A blot on Bolt

By David Knoll AM

Pat Eatock (sitting in wheelchair) with supporters after the case. Photographer Trevor Pinder / Newspix.

In *Eatock v Bolt* [2011] FCA 1103 a well-known newspaper columnist argued forcefully in a series of articles and opinion pieces that persons who had, for example, an Aboriginal maternal grandmother but whose other grandparents were not Aboriginal and who did not 'look' Aboriginal, ought to not be entitled to claim either Aboriginal identity or financial benefits targeted to Aboriginals. One might anticipate the rejoinder that such qualifications were sufficient for the original harm to have been applied to earlier generations of relatively fair-skinned Aboriginal Australians.

Add that the columnist argues not only that such people are not really Aboriginal but also that when such people make financial claims they do so to keep an unjustifiable 'industry' rolling, or that they chose an Aboriginal identity in order to further their careers. All the plaintiffs gave unchallenged evidence to the effect that they had identified as Aboriginal since their childhood, and had upbringings in which they identified culturally as Aboriginal, and that they were recognised by their communities as Aboriginal.

Imagine also that some of those persons had become quite proud of their Aboriginal roots and sought to identify as Aboriginal, and were humiliated and offended by the newspaper columnist. Say also that the words used were unarguably offensive. It is trite common law that freedom of expression is not merely a freedom to speak inoffensively,[1] but can they sue under the anti-vilification provisions contained in Part IIA of the *Racial Discrimination Act 1975* (Cth)? If they can, ought not an opinion piece in a general circulation newspaper by a regular columnist be exempt?

Section 18D of the *Racial Discrimination Act 1975* exempts from being unlawful, conduct which has been done reasonably and in good faith for particular specified purposes, including the making of a fair comment in a newspaper.

It is the issue of exemption that has drawn the most comment on the decision of the Federal Court of Australia, constituted by Mr Justice Bromberg, in *Eatock v Bolt*.[2]

In that case Bromberg J followed the decisions of full Federal Court in *Bropho v Human Rights & Equal Opportunity Commission*[3] and *Toben v Jones*,[4] and conducted a sensible, structured analysis of the facts against the statutory requirements.

In *Toben v Jones*, the full Federal Court accepted that Australia has a public interest in punishing the dissemination of ideas based on racial superiority or hatred, and that there is no public interest in promoting them. The court ruled that reasoned, fairly expressed, policy debate is permissible, but sweeping, public derogatory generalisations about any racial group are impermissible. Bromberg J held that Mr Bolt's opinion piece fell on the wrong side of that dividing line.

Bromberg J fully recognised the need to allow the exemption to do its work in preserving the right to express abhorrent views, and observed that: 'Where rights and freedoms are in conflict, the impairment of one right by the exercise of another is often subjected to a test of proportionality.' [5]

His Honour accepted that: 'The fair comment defence at common law extends to protect opinions, even those that reasonable people would consider to be abhorrent'.[6] Part IIA

thus does not necessarily operate to prevent the publication of ideas which reasonable people would consider offensive or insulting even if race is a factor.

So why did Mr Bolt and the Herald and Weekly Times fail?

His Honour found that:

> … Mr Bolt and HWT made no specific submissions as to why, if the Court was to make a finding of s 18C conduct on the basis of the imputations upon which Ms Eatock relied (or similar imputations), that conduct ought nevertheless be excused pursuant to s 18D.[7]

Bromberg J concluded after a detailed and careful analysis of the evidence as follows:

> In my view, Mr Bolt was intent on arguing a case. He sought to do so persuasively. It would have been highly inconvenient to the case for which Mr Bolt was arguing for him to have set out facts demonstrating that the individuals whom he wrote about had been raised with an Aboriginal identity and enculturated as Aboriginal people. Those facts would have substantially undermined both the assertion that the individuals had made a choice to identify as Aboriginal and that they were not sufficiently Aboriginal to be genuinely so identifying. The way in which the Newspaper Articles emphasised the non-Aboriginal ancestry of each person serves to confirm my view. That view is further confirmed by factual errors made which served to belittle the Aboriginal connection of a number of the individuals dealt with, in circumstances where Mr Bolt failed to provide a satisfactory explanation for the error in question.[8]

On this basis, Mr Bolt was found not to have written in good faith. His Honour added:

> Insufficient care and diligence was taken to minimise the offence, insult, humiliation and intimidation suffered by the people likely to be affected by the conduct and insufficient care and diligence was applied to guard against the offensive conduct reinforcing, encouraging or emboldening racial prejudice. The lack of care and diligence is demonstrated by the inclusion in the Newspaper Articles of the untruthful facts and the distortion of the truth which I have identified, together with the derisive tone, the provocative and inflammatory language and the inclusion of gratuitous asides. For those reasons I am positively satisfied that Mr Bolt's conduct lacked objective good faith.[9]

The error made by Bolt in asserting that the plaintiffs could choose to be Aboriginal, or not, and then to base his opinion upon a faulty premise, was found by the court to preclude reliance on the fair comment exemption. A fair comment must be based on an accurate factual premise, and Mr Bolt's comments were not. While it shouldn't be against the law to make mistakes, in this case all the mistakes seemed to be in one direction, heightening the polemical effect of the message Bolt was conveying about the plaintiffs and their race.

The case also serves as a salient reminder that freedom of speech cannot in a truly democratic society include freedom to vilify on the basis of peoples' race. In his famous 'Essay on Liberty', English philosopher John Stuart Mill recognised that liberty is measured not by the freedom exercised by one person, but rather by the freedoms exercised by us all. That concept is central to the Australian ethos of a fair go. It underpins anti-vilification laws including Part IIA of the *Racial Discrimination Act 1975* (Cth).

We need to remember that there is a practical difference between words that may offend a majority group, faith or culture, one with social power and which can defend itself, and attacks directed at a less powerful minority, one fearful of the majority's reaction. Vilification degrades the humanity of members of the minority group in the eyes of the majority, whether that outcome is intended or not.

The test of a healthy democracy is not only the freedom of each individual to do as they please, but also the protections put in place to protect the weaker members of society against abuses of those very freedoms. That is the principle which the decision in *Eatock v Bolt* upholds.

Endnotes

1. *R (on the application of Gaunt) v Office of Communications (OFCOM)* [2011] EWCA Civ 692 at [22] (Lord Neuberger MR).
2. [2011] FCA 1103.
3. (2004) 135 FCR 105.
4. [2003] FCAFC 137; (2003) 129 FCR 515.
5. [2011] FCA 1103 at 349.
6. [2011] FCA 1103 at 353.
7. [2011] FCA 1103 at 360.
8. [2011] FCA 1103 at 405.
9. [2011] FCA 1103 at 425.