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Nigger Brown sign on sportsground *not* discriminatory

*Hagan v Trustees of the Toowoomba Sports Ground Trust**

The Federal Court has dismissed a complaint that the display of the word "Nigger" on a sign at a sports ground infringed the Racial Discrimination Act 1975 (Cth).

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The facts

The Toowoomba Athletic Oval is controlled by a trust (the respondent) and is a major regional rugby league venue. One public stand is name "The ES 'Nigger' Brown Stand" by a large sign in a prominent position, visible from inside and outside the Oval. Announcements during matches frequently refer to "The 'Nigger' Brown Stand".

The stand was named in 1960 to honour Edward Stanley Brown, who was of Anglo-Saxon descent and long known by the nickname "Nigger". Although the origin of the nickname was not clear, it was thought that either he was named "Nigger" as a child, or because he was blonde haired and fair-skinned or that he acquired it due to his penchant for wearing deep brown shoes, a colour which was known as "nigger brown". Mr Brown was well known for his career in representative rugby league, league administration and subsequently as a long-term Chairperson of trustees of the oval.

Stephen Hagan (the Complainant), a member of a local indigenous community, complained to the trustees after taking offence at the word "Nigger" in the sign and the frequent mention of the word "Nigger" during games. He requested that the sign be removed immediately.

After making inquiries and ascertaining that, apart from the complainant, the local indigenous community did not object to its continuous display, the trustees decided to retain the sign unaltered.

The claim

The complainant claimed in the Federal Court against the respondent, pursuant to s46PO of the *Human Rights and Equal Opportunities Commission Act* 1986 (Cth), for compensation of $50,000 for loss and damage because of the respondent's alleged breach of ss9 and 18C of the *Racial Discrimination Act* 1975 (Cth) and for the removal of the sign.

Was there a breach of s18C of the *Racial Discrimination Act*?

Section 18C(1) of the *Racial*

Discrimination Act provides that it is unlawful for a person to do an act, otherwise than in private, if:

a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

In relation to s18C, His Honour made the following observations:

- To determine whether the act complained of has the necessary offensive, insulting, humiliating or intimidatory quality, an objective test is applied.
- To determine whether a word is racially offensive etc. regard must be had to the circumstances and the context in which the word is used.
- To establish that the "act is done because of the race" there must be a causal relationship between the reason for doing the act and the race of the "target person or group".

The complainant's case under 18C failed because:

The trustee's decision to retain the sign was arrived at only after considering the views of numerous members of Toowoomba's indigenous community and forming the opinion that the community had no objection to the name, and, in fact, supported retention of it on the stand. The trustee's decision was affirmed by a well-publicised meeting attended by a relatively large cross-section of the Aboriginal community.

The sign has been on public display at the Oval for forty years; the Oval is a heavily frequented venue and many persons of Aboriginal descent must have observed the sign over those years. Until the applicant's complaint, no complaints had ever been made to the Trust with respect to the name of "The ES 'Nigger' Brown Stand".

The Claimant's contention that the use of the word "nigger", whatever the context, must invariably be racially offensive is not sustainable. This is supported by dictionary definitions.[1]

The word "nigger" was used in the context of an integral part of the name of a person who was clearly being honoured by having his name publicly applied to the stand. The word "nigger" was the long-established nickname which Mr Brown went by throughout most of his life and by which he was widely known in the community. This usage of the word "nigger" was not intended by Mr Brown to convey, and did not convey to any local resident (apart from the applicant), a racist element. Even if the nickname was originally bestowed in circumstances in which the word had a racial or even racist connotation, it had lost that connotation within the community long ago.

The act was not done because of the race of the people in the group. It would give s18C an impermissibly wide reach to interpret it as applying to acts done specifically in circumstances where the actor has been careful to avoid giving offence to a racial group who might be offended.

Was there a breach of s9(1) of the *Racial Discrimination Act*?

Section 9(1) of the *Racial Discrimination Act* provides that it is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

In relation to s9 His Honour made the following observations:

This section is not directed to protecting the personal sensitivities of individuals. It protects the basic human right of every member of a particular racial group to go about his or her activities without being treated by others less favourably than persons who do not belong to that racial group are treated by those others.[2]

"Based on" in s9(1) does not require a causal relationship between the act complained of and race, etc, but rather "by reference to" ie. a less direct relationship than cause and effect. Proof of a subjective intention to discriminate on the grounds of race is sufficient but not necessary. Even though an act may not be done with a racially discriminatory motive, if it in fact operates to treat the members of a particular racial group less favourably than the community generally, it can fairly be described to be an act based on race.[3]

The complainant's case under s9 failed because:

The trustee's decision to retain the sign unaltered was not an act that involved treating members of the Aboriginal race differently, let alone less favourably, from other members in the community.

The word complained of was only used as part of the customary identifier of a well-known and respected person and had no racial or racist connotation in that context.

The general view of the local indigenous community was that the use of the word complained of in this particular context was not offensive.

The act of the trustees was not based on race as racial considerations were only taken into account by the trustees to satisfy themselves that retaining the sign would not offend indigenous persons generally, as distinct from offending the complainant personally.

Only the complainant's personal feelings were affected. There was no distinction etc. produced which was in any way capable of detrimentally affecting any human rights and fundamental freedoms. PL

Footnotes:

* Unreported [2000] FCA 1615, Q35 of 2000

1 The Australian National Dictionary; The Macquarie Dictionary, 3rd Edition; Dictionary of Afro-American slang (International Publishers, New York, 1970); The Oxford Dictionary, 2nd Edition, (Clarendon Press, Oxford, 1989)

2 See *International Convention on the Elimination of All Forms of Racial Discrimination* article 5; *Racial Discrimination Act* s 9(2); *Ebber v Human Rights and Equal Opportunity Commission* (1995) 129 ALR 455 at 471 and 475-477.

3 *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission* (1998) 160 ALR 489 per Weinberg J at 512; see also *Aboriginal Legal Rights Movement Inc v South Australia* (No 1) (1995) 64 SASR 551 at 553 per Doyle CJ (Bollen J agreeing).