Media responsibility under the Racial Discrimination Act

Nicolas Kirby discusses *Eatock v Bolt* [2011] FCA 1103

Andrew Bolt is no stranger to controversy. He calls it like he sees it. In 2009, he saw a 'trend' of fair-skinned Indigenous people opportunistically choosing to falsely identify themselves as Aboriginal to further their careers and gain access to opportunities reserved for Aboriginal and Torres Strait Island peoples. Bolt wrote two articles called 'It's so hip to be black' and 'White Fellas in the Black'. The articles were published in the *Herald Sun* and on its website. Bolt argued that a person with fair skin is not sufficiently Aboriginal to genuinely identify as an Aboriginal person.

Bolt made his argument by providing alleged real-life examples of this 'trend' – 18 of them. He told of how they were 'eager to proclaim their Aboriginality'; how they 'chose, incidentally, the one identity open… that has political and career clout'; he said that the 'choice' of Aboriginality 'can seem almost arbitrary'. He described one of them as 'a professional Aborigine'; others that 'out of their multi-stranded but largely European genealogy, [they] decide to identify with the thinnest of all those strands'.

Bolt made extensive reference to the physical appearances of his subjects. He described them variously as 'pink in face as they are in politics'; 'blue-eyed and ginger-haired'; and 'pale as a blank canvas'.

He juxtaposed their physical characteristics against what he regarded as 'real' Aboriginals: 'Hear that scuffling at the trough? That's the sound of black people being elbowed out by white people shouting 'but I'm Aboriginal, too!'; 'privileged white Aborigine… underprivileged black Aborigine'; and 'White university lecturer… real draw-in-the-dirt Aboriginal artists.'

Bolt's articles were appended to the judgment. They are well-written: powerful and emotive. Their tone ranges from wry bemusement to mocking, sarcastic derision. Their style is cynical and inflammatory. The way Bolt wrote the articles was an important factor in the outcome of the case.

The RDA proceedings

Pat Eatock brought proceedings against Bolt and the Herald and Weekly Times (HWT) (publisher of the *Herald Sun*) in the Federal Court under the *Racial Discrimination Act 1975* (Cth) (the RDA) seeking declarations, injunctions and an apology.

In resisting Eatock's claim, Bolt and his employer denied that the articles were offensive, denied that race had anything to do with their publication and, if those defences failed, said that the articles were excused by provisions in the RDA which make exceptions for freedom of expression.

When the matter came before Bromberg J, the main issues for determination were:

- whether it was reasonably likely that fair-skinned Aboriginals would be offended, insulted, humiliated or intimidated by the articles[1];
- whether the articles were written including because of the race, colour or ethnic origin of fair-skinned Aboriginals[2]; and
- whether the articles were protected by the exception for fair comment on a matter of public interest and were an expression of Bolt's genuine belief[3].

Defamation principles apply

Part IIA of the RDA is designed to prohibit offensive behaviour based on racial hatred. The questions to be determined under that part require the importation of principles from defamation law. Ms Eatock relied on the ordinary and natural meaning of the articles' words[4]. Imputations were pleaded and his Honour decided those imputations by reference to what 'an ordinary and reasonable reader' would have understood upon reading the articles. Bolt's defence was analysed by reference to the defamation defences of fair comment and qualified privilege.

Reasonably likely to offend

The way Ms Eatock pleaded her case, the issue was not whether or not she was reasonably likely to be offended, but, instead, whether the identified class of persons (i.e. fair-skinned Aboriginals) were reasonably likely to be offended[5].

Bromberg J found that such a reasonable likelihood existed. His Honour found that such persons would be reasonably likely to fear that many people would read the articles and agree with the imputations and attribute the negative characteristics that Bolt associated with so-called 'white Aborigines'[6]. Such persons would be particularly sensitive to the fact that their appearance does not fit the stereotypical image of an Aboriginal

person and would be the more offended by the articles' challenging the legitimacy of their identity.

Two fundamental rights collide

A publication is not unlawful if it is made reasonably and in good faith and a fair comment on a matter of public interest and is an expression of the author's genuine belief[7].

In determining whether Mr Bolt and his employer were entitled to avail themselves of this exception, Bromberg J had to consider the impact of two fundamental rights: on the one hand, the common law right of freedom of expression[8]; on the other, the right to be free from racial prejudice and intolerance[9].

In support of freedom of expression[10], sources as diverse as Benjamin Franklin, John Locke and Thomas Jefferson were called upon alongside statements of the High Court in *Lange v ABC*[11] and *Lenah Game Meats*[12].

In support of the freedom from prejudice[13], his Honour said: 'At the heart of any attempt to secure freedom from racial prejudice and intolerance is the protection of equality and the inherent dignity of all human beings. These are the values that infuse international human rights.'

Bolt's defence fails

Bromberg J held that Mr Bolt's treatment of the subject in the articles was not reasonable or done in good faith. His Honour's reasons rested on both the substance and the style of the articles.

In terms of the substance, there were two problems. First, Bolt only told half the story. The half he omitted comprised the inconvenient facts that tended to spoil his argument. The second problem was that the half of the story he chose to tell, he got substantially wrong.

The factual errors were significant. Criticism of a woman who won 'plum jobs reserved for Aborigines' turned out to be a reference to what was, in fact, an unpaid voluntary position. A statement that a man's Aboriginality rested solely on a part-Aboriginal great-grandmother ignored the fact that both his parents, all his grandparents and all but one of his great-grandparents were Aboriginal. Mr Bolt charged Ms Eatock with choosing to identify as Aboriginal 'when she was 19 after attending a political rally'. Mr Bolt failed to say that Ms Eatock began publicly identifying as Aboriginal at that age, but had thought of herself as Aboriginal since she was much younger.

These factual errors proved to be a stumbling block to Mr Bolt's fair comment defence. That defence requires the comment to be based on true facts. The incursions made into free speech by defamation require a publisher to be diligent in verifying the accuracy of statements and, where practicable and necessary, seek responses from those whose reputations are at stake.

In terms of the articles' style, Bolt's mocking tone and inflammatory language was neither necessary for his argument nor reasonable. Bromberg J held that the strong language and disrespectful manner in which the articles dealt with their subjects heightened the intimidatory impact of the articles and regarded that as the most pernicious aspect of the contravening conduct. His Honour said 'That young Aboriginal persons or others with vulnerability in relation to their identity, may be apprehensive to … publicly identify as Aboriginal as a result of witnessing the ferocity of Mr Bolt's attack… is significant to my conclusions that… Mr Bolt failed to honour the values asserted by the RDA.'[14]

His Honour found Mr Bolt's conduct involved a lack of good faith: '…insufficient care and diligence was applied to guard against the offensive conduct reinforcing, encouraging or emboldening racial prejudice.[15]'

Subjects not taboo

The court did not find that the articles' subject constituted the contravention. Bolt claimed that he wanted to draw attention to what, in his view, was an undesirable trend in people relying upon racial differences – undetectable to the naked eye – when they ought to be drawing attention to our common humanity. But that is not what he wrote. Instead he attacked people's identity and attributed cynical and opportunistic motivations for their self-identification[16].

Clarke v Nationwide News [2012] FCA 307

Recently, Bolt was applied extensively in *Clarke v Nationwide News* ('Clarke'). In that case Barker J applied the RDA to the modern phenomenon of online readers' comments.

Four young Aboriginal boys were killed when they

crashed the stolen car they were driving. Readers were encouraged to provide their opinions and many did.

Many readers suggested that the boys' criminal behaviour was their parents' fault. Some readers suggested that they had no sympathy for them and that the boys got what was coming to them. Others commented that the Aboriginal community would never gain the respect of others until they respect the law. Certain comments were truly unedifying: 'Let em all fight and kill each other I say!'

Nationwide News 'moderated' (i.e. vetted) the posting of the comments. There were hundreds of comments in all. Complaint was made in respect of 16 of them. Barker J analysed each comment in turn and found that 4 of the 16 contravened the RDA. The other 12 comments, while often hurtful, ignorant or intemperate, were held not to be unreasonable.

Of the four comments that were held to contravene s 18C of the Act (which prohibits offensive behaviour because of race, colour or national or ethnic origin), one implied that the family would have a criminal record and his Honour inferred that that assumption was based on their being Aboriginal; one called the boys 'scum' and suggested he would use them as landfill; one of them implored hopeless mothers to realise their limitations and stop breeding and one lamented the increase to insurance premiums due to 'criminal trash like these young boys.'

When compared to Bolt the decision in *Clarke* shows:

- Website publishers do have a duty to moderate readers' comments and online forums.
- A reader expressing a crude and ill-informed opinion is afforded more leniency than a professional writer such as Andrew Bolt.

Examples of the leniency include many comments which, on one view, fell into stereotyping by associating the Aboriginal community with crime and anti-social behaviour. Another comment, which was found not to contravene, was the comment calling on the funeral attendees to 'fight and kill each other'. After reading both Bolt and Clarke, one cannot escape the impression that had Bolt written some of those comments, they would have been found to contravene the Act.

This disparity can be reconciled. All the circumstances of the publication must be considered. Readers would be entitled to assume Bolt had his facts right. His opinion carries weight. An anonymous commenter on a news website ought not be expected to apply the same diligence as a professional writer in order to avail himself of the statutory defence. Nor will such a person be in a position to so influence public opinion.

One more comment

Although Barker J provides detailed reasons for why some comments contravened and other comments did not, a publisher faces an unenviable task. When one reads the comments – and before reading his Honour's reasons – it is very difficult to predict which comments will be held to contravene. Even after reading his Honour's reasons, it will be difficult for publishers (and even lawyers) to read a comment and intuit whether it will or won't run afoul of the Act. Different processes of reasoning yield different results. Some comments that seemed to be quite benign were held to contravene and others which some might find unequivocally racist and offensive were held not to.

News consumers now expect to interact with the publisher and with other readers. When inviting readers' comments on controversial matters touching race, publishers must conscientiously consider whether the comment is reasonable or whether it is likely to offend a particular group of people. Clearly, the law does not require from readers the same level of proportionality, fairness, accuracy or temperance that it requires of professional writers. But publishers are still required to negotiate a minefield – and without much of a map. The only certainty is someone's bound to get hurt.

Endnotes

1. s 18C(1)(a) of the RDA
2. s 18C(1)(b) of the RDA
3. s 18D(c)(ii) of the RDA
4. Judgment at [16]
5. Judgment at [270]
6. Judgment at [288]
7. s 18D of the RDA
8. Judgment at [192]
9. Judgment at [212] – [226]
10. Judgment at [227] – [240]
11. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520
12. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199
13. Judgment [212] – [226]
14. Judgment at [415] and [417]
15. Judgment at [425]
16. see also Judgment at [445] and [446]