

THE CONVERSATION

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In the government's hierarchy of values, is free speech at the top?

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George Brandis wants to protect the 'right to be a bigot' in the name of free speech. But the government may seek to remove such a right in relation to corporations. AAP/Dan Himbrechts

The federal government has indicated that it is considering repealing an exemption in the Competition and Consumer Act that provides for boycotts of companies on environmental grounds. The government is concerned at preventing boycotts such as GetUp's 2011 campaign against Harvey Norman. Customers were urged to boycott the store to encourage it to stop stocking furniture made from Australian native forests.

There are valid reasons to protect even inaccurate speech in order to safeguard the principle of freedom of expression. But the issue here is that the government is seeking to do so in an inconsistent manner.

The government is also seeking to amend the Racial Discrimination Act in order to protect the "right to be a bigot" – in attorney-general George Brandis' words – and thus to make inaccurate and harmful claims about people on the basis of their race in the name of free speech. Simultaneously, however, the government may amend the Competition and Consumer Act to remove such a right in relation to corporations.

In doing so, the government is exposing its own hierarchy of values in which freedom of expression is not actually paramount.

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The Competition and Consumer Act

The parliamentary secretary for agriculture, Richard Colbeck, argued that the proposed amendments to the Competition and Consumer Act are consistent with the government's apparent commitment to freedom of speech. He says that campaigners can "say what they like", but that businesses need to have access to "some recourse to enforce accuracy".

As it stands, Section 45D of the act prohibits people from conducting a boycott that would cause loss or damage to the business of another person. The purpose of the section is to promote competition in the market and to protect the freedom to conduct business within this market.

In drafting the act, the government recognised that this value of market freedom had to be balanced against the value of freedom of expression. As a result, Section 45DD contains several exemptions to Section 45D, which protect certain kinds of industrial action and consumer boycotts conducted for reasons:

...substantially related to environmental protection or consumer protection.

The operation of these two sections is a classic example of the fact that Australian law often seeks to promote a whole variety of policy objectives, and these objectives or values are not always consistent with each other. One of the complications of drafting good law is finding an appropriate balance between competing values. Often this requires determining which value is most important.

In the case of Section 45D, it was decided that freedom of expression would be given priority and allowed to "trump" the rights of businesses to profit.



The government is concerned at preventing boycotts such as GetUp's 2011 campaign against Harvey Norman.

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The 18C debate

But if we examine Colbeck's argument in relation to the government's commitment to repealing Section 18C of the Racial Discrimination Act, it becomes clear that this claim of consistency is unsustainable, unless Colbeck believes that bigotry is, in fact, accurate.

Brandis has previously indicated that the decision to repeal Section 18C was motivated by the 2011 case against News Corp columnist Andrew Bolt. Brandis argued last September that Bolt:

...was successfully prosecuted merely because he expressed a controversial opinion.

As the law stands, Section 18D provides a broad exemption to Section 18C for, among other things:

...anything said or done reasonably and in good faith ... in making or publishing ... a fair comment on any ... matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

In his judgment against Bolt, Justice Bromberg emphasised that although the phrase “offend, insult, humiliate or intimidate” in Section 18C seems to be very broad, it does not extend to personal hurt feelings, but rather to conduct that has profound and serious effects.

The reason that Bolt was found to have breached Section 18C was because his articles were found to have both profound and serious effects, and to contain multiple errors of material fact, distortions of the truth and inflammatory and provocative language.

In other words, the group of fair-skinned Indigenous Australians did not use Section 18C to sue Bolt for “hurt feelings” (as so many have claimed), but rather as a means of preventing serious harm to themselves and their community, and as “recourse to enforce accuracy”.

The wider freedom agenda

When taken together, it is clear from the government's actions that the value it holds to be paramount is the freedom of the market – or, more accurately, the freedom to profit.

While the government is keen to promote an unfettered right to speech when it comes into conflict with the right to equality for marginalised groups, it is quite prepared to trample over this same right to speech when it conflicts with corporate profits.

So, the next time Brandis highlights this government's commitment to freedom, it's worth being clear about whose freedom he is referring to. He has previously written that:



Andrew Bolt was found guilty of breaching Section 18C in 2011 – a section the government is seeking to repeal.
AAP/Julian Smith

...rights are moral claims inhering in individual men and women (and, in certain circumstances, in corporations as well).

In light of possible changes to the Competition and Consumer Act, perhaps Brandis should have considered reversing this order of mention.

 [Freedom of speech](#) [Human rights](#) [Section 18C](#) [George Brandis](#) [Freedom](#) [Boycotts](#)