
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.

Michelle Hannan is a Lawyer at the Sydney office of Gilbert & Tobin.

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:

AUSTRADE
 C.E.S.
 OLYMPIC CHAMPION
 REPATRIATION
 RETURNED AIRMAN
 RETURNED SAILOR
 RETURNED SOLDIER

O.M.S. list now needs to be revisited by Government.

It is possible for living icons to protect themselves under the little used defensive trade mark regulation provisions of the *Trade Marks Act*. A defensive registration allows an individual or company to register its famous trade mark for all matters of goods and lines of service. It is not like normal trade mark registration: it is a recognition that the mark is of icon status.

International celebrities and companies are using the Australian defensive registration route but Australians are proving slow to use the system.

Some of the international icon defensive registrations are:

RONALD McDONALD
 ESTEE LAUDER
 JACK DANIELS
 HUGO BOSS
 HARLEY-DAVIDSON



However, Australian icons such as those in the recent Olympic closing parade (Elle McPherson, Paul Hogan, and Greg Norman) have not registered their names or alter egos "The Body", "Crocodile Dundee" and "The Shark" as defensive trade marks.

Our corporate legislators and regulators should take time to understand the value of intellectual property and celebrity, and

either legislate or research the most effective ways to protect our national icons from exploitation. Amending the Corporations law is not the most effective solution.

This note was prepared by Ann Slater, a Partner in the intellectual property group at the Sydney Office of PricewaterhouseCoopers Legal.