# Racial Hatred Provisions Applied to the Internet

**Michelle Hannan examines a landmark case before the Human Rights and Equal Opportunity Commission and its implications on the on-line industry.**

In a significant decision for on-line racist hate material, the Human Rights and Equal Opportunity Commission (**"Commission"**) recently ordered that materials on the website of a South Australian organisation be removed on the basis that they were an unlawful breach of the racial hatred provisions of the *Racial Discrimination Act* 1975 (Commonwealth) (**"RDA"**). The Commission also ordered the organisation to post a detailed apology on its homepage. The case is the first finding of unlawful racial hatred in relation to materials published on a website in Australia.

Jeremy Jones, the Executive Vice President of the Executive Council of Australian Jewry, lodged a complaint of racial hatred under the RDA against Frederick Toben on behalf of the Adelaide Institute in relation to material published by the Adelaide Institute on its website. The complaint alleged the material published constituted "malicious anti-Jewish propaganda".

Under the RDA, material published in public will breach the racial hatred provisions where it is reasonably likely to offend, insult, humiliate or intimidate another person or group of people and is published because of the race, colour, national or ethnic origin of the other person or some of or all of the people in the group.

In this case, the Commission found it was apparent from the content of the materials that they were published to offend, insult, humiliate and intimidate members of the Jewish community.

However such material will only offend the racial hatred provisions of the RDA if it is made available in a public place or communicated to the public. The Commission's fundamental finding in this case that placing material on a website which is not password protected and is "generally available to anyone who can access an Internet connection" is an act "done in public" demonstrates that the RDA provisions are broadly applicable to websites and those who post material on them. Commissioner McEvoy found that publishing material on such a site is "equivalent to publishing material in a newspaper".

Password protected websites could also fall within the scope of the RDA provisions given that allowing access by invitation only or through paying a fee does not prevent an act from being a public one. Factors such as the number of subscribers to the site, the purpose of the site and the connection between the subscribers to the site would all be relevant to determining whether or not a password protected site would also fall within the realm of a "public place".

The position of Intranet sites is unclear. It might be that these sites are sufficiently private to avoid the racial hatred provisions of the RDA. However, whether or not this is so would depend on the purpose of the Intranet, the number of subscribers and whether or not there is a sufficiently close tie between the subscribers to argue that the material was published privately.

A question which is likely to cause significant argument in some similar cases, but was not an issue in this case, is that of liability. In this case the question was not debated as the Respondent, Dr Toben, acknowledged that he was responsible for the offending material being posted on the website. However, this question may be an issue in matters where members are able to directly post material on a website of their own accord. The question of whether or not the host of a site could be liable for publishing material which amounts to racial hatred also remains unanswered.

## BROADCAST-TYPE SCRUTINY

In some ways, the Commission's findings bring website materials under the kind of scrutiny previously reserved for broadcasting services.

For example, under the industry codes of practice for commercial radio broadcasters (the **FARB Codes**), a commercial radio licensee must not broadcast a program which is likely to incite or perpetuate hatred against or vilify any person or group on the basis of age, ethnicity, nationality, race, gender, sexual preference, religion or physical or mental disability. It is also a condition of commercial radio broadcasting licences that a broadcast service not be used in the commission of an offence against another Act. Similar provisions apply to commercial television broadcasting licensees.

The reason that commercial television and commercial radio are highly regulated forms of media is that traditionally, they have been regarded as "influential". The regulatory policy stated in the *Broadcasting Services Act* 1992 (the BSA) is that *"different levels of regulatory control be applied across a range of broadcasting services according to the degree of influence that different types of broadcasting services are able to exert in shaping community views in Australia"*. Content on Internet services is only regulated in relatively extreme cases under the BSA (under Schedule 5). The Commission's finding may be an early sign that certain website content may be more scrutinised by the regulators, whether broadcasting or otherwise, in the future.

## DEFENCES

This determination also indicates that ensuring material posted on a website is not defamatory will not necessarily ensure that the material does not fall foul of the racial hatred provisions of the RDA. The Respondent in this matter did not attend the hearing, however, prior to the hearing he indicated that he relied on the truth of the documents as a defence to the publication. The Commission, without accepting that the contents of the materials were true, made it clear that truth alone is an insufficient defence to the provisions. The standard New South Wales defence to defamation of truth and public interest might not be sufficient to provide a defence to a publication which is alleged to amount to racial hatred.

The RDA sets out the only bases for materials which would otherwise amount to racial hatred being exempted. Broadly, the materials must fall into one of the following categories:

- A performance, exhibition or artistic work;
- A statement, publication, or debate for genuine academic, artistic, scientific or public interest; or
- A fair and accurate report or comment on a matter of public interest as long as the comment is a genuine belief held by the person making the comment.

However in each case the Commission recognises that there is an "overarching" requirement that the publication, work or comment has been made "reasonably and in good faith". As it did in this case, the Commission can draw a conclusion as to whether an act is done reasonably and in good faith based on the nature of the comments made in the publication. The Commission found that in this case the highly inflammatory and offensive comments, as well as the links to hate sites, undercut any arguments that the publication was made reasonably and in good faith.

## ORDERS

The Commission has very broad powers to deal with material amounting to racial hatred. They include ordering that the material be removed from a website and not republished, that compensation be paid to a complainant for any damage resulting from the offensive publication and/or that an apology be given.

In this case the Commission ordered that all the offensive material be removed and that a detailed apology, as worded by the Commission, be published on the homepage of the Adelaide Institute. Although the orders of the Commission are not enforceable, complaints under the same provisions are now heard by the Federal Court, which can make orders binding on the parties.

*The views expressed in this article are the author's views and not necessarily those of the firm or its clients.*

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# Legislation Note: Bradman Deserves More Than Corporations Law

**Ann Slater analyses recent Corporations Law amendments to protect the Don.**

Recently, the Corporations Law was amended by the Federal Parliament to prohibit incorporation of companies using the surname "Bradman". Bradman, however, deserves more than an amendment to the Corporations Law.

It is a common mistake, even in the corridors of power it seems, that the protection and prohibition of names begins and ends with the Corporations Law and State Business Names Act.

What our Don needs is formal protection under the *Trade Marks Act*, and through domain name registry practice, to prohibit the third party registration of SIR DONALD BRADMAN, BRADMAN, THE DON, 99.94 and DON BRADMAN across all goods and lines of service.

It shouldn't stop there. Why not protect other Australian icons such as Sir Gustav Nossal, Dawn Fraser, Cathy Freeman, Nova Peris Kneebone, Ian Thorpe, Keiren Perkins, Chips Rafferty, Kylie Minogue, Errol Flynn, Bananas in Pyjamas, Play School, Barry Humphries, Weary Dunlop, Fred Hollows, Sir Robert Helpman and Albert Namatjira to name only a few.

The more appropriate, but under-appreciated, legislation for such protection is the *Trade Marks Act 1995*. There are at least four other potentially better ways to protect these names and they all fall within the scope of the *Trade Marks Act*. The *Trade Marks Act* and Regulations provide regulation regarding:

- prohibited trade marks;
- the registration of domain names as trade marks
- defensive registration; and
- well-known trade marks

Firstly, legislators can secure the names of our deceased icons such as Weary Dunlop and Albert Namatjira by amending the Trade Marks Regulations to include appropriate names as prohibited trade marks.

The current list of prohibited marks under Schedule 2 of the Trade Mark Regulations is: