Cyber-racism: can the RDA prevent it?

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THE REACH OF THE INTERNET and the freedom it gives those wanting to share information and publish opinions presents a wide range of regulatory challenges. One such challenge is preventing online acts of racial hatred, or 'cyber-racism'.[1]

In a number of cases, the Federal Court has held that posting racially offensive material on the internet is subject to the racial hatred provisions of the *Racial Discrimination Act 1975* (Cth) (RDA). More recently, the court has held that the RDA also applies to those hosting websites which fail to remove offensive material posted by users.

There are, however, significant limitations in the ability of the RDA to prevent cyber-racism. Recognising this, the Standing Committee of Attorneys-General is reported to be considering giving the Australian Communications and Media Authority (ACMA) specific powers to order internet service providers to take down websites expressing racial hatred (*The Australian*, 1 April 2008).

The RDA

Section 18C of the RDA makes it unlawful to commit an act "otherwise than in private" if:

- the act is reasonably likely to offend, insult, humiliate or intimidate another person or group of people; and
- the act is done because of the race, colour or national or ethnic origin of the other person or people in the group.

An act is taken not to be done in private if, relevantly, it "causes words, sounds, images or writing to be communicated to the public" (s.18C(2)).

The RDA provides an exemption for things done "reasonably and in good faith" in the context of artistic works, discussions and debates, fair and accurate reporting and fair comment expressing a genuine belief (see s.18D).[2]

Jones v Toben

The first case to consider the application of the RDA to internet publication was *Jones v Toben*.[3] The respondent had published anti-Semitic material that, among other things, sought to cast doubt on whether the Holocaust had occurred.

Branson J held that the action fell within the scope of s.18C: "placing of material on a website which is not password-protected is an act which, for the purposes of the RDA, is taken not to be done in private".[4]

The material was also found to be offensive to Australian Jews and done "because of" race, being plainly calculated to convey a message about Jewish people.[5]

On appeal, the full Federal Court upheld the decision at first instance and also considered the application of the exemption in s.18D.[6]

Although the material published purported to be part of an historical debate, the full court held that the respondent had not acted reasonably in good faith as the material published was "deliberately provocative and inflammatory", intended to "smear, hurt, offend, insult and humiliate Jews".[7]

The respondent was ordered to remove the offensive material from the world wide web and restrained from publishing the material on the internet or otherwise.[8]

An order to the same effect was made in another case involving material of a similar nature published on the internet: *Jones v The Bible Believers' Church*.[9]

Silberberg

In *Silberberg v The Builders Collective of Australia and Buckley*,[10] the Collective conducted an internet website which included an online forum to enable discussion and debate of issues relating to the building industry.

All members of the public with internet access could view the messages posted in the forum. While only registered users were entitled to post messages, in practical terms users could remain anonymous. Messages were posted automatically without intervention or monitoring by the Collective and there was no systematic monitoring thereafter, although postings were reviewed from time to time and there was a general policy of deleting objectionable material.

People posting material were also required to indicate their agreement that they would not post information that was "vulgar, hateful, threatening, invading of others privacy, sexually oriented or violates any laws".[11]

The second respondent, Buckley, posted material that made reference to the applicant's Jewish ethnicity and conveyed imputations that were found to be likely to offend and insult the applicant and other persons of Jewish ethnicity. Gyles J found that this was in breach of the RDA, citing with approval *Jones v Toben* and *Jones v The Bible Believers' Church*.[12] Buckley was ordered not to publish the impugned messages or any material conveying similar content or imputations.

However, the case against the Collective was dismissed. Gyles J noted that while there was "little difficulty in applying s.18C to the author of a message", the position of "others involved in the chain between author and ultimate reader is not so clear".[13]

Given that the essence of the complaint against the Collective was their failure to remove material posted by Buckley, it was significant that s.3(3) of the RDA provides that "refusing or failing to do an act shall be deemed to be the doing of such an act".

Gyles J considered a range of cases that had dealt with issues of liability for publication and broadcasting in the context of copyright and defamation proceedings.

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Based on these authorities and s.3(3) of the RDA, his Honour concluded that it was "clear enough that failure to remove known offensive material would be caught by s.18C(1)".[14]

Gyles J further concluded that s.18C(1) caught failures to remove offensive material within a reasonable time, even in the absence of actual knowledge of the offensive contents of the message. His Honour observed that "the Collective chose to conduct an open anonymous forum available to the world without any system for scrutinising what was posted. The party controlling a website of such a nature is in no different position to publishers of other media".[15]

The fact that the material was said to be posted in breach of user conditions did not, in his Honour's view, alter that conclusion: "In one sense it

underlines the fact that the Collective took no steps to ensure that its conditions were obeyed."[16]

However, the failure could not be shown to have any relevant connection with race or ethnic origin. The failure "is just as easily explained by inattention or lack of diligence". On this basis, the Collective was found not to have breached the RDA and the case against it was dismissed.

Although not referred to by his Honour, it is relevant to note that while s.18E of the RDA provides for vicarious liability for acts of racial hatred (not applicable here as Buckley was not in a position of employee or agent), there is no provision for ancillary liability. Section 17 makes it unlawful to "assist or promote" the doing of other acts of unlawful discrimination proscribed by Part II of the RDA, but this does not apply to the prohibition on racial hatred in Part IIA.

Limited protection

The cases discussed above reveal a number of potential and actual limitations of the RDA in preventing cyber-racism.

First, the courts have yet to consider whether s.18C(1) applies to password-protected sites. Although much is likely to turn on the facts of a case, such sites arguably should still be considered to be "otherwise than in private" on the basis that there is a communication to "the public", albeit a limited section of it.

Such an approach is supported by s.18C(3) which provides that public place "includes any place to which the public have access as of right *or by invitation*" (emphasis added).

More significantly, the absence of ancillary liability provisions would appear to require very little care to be taken by those hosting websites that allow for comments to be posted.

It is not enough to show that a host organisation was aware of offensive material appearing on their website, or even that they refused (rather than simply neglected) to remove it. An applicant must prove that the failure or refusal was connected with the race of the relevant group.

The need to pursue the individual responsible for posting offensive material creates particular difficulties in the context of the internet, which can allow anonymous publication from anywhere with internet access.

While internet content hosts and service providers are also subject to content regulation under the *Broadcasting Services Act 1992* (Cth) (BSA), the obligations in the BSA are based upon the film classification regime.[17]

Film classification concerns itself primarily with material depicting sex, violence and certain criminal activity. Although this will potentially include more serious forms of vilification involving, for example, incitement to violence, which may also fall within the reach of criminal law, this regime does not address the specific types of harm that the RDA prohibits and seeks to prevent.

The proposal to give ACMA specific powers to regulate racial hatred appearing online is therefore timely. ❑

ENDNOTES

1. Further discussion of the issue of cyber-racism can be found on the HREOC website at *www.humanrights.gov.au/racial_discrimination/cyberracism/index.html.*
2. For a discussion of cases that have considered these sections, see *Federal Discrimination Law 2005*: *www.humanrights.gov.au/legal/FDL/fed_discrimination_law_05/index.html.* An updated version of *Federal Discrimination Law* will be published later this year.
3. [2002] FCA 1150.
4. Ibid [74].
5. Ibid [95], [99]-[100].
6. [2003] FCAFC 137. The issue of exemptions was not considered in detail at first instance as the respondent had not filed a defence and the onus of making out an exemption rests with the respondent: [2002] FCA 1150, [101].
7. [2003] FCAFC 137, [161]-[163] (Allsop J), [45] (Carr J with whom Branson J agreed).
8. [2002] FCA 1150, [113].
9. [2007] FCA 55.
10. [2007] FCA 1512 ('Silberberg').
11. Ibid [3]-[5].
12. Ibid [18]-[23].
13. Ibid [26].
14. Ibid [34].
15. Ibid.
16. Ibid.
17. See Schedule 5. The key concept is 'prohibited content' which is defined by reference to classification by the Classification Board: see cl 20 Schedule 7. ❑

■ PROFESSIONAL DEVELOPMENT

Mapping the path to an in-house career

SOME OF NEW SOUTH WALES' most experienced in-house legal practitioners, who all supervise large in-house legal teams, will discuss career paths for corporate lawyers at a seminar at the Law Society on 21 May 2008 from 5.30 to 7.00 pm.

Professor Michael Adams, head of the University of Western Sydney Law School, will chair a panel comprising Westpac general counsel Richard Willcock, IAG general counsel Michael Cripps, Babcock & Brown group general counsel Margaret Cole, and Qantas general counsel and company secretary Brett Johnson. The panellists will discuss their individual career paths, the decision to move in-house, significant career challenges and taking on managerial roles – which reflects that the path to managing in-house teams is different from that of the traditional partnership route.

The cost of the seminar is $45 for members, $50 for non-members, and includes refreshments. For further information and registrations contact Robyn Davies at the Law Society, 170 Phillip Street, Sydney 2000, DX 362 Sydney, phone 9926 0276, email *rad@lawsocnsw.asn.au.* ❑

Federalism under the microscope in Brisbane

BRISBANE WILL PLAY HOST IN July to an international panel of experts to discuss the major challenges and opportunities for federal systems around the world.

The "Future of Federalism" conference from 10 to 12 July 2008 will be jointly hosted by the European Focus Group of the Law Council of Australia and the Centre for Public, International and Comparative Law at the University of Queensland's TC Beirne School of Law.

Speakers will include Justice Robert French of the Federal Court, Professor Thomas Fleiner of the Swiss Centre for Federalism, Professor Christina Murray of the University of Cape Town, Justice Margaret White of the Supreme Court of Queensland, and Andrew Hudson of Hunt & Hunt.

Organisers promise a conference that provides an opportunity to study the phenomenon of federalism, its advantages and difficulties, and its laws and practices.

Full details of the conference and a complete list of speakers are available at *www.fedcon2008.net.* Online registrations are now open and early bird discounts are available. ❑