Giving and Taking Offence
[The Eighth Sir Harry Gibbs Memorial Oration]

The Honourable Robert French

It is a pleasure to be given this opportunity to honour Sir Harry Gibbs, your founding President and, in so doing, Sir Samuel Griffith, for whom your Society is named. There is no need to rehearse before this audience their life histories and contributions.

The story of Sir Samuel Griffith will be taken a little further afield in a few weeks. On 15 September 2016 I will visit Merthyr Tydfil in Wales, where he was born in 1845, and there present the Crown Court with a photographic montage honouring him and his birthplace. The montage will show the well-known photograph of Griffith presiding at the first sitting of the High Court in Melbourne in 1903, a reproduction of his handwritten Commission from the Governor-General, Lord Tennyson, and his oaths of office and allegiance. The response to the presentation has been enthusiastic and the event will be attended by the Lord Chief Justice of England and Wales.

This Society is one of only three, of which I am aware, named after a High Court Justice. The other two are the Isaacs Law Society at Canberra University and the Western Australian-based Piddington Society. It is named after the shortest serving High Court Justice in our history, Albert Piddington, who was appointed in February 1913 and resigned in April. His resignation followed criticism from the Melbourne and Sydney Bars based in part upon his pre-appointment assurance to William Morris Hughes, Attorney-General in the Fisher Government, that he was "in sympathy with supremacy of Commonwealth powers".[1] The Society, which does a number of useful things, has an informal motto reflecting the short judicial career of Albert Piddington – we are here for a good time not for a long time.

I mention Piddington because in the Inaugural Sir Samuel Walker Griffith Memorial Lecture delivered in 1984, Sir Harry Gibbs quoted Piddington's observation that one of the greatest services that Griffith performed was to raise the standard of argument in Australia. Sir Harry Gibbs also noted the description of Griffith's demeanour in court as "dignified and courteous".[2] That description applied equally to Sir Harry. It was my own perception in appearing before him. In the first of these Orations delivered to your Society in 2006, Dyson Heydon described him in his judicial role as "cool, mild-mannered, unpretentious and tactful . . . quiet, unflustered, and, above all, unfailingly polite".[3]

Would that we all were so. It is not an unusual feature of human nature that those of advancing years observe a general deterioration in the manners of the society from which they will, sooner rather than later, depart. The members of my generation are as prone to such gloomy diagnoses as their predecessors. That being said, it does seem that a significant portion of our public discourse is variously angry, aggrieved, abusive, impatient, strident, unctuously judgmental, disposed to attaching mindless labels to perceived adversaries, quick to give offence and quick to take it. Not all of these phenomena can be swept under a carpet of euphemisms about public debate such as "robust" and "vigorous". Some offensive expressive conduct can have real effects on lives, reputations, happiness and the general welfare and harmony of society. Some offensive expressive conduct can have a potential for violence – by incitement or provoked response – in old fashioned language it may lead to a breach of the peace. The limiting cases raise a fundamental

question – When, if at all, should offensive, expressive conduct by spoken or written words or otherwise, attract the intervention of law makers?

There are some whose default position is to respond to every perceived social evil with a call for governmental action. That tendency in Australian society was encapsulated in one of the first words to appear in the Dictionary of Strine, published in about 1965. The word was spelt "A-o-r-t-a", and defined as "the vessel through which courses the life-blood of Strine public opinion". A number of examples of its use were given which could be collected generically under the rubric "aorta do this and aorta do that". When it comes to offensive speech and conduct the law has had a long history of doing this and that – and it continues to do things.

The giving and taking of offence and the law's response to it is my topic. It was my topic in 2016 in delivering the Lord Birkenhead Lecture at Gray's Inn in London. Birkenhead, before he became Lord Chancellor and when he was merely F. E. Smith, KC, was notoriously offensive to judges. His witty put downs from the Bar Table to hapless judges are often deployed by desperate speakers at legal dinners – for example, "your Honour is right and I am wrong as your Honour usually is". Any account of his sayings, however, has to be qualified with the caveat that most were made up in his chambers after the event as things he would have said if he had thought of them.[4] As a politician, F. E. Smith made good his reputation for rudeness beginning with an unconventionally abrasive maiden speech in the House of Commons in 1906. He made his speech "as offensive to the government benches as he possibly could."[5] He was politically incorrect. In 1923 he told students at Glasgow University that there would always be wars, the motive of self-interest was the mainspring of human conduct and "the world continue[d] to offer glittering prizes to those who have stout hearts and sharp swords."[6]

Offensive speech and conduct have long attracted legal sanctions. Examples include insulting the dignity of the sovereign, blasphemy, scandalising the courts, defamation, obscenity and offensive language and communications generally. Today, negative speech directed to particular classes of persons in our society by reference to their inherent attributes, ancestry or religious beliefs, can contravene statute laws giving effect to human rights norms. The term, "hate speech", is frequently applied to that class of communication. The American Bar Association has defined "hate speech" as "speech that offends, threatens or insults groups based on race, color, religion, national origin, sexual orientation, disability or other traits."[7]

That definition attaches the strong negative connotation of the word "hate" to a range of conduct including conduct which, while it should be strongly condemned, may be informed by something less than "hatred" according to the ordinary meaning of that word. The appropriation of narrowly focused negative terms in order to market broadly defined behavioural norms can risk undercutting what it seeks to promote. It can detract from the moral clarity of the law. This is not a modern phenomenon.

At one time mere oral insults against the King of England were treated as a species of high treason, a capital offence, which William Blackstone equated to the *Crimen Laesae Majestatis* of the Romans. By the time Blackstone published his famous *Commentaries on the Laws of England* in the second half of the 18th century the position had moderated. Offensive words spoken about the King amounted only to a high misdemeanour and not high treason. Blackstone, in terms relevant to our times, said of such words:

> They may be spoken in heat, without any intention, or be mistaken, perverted or misremembered by the hearers; their meaning depends always on their connexion with other words and things; they may signify differently even according to the tone of voice, with which they are delivered; and sometimes silence itself is more expressive than any discourse. As therefore there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to high treason.[8]

This observation tells us something about the slipperiness of the characterisation of speech as offensive or insulting for legal purposes. And even though Blackstone distinguished the spoken from the written word, there is much about the character of the latter that depends upon context, circumstances and readership which must be considered before treating it as offensive.

The law books of the 20th and 21st century are not replete with reports of cases of *Crimen Laesae Majestatis*. A successful appeal against a conviction for the offence appears from the report of a judgment of the Supreme Court of the Union of South Africa in 1935. Two persons published a pamphlet reflecting adversely on King George V and the amount which the English taxpayer was paying for his upkeep. They were convicted of having wrongfully and unlawfully printed and published certain scandalous and dishonouring words against "our Sovereign Lord, the King, whereby the Majesty of our said Sovereign Lord, King George V, was dishonoured and his dignity injured." Justice Davis wrote the judgment of the Supreme Court of South Africa allowing an appeal against the convictions.[9] The charge alleged only injury to the dignity of the King and did not mention his Union Government. It was therefore held to be defective for the essence of the offence was injury to the *majestas* of the state. The judgment ended with a cautionary passage:

> there is hardly any crime in which greater caution is to be enjoined upon the judge, so as on the one hand to preserve the maintenance of peace and good order, and on the other hand not to render anyone the unfortunate victim of political dissensions by excessive severity.[10]

Another important area attracting civil sanctions and, in some cases, criminal sanctions, for offensive speech is that of defamation. The Star Chamber took a particularly hard line in relation to libelling the nobility.[11] Holdsworth quotes the threatening injunction of the Star Chamber – "[l]et all men take heed how they complayne in words against any magistrate for they are Gods."[12] The common law of defamation in Australia today is substantially affected by statute law and considerably less protective of public figures, ennobled or otherwise, than it used to be. In the case of public figures in Australia, the common law cause of action in defamation is constrained by the implied constitutional freedom of political communication.

Ours is an age of statutes. There are many statutes which in one way or another impose sanctions upon offensive conduct, including speech. Their application generally requires a restrictive interpretation of the term "offensive". Its ordinary English meaning covers conduct which is vexing, annoying, displeasing, angering, exciting resentment or disgust. It is often found in statutes in the company of cognate terms like "insult" or "humiliate". The question whether expressive conduct is offensive or insulting or humiliating is not necessarily answered by asking its victim. He or she may take offence or feel insulted or humiliated too easily. So the law engages the services of the leading figure in the judge's small band of imaginary friends – the reasonable person.

The reasonable person played a part in a leading Australian decision on offensive behaviour with some interesting historical resonances. It involved the former Governor-General of Australia, Sir John Kerr, whose dismissal of the Prime Minister, Gough Whitlam, more than 40 years ago, was the subject of a presentation and discussion in this conference. Long before his appointment as Governor-General, when he was a judge of the Supreme Court of the Australian Capital Territory in 1966, Justice Kerr wrote a judgment on the subject of offensive behaviour.[13] A student at the Australian National University, Desmond Ball, protesting against Australia's involvement in the Vietnam war, climbed on to a statue of King George V outside Parliament House in Canberra. He wore on his head a placard which read, "I will not fight in Vietnam". He refused to remove the placard or climb down from the statue. Unlike the detractors of King George V in South Africa in 1935, he was not charged with *Crimen Laesae Majestatis*, but with the rather more pedestrian misdemeanour of behaving in an offensive manner in a public place contrary to section 17 of the *Police Offences Ordinance* 1930–1961 (ACT).

There was little evidence that anybody had actually been offended by this behaviour. Justice Kerr called in aid "the reasonable person" in its gendered manifestation as the "reasonable man". To be offensive, he concluded, the behaviour must be "calculated to wound the feelings, arouse anger, resentment, disgust or outrage in the mind of a reasonable man."[14]

He defined the reasonable man as one "reasonably tolerant and understanding, and reasonably contemporary in his [or her] reactions."[15] Justice Kerr's decision in *Ball v McIntyre*, which allowed an appeal against Ball's summary conviction, set the threshold of the imputed emotional response required for conviction of offensive behaviour at a fairly high level. It defined a legal standard which acted as a warning to judges to proceed with caution before making a finding that a legal prohibition on offensive behaviour had been breached. That kind of interpretive approach has been reflected in many later decisions which have cited Justice Kerr's judgment.

The allegedly offensive student, Desmond Ball, became a renowned scholar in strategic studies both nationally and internationally, a Professor at the Australian National University and the recipient of many honours, including appointment as an Officer of the Order of Australia. He was invited by the United States Government to provide advice on strategic studies, including the uncontrollability of limited nuclear exchanges. President Carter said of him, "[Desmond] Ball's counsel and cautionary advice, based on deep research, made a great difference to our collective goal of avoiding nuclear war."[16] Apologists for the dismissal might say that John Kerr saved Australia. Admirers of Desmond Ball might say that he saved the world. It is, however, beyond controversy that both of them together contributed substantially to the development of the law relating to offensive behaviour in Australia.

There have long been debates about the proper limits of societal interference with speech in general and offensive speech in particular. John Stuart Mill said that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[17] That statement, of course, raises the question – what is meant by harm? There are many "harms" which can be defined depending upon value judgments and not requiring proof of physical injury or material loss.

A wider approach has been proposed by Professor Joel Feinberg, who suggests that the prevention of offensive conduct is properly the state's business.[18] His approach has been criticised on the basis that it may extend the heavy handed reach of the criminal law and increase a

potentially oppressive discretion allowed to law enforcement officers and sanction an illiberal lack of acceptance or toleration of other ways of life.[19]

The difficulty of the question about the proper occasion for state intervention against offensive speech is demonstrated in the area of religious vilification. Saying offensive things about religion has long been hazardous. In 1676, when convicting John Taylor of blasphemy for insulting remarks about Jesus Christ, Chief Justice Hale described the offence as:

> a crime against the laws, State and Government, and therefore punishable in this Court. For to say religion is a cheat is to dissolve all those obligations whereby the civil societies are preserved . . . Christianity is parcel of the laws of England and therefore to reproach the Christian religion is to speak in subversion of the law.[20]

Those remarks reflected as much of a concern for the protection of the social order as they did a concern for the protection of the Christian religion. Eventually, however, freedom of expression was seen as limiting the scope of the offence of blasphemy. Lord Chief Justice Coleridge said in 1883:

> I now lay it down as law, that if the decencies of controversy are observed even the fundamentals of religion may be attacked without the writer being guilty of blasphemy.[21]

The House of Lords adopted that position in 1917[22] and thereafter the common law offence of blasphemy seemed to fall away – until 1977. In that year the publication, in a newspaper, of a poem and cartoon depicting indecent acts on the body of Christ led to the editor and publisher being convicted by a jury of a blasphemous act. The House of Lords upheld the conviction in the case of *Whitehouse v Lemon*.[23] Lord Scarman described the rationale for the law of blasphemy in terms of the social order. He accepted that on that basis there was a logical case for extending the offence to protect the religious beliefs and feelings of non-Christians saying:

> In an increasingly plural society such as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings and practices of all but also to protect them from scurrility, vilification, ridicule and contempt.[24]

However, despite the logical case, the common law could not stretch that far. Its limited scope was demonstrated by the decision, in 1990, that Salman Rushdie's book, *The Satanic Verses*, did not involve the offence of blasphemy against the teachings of Islam.[25] The common law offence did not cover offensive language about religions other than Christianity. In the event, the offence of blasphemy was abolished in the United Kingdom in 2008.[26]

Although blasphemy was a common law offence in the Australian colonies before federation there were not many prosecutions after the Commonwealth came into existence. In 1997, the then Archbishop of Melbourne, now Cardinal George Pell, applied for an injunction to restrain the National Gallery of Victoria from exhibiting a photograph showing a crucifix immersed in urine. The application was refused by Justice Harper of the Supreme Court of Victoria.[27] He accepted that the photograph was "offensive, scurrilous and insulting at least to a very large number of Christians" but quoted Lord Scarman from *Whitehouse v Lemon* and added:

> a plural society such as contemporary Australia operates best where the law need not bother with blasphemous libel because respect across religions and cultures is such that, coupled with an appropriate capacity to absorb the criticisms or even jibes of others, deep offence is neither intended nor taken.[28]

To amount to a blasphemous libel the matter complained of had to raise the risk of a breach of the peace. That approach, of course, could invite consideration of the particular sensitivities of the offended party or group.

State laws against religious vilification are found in Queensland, Tasmania and Victoria. They do not depend upon any apprehension of a breach of the peace. Their enactment raises the question – what is their purpose – the protection of civil tranquillity, people's religious sensibilities, communal civility or some combination of all of them? We can say that people are entitled to have their dignity respected and protected. But do we have to respect their beliefs. A short glib answer is that beliefs are not people – beliefs do not have rights and are not entitled to respect. But for some people their religious beliefs are an important part of their identity. Can one then say – I mock the belief, but respect the believer? The point was made in a 2006 judgment of the Court of Appeal of Victoria,[29] written by Justice Geoffrey Nettle, now a member of the High Court, about an alleged breach of the *Racial and Religious Tolerance Act* 2006 (Vic) involving comments about Islam by a body called "Catch the Fire Ministries". Justice Nettle observed that hatred of a religious belief might, but does not necessarily, result in hatred of the believers. It was essential, he said, "to keep the distinction between the hatred of beliefs and the hatred of their adherents steadily in view."[30]

Debates about laws affecting offensive speech or conduct tend to focus on the tension between such laws and freedom of speech and expressive action recognised by the common law and by international human rights norms. Neither the written nor the unwritten law can resolve those tensions with precision. Generally speaking, however, the courts endeavour to interpret laws affecting freedom of expression so as to protect that freedom from unnecessary burdens.

I mentioned earlier that in Australia there is an implied freedom of political communication which began its life with a law giving statutory protection against insult to the dignity of the Industrial Relations Commission of Australia. In or about 1992 the *Australian* newspaper published an article highly critical of the Commission. It said, among other things:

> The right to work has been taken away from ordinary Australian workers. Their work is regulated by a mass of official controls, imposed by a vast bureaucracy in the ministry of labour and enforced by a corrupt and compliant 'judiciary' in the official Soviet-style Arbitration Commission.[31]

The newspaper was prosecuted for a breach of section 299 of the *Industrial Relations Act* 1988 (Cth), which provided that:

> (1) A person shall not:
> . . .
> (d) by writing or speech use words calculated:
> . . .
> (11)
> (ii)to bring a member of the [Industrial Relations] Commission or the Commission into disrepute.

Counsel for the *Australian* newspaper submitted that there was to be implied into the Constitution a guarantee in favour of the people of Australia that the Parliament has no power to make a law which impairs their capacity to perform the functions and responsibilities entrusted to them by the Constitution. The High Court held the section invalid. Three members held that it infringed an implied freedom of political communication derived from the text and structure of the Constitution relating to representative democracy and election of parliamentary representatives by the people.[32]

The existence of the implied freedom was also successfully argued on behalf of Australian Capital Television in a companion case challenging restrictions on the broadcasting of political advertisements for a period prior to election day.[33]

Unlike the First Amendment guarantee in the Constitution of the United States, the implied freedom is not an individual right. It is a limitation on the legislative power of the Commonwealth and also of the States and Territories of Australia. It also limits the application of the common law of defamation in relation to public figures. It was elaborated in a number of defamation cases involving politicians[34] culminating in the decision of the High Court in *Lange v Australian Broadcasting Corporation*,[35] which concerned a defamation action brought by a former Prime Minister of New Zealand, David Lange, against the Australian Broadcasting Corporation. The test for validity adopted by the Court in *Lange*, modified in a later case, *Coleman v Power*,[36] involved two questions:

1. Does the challenged law in its terms, operation or effect, effectively burden freedom of communication about government or political matters?
2. If the law effectively burdens that freedom, is the law nevertheless reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

As can be seen, the application of those tests to laws affecting offensive speech and expressive conduct necessarily requires evaluative judgments.

The difficulty of applying evaluative judgments reflected in a legal standard rather than a precise legal rule was demonstrated in the decision of the High Court in 2013 in *Monis v The Queen*.[37] The appellant had been charged with using a postal service in a way that reasonable persons would regard as being, in all the circumstances, offensive, contrary to section 471.12 of the *Criminal Code* (Cth). The charges related to derogatory letters he had sent to parents and relatives of soldiers who had been killed on active duty in Afghanistan. He and a co-accused argued that the charges should be quashed on the basis that section 471.12 was invalid in its application to "offensive" communications because it infringed the implied constitutional freedom of political communication. The case came on appeal to the High Court, which could only sit six Justices because the seventh was about to retire. In the event, the Court was evenly divided. Justices Hayne and Heydon and I held that, in its application to offensive communications, the section under which the appellants were charged was invalid as impermissibly burdening the implied freedom of political communication.[38] Justices Crennan, Kiefel and Bell held that, if interpreted as referring to high level offensiveness, the section went no further than was reasonably necessary to achieve its purpose of preventing the misuse of

postal services to effect an intrusion of seriously offensive material into a person's home or workplace and did not impose too great a burden on the implied freedom and was therefore valid.[39]

The Court being evenly divided, the appeal was dismissed. The question before the Court did not involve the moral quality of Monis's conduct. That spoke for itself. The Court was rather concerned with the scope and validity of the law under which he was charged. As we are all sadly aware, Monis was later to take hostages in a cafe in Sydney. Tragically, two innocent young people were killed in that awful event.

Before closing I will make an appropriately spare reference to the substantial controversy in recent times in Australia concerning the prohibition of offensive behaviour directed to people because of their race, colour, or national or ethnic origin. The prohibition is to be found in section 18C of the *Racial Discrimination Act* 1975 (Cth), which provides in sub-s (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 of some or all of the people in the group.

It is subject to some good faith defences in section 18D, which it is not necessary to go into here.

Section 18C was introduced into the *Racial Discrimination Act* by the *Racial Hatred Act* 1995 (Cth). The purpose of the amendment as explained by the Attorney-General of the day in the Second Reading Speech was "to close a gap in the legal protection available to the victims of extreme racist behaviour".[40] The Attorney-General advanced a social order justification for the provision:

> In this bill, free speech has been balanced against the rights of Australians to live free of fear and racial harassment. Surely the promotion of racial hatred and its inevitable link to violence is as damaging to our community as issuing a misleading prospectus, or breaching the Trade Practices Act.[41]

There has been debate about whether, as a matter of public policy, the section goes too far in its application to conduct likely to offend and whether, having regard to the relevant provisions of the Convention for the Elimination of all Forms of Racial Discrimination, it is supported by the external affairs power and whether or not it impermissibly infringes the implied freedom of political communication.

I can make no comment on the merits or demerits of those questions. Section 18C may yet come before the High Court although, if it does come, it will be after my retirement. I will therefore offer you an anodyne statement of the blindingly obvious. The debate about section 18C illustrates the way in which prohibitions on offensive speech and expressive conduct can sometimes lie at the interface of hotly contested and differing views about the proper limits of legislative intervention. Those differences tend to be rooted in different views about the kinds of harm seen as flowing from particular kinds of offensive speech.

In conclusion, there is no generally accepted human right not to be offended. Even if there were, the law alone cannot protect us from being offended. Nor can the law alone prevent the

social disharmony which some kinds of offensive expression can cause. It cannot protect the dignity of people if our culture does not respect them. In limiting cases the law has intervened and does intervene. The identification of those limits depends upon societal and political attitudes to the proper province of the law. These can vary from place to place and from time to time. Regardless of the existence and extent of legal rules, we must accept that for a society to work and especially for a culturally and ethnically diverse society to work, there must be an ethic of respect for the dignity of all its members.

There are some old fashioned ideas of courtesy and good manners, of which Sir Harry Gibbs was an exemplar, which can be quite helpful in that respect. They are powerful instruments of the art of getting along together in full participation in a free and democratic society. To borrow from Lord Birkenhead's politically incorrect metaphor, we will be well served in this area by stout hearts and sharp swords – not real weapons but a steely determination to exemplify the great civic virtue of doing unto others, as we would have them do unto us.

Endnotes

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4. John Campbell, *F. E. Smith: First Earl of Birkenhead*, Jonathan Cape, 1983, 113, n. 54 quoting George Jager who shared chambers with F. E. Smith.

5. Paul Johnson, "The age of stout hearts, sharp swords — and fun", *Spectator* (online), April 2006 http://new_spectator.co.uk/2006/04/the-age-of-stout-hearts:sharp-swords-and-fun.

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9. *R v Gomas* (1930) SALR-KPA 225.

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11. William Hudson, *A Treatise of the Court of Star Chamber*, Legal Classics Library first published 1792, 1986 ed., vol. 2, 100-4.

12. M. Lindsay Kaplan, *The Culture of Slander in Early Modern England*, Cambridge University Press, 1997, 106 quoting WS Holdsworth *A History of English Law* (Boston: Little, Brown-Methuen, 1927-66) 208-9.

13. *Ball v McIntyre* (1966) 9 FLR 237.

14. Ibid., 243.

15. Ibid., 245.

16. Brendan Taylor, Nicholas Farrelly, Sheryn Lee (eds), *Insurgent Intellectual: Essays in Honour of Professor Desmond Ball* (ISEAS, 2012) 18.

17. John Stuart Mill, *On Liberty*, John W Parker, 1859, 14–15.

18. Joel Feinberg, *Offense to Others: The Moral Basis of the Criminal Law*, Oxford University Press, 1985, 1.

19. R. A. Duff and S. E. Marshall, "How Offensive Can You Get", in Andrew von Hirsch and A P Simester, *Incivilities: Regulating Offensive Behaviour*, Hart Publishing, 2006, 57.

20. *Taylor's Case* 1 Vent 293; (1726) 86 ER 189.

21. *Ramsey v Foote* (1883) 15 Cox Criminal Cases 231 (QB).

22. *Bowman v Secular Society* [1917] AC 406. [1979] AC 617.

23. Ibid., 658.

24. Ibid., 658.

25. *Regina v Chief Metropolitan Stipendiary Magistrate; Ex parte Choudhury* [1991] 1 QB 429; [1990] 3 WLR 986.

26. *Criminal Justice and Immigration Act 2008* (UK); Racial *and Religious Hatred Act* 2006 (UK).

27. *Pell v The Council of the Trustees of the National Gallery of Victoria* (1998) 2 VR 391.

28. Ibid., 393.

29. *Catch the Fire Ministries Inc v Islamic Council of Victoria* (2006) 15 VR 207.

30. Ibid., 219 [34].

31. *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1, 96.

32. Ibid., 52–53 (Brennan J), 95 (Gaudron J), 105 (McHugh J).

33. *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

34. *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; Stephens v West Australian

Newspapers Ltd (1994) 182 CLR 211.

35. (1997) 189 CLR 520.

36. (2004) 220 CLR 1. That test has been recently elaborated by the High Court in rejecting a challenge to the validity of laws of the State of New South Wales prohibiting the political donations from property developers: see *McCloy v New South Wales* (2015) 321 ALR 15.

37. (2013) 249 CLR 92.

38. Ibid., 134 [74] (French CJ), 158 [162] (Hayne J), 178 [236] (Heydon J).

39. Ibid., 215–16 [350]–[353].

40. Commonwealth, *Parliamentary Debates,* House of Representatives, 15 November 1994, 3336 (Michael Lavarch, Attorney-General).

41. Ibid., 3337 (Michael Lavarch, Attorney-General).