine whether the act complained of has the necessary offensive, insulting, humiliating or intimidatory quality for it to be within s. 18C(1)(a) , what brought about the action constituting the behaviour, or act in question and what the applicant felt are not relevant: Creek v Cairns Post at [12];

r) the questions of the satisfaction of ss.18C(1)(a) and 18C(1)(b) are different and separate enquiries, although the material relevant to one may be relevant to another: Toben v Jones at [154];

s) "Section 18C(1) is not enlivened unless the relevant act is done "because of the race, colour or national or ethnic origin of the person or group likely to be offended by the act". As earlier indicated, the phrase "because of" requires consideration of the reason or reasons for which the relevant act was done. .... the expression "because of" in par (b) necessitates a consideration of the reasons for which the act in question was done": Hagan v Trustees of the Toowoomba Sports Ground Trust (2001) 105 FLR 56 at [23];

t) what is necessary to consider for the application of s.18C(1)(b), is whether the act was "because of" race, colour or national or ethnic origin of the other person or of some or all of the people in the group: Toben v Jones at [154];

u) "It is the reason or reasons for the act which must be discerned. ... An investigation of the reason or reasons for the act will involve, as a matter of meaning and language, an enquiry into the explanation for the act or why the act was done. Whilst it may be accurate to say that this is not the same thing as enquiring as to the motive or purpose or intention behind such conduct ... proof of those matters (motive, purpose or intention) may, in any given case, be relevant, perhaps even central, to the ascertainment of the reason or reasons for the act in question. It is unwise, however, to go too far in explication of the language of s 18B and par 18C(1)(b) lest words be substituted for those chosen by Parliament.": Toben v Jones at [151].

Durston v Anti-Discrimination Tribunal (No 2) [2018] TASSC 48 (04 October 2018) (Brett J)
In Jones v Scully (above), Hely J rejected a challenge to the validity of

Reurich v Club Jervis Bay Ltd [2018] FCA 1220 (17 August 2018) (Markovic J)
(Jones v Scully) at [245] that "the idea of ordering someone to make an apology is a contradiction in terms"

Reurich v Club Jervis Bay Ltd [2018] FCA 1220 (17 August 2018) (Markovic J)
of those cases dealt with claims of offensive behaviour based on race arising under s 18C of the RDA, but the approach taken by Hely J in Jones v Scully has also been followed in cases dealing with other types of discrimination

Ekermawi v Nine Network Australia Pty Limited [2018] NSWCATAD 112 (29 May 2018) (Hennessy Lcm, Deputy President)
3- Jones v Scully [2002] FCA 1080 (2 September 2002)

Wotton v State of Queensland (No 5) [2016] FCA 1457 (05 December 2016) (Mortimer J)
of those cases dealt with claims of offensive behaviour based on race arising under s 18C of the RDA, but the approach taken by Hely J in Jones v Scully has also been followed in cases dealing with other types of discrimination

Wotton v State of Queensland (No 5) [2016] FCA 1457 (05 December 2016) (Mortimer J)
Apology orders were also considered in a handful of cases that preceded, or did not refer to, Jones v Scully

Wotton v State of Queensland (No 5) [2016] FCA 1457 (05 December 2016) (Mortimer J)
Apart from Jones v Scully, the parties did not refer the Court to any of these cases

Wotton v State of Queensland (No 5) [2016] FCA 1457 (05 December 2016) (Mortimer J)
It may well be the case that the observations made in cases such as Jones v Scully and

Prior v Queensland University Of Technology and Ors (No.2) [2016] FCCA 2853 (04 November 2016) (Judge Jarrett)
Jones v Scully (2002) 120 FCR 243
Keenan v Bundaberg Port Authority

Prior v Queensland University Of Technology and Ors (No.2) [2016] FCCA 2853 (04 November 2016) (Judge Jarrett)
See also Jones v Scully (2002) 120 FCR 243 at [99]-[101]

Prior v Queensland University Of Technology and Ors (No.2) [2016] FCCA 2853 (04 November 2016) (Judge Jarrett)
Jones v Scully at [98]-[100]

Prior v Queensland University Of Technology and Ors (No.2) [2016] FCCA 2853 (04 November 2016) (Judge Jarrett)
Scully at [108]

Prior v Queensland University Of Technology and Ors (No.2) [2016] FCCA 2853 (04 November 2016) (Judge Jarrett)
Scully at [108] (Hely J)

ILIJEVSKI v Commonwealth of Australia (As Represented BY the Commissioner of the Australian Taxation Office) [2016] FCCA 2787 (02 November 2016) (Judge Jones)
Jones v Scully (2002) 120 FCR 243 (

ILIJEVSKI v Commonwealth of Australia (As Represented BY the Commissioner of the Australian Taxation Office) [2016] FCCA 2787 (02 November 2016) (Judge Jones)
(Jones v Scully) at [98]-[100]

ILIJEVSKI v Commonwealth of Australia (As Represented BY the Commissioner of the Australian Taxation Office) [2016] FCCA 2787 (02 November 2016) (Judge Jones)

Jones v Scully at [102]

ILIJEVSKI v Commonwealth of Australia (As Represented BY the Commissioner of the Australian Taxation Office) [2016] FCCA 2787 (02 November 2016) (Judge Jones)

the terms of the section and not to reach to 'mere slights' in the sense of acts which, for example, are reasonably likely to cause technical, but not real, offence or insult (see also Jones v Scully per Hely J at [102])

Vakras v Cripps [2016] FCA 955 (15 August 2016) (Davies J)

31. In *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389; [2012] FCA 307, Barker J at [46]–[49] usefully summarised the applicable principles in respect of the requirements under s 18C(1)(a) as follows:

> 46. *Objective test:* In determining whether s 18C of the [Racial Discrimination] Act has been contravened, it is first necessary to determine whether, for the purposes of para (1)(a), the act complained of is "reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people". In deciding this, the Court does not simply rely on how a particular person or group of people subjectively felt about or reacted to the doing of the act complained of. Rather, the Court assesses whether, objectively, the act complained of was "reasonably likely, in all the circumstances to offend, insult, humiliate or intimidate" another person or a group of people: *Hagan v Trustees of Toowoomba Sports Ground Trust* [2000] FCA 1615 at [15] ; *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 (*Cairns Post*) at [12]; *Jones v Scully* (2002) 120 FCR 243 (*Jones v Scully*) at [98]-[100] ; *Eatock v Bolt* (2011) 197 FCR 261 (*Bolt*).
>
> 47. In *Bolt* at [257] , Bromberg J noted that the expression "in all the circumstances" needs firmly to be kept in mind. With that I agree. I should add that, in my view, the circumstances in a particular case will depend on the facts found from the evidence.

...

> 49. ... The "circumstances" that will readily be relevant are those particular factual circumstances in which a particular act complained of was done. Of course, the reasons why a particular person or group might feel offended, insulted, humiliated or intimidated by a particular act will also be relevant though not determinative of the issue ...

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complained of was "reasonably likely, in all the circumstances to offend, insult, humiliate or intimidate" another person or a group of people: *Hagan v Trustees of Toowoomba Sports Ground Trust* [2000] FCA 1615 at [15] ; *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 (*Cairns Post*) at [12]; *Jones v Scully* (2002) 120 FCR 243 (*Jones v Scully*) at [98]-[100] ; *Eatock v Bolt* (2011) 197 FCR 261 (*Bolt*).

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Rubio v Ohlmus [2016] ACTSC 84 (11 May 2016) (Refshauge J)

63. It is not incumbent on a sentencer to draw the attention of an offender to every possible sentencing option. A sentencer does not have to consider every possible sentence, including those obviously not applicable (such as a fine for an offence of murder): *Wanambi v Thompson* (1994) 120 FLR 243 at 264 . That, however, is not this case, where a non-conviction order was clearly within the range of the appropriate sentences to be imposed.

Kanapathy v In De Braekt (No.4) [2013] FCCA 1368 -
Kanapathy v In De Braekt (No.4) [2013] FCCA 1368 -
Kanapathy on behalf of Rajandran Kanapathy v In De Braekt (No. 3) [2012] FMCA 1213 -
Kanapathy on behalf of Rajandran Kanapathy v In De Braekt (No. 3) [2012] FMCA 1213 -
Ibrahim v Australian Dental Council [2012] FMCA 612 (20 September 2012) (Nicholls FM)
Jones v Scully [2002] FCA 1080
Charles v Fuji Xerox Australia Pty Ltd

Ibrahim v Australian Dental Council [2012] FMCA 612 (20 September 2012) (Nicholls FM)
and Jones v Scully [2002] FCA 1080 at [98] per Hely J)

Clarke v Nationwide News Pty Ltd [2012] FCA 307 (27 March 2012) (Barker J)
(Jones v Scully) at [98][100]

Clarke v Nationwide News Pty Ltd [2012] FCA 307 (27 March 2012) (Barker J)
Jones v Scully at [102]

Clarke v Nationwide News Pty Ltd [2012] FCA 307 (27 March 2012) (Barker J)
the terms of the section and not to reach to 'mere slights' in the sense of acts which, for example, are reasonably likely to cause technical, but not real, offence or insult (see also Jones v Scully per Hely J at [102])

Clarke v Nationwide News Pty Ltd [2012] FCA 307 (27 March 2012) (Barker J)
In cases such as Jones v Scully,

Sunol v Collier (No 2) [2012] NSWCA 44 (22 March 2012) (Bathurst CJ at [1]; Allsop P at [55]; Basten JA at [75])
supra, and by Hely J in Jones v Scully supra

Sunol v Collier (No 2) [2012] NSWCA 44 (22 March 2012) (Bathurst CJ at [1]; Allsop P at [55]; Basten JA at [75])

The conclusion I have reached is consistent with that reached by Hely J in Jones v Scully supra at [239]

Sunol v Collier (No 2) [2012] NSWCA 44 (22 March 2012) (Bathurst CJ at [1]; Allsop P at [55]; Basten JA at [75])
balance between the legitimate end of preventing homosexual vilification and the requirement of freedom to discuss and debate government or political matters, required by the Constitution: Cf Jones v Scully supra at [240]

Altaranesi v Administrative Decisions Tribunal [2012] NSWCA 19 (28 February 2012) (Campbell JA at [1], Meagher JA at [2], Handley AJA at [104])
Jones v Scully [2002] FCA 1080; (2002) 120 FLR 243 Health Care Complaints Commission v Karalasingham

Altaranesi v Administrative Decisions Tribunal [2012] NSWCA 19 (28 February 2012) (Campbell JA at [1], Meagher JA at [2], Handley AJA at [104])
Jones v Scully [2002] FCA 1080; (2002) 120 FLR 243 Kadian v Richards

Altaranesi v Administrative Decisions Tribunal [2012] NSWCA 19 (28 February 2012) (Campbell JA at [1], Meagher JA at [2], Handley AJA at [104])
and Jones v Scully [2002] FCA 1080; (2002) 120 FLR 243 at [111]

Eatock v Bolt (No 2) [2011] FCA 1180 (19 October 2011) (Bromberg J)
Jones v Scully (2002) 120 FCR 243
Jones v Toben

Eatock v Bolt (No 2) [2011] FCA 1180 (19 October 2011) (Bromberg J)
: see Jones v Scully (2002) 120 FCR 243

Eatock v Bolt [2011] FCA 1103 (28 September 2011) (Bromberg J)
Jones v Scully (2002) 120 FCR 243
Jones v Toben

Eatock v Bolt [2011] FCA 1103 (28 September 2011) (Bromberg J)

21. As both Hely J in *Scully* and Branson J in *Jones v Toben* identified, the principles summarised in *Marsden* were also applied in this Court by Tamberlin J in *Gianni Versace SpA v Monte* (2002) 119 FCR 349 at [144]-[146] . In that case at [145], Tamberlin J emphasised that the statement or matters complained of must not be looked at in isolation. The judge said:

> When considering whether an imputation is raised in the present case it is necessary to consider the cumulative effect of the references in the evidence as opposed to relying on selected passages in isolation.

Eatock v Bolt [2011] FCA 1103 (28 September 2011) (Bromberg J)

19. Before dealing with the Articles, I also need to explain the legal principles that have guided me in making the findings which I have made as to what imputations were conveyed by the Articles. The principles developed about imputations by the law of defamation have been adopted in at least two cases dealing with Part IIA of the RDA : *Jones v Scully* (2002) 120 FCR 243 at [125]-[126] (Hely J); and *Jones v Toben* [2002] FCA 1150 at [87] (Branson J). Both of those cases relied on a summary of the relevant principles found in *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 165-166 (Hunt CJ at CL with whom Mason P and Handley JA agreed). The principles there outlined may be summarised as follows:

> · In deciding whether any particular imputation is capable of being conveyed, the question is whether it is reasonably so capable;

· Any strained or forced or utterly unreasonable interpretation must be rejected;

· The ordinary reasonable meaning of the matter complained of may be either the literal meaning of the published matter or what is implied by that matter, or what is inferred from it;

· The mode or manner of publication is a material matter in determining what imputation is capable of being conveyed. Thus, for example, the reader of a book is assumed to read it with more care than he or she would read a newspaper;

· The more sensational the article in a newspaper the less likely it is that the ordinary reasonable reader will have read it with a degree of analytical care which may otherwise have been given to a book and the less the degree of accuracy which would be expected from the reader;

· The ordinary reasonable reader of such an article is understandably prone to engage in a certain amount of loose thinking;

· There is a wide degree of latitude given to the capacity of the matter complained of to convey particular imputations where the words published are imprecise, ambiguous, loose, fanciful or unusual; and

· In determining what is reasonable in any case, a distinction must be drawn between what the ordinary reasonable reader, listener or viewer (drawing on his or her own knowledge and experience of human affairs) could understand from what the author has said and the conclusion which the reader, listener or viewer could reach by taking into account his or her own belief which has been excited by what was said. It is the former approach, not the latter, which must be taken.

Eatock v Bolt [2011] FCA 1103 (28 September 2011) (Bromberg J)

209. Other judicial statements have identified the underlying purpose of Part IIA as intending to regulate conduct which stimulates contempt or hostility between groups of people within the community by lowering regard for, and demeaning the worthiness of, the person or persons subjected to the conduct: *Bropho* at [138] (Lee J); or as seeking to control "socially corrosive conduct": *Bropho* at [138] (Lee J); or as seeking to eliminate racial discrimination: *Scully* at [240] (Hely J); and as seeking to promote racial tolerance: *McGlade v Lightfoot* (2002) 124 FCR 106 at [90] (Carr J).

Eatock v Bolt [2011] FCA 1103 (28 September 2011) (Bromberg J)

241. Section 18C(1)(a) requires an assessment to be made of the reasonable likelihood of a person or group of people being offended, insulted, humiliated or intimidated (which, as a short-hand, I will refer to as "offended") by the act of another person. That calls for an assessment of the reasonably likely reaction of the person or people within the group concerned. It is thus the risk of a person or one or more people within a particular group of people being offended, rather than the actuality of offence that is being assessed. Proof of actual offence for a particular person or group is neither required nor determinative, although evidence of subjective reaction is relevant to whether offence was reasonably likely: *Scully* at [99]-[101] (Hely J); *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 at [28] (Drummond J) and *McGlade* at [44]-[45] (Carr J).

Eatock v Bolt [2011] FCA 1103 (28 September 2011) (Bromberg J)

242. The assessment required by s 18C(1)(a) is obviously to be conducted objectively and not subjectively: *Bropho* [66] (French J); *Hagan* at [15] (Drummond J); *Creek* at [12] (Kiefel J); *Scully* at [99] (Hely J); *McGlade* [42]-[45] and [47] (Carr J).

Eatock v Bolt [2011] FCA 1103 (28 September 2011) (Bromberg J)

247. The distinction utilised by the law on misleading and deceptive conduct is based upon reasoning which, in my view, applies with equal force to s 18C(1)(a) . Whilst the decided cases on s 18C(1)(a) have not expressly drawn attention to the law on misleading and deceptive conduct, that the same approach is to be taken in relation to s 18C(1)(a) is implicit in the reasoning of those cases: *Creek* at [13] (Kiefel J); *Scully* at [108] (Hely J); *McGlade* at [52], [60] and [88] (Carr J).

Eatock v Bolt [2011] FCA 1103 (28 September 2011) (Bromberg J)

253. Mr Bolt contended that the objective nature of the assessment required by s 18C(1)(a) importe d an objective assessment of community standards and that the same standard applied irrespective of whether group offence or personal offence was alleged. Acceptance of that contention would see a reasonable person test substitute the reasonable representative test and result in the perspective clearly required by the words of s 18C(1)(a) to be ignored. For the reasons I have just outlined, that contention must be rejected. It is the values, standards and other circumstances of the person or group of people to whom s 18C(1)(a) refers that will bear upon the likely reaction of those persons to the act in question. It is the reaction from their perspective which is to be assessed: *Creek* at [16] (Kiefel J); *Scully* at [108] (Hely J) . Further, to import general community standards into the test of the reasonable likelihood of offence runs a risk of reinforcing the prevailing level of prejudice. To do that would be antithetical to the promotional purposes of Part IIA. Such an approach has been rejected in relation to sexual harassment: *Ellison v Brady* 924 F.2d 872 (9th Cir. 1991) at 878-879 ; *Stadnyk v Canada (Employment and Immigration Commission)* (2000) 38 CHRR 290 at [11]; and see *Corunna v West Australian Newspapers Ltd* (2001) EOC 93-146 at [75467]-[75468]. Sexual harassment legislation is the arena from which the words "offend, insult, humiliate or intimidate" were deliberately borrowed: see Explanatory Memorandum at 10 and the Second Reading Speech to the RDA at column 3341.

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262. Lastly, it is necessary to consider the words "offend, insult, humiliate or intimidate". Hely J in *Scully* at [103] (as well as Carr J in *McGlade* at [52] ; Branson J in *Jones* at [90]; and French J in *Bropho* at [67]) identified the ordinary meaning of these words by reference to their dictionary definitions:

> Dictionary definitions of the terms used in s 18C are as follows:
>
> *Offend*
> •"1.To irritate in mind or feelings; cause resentful displeasure in.
> 2. To affect (the sense, taste, etc) disagreeably."
> (Macquarie Dictionary 3rd Ed)
>
> • In its chief sense "to hurt or wound the feelings or susceptibilities of; to be displeasing or disagreeable to; to vex, annoy, displease, anger; to excite a feeling of personal annoyance, resentment or disgust in (any one)."
>
> (Oxford English Dictionary)
>
> *Insult*
> •"To assail with offensively dishonouring or contemptuous speech or action; to treat with scornful abuse or offensive disrespect; to offer indignity to; to affront, outrage."
> (Oxford English Dictionary)

Humiliate
• "To lower the pride or self respect of; cause a painful loss of dignity to; mortify." (Macquarie Dictionary)

•"To make low or humble in position, condition or feeling; to humble." (Oxford English Dictionary)

Intimidate
•"1. To make timid, or inspire with fear; overawe; cow.
• 2. To force into or deter from some action by inducing fear." (Macquarie Dictionary)

•"To render timid, inspire with fear; to overawe, cow; in modern use especially to force to or deter from some action by threats or violence." (Oxford English Dictionary)

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268. It is for those reasons that I would respectfully agree with the conclusion reached by other judges of this Court, that the conduct caught by s 18C(1)(a) will be conduct which has "profound and serious effects, not to be likened to mere slights": *Creek* at [16] (Kiefel J); *Bropho* at [70] (French J); *Scully* at [102] (Hely J); or, as Branson J put it in *Jones* at [92] "real, offence".

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308. The test has been expressed in different but not inconsistent ways:

· "whether anything suggests race as a factor in the respondent's decision to publish": *Creek* at [28] (Kiefel J); *Scully* at [114] and [116] (Hely J); *Jones* at [99] (Branson J);

· Did considerations of race actuate or motivate the conduct?: *Creek* at [28] (Kiefel J);

· Was the act "plainly calculated to convey a message about" or concerned with the racial group?: *Jones* at [99]-[100] (Branson J); *Toben* at [38] (Carr J), [65] (Kiefel J), [154] (Allsop J); *Scully* at [117]-[118] and [224] (Hely J); *McGlade* at [66] (Carr J).

Eatock v Bolt [2011] FCA 1103 (28 September 2011) (Bromberg J)

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· Was the act "plainly calculated to convey a message about" or concerned with the racial group?: *Jones* at [99]-[100] (Branson J); *Toben* at [38] (Carr J), [65] (Kiefel J), [154] (Allsop J); *Scully* at [117]-[118] and [224] (Hely J); *McGlade* at [66] (Carr J).

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311. This passage from the Explanatory Memorandum was relied upon by Hely J in *Scully* to find that Jews in Australia were a group of people with an "ethnic origin" for the purposes of the RDA : at [112]-[113]. On the basis of *King-Ansell* , a Full Court of this Court in *Miller v Wertheim* [2002] FCAFC 156 at [14] (Heerey, Lindgren and Merkel JJ) also accepted that Jewish people in Australia comprise a group of people with an "ethnic origin" for the purposes of the RDA .

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337. In *McGlade* , Carr J at [67]-[69] addressed the issue of onus of proof. His Honour referred to *Scully* where Hely J assumed that the onus rested on the respondent: at [127]-[128] . Carr J then referred to *Jones* at [101] where Branson J said: "The onus of proof with respect to an exemption provided by s 18D rested on the respondent...". Carr J continued at [69]:

> I respectfully agree with their Honours. In my view, the exemptions provided by s 18D of the Act fall within the following description in *Vines v Djordjevitch* (1955) 91 CLR 512 at 519-520 :
>
> > "... it may be the purpose of the enactment to lay down some principle of liability which it means to apply generally and then to provide for some special grounds of excuse, justification or exculpation depending upon new or additional facts. In the same way where conditions of general application giving rise to a right are laid down, additional facts of a special nature may be made a ground for defeating or excluding the right. For such a purpose the use of a proviso is natural. But in whatever form the enactment is cast, if it expresses an exculpation, justification, excuse, ground of defeasance or exclusion which assumes the existence of the general or primary grounds from which the liability or right arises but denies the right or liability in a particular case by reason of additional or special facts, then it is evident that such an enactment supplies considerations of substance for placing the burden of proof on the party seeking to rely upon the additional or special matter." (Footnotes omitted.)

Eatock v Bolt [2011] FCA 1103 (28 September 2011) (Bromberg J)

The protection of reputation and the protection of people from offensive behaviour based on race are both conducive to the public good: Scully at [239] (Hely J)

Philip v State of New South Wales [2011] FMCA 308 (10 June 2011) (Lloyd-Jones FM)

81. Mr Seck acknowledges that unlike the term 'race', the term 'ethnic origin' has been subject to significant judicial scrutiny. Courts and tribunals have held that a collection of people establish an 'ethnic group' for the purposes of the term 'ethnic origin' where the members of the group must have a social identity, in both their own eyes and the eyes of others in the community: *Mandla v Dowell Lee* (supra) at 561-565 ; *King-Ansell v Police* (supra) at 543 ; *Commission of Racial Equality v Dutton* [1989] 1QB783 at 799 ; *Jones v Scully* (2002) 120 FCR 243 at 271-273 .

Clarke v West Australian Newspapers Ltd [2010] FMCA 502 (20 July 2010) (Raphael FM)

Jones v Scully [2002] FCA 1080
McGlade v Lightfoot

Clarke v West Australian Newspapers Ltd [2010] FMCA 502 (20 July 2010) (Raphael FM)

7. His Honour made reference to the decision of Branson J in *Jones v Toben* [2002] FCA 1150 where her Honour said at [23] :

> "In my view, the placing of material, whether text, graphics, audio or video, on a website which is not password protected is an act which causes words sounds images or writings to be communicated to the public in the sense they are communicated to any person who utilises a browser to gain access to that website. ....

And at [75]:

> "I further conclude that the act of placing text and graphics on a website which is not password protected is an act of publication."

However Gyles J did not specifically adopt the view, which had been expressed by Branson J in the context of an undefended summary judgment application. The respondent in the instant case wishes to argue that the matter is still live and deserves consideration and determination by a court at the same level as those other decisions. The applicant would prefer me to find that the matter was not considered in *Silberberg* and to follow *Jones v Toben* (supra) but concedes that the issue is complex and would prefer that it be decided by a court which did not feel constrained by the possibility that it might be bound by these decisions of the Federal Court. The respondent also argues that the question of who bears the burden of proof of the exemption under s. 18D of the RDA is also a live issue. Although it has been held to be that of the respondent; *Jones v Scully* [2002] FCA 1080 [127] ; *Jones v Toben* (supra) at [101] , *McGlade v Lightfoot* [2002] FCA 1457 at [67 – 69] the first matter only made a reference to the second reading speech and the last two matters were uncontested. The respondent points to the views expressed by French J, as he then was, in *Bropho v The Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 when his Honour said at [75] (obiter):

> "While the incidence of the burden of proof of the exemption is not contested on the appeal it is not, in my opinion, a question that should be regarded as settled."

In the instant case the applicant would argue that the burden of proof lies upon the respondent.

Ekermawi v Harbour Radio Pty Ltd, Ekermawi v Nine Network Television Pty Ltd [2010] NSWADT 145 (10 June 2010) (Chesterman M - Deputy President; Kelleghan D - Non-Judicial Member; Schneeweiss J - Non-Judicial Member)

Jones v Scully [2002] FCA 1080
Khan v Commissioner, Department of Corrective Services & anor

Ekermawi v Harbour Radio Pty Ltd, Ekermawi v Nine Network Television Pty Ltd [2010] NSWADT 145 (10 June 2010) (Chesterman M - Deputy President; Kelleghan D - Non-Judicial Member; Schneeweiss J - Non-Judicial Member)

40 Mr Ekermawi referred to decisions, both in Australia and overseas, in which Jews have been held to have a common ethnic origin, and argued that a similar ruling should be made regarding Muslims whose background was in the Middle East. One of these decisions was *Jones v Scully* [2002] FCA 1080 , in which Hely J considered whether Jews living in Australia had a common 'ethnic origin' within the meaning of the phrase 'race, colour or national or ethnic origin' in section 18C(1)(b) of the *Racial Discrimination Act* 1975 (Cth) . It is useful here to quote the following paragraphs of his Honour's judgment:-

> 111 The meaning of "ethnic origins" was considered in *King-Ansell v Police* [1979] 2 NZLR 531. In that case the New Zealand Court of Appeal held that Jews in New Zealand formed a group with common ethnic origins within the meaning of the *Race Relations Act* 1971 (NZ). Richardson J said at p 543:
>
> > "... a group is identifiable in terms of its ethnic origins if it is a segment of the population distinguished from others by a sufficient

> combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what is biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents."

That passage was approved by the House of Lords in *Mandla v Dowell Lee* [1982] UKHL 7; [1983] 2 AC 548 at 564 . See also *Commission for Racial Equality v Dutton* [1989] 1 QB 783, 799 . In *Miller v Wertheim* [2002] FCAFC 156 at [14] , a Full Court said, on the basis of *King-Ansell* , that it can readily be accepted that Jewish people in Australia can comprise a group of people with an "ethnic origin" for the purposes of the RDA.

112 That position is confirmed by the Explanatory Memorandum circulated in relation to the Racial Hatred Bill. At pp 2 - 3 the following appears:

> "The terms `ethnic origin' and `race' are complementary and are intended to be given a broad meaning.
> The term `ethnic origin' has been broadly interpreted in comparable overseas common law jurisdictions... It is intended that Australian courts would follow the prevailing definition of "ethnic origin" as set out in *King-Ansell* . The definition of an ethnic group formulated by the Court in *King-Ansell* involves consideration of one or more of characteristics such as a shared history, separate cultural tradition, common geographical origin or descent from common ancestors, a common language (not necessarily peculiar to the group), a common literature peculiar to the group, or a religion different from that of neighbouring groups or the general community surrounding the group. This would provide the broadest basis for protection of peoples such as Sikhs, Jews and Muslims.
> The term `race' would include ideas of ethnicity so ensuring that many people of, for example, Jewish origin would be covered. While that term connotes the idea of a common descent, it is not necessarily limited to one nationality and would therefore extend also to other groups of people such as Muslims."

113 Jews in Australia are accordingly a group of people with an "ethnic origin" for the purposes of the RDA. There is evidence that Jewish people see themselves as a distinct community;

that Jews are bound by common customs and beliefs; have a common language; and share other common characteristics.

Midjumbani v Moore [2009] NTSC 27 (26 June 2009)
Wanambi v Thompson (1994) 120 FLR 243, referred to

Midjumbani v Moore [2009] NTSC 27 (26 June 2009)
Wanambi v Thompson[5]

Midjumbani v Moore [2009] NTSC 27 (26 June 2009)
Wanambi v Thompson[5]

Dunne v Noonan [2009] FMCA 362 (22 April 2009) (Burnett FM)
Jones v Scully (2002) 120 FCR 243
Li v Minister for Immigration and Multicultural Affairs

Dunne v Noonan [2009] FMCA 362 (22 April 2009) (Burnett FM)

12. In response to this the respondent, Mr Noonan, says the case against him is weak. A number of points were made about the manner in which the application has been pleaded. In submissions made by Mr Ashton of counsel who appeared for the respondent he contended that the applicant's case on the primary application was weak, particularly because the necessary elements for such a case as discussed in *Creek v Cairns Post Pty Ltd* (2002) 120 FCR 243 and *Jones v Scully* (2001) 112 FCR 352 were not addressed.

Jones v Toben [2009] FCA 354 (16 April 2009) (Lander J)
Jones v Scully (2002) 120 FCR 243 cited

Jones v Toben [2009] FCA 354 (16 April 2009) (Lander J)

101. Moreover, the argument put does not assist the respondent in the proceeding because the respondent has not tendered any evidence at all and there is no evidence that would bring the respondent within s 18D of the Racial Discrimination Act . The onus was on the respondent to establish an entitlement to an exemption under s 18D of the Racial Discrimination Act : *Jones v Scully* (2002) 120 FCR 243 at [127] and [230] .

Baker v Arnison; Burrett v Arnison [2009] NTSC 11 (02 April 2009)

R v Davey (1980) 50 FLR 57 ; Wannambi v Thompson (1994) 120 FLR 243 , referred to

Baker v Arnison; Burrett v Arnison [2009] NTSC 11 (02 April 2009)

12. Similarly, it should not be inferred that, merely because her Honour failed to specifically mention a particular sentencing option other than the imposition of a conviction and a fine, she did not consider all of the available sentencing options: Kuiper v Brennan [2] . In Wannambi v Thompson [3] Kearney J observed:

> It is not the duty of a sentencing court to set out in detail, or in general terms, each and every disposition available in a given case, and then to explain why and on what basis that disposition is or is not made. It is presumed that a court in

> exercising its sentencing discretion will keep the alternative dispositions in mind in assessing what is the appropriate disposition for the case and offender under consideration.

via

[3] (1994) 120 FLR 243 at (264)

BI (Contracting) Pty Limited v University of Adelaide [2008] NSWCA 210 (19 September 2008) (Beazley JA ; Bell JA ; McClellan CJ at CL)

Jones v Scully [2002] FCA 1080
Julia Farr Services Inc v Hayes

BI (Contracting) Pty Limited v University of Adelaide [2008] NSWCA 210 (19 September 2008) (Beazley JA ; Bell JA ; McClellan CJ at CL)

17 The ruling is as follows:

> "[53] Mr Parker SC objected to evidence of witnesses on this issue unless they were witnesses practising in the field at the time Professor Rowley was exposed and could, by reason of that fact, give evidence of the state of knowledge in 1961 or of what an appropriate expert might advise as to safety at that time. I do not think this submission is right. It would mean that in the case of an event at a time when no practising expert was alive, a person who later became an expert could not give evidence of an earlier state of knowledge based on his learning. I think this is historical material about which these persons may give evidence – see, for example, *Jones v Scully* [2002] FCA 1080 [82-5]." (Red 64.M-V)

BI (Contracting) Pty Limited v University of Adelaide [2008] NSWCA 210 (19 September 2008) (Beazley JA ; Bell JA ; McClellan CJ at CL)

18 On the appeal, Mr Parker submitted that his Honour's reliance on *Jones v Scully* [2002] FCA 1080 was misplaced. Hely J had been concerned in that case with the admissibility of video recordings and books to prove historical facts in proceedings in which it was contended that an individual had engaged in unlawful conduct by distributing anti-Semitic literature contrary to the *Racial Discrimination Act* 1975 (Cth) . The discussion of the admissibility of historical evidence is at 264-265 [82] – [85]. His Honour referred to the dictum of Dixon J in *Australian Communist Party v Commonwealth* [1951] HCA 5; (1951) 83 CLR 1 at 196 that the courts may use the general facts of history as ascertained from the writings of serious historians and employ the common knowledge of educated persons. The material in *Jones* was polemical in nature and was not admitted.

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Burns v Laws [2008] NSWADTAP 32 (16 May 2008) (O'Connor K - DCJ (President); Grotte E - Judicial Member; Nemeth de Bikal L - Non Judicial Member)
Jones v Scully (2002) 120 FCR 243Jones v The Bible Believers Church

Burns v Laws [2008] NSWADTAP 32 (16 May 2008) (O'Connor K - DCJ (President); Grotte E - Judicial Member; Nemeth de Bikal L - Non Judicial Member)
Jones v Scully (2002) 120 FCR 243 (Hely J)

Burns v Laws [2008] NSWADTAP 32 (16 May 2008) (O'Connor K - DCJ (President); Grotte E - Judicial Member; Nemeth de Bikal L - Non Judicial Member)
See for example, Jones v Scully at [127], [128]

Burns v Laws [2008] NSWADTAP 32 (16 May 2008) (O'Connor K - DCJ (President); Grotte E - Judicial Member; Nemeth de Bikal L - Non Judicial Member)
See for example, Jones v Scully at [99]

Paramasivam v University of New South Wales [2007] FCAFC 176 (23 November 2007) (Mansfield, Jacobson and Middleton JJ)

25. The judge at first instance then identified the essence of Ms Paramasivam's complaint (which she confirmed in her submissions on appeal) and the applicable law in the following terms:

> In the present proceeding, the applicant asserts that University security officers and the NSW Police Service identified and removed her from the University's premises by reference to her dark complexion and Sri Lankan background. However, in my view, this belief of the applicant is not determinative when one considers that the appropriate test for unlawful racial discrimination under s 9 of the Act is whether a person has suffered unfair treatment based partly or wholly, or sufficiently connected to, his or her race, colour, descent or national or ethnic background: see *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission* (1998) 91 FCR 8 at 33 ; *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 at [39] . In broad terms, under the Act it is unlawful to do any act involving a distinction based on race, colour, descent or national or ethnic origin which has the purpose or effect of impairing the recognition, enjoyment or exercise on an equal footing of any human right. Moreover, where an act is done for one or more reasons, it is enough that one of the reasons is the race, colour, descent or national or ethnic origin of the relevant person, irrespective of whether it is the dominant or substantial reason for doing the act: see *Jones v Scully* (2002) 120 FCR 243 at 273 . The applicant claims that she comes within this requirement.

Silberberg v The Builders Collective of Australia Inc [2007] FCA 1512 (02 October 2007) (Gyles J)
Jones v Scully (2001) 120 FCR 243 cited

Silberberg v The Builders Collective of Australia Inc [2007] FCA 1512 (02 October 2007) (Gyles J)

21. The test or standard in s 18C(1)(a) of the Act is objective: see *Jones v Scully* (2002) 120 FCR 243 at 268-269 ; *Hagan v Trustees of Toowoomba Sports Grounds Trust* [2000] FCA 1615; *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at [12] . It is for the Court to determine whether the act, in all the circumstances in which it was done, would be reasonably likely to offend, insult, humiliate or intimidate another person or a group of people of a particular racial, national or ethnic group: see *Hagan* [2000] FCA 1615 at [15] . As Hely J remarked in *Scully* (2002) 120 FCR 243 at [99] :

> *"it is not necessary for an applicant to prove that any person was actually offended, insulted, humiliated or intimidated by the conduct in question ...* [but] *evidence, for example, that a member of a particular racial group was offended by the conduct in question would be admissible, on, but not determinative of, the issue of contravention."*

Silberberg v The Builders Collective of Australia Inc [2007] FCA 1512 (02 October 2007) (Gyles J)

21. The test or standard in s 18C(1)(a) of the Act is objective: see *Jones v Scully* (2002) 120 FCR 243 at 268-269 ; *Hagan v Trustees of Toowoomba Sports Grounds Trust* [2000] FCA 1615; *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at [12] . It is for the Court to determine whether the act, in all the circumstances in which it was done, would be reasonably likely to offend, insult, humiliate or intimidate another person or a group of people of a particular racial, national or ethnic group: see *Hagan* [2000] FCA 1615 at [15] . As Hely J remarked in *Scully* (2002) 120 FCR 243 at [99] :

> *"it is not necessary for an applicant to prove that any person was actually offended, insulted, humiliated or intimidated by the conduct in question ...* [but] *evidence, for example, that a member of a particular racial group was offended by the conduct in question would be admissible, on, but not determinative of, the issue of contravention."*

Miller v Director-General, Department of Community Services (No2) [2007] NSWADT 140 (25 June 2007) (Britton A - Deputy President; Bolt M - Non Judicial Member; Martin M - Non Judicial Member)
Jones v Scully (2002) 71 ALD 567

Miller v Director-General, Department of Community Services (No2) [2007] NSWADT 140 (25 June 2007) (Britton A - Deputy President; Bolt M - Non Judicial Member; Martin M - Non Judicial Member)

56 As the respondent points out, courts are reluctant to order parties to apologise because, as Hely J said in *Jones v Scully* (2002) 71 ALD 567 at [245] , 'the idea of ordering someone to apologise is a contradiction in terms'. In *Burns v Radio 2UE Sydney Pty Ltd & Ors* (No 2) [2005] NSWADT 24, a decision of the Equal Opportunity Division of the ADT, the Tribunal commented (at [29]):

> We agree that if an apology is understood, as it is commonly understood, to be a statement that reflects a person's own feeling of regret for conduct that has caused offence or harm, then of its nature it cannot be ordered to be made, unless the feeling is in fact held and it is only its expression that is ordered. In submissions the applicant, however, says that an apology for purposes of s113(1)(b)(iiia) should be understood as being associated with a legal requirement, rather than "genuine and voluntary". The Anti-Discrimination Act 1977 makes clear that there is power to order an apology in respect of a vilification complaint. The apology is acknowledgement of the wrongdoing and, seen as fulfilment of a legal requirement rather than as a statement of genuinely held feelings, it can properly be compelled by way of order. There would be a welcome extra dimension to the apology if it reflected that the person actually regrets the conduct.

Paramasivam v University of New South Wales [2007] FCA 875 (19 June 2007) (Tamberlin J)
Jones v Scully (2002) 120 FCR 243 , cited

Paramasivam v University of New South Wales [2007] FCA 875 (19 June 2007) (Tamberlin J)

13. In the present proceeding, the applicant asserts that University security officers and the NSW Police Service identified and removed her from the University's premises by reference

to her dark complexion and Sri Lankan background. However, in my view, this belief of the applicant is not determinative when one considers that the appropriate test for unlawful racial discrimination under s 9 of the Act is whether a person has suffered unfair treatment based partly or wholly, or sufficiently connected to, his or her race, colour, descent or national or ethnic background: see *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission* (1998) 91 FCR 8 at 33 ; *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 at [39] . In broad terms, under the Act it is unlawful to do any act involving a distinction based on race, colour, descent or national or ethnic origin which has the purpose or effect of impairing the recognition, enjoyment or exercise on an equal footing of any human right. Moreover, where an act is done for one or more reasons, it is enough that one of the reasons is the race, colour, descent or national or ethnic origin of the relevant person, irrespective of whether it is the dominant or substantial reason for doing the act: see *Jones v Scully* (2002) 120 FCR 243 at 273 . The applicant claims that she comes within this requirement.

Simon v Garner [2007] NTSC 33 (10 May 2007) (Riley J)

12. A review of the transcript makes it clear that counsel for the appellant did not raise the issue of a home detention order and no home detention suitability report was requested by the learned sentencing magistrate. The failure of counsel for the appellant to raise the issue may have given rise to an assumption that counsel had taken instructions and that the appellant was not a suitable person for the provision of a home detention order because of the place at which he lived or because he does not consent to the order or for some other reason, for example, the information placed before his Honour that identified an intention on the part of the appellant to visit his wife at Doomadgee in Queensland "for a period of time", described as "some months": *Ross v Toohey* [2006] NTSC 92 at [19] . More importantly, the mere fact that the prospect of a home detention order was not raised before his Honour does not mean that all sentencing options were not considered by him. It is to be assumed that magistrates are well aware of the sentencing options open to them. The reasons for sentence delivered by the learned sentencing magistrate on this occasion were ex tempore and it should not be inferred that, merely because he failed to specifically mention a particular sentencing option, other than immediate imprisonment, he did not consider all of the options: *Kuiper v Brennan* [2006] NTSC 54 at [33] . As Kearney J observed in *Wanambi v Thompson* (1994) 120 FLR 243 at 264 :

> "It is not the duty of a sentencing court to set out in detail, or in general terms, each and every disposition available in a given case, and then to explain why and on what basis that disposition is or is not made. It is presumed that a court in exercising its sentencing discretion will keep the alternative dispositions in mind in assessing what is the appropriate disposition for the case and offender under consideration."

Tallong Park Association Inc v Sutherland; Sutherland v Tallong Park Association Inc (EOD) [2007] NSWADTAP 19 (16 April 2007) (Hennessy N - Magistrate (Deputy President); Rice S - Judicial Member; Bolt M - Non Judicial Member)

Jones v Scully (2002) 120 FCR 243McDonald v Director-General of Social Security

Tallong Park Association Inc v Sutherland; Sutherland v Tallong Park Association Inc (EOD) [2007] NSWADTAP 19 (16 April 2007) (Hennessy N - Magistrate (Deputy President); Rice S - Judicial Member; Bolt M - Non Judicial Member)

For example, in Jones v Scully (2002) 120 FCR 243 at [245], a case in which the respondent was found to have contravened Part IIA of the

(re Rowley) the University of Adelaide v BI (Contracting) Pty Limited [2007] NSWDDT 1 (05 April 2007) (Kearns J)

Jones v Scully [2002] FCA 1080 [82-5];

(re Rowley) the University of Adelaide v BI (Contracting) Pty Limited [2007] NSWDDT 1 (05 April 2007) (Kearns J)

> 53. Mr Parker SC objected to evidence of witnesses on this issue unless they were witnesses practising in the field at the time Professor Rowley was exposed and could, by reason of that fact, give evidence of the state of knowledge in 1961 or of what an appropriate expert might advise as to safety at that time. I do not think this submission is right. It would mean that in the case of an event at a time when no practising expert was alive, a person who later became an expert could not give evidence of an earlier state of knowledge based on his learning. I think this is historical material about which these persons may give evidence - see, for example, *Jones v Scully* [2002] FCA 1080 [82-5].

Burns v Laws (No 2) [2007] NSWADT 47 (01 March 2007) (Chesterman M - ADCJ (Deputy President); Mooney L - Non Judicial Member at 288; Quayle C - Non Judicial Member)

> Jones v Scully [2002] FCA 1080
> Jones v Toben

Burns v Laws (No 2) [2007] NSWADT 47 (01 March 2007) (Chesterman M - ADCJ (Deputy President); Mooney L - Non Judicial Member at 288; Quayle C - Non Judicial Member)

> 182 It should be added here that other decisions have been reached, both by the Federal Court and by Commissioners of HREOC, relating to the phrase 'reasonably and in good faith' in s. 18D of the R D Act . The Federal Court decisions include *Jones v Scully* [2002] FCA 1080 , *Toben v Jones* [2003] FCAFC 137 (in this judgment, see in particular paras [43 – 47], [78] and [159 – 170]) and, very recently, *Jones & Anor v The Bible Believers' Church* [2007] FCA 55 (see [61 – 63]). But in view of the extended discussion appearing in *Bropho* , it is not necessary in this judgment to review these other authorities.

Jones v The Bible Believers' Church [2007] FCA 55 (02 February 2007) (Conti J)

> *Jones v Scully* (2002) 120 FCR 243 referred to

Jones v The Bible Believers' Church [2007] FCA 55 (02 February 2007) (Conti J)

> 59. Mr Grigor-Scott's case has failed moreover to confront and answer the nature and the extent of the findings and reasoning of this Court in *Jones v Toben* , both at first instance and on appeal, to which authority I have of course earlier made reference. There was ample corresponding support in the present case for the making here of similar findings to those made in *Jones v Toben* . Moreover it is unnecessary for me to determine the validity of the second respondent's assertions regarding the Holocaust. Hely J observed in *Jones v Scully* (2002) 120 FCR 243 at [176]-[177] as follows:
>
> > *'176. I am not in a position to determine, as a matter of fact, whether the claim made by the author of the pamphlet that the Holocaust never occurred is true or not. I do not have the evidence which would be needed to enable me to make that determination, assuming that the matter is susceptible of proof in a court. As Gray J observed in* Irving v Penguin Books Ltd [2000] *EWHC QB 115 at [1.3], that is a task for historians whose role it is to provide an accurate narrative of past events; whereas my role is to determine whether the public dissemination of the leaflet by Mrs Scully in Launceston contravenes s 18C of the RDA.*
> >
> > *177. In my view, a leaflet that conveys an imputation that Jews are fraudulent, liars, immoral, deceitful and part of a conspiracy to defraud the world is reasonably likely to offend, insult, humiliate or intimidate Jews in Australia. This would be so regardless of whether or not the leaflet made mention of the Holocaust. However, the fact that the imputation arises in the context of a debate about the Holocaust makes it even more*

likely that the leaflet would cause offence. This is particularly so owing to the inflammatory language used in the leaflet, as well as the fact that it is unambiguously dismissive of the Jewish view of the Holocaust. I therefore find that this leaflet contravenes s 18C .'

I think it is appropriate for me to refrain from addressing further what appears in the evidence as to Mr Grigor-Scott's apparent views concerning the occurrence or otherwise of the Holocaust.

Jones v The Bible Believers' Church [2007] FCA 55 (02 February 2007) (Conti J)

'*...I do not consider it appropriate to seek to compel the respondent to articulate a sentiment that he plainly enough does not feel. As Hely J pointed out in* Jones v Scully *at [245]* , "prima facie the idea of ordering someone to make an apology is a contradiction in terms"...'

Catch the Fire Ministries Inc v Islamic Council of Victoria Inc [2006] VSCA 284 (14 December 2006) (Nettle, Ashley and Neave, JJ.A.)

65. Arguably, that may mean no more than that, because the witnesses were upset by Pastor Scot's statements, it was more probable that the statements were sufficiently vehement to invoke hatred or other relevant emotion of or towards Muslims on the basis of their religious beliefs. If so, the reasoning would be unexceptionable. But I think it unlikely that that is what it means; for, immediately after making those observations, the Tribunal continued, as follows:

> "The extent to which such evidence can be used was discussed by Hely, J. in *Jones v. Scully* . His Honour observed that people affected by what was said and done was subjective, but was admissible to the limited extent that a Court or Tribunal can use such evidence, but it is not determinative of the actual result. Therefore it may be used in a narrow fashion. Furthermore, even if the three individuals did not attend the seminar, it would not prevent the complaint from being made to the Equal Opportunity Commission, and to this Tribunal subject to proof." (See the comment in *Jones v. Scully* at paragraph 99).

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Catch the Fire Ministries Inc v Islamic Council of Victoria Inc [2006] VSCA 284 (14 December 2006) (Nettle, Ashley and Neave, JJ.A.)

66. *Jones v. Scully* [50] was concerned with s. 18C of the *Racial Discrimination Act* 1975 (C'th). It prohibits a person from doing an act "that is reasonably likely in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people". Not surprisingly, therefore, Hely, J. said at paragraph 99 of his reasons for judgement, that:

> "...evidence, for example, that a member of a particular racial group was offended by the conduct in queston would be admissible on, ...the issue of contravention..."

Catch the Fire Ministries Inc v Islamic Council of Victoria Inc [2006] VSCA 284 (14 December 2006) (Nettle, Ashley and Neave, JJ.A.)

68. Furthermore, although the Tribunal said at another point in its reasons that it would be possible to look no further than the transcript of the Seminar in order to conclude that the Seminar contravened s. 8 of the Act , it is apparent that the evidence of the three Muslim witnesses was material to the Tribunal's decision. Much later in the reasons for decision, the Tribunal returned to the evidence of the three Muslim witnesses and said, in its conclusions, that:

> "I find that the evidence of the three lay witnesses is probative of the fact, that what was said amounted to incitement."

That statement implies the Tribunal may not have come to the same conclusion if it had understood that such evidence cannot be used for the purposes of s.8 in the way in which Hely, J. said in *Jones v. Scully* that it may be used for the purposes of s. 18C of the *Racial Discrimination Act* 1975 .

Catch the Fire Ministries Inc v Islamic Council of Victoria Inc [2006] VSCA 284 (14 December 2006) (Nettle, Ashley and Neave, JJ.A.)

185. I agree with Nettle, J.A. that such evidence may be relevant in determining whether the statements made by Pastor Scot incited or were likely to incite hatred or other relevant emotion among the audience which heard the statement.[112] As Nettle, J.A. points out, however, his Honour's reference to *Jones v. Scully [113]* suggests that the Tribunal may have relied on these statements for the purpose of deciding whether the statements were likely to offend Muslims, which is the issue which must be decided for the purposes of s 18C of the *Racial Discrimination Act* , but not the test which must be applied under s. 8 of the *Racial and Religious Tolerance Act* .

Catch the Fire Ministries Inc v Islamic Council of Victoria Inc [2006] VSCA 284 (14 December 2006) (Nettle, Ashley and Neave, JJ.A.)

186. In my view however, the reference to *Jones v. Scully* would not, standing alone, be sufficient to vitiate the Tribunal's decision. In the next paragraph of his Reasons the learned Vice President said that

> "The newspaper and the article were such as to lead to a wider audience. In fact, I believe that is the reason why the legislature both in this State and in other jurisdictions, have made it clear it is an objective test to be applied. It is the concept of the reasonable person possessing particular attributes by which the test is applied, not particular individuals whose sensitivities, be they well held or otherwise may be subjected to."

Catch the Fire Ministries Inc v Islamic Council of Victoria Inc [2006] VSCA 284 (14 December 2006) (Nettle, Ashley and Neave, JJ.A.)

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> "...evidence, for example, that a member of a particular racial group was offended by the conduct in queston would be admissible on, ...the issue of contravention..."

via

[50] (2002) 120 F.C.R. 243 .

Catch the Fire Ministries Inc v Islamic Council of Victoria Inc [2006] VSCA 284 (14 December 2006) (Nettle, Ashley and Neave, JJ.A.)

113. As at present advised, I do not consider that s. 8 of the Act effectively burdens freedom of communication about political matters in the sense which was contemplated in *Lange*. [73] But if it did then, based upon the observations of Gleeson, C.J. in *Coleman v. Power* ,[74] I consider that it would be appropriate and adapted to serve a legitimate end, namely, the prevention of religious vilification, in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s. 128 for submitting a proposed amendment of the Constitution to the informed decision of the people. [75]

via

[75] Cf. *Jones v. Scully* (2002) 120 F.C.R. 243 .

Catch the Fire Ministries Inc v Islamic Council of Victoria Inc [2006] VSCA 284 (14 December 2006) (Nettle, Ashley and Neave, JJ.A.)

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via

[113] (2002) 120 F.C.R. 243 .

Kelly v Brennan [2006] NTSC 80 (11 October 2006) (Riley J)

5. The mere fact that a sentencing magistrate does not refer to a particular disposition in ex tempore reasons delivered during the course of sentencing does not mean that the whole of the range of available dispositions has not been considered. As has been observed elsewhere, ex tempore remarks on sentence are not to be analysed as critically as the words in a considered reserve judgment. An appellate court is entitled to assume that a magistrate has considered all matters which are necessarily implicit in any conclusions he has reached. In this case the learned magistrate did not mention other dispositions and, in my view, it was not necessary for him to run through the whole gamut of available dispositions in order to reject them. The magistrate is a very experienced magistrate and, as Bailey J observed in *Murrungun v Peach* (JA 36 of 1997):

> "Unless there is anything to suggest the contrary, this Court is entitled to presume that an experienced stipendiary magistrate both knew and applied appropriate sentencing principles. The fact that such a magistrate failed to refer expressly to every matter advanced by counsel does not mean that such a matter was either ignored or not given sufficient weight."

Similar observations apply in circumstances such as the present. It is not necessary for courts, in passing sentence, to advert to all the penalties which they have the power to impose and to give reasons for selecting imprisonment rather than any other form of penalty: *Napper v Samuels* (1972) 4 SASR 63 at 74 ; *Blacksmith v Materna* (JA 21 and 22 of 1996 per Mildren J) and *Wanambi v Thompson* (1994) 120 FLR 243 at 264 .

Sunol v Collier [2006] NSWADTAP 51 (27 September 2006) (Hennessy N - Magistrate (Deputy President); Rees N - Judicial Member; Nemeth de Bikal L - Non Judicial Member)

Jones v Scully (2002) 120 FCR 243Jones v Toben

Sunol v Collier [2006] NSWADTAP 51 (27 September 2006) (Hennessy N - Magistrate (Deputy President); Rees N - Judicial Member; Nemeth de Bikal L - Non Judicial Member)

For example in Jones v Scully (2002) 120 FCR 243 at [245], a case in which the respondent was found to have contravened Part IIA of the

Cohen v Hargous; Karelicki v Hargous [2006] NSWADT 209 (20 July 2006) (Britton A - Judicial Member; Weule B - Non Judicial Member; Gill M - Non Judicial Member)

Jones v Scully (2002) 120 FCR 243

King Ansell v Police

Cohen v Hargous; Karelicki v Hargous [2006] NSWADT 209 (20 July 2006) (Britton A - Judicial Member; Weule B - Non Judicial Member; Gill M - Non Judicial Member)

> 26 In *Toben v Jones* (2003) 199 ALR 1 the Full Court of the Federal Court affirmed the trial judge's decision that Jewishness was an ethnic or racially protected category under s 18C of the *Racial Discrimination Act (Cth) 1975* the analogous provision in Commonwealth law to the NSW AD Act. It in turn followed the decision of Hely J in *Jones v Scully* (2002) 120 FCR 243 . Decisions in similar vein have been delivered by the House of Lords in *Mandla v Dowell Lee* [1983] 2 AC 548 and the New Zealand Court of Appeal in *King Ansell v Police* [1979] 2 NZLR 531.

Burns v Radio 2UE Sydney Pty Ltd & Ors (No 2) [2005] NSWADT 24 (02 April 2006) (Rice S - Judicial Member; Alt M - Non Judicial Member; Bolt M - Non Judicial Member)

Jones v Scully [2002] FCA 1080

Re: Hall; Oliver and Reid and A & A Sheiban Pty Ltd; Dr Sheiban and Human Rights and Equal Opportunity Commission

Burns v Radio 2UE Sydney Pty Ltd & Ors (No 2) [2005] NSWADT 24 (02 April 2006) (Rice S - Judicial Member; Alt M - Non Judicial Member; Bolt M - Non Judicial Member)

4 To this end the orders that can be made are each capable, to different degrees, of being all or any of compensatory, preventative and remedial. We have already said that, in the circumstances, we do not consider an order for the payment of damages under s113(b)(i) is appropriate. The need for an order under s113(b)(iv) voiding an agreement does not arise. We agree with the observation of the Federal Court in *Jones v Scully* [2002] FCA 1080 at [245] that "a retraction is only appropriate where it has been established by an applicant that what has been published or disseminated by a respondent is false". In this matter, as in *Jones v Scully* , the issue was not the truth or falsity of what was said, but whether what was said was reasonably likely to incite serious ridicule. In these circumstances an order for a retraction under s113(b)(iiia) is not appropriate.

Burns v Radio 2UE Sydney Pty Ltd & Ors (No 2) [2005] NSWADT 24 (02 April 2006) (Rice S - Judicial Member; Alt M - Non Judicial Member; Bolt M - Non Judicial Member)

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Kelly-Country v Beers [2004] FMCA 336 (21 May 2004) (Brown FM)
Jones v Scully [2002] FCA 1080
McGlade v Lightfoot

Kelly-Country v Beers [2004] FMCA 336 (21 May 2004) (Brown FM)

91. As the test to be applied is an objective one, it is not necessary for an applicant to prove that any person was actually offended, insulted, humiliated or intimidated by the conduct in question. [12] However, in this case, clearly Mr Kelly-Country feels that he has been offended, insulted, humiliated and intimidated by Mr Beers' performances. But, it is not necessary for him to bring forward other evidence from other people who share his social background as an Aboriginal Elder as to their offence. However, in applying the reasonable victim test, the Court must have regard to the likely cultural sensitivity of the group to which Mr Kelly-Country belongs.

via

[12] See *Jones v Scully* [2002] FCA 1080 at paragraph 99

Kelly-Country v Beers [2004] FMCA 336 (21 May 2004) (Brown FM)

101. The words "*offend, insult, humiliate or intimidate*" are to be given their ordinary English meanings. [18] Their definition in the shorter Oxford English Dictionary include:

> *"offend – to vex, annoy, displease, anger, now especially to excite personal annoyance, resentment, or disgust (in anyone) (now the chief sense)."*
>
> *"insult – to assail with scornful abuse or offensive disrespect; to offer indignity to; to affront, outrage..."*
>
> *"humiliate – to make low or humble in position, condition or feeling, to humble...to subject to humiliation; to mortify."*

> *"intimidate – to render timid, inspire with fear; to overawe, cow, now especially to force to or deter from some action by threats or violence."*

via

[18] See *Jones v Scully* (supra) at paragraph 102

Toben v Jones [2003] FCAFC 137 (03 July 2003) (Carr, Kiefel and Allsop JJ)
Jones v Scully [2002] FCA 1080 referred to and discussed

Toben v Jones [2003] FCAFC 137 (03 July 2003) (Carr, Kiefel and Allsop JJ)

24. The primary judge adopted the approach taken to this question by Kiefel J in *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at 359 as applied by Hely J in *Jones v Scully* [2002] FCA 1080 at [114] . That was to inquire whether "anything suggests race as a factor in the respondent's decision to publish" the work in question. The primary judge reasoned as follows:

> *'99. In my view, it is abundantly clear that race was a factor in the respondent's decision to publish the material set out in [81] above. The material includes many references to Jews and events and people characterised as Jewish. It is particularly concerned with the Holocaust and with the conduct of German forces during World War II, matters of particular importance to Jewish people. It is, in my view, plainly calculated to convey a message about Jewish people (see Jones v Scully per Hely J at [116]-[117]).*
>
> *100. I am satisfied that the act of publishing on the World Wide Web the material set out in [81] above was done because of the ethnic origin, namely the Jewishness, of the people in the groups which I have identified above (see [95] and [96]).'*

Toben v Jones [2003] FCAFC 137 (03 July 2003) (Carr, Kiefel and Allsop JJ)

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Toben v Jones [2003] FCAFC 137 (03 July 2003) (Carr, Kiefel and Allsop JJ)

39. As the primary judge observed, the only potentially relevant exemption was that contained in s 18D(b) which provides that s 18C does not render unlawful anything said or done reasonably and in good faith in the course of any publication made for any genuine academic or other genuine purpose in the public interest. Her Honour dealt with this matter, at para [101] of her reasons, in the following terms:

'The onus of proof with respect to an exemption provided for by s 18D rested on the respondent (Jones v Scully per Hely J at [127]-[128]). The respondent did not comply with the direction of the Court to file and serve a defence. This application for summary judgment is to be determined solely on the basis of the evidence placed before the Court by the applicant. Even if the Court were free to have regard to the various material produced to the Court by the respondent, none of that material establishes that the respondent relevantly acted "in good faith". *No further consideration need, in the circumstances, be given to s 18D of the RDA.'*

Toben v Jones [2003] FCAFC 137 (03 July 2003) (Carr, Kiefel and Allsop JJ)

41. The appellant did not challenge her Honour's view that he had had the onus of proof with respect to the exemption provided by s 18D(b) . I think that is correct. In *McGlade v Lightfoot* [2002] FCA 1457 at [68] and [69] I noted that Hely J in *Jones v Scully* appeared to have assumed that the onus of proof with respect to an exemption provided for by s 18D rested on the respondent. I also noted her Honour's conclusion in the present matter and recorded my respectful agreement with both of their Honours. I went on to express the view that the exemptions provided by s 18D of the Act fell within the category of exemptions described by the High Court of Australia in *Vines v Djordjevitch* (1955) 91 CLR 512 at 519-520 .

Toben v Jones [2003] FCAFC 137 (03 July 2003) (Carr, Kiefel and Allsop JJ)

58. In *Jones v Scully* [2002] FCA 1080 at [114] , Hely J observed that the phrase 'because of' requires consideration of the reason or reasons for which the relevant act was done (and see *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2001) 105 FCR 56 at 60, at [23] (Full Court)). It was important to note, his Honour considered, that pursuant to s 18B , if an act is done for one or more reasons, it is enough that one of the reasons is the race, colour or national or ethnic origin of the person or a group of people, whether or not it is the dominant purpose or the substantial reason for doing the act. It was submitted before his Honour that the test to be applied under s 18C(1)(b) was whether race is a 'material factor' in the performance of the act in question. His Honour followed the approach I had outlined in *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, namely to inquire whether 'anything suggests race as a factor in the respondent's decision to publish the work in question'. Her Honour also followed that course. Her Honour found (at [99] and [100]):

'In my view, it is abundantly clear that race was a factor in the respondent's decision to publish the material set out in [81] above. The material includes many references to Jews and events and people characterised as Jewish. It is particularly concerned with the Holocaust and with the conduct of German forces during World War II, matters of particular importance to Jewish people. It is, in my view, plainly calculated to convey a message about Jewish people (see Jones v Scully per Hely J at [116-117]).

I am satisfied that the act of publishing on the World Wide Web the material set out in [81] above was done because of the ethnic origin, namely the Jewishness, of the people in the groups which I have identified above (see [95] and [96]).'

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Toben v Jones [2003] FCAFC 137 (03 July 2003) (Carr, Kiefel and Allsop JJ)

149. The appellant submitted that an interpretation of par 18C(1)(b) has been expressed by Judges of this Court which was, on the plain words of par 18C(1)(b), too broad, and so, in error. Reference was made to the discussion by Kiefel J in *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 where her Honour said at 359 [28] :

> *...the question is whether anything suggests race as a factor in the respondent´s decision to publish the photograph.*

Hely J followed that approach in *Jones v Scully* [2002] FCA 1080 at [114] . The learned primary judge here referred to that which Hely J had said in *Jones v Scully* and, like Hely J, expressly followed the approach of Kiefel J in *Creek* .

Toben v Jones [2003] FCAFC 137 (03 July 2003) (Carr, Kiefel and Allsop JJ)

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> *...the question is whether anything suggests race as a factor in the respondent´s decision to publish the photograph.*

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Toben v Jones [2003] FCAFC 137 (03 July 2003) (Carr, Kiefel and Allsop JJ)

152. Thus, I would not read the passage in Kiefel J's reasons in *Creek* set out at [149] above as departing from a need for an enquiry as to the reason or reasons for the act as stated by the Full Court in *Hagan*. I would not read Hely J (a member of that Full Court) in *Jones v Scully* as departing from what the Full Court said in *Hagan;* nor would I read what the primary judge said here (her Honour having quoted the whole of the relevant paragraph of Hely J's reasons in *Jones v Scully,* which itself referred to the Full Court in *Hagan*) as departing from what the Full Court said in *Hagan.*

NAEN v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 216 (19 March 2003) (Sackville J)

Jones v Scully [2002] FCA 1080 , cited

NAEN v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 216 (19 March 2003) (Sackville J)

72. If that is the relevant right for the purposes of s 10(1) of the *Racial Discrimination Act* , it is difficult to see how, on the material before me, the applicant has been denied equal treatment by the RRT or the courts. The reason that her application for a protection visa failed was that, on the facts before the RRT, Australia does not owe her protection obligations. That in turn is because Israel's *Law of Return,* according to the RRT, entitles her to effective protection in that country. It is, however, not only Jews who are affected by the principle that Australia owes no protection obligations to a refugee who can receive effective protection in a third country. The same principle applies to persons of different ethnic origin (assuming Jews to be persons of a particular ethnic origin: cf *Jones v Scully* [2002] FCA 1080, at [113]). The difficulty facing the applicant is created by Israel's *Law of Return* which attracts the effective protection principle. In other words, the Commonwealth law which excludes the applicant from a protection visa (ss 36(2) and 65(1) of the *Migration Act*) cannot be characterised as discriminatory.

Bropho v Human Rights and Equal Opportunity Commission [2002] FCA 1510 (04 December 2002) (RD Nicholson J)
Jones v Scully [2002] FCA 1080 referred to

Bropho v Human Rights and Equal Opportunity Commission [2002] FCA 1510 (04 December 2002) (RD Nicholson J)

30. Precisely that point was made in the explanatory memorandum to the *Racial Hatred Bill* which made the following observations in relation to the proposed s 18D (pp 10 - 11):

> *"Proposed section 18D provides a number of very important exemptions to the civil prohibition created by proposed section 18C. The exemptions are needed to ensure that debate can occur freely and without restriction in respect of matters of legitimate public interest.*
>
> *However, the operation of proposed section 18D is governed by the requirement that to be exempt, anything said or done must be said or done reasonably and in good faith. It is not the intention of that provision to prohibit a person from stating in public what may be considered generally to be an extreme view, so long as the person making the statement does so reasonably and in good faith and genuinely believes in what he or she is saying.*
>
> ...
>
> *It is for the complainant, in relation to the civil prohibitions, to establish that the respondent´s act was reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group, and that the act was done because of the race, colour, or national or ethnic origin of the complainant or group of people of which the complainant is a member. However, if so established, the onus then rests on the respondent to show, on the balance of probabilities, that his or her action falls within one of the exemptions in section 18D."*

This memorandum was cited and relied upon in *Jones v Scully* [2002] FCA 1080 .

McGlade v Lightfoot [2002] FCA 1457 (26 November 2002) (Carr J)
Jones v Scully [2002] FCA 1080 applied

McGlade v Lightfoot [2002] FCA 1457 (26 November 2002) (Carr J)

42. The use of the words "reasonably likely" suggests that the test is an objective one. The authorities confirm that this is the case: *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615; *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at [12] and *Jones v Scully* [2002] FCA 1080 .

McGlade v Lightfoot [2002] FCA 1457 (26 November 2002) (Carr J)

45. I propose to take the same approach as that taken in *Hagan* and *Jones v Scully* .

McGlade v Lightfoot [2002] FCA 1457 (26 November 2002) (Carr J)

49. Hely J in *Jones v Scully* referred to this passage in *Creek* with apparent approval. His Honour also referred to the fact that in his Second Reading Speech, the Attorney-General had said that the Commission was familiar with the scope of such language and has applied it in a way that deals with serious incidents only: Hansard (15 November 1994) p 3341.

McGlade v Lightfoot [2002] FCA 1457 (26 November 2002) (Carr J)

50. In *Jones v Toben* [2002] FCA 1150, Branson J in referring to the above passage in *Creek* sounded a note of caution at [92] :

> *"... I do not understand her Honour to have intended by the above observation to imply that a gloss should be placed on the ordinary meaning of the words that Parliament chose to include in s 18C of the RDA. Rather, I understand her Honour to have found in the context provided by s 18C of the RDA a legislative intent to render unlawful only acts which fall squarely within the terms of the section and not to reach to "mere slights" in the sense of acts which, for example, are reasonably likely to cause technical, but not real offence or insult. (See also Jones v Scully per Hely J at [102]). It would be wrong, in my view, to place a gloss on the words used in s 18C of the RDA."*

McGlade v Lightfoot [2002] FCA 1457 (26 November 2002) (Carr J)

52. In *Jones v Scully* Hely J set out the various dictionary definitions of those words and made some observations with which I am in full agreement. I set out below the relevant passages:

> *"103. Dictionary definitions of the terms used in s 18C are as follows:*
>
> ***Offend***
>
> *"1. To irritate in mind or feelings; cause resentful displeasure in.*
>
> *2. To affect (the sense, taste, etc) disagreeably."*
> *(Macquarie Dictionary 3 rd Ed.)*
> *In its chief sense "to hurt or wound the feelings or susceptibilities of; to be displeasing or disagreeable to; to vex, annoy, displease, anger; to excite a feeling of personal annoyance, resentment or disgust in (any one)."*
> *(Oxford English Dictionary)*
>
> ***Insult***
> *"To assail with offensively dishonouring or contemptuous speech or action; to treat with scornful abuse or offensive disrespect; to offer indignity to; to affront, outrage."*
> *(Oxford English Dictionary)*
>
> ***Humiliate***
> *"To lower the pride or self respect of; cause a painful loss of dignity to; mortify."*

(Macquarie Dictionary)
"To make low or humble in position, condition or feeling; to humble."
(Oxford English Dictionary)

Intimidate

"1. To make timid, or inspire with fear; overawe; cow.

2. To force into or deter from some action by inducing fear."
(Macquarie Dictionary)
"To render timid, inspire with fear; to overawe, cow; in modern use especially to force to or deter from some action by threats or violence."
(Oxford English Dictionary)

104. The fact, if it be a fact, that assertions made in the leaflets may be wrong or inaccurate does not of itself establish a contravention of s 18C : Creek *at [6] . A true statement, or one which might be shown in some way to be true, does not mean that the statement is incapable of being offensive:* Patrick v Cobain *[1993] 1 VR 290 at 294 .*

105. In Worcester v Smith *[1951] VLR 316, O'Bryan J held that behaviour, to be offensive within the context of "behaves in an offensive manner" in s 25 of the* Police Offences Act 1928 *(Vic) must be such as is calculated to wound the feelings or arouse anger, resentment, disgust or outrage in the mind of a reasonable person. His Honour held that the mere expression of political views contrary to those probably held by the majority of the community, even when made in the proximity of the offices of those whose views are attacked, does not amount to such offensive behaviour. A banner bearing the inscription "Stop Yank Intervention in Korea" was regarded by his Honour as an inoffensive statement of political views, even when carried outside the offices of the United States Consul.*

106. For the reasons explained by Wilcox J in CEPU v Australian Postal Corporation *(1998) 85 FCR 526 at 534-535, criminal cases on offensive behaviour, whilst not determinative of the question which arises in the present case, do provide some general insight into the question of offensiveness. In particular, they support the proposition that the expression or dissemination of views contrary to those held by a section of the community or even by a majority of the community will not necessarily be offensive (although in some circumstances it may), even if the expression of those views is hurtful to those who hold a different opinion. As the outline in the Explanatory Memorandum to the Racial Hatred Bill states (p 1), the RDA: "is not intended to prohibit people from having and expressing ideas". In the context of the summary offence of offensive behaviour, conduct or language to be offensive must be such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person: Watson, Blackmore and Hosking* Criminal Law (NSW) *at [9.7990]. In* CEPU *(supra) at 534 Wilcox J quoted the following observation by Kerr J in* Ball v McIntyre *(1966) 9 FLR 237 at 241 :*

"Some types of political conduct may offend against accepted views or opinions and may be hurtful to those who hold those accepted views or opinions. But such political conduct, even though not thought to be proper conduct by accepted standards, may not be offensive conduct within the section. Conduct showing a refusal to accept commonly held attitudes of respect to institutions or objects held in high esteem by most may not produce offensive behaviour, although in some cases, of course, it may."

107. At p 243 in Ball v McIntyre, *Kerr J said:*

"... behaviour to be offensive behaviour must be calculated to produce a stronger emotional reaction in the reasonable man than is involved in indicating difference from

or non acceptance of his views or values. The behaviour to be offensive would normally be calculated to wound the feelings, arouse anger, resentment, disgust or outrage in the mind of a reasonable man."

108. In assessing whether the respondent's actions offend s 18C(1)(a), it is necessary to consider the perspective from which these actions are to be viewed, namely the hypothetical person in the applicant's position, or the group of which the applicant is one..."

McGlade v Lightfoot [2002] FCA 1457 (26 November 2002) (Carr J)

68. Hely J in *Jones v Scully* at [127] and [128] appears to have assumed that the onus of proof with respect to an exemption provided for by s 18D rested on the respondent. Branson J in *Jones v Toben,* at [101] said:

"The onus of proof with respect to an exemption provided by s 18D rested on the respondent (Jones v Scully *per Hely J at [127]-[128])."*

McGlade v Lightfoot [2002] FCA 1457 (26 November 2002) (Carr J)

68. Hely J in *Jones v Scully* at [127] and [128] appears to have assumed that the onus of proof with respect to an exemption provided for by s 18D rested on the respondent. Branson J in *Jones v Toben,* at [101] said:

"The onus of proof with respect to an exemption provided by s 18D rested on the respondent (Jones v Scully *per Hely J at [127]-[128])."*

Jones v Toben [2002] FCA 1150 (17 September 2002) (Branson J)
Jones v Scully [2002] FCA 1080 cited and followed

Jones v Toben [2002] FCA 1150 (17 September 2002) (Branson J)

69. In *Miller v Wertheim* [2002] FCAFC 156 at [14] the Full Court of this Court observed:

"...it can be readily accepted that Jewish people in Australia can comprise a group of people with an 'ethnic origin' for the purposes of the Act [ie the RDA] *(see* King-Ansell v Police *[1979] 2 NZLR 531)...."*

See also *Jones v Scully* [2002] FCA 1080 (" *Jones v Scully")* per Hely J at [110]-[113] . I am satisfied that Jews in Australia are a group of people with a common "ethnic origin" within the meaning of s 18C of the RDA . I did not understand the applicant to place reliance on the additional plea in paragraph 6 of the statement of claim that Australian Jews who immigrated to Australia from nations in Europe, and their direct descendents, constitute a group of people with a "national origin" in respect of each such nation for the purposes of s 18C of the RDA .

Jones v Toben [2002] FCA 1150 (17 September 2002) (Branson J)

83. In *Jones v Scully* at [98]-[99] Hely J said:

"*The use of the words 'reasonably likely' in s 18C(1)(a) sets up an objective test or standard: see* Hagan v Trustees of the Toowoomba Sports Ground Trust *[2000] FCA 1615;* Creek v Cairns Post Pty Ltd *[2001] FCA 1007 at [12] . In* Hagan , *Drummond J stated at [15] :*

'It is apparent from the wording of s 18C(1)(a) that whether an act contravenes the section is not governed by the impact the act is

> *subjectively perceived to have by a complainant. An objective test must be applied in determining whether the act complained of has the necessary offensive, insulting, humiliating or intimidatory quality for it to be within the sub-section. The question so far as s 18C(1)(a) is concerned is not: how did the act affect the particular complainant? But rather would the act, in all the circumstances in which it was done, be likely to offend, insult, humiliate or intimidate a person or a group of people of a particular racial, national or ethnic group?'*
>
> *As the test is an objective one, it is not necessary for an applicant to prove that any person was actually offended, insulted, humiliated or intimidated by the conduct in question. But the analogy provided by the cases on s 52 of the* Trade Practices Act 1974 *(Cth) suggests that evidence, for example, that a member of a particular racial group was offended by the conduct in question would be admissible on, but not determinative of, the issue of contravention. In the s 52 context, idiosyncratic evidence from consumers about how they reacted when reading documents said to be misleading is not to be ignored, but it is not determinative. The Court must make an objective assessment of the position itself:* ACCC v Optell Pty Ltd *(1998) ATPR 41-640 at 41,082 . Whether that evidence is of any, and if so, what weight depends upon the circumstances. However, in his second reading speech on the Racial Hatred Bill the Attorney-General said:*
>
> > *'The Bill requires an objective test to be applied by the Commission so that community standards to behaviour rather than the subjective views of the complainant are taken into account.'"*

I respectfully adopt the approach taken by his Honour.

Jones v Toben [2002] FCA 1150 (17 September 2002) (Branson J)

89. As Hely J pointed out in *Jones v Scully* at [176] it is not for the Court in a case of this kind to seek to determine whether or not the Holocaust occurred. No doubt it is for that reason that no attempt was made in this case to lead evidence on that topic. The role of the Court is to determine whether the applicant has substantiated his complaint that the respondent engaged in conduct rendered unlawful by s 18C of the RDA . However, it is appropriate to note, as the document headed *"About the Adelaide Institute"* itself recognises, that it is generally accepted in Australia and elsewhere that the Holocaust did occur.

Jones v Toben [2002] FCA 1150 (17 September 2002) (Branson J)

92. In *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at [16] Kiefel J observed:

> *"To "offend, insult, humiliate or intimidate" are profound and serious effects, not to be likened to mere slights."*

I do not understand her Honour to have intended by the above observation to imply that a gloss should be placed on the ordinary meaning of the words that Parliament chose to include in s 18C of the RDA . Rather, I understand her Honour to have found in the context provided by s 18C of the RDA a legislative intent to render unlawful only acts which fall squarely within the terms of the section and not to reach to *"mere slights"* in the sense of acts which, for example, are reasonably likely to cause technical, but not real, offence or insult (see also *Jones v Scully* per Hely J at [102]). It would be wrong, in my view, to place a gloss on the words used in s 18C of the RDA .

Jones v Toben [2002] FCA 1150 (17 September 2002) (Branson J)

98. In *Jones v Scully* at [114] Hely J said:

> *"The phrase "because of" requires consideration of the reason or reasons for which the relevant act was done:* Hagan *(Full Federal Court)* *(2001) 105 FCR 56* *at 60* *. It is important to note that if an act is done for one or more reasons, it is enough that one of the reasons is the race, colour or national or ethnic origin of a person or group of people, whether or not it is the dominant reason or a substantial reason for doing the act: s 18B. The applicant submits that the test to be applied in a consideration of s* *18C(1)(b)* *is whether race is a "material factor" in the performance of the act. In* Creek *, Kiefel J notes at pars [19] – [27] that there have been differences of opinion expressed about the meaning of phrases such as "on the ground of" and "by reason of" in the context of discrimination legislation. It is not necessary for me to repeat what her Honour said there, except to say that, at the end of her discussion of the relevant authorities, her Honour adopted an approach to s* *18C(1)(b)* *which enquired into whether "anything suggests race as a factor in the respondent's decision to publish" the work in question. I respectfully propose to follow that approach."*

I also propose to adopt the approach adopted by Kiefel J in *Creek v Cairns Post Pty Ltd* .

Jones v Toben [2002] FCA 1150 (17 September 2002) (Branson J)

99. In my view, it is abundantly clear that race was a factor in the respondent's decision to publish the material set out in [81] above. The material includes many references to Jews and events and people characterised as Jewish. It is particularly concerned with the Holocaust and with the conduct of German forces during World War II, matters of particular importance to Jewish people. It is, in my view, plainly calculated to convey a message about Jewish people (see *Jones v Scully* per Hely J at [116]-[117]).

Jones v Toben [2002] FCA 1150 (17 September 2002) (Branson J)

101. Section 18D of the RDA provides certain exemptions from the operation of s 18C . In particular s 18D(b) provides, in effect, that s 18C does not render unlawful anything done reasonably and in good faith in the course of any publication made for any genuine academic or other genuine purpose in the public interest. The onus of proof with respect to an exemption provided for by s 18D rested on the respondent (*Jones v Scully* per Hely J at [127] -[128]). The respondent did not comply with the direction of the Court to file and serve a defence. This application for summary judgment is to be determined solely on the basis of the evidence placed before the Court by the applicant. Even if the Court were free to have regard to the various material produced to the Court by the respondent, none of that material establishes that the respondent relevantly acted *"in good faith"*. No further consideration need, in the circumstances, be given to s 18D of the RDA .

Jones v Toben [2002] FCA 1150 (17 September 2002) (Branson J)

106. I do not understand the applicant to have pressed his claim for an apology. In any event I do not consider it appropriate to seek to compel the respondent to articulate a sentiment that he plainly enough does not feel. As Hely J pointed out in *Jones v Scully* at [245] , "prima facie *the idea of ordering someone to make an apology is a contradiction in terms"*. The applicant did press for an order requiring a "retraction" by the respondent. I understood the applicant to be seeking a statement of retraction by the respondent. In the circumstances, it seems to me that the practical distinction between an apology and a statement of retraction is slight. I do not consider it appropriate to order the respondent to issue any statement of retraction.