Cyber-racism: can the RDA prevent it?

By Jonathon Hunyor

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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'.

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 *Racial Discrimination Act 1975 (Cth) ('RDA')*. More recently, the Court has held that the RDA also applies to those hosting websites who 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 RDA

Section 18C of the RDA makes it unlawful to do 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).

Jones v Toben

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

Branson J held that the act 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'.

The material was also found to be offensive to members of the Australian Jewry and done 'because of' race, being plainly calculated to convey a message about Jewish people.

On appeal the Full Federal Court upheld the decision at first instance, and also considered the application of the exemption in s 18D. 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'.

The respondent was ordered to remove the offensive material from the World Wide Web and restrained

from publishing the material on the Web or otherwise.

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.

Silberberg

In Silberberg v The Builders Collective of Australia and Buckley, the first respondent ('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.'

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. Buckley was ordered not to publish the impugned messages or any material conveying similar content or imputations.

The case against the Collective was, however, 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'.

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. 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)'.

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 '[t]he 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'. 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.'

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 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 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…'

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 from their website. 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

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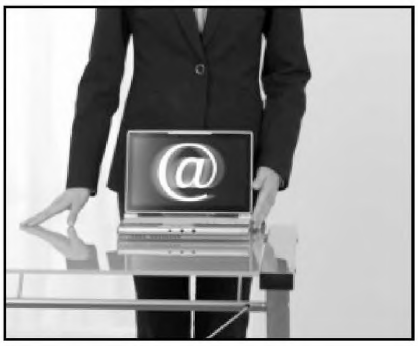
from anywhere with Internet access.

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. This film classification regime 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.



CALD Communities Family Law Project

By the Northern Territory Legal Aid Commission

The NT Legal Aid Commission and Melaleuca Refugee Centre have been successful in obtaining funding from the LSNT Public Purposes Trust to develop a Culturally and Linguistically Diverse Communities project, focussing on family law. The model is being adapted from a similar project developed by the Legal Services Commission of South Australia.

Laws in countries of origin are often different to Australia's laws and learning about Australian law is only one issue that recent migrants and refugees have to deal with. New community members can sometimes be surprised that laws they lived with previously do not apply in Australia, and Australian laws can sometimes be the opposite.

The main aims of the project are:

- To promote understanding of the Australian family law system among CALD communities;
- To promote understanding of how to access and comply with the Australian legal system among CALD communities;
- To promote the ability of individuals to make informed choices.

In early 2008 a reference group will be formed to inform and guide the project workers. The reference group will meet on a regular basis.

CALD communities with the greatest need for family law information will be identified. Relationships will be developed with those communities and consultations will take place to identify the most effective method of information delivery.

Three staff, including a lawyer, multicultural facilitator and project officer will work on the project.

If your organisation would like to be involved or would like more information about this exciting new project, please contact the CALD Family Law Project Officer, Melinda Schroeder on 8999 4697 or email melinda.schroeder@ntlac.nt.gov.au.

Information on the SA CALD project can be obtained from www.lsc.sa.gov.au/cb_pages/cald.php

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