FEDERAL COURT OF AUSTRALIA

Eatock v Bolt (No 2) [2011] FCA 1180

Citation:	Eatock v Bolt (No 2) [2011] FCA 1180
Parties:	**PAT EATOCK v ANDREW BOLT and HERALD AND WEEKLY TIMES PTY LTD (ACN 004 113 937)**
File number:	VID 770 of 2010
Judge:	**BROMBERG J**
Date of judgment:	19 October 2011
Catchwords:	**HUMAN RIGHTS** – declaration of contravention of s 18C of the Racial Discrimination Act 1975 (Cth) – the extent to which the declaration made should include the Court's principal findings – whether the terms of an injunction restraining republication of an article should extend to the republication of a substantial part thereof – whether an order requiring the publication of a corrective notice should be made and the terms of such a notice. **COSTS** – indemnity costs - Calderbank offer – relevant principles discussed – whether it was unreasonable for the applicant to refuse the respondent's offer of settlement – whether applicant should pay costs thrown away as a result of the vacation of the trial. **PRACTICE AND PROCEDURE –** the extent to which a declaration should include the Court's principal findings – whether a declaration can be made in the absence of evidence or an agreed statement of facts – whether a declaration can be made in the absence of a contradictor – whether a declaration is to be limited to the facts or matters which the Court is called upon to determine.
Legislation:	*Australian Human Rights Commission Act 1986* (Cth) s 46PO(4) *Racial Discrimination Act 1975* (Cth) ss 18C, 18D
Cases cited:	*Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 *Alpine Hardwood (Aust) Pty Ltd v Hardys Pty Ltd (No 2)* (2002) 190 ALR 121 *Australia Wide Airlines Limited v Aspirion Pty Ltd* [2006] NSWCA 365 *Australian Competition and Consumer Commission v*

Harris Scarfe (No 2) [2009] FCA 433
Australian Competition and Consumer Commission v Midland Brick Co Pty Ltd (2004) 207 ALR 329
Australian Competition and Consumer Commission v MSY Technology Pty Ltd (No 2) (2011) 279 ALR 609
Australian Competition Consumer Commission v Telstra Corporation Limited [2007] FCA 2058
Australian Competition and Consumer Commission v Willesee Health Care Pty Ltd (No 2) [2011] FCA 752
Becker v Queensland Investment Corporation and Bovis Lend Lease Pty Ltd (No 2) [2009] ACTSC 147
Black v Lipovak (1998) 217 ALR 386
Calderbank v Calderbank [1975] 3 All ER 333
Citron v Zundel (2002) 41 CHRR D/274 (CHRT)
Creek v Cairns Post Pty Ltd (2001) 112 FCR 352
Cruse v Multiplex Limited (2008) 172 FCR 279
Eatock v Bolt [2011] FCA 1103
Grbavac v Hart [1997] 1 VR 154
John Goss Projects Pty Ltd v Thiess Watkins White Constructions Ltd (In liq) [1995] 2 Qd R 591
Jones v Scully (2002) 120 FCR 243
Jones v Toben [2002] FCA 1150
Review 2 Pty Ltd v Redberry Enterprises Pty Ltd (No 2) [2008] FCA 1805
Seven Network Ltd v News Ltd (2007) 244 ALR 374
Silberberg v The Builders Collective of Australia (2007) 164 FCR 475
Stuart v Construction, Forestry, Mining and Energy Union (2010) 185 FCR 308
Thomas Australian Holdings Pty Ltd v Trade Practices Commission (1981) 148 CLR 150

Date of hearing:	Heard on the papers
Place:	Melbourne
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	53
Counsel for the Applicant:	Mr R Merkel QC with Mr H Borenstein SC, Ms C Harris and Ms P Knowles
Solicitor for the Applicant:	Holding Redlich
Counsel for the Respondents:	Mr N Young QC with Dr M Collins

Solicitor for the Respondents:	Kelly Hazell Quill

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 770 of 2010**

BETWEEN:	**PAT EATOCK** **Applicant**
AND:	**ANDREW BOLT** **First Respondent**
	HERALD AND WEEKLY TIMES PTY LTD (ACN 004 113 937) **Second Respondent**

JUDGE:	**BROMBERG J**
DATE OF ORDER:	**19 OCTOBER 2011**
WHERE MADE:	**MELBOURNE**

THE COURT DECLARES THAT:

1. On 15 April 2009, the Herald and Weekly Times Pty Ltd published in the *Herald Sun* newspaper an article written for publication by Andrew Bolt under the title "It's so hip to be black". On or about 15 and 16 April 2009, that article was also published by the Herald and Weekly Times Pty Ltd on its website, under the title "White is the new black". On 21 August 2009, the Herald and Weekly Times Pty Ltd published a second article written for publication by Andrew Bolt in the *Herald Sun* newspaper under the title "White fellas in the black". On 21 August 2009, that article was also published by the Herald and Weekly Times Pty Ltd on its website, under the title "White fellas in the black" (collectively "the Newspaper Articles").

2. The writing of the Newspaper Articles for publication by Andrew Bolt and the publication of them by the Herald and Weekly Times Pty Ltd contravened s 18C of the *Racial Discrimination Act 1975* (Cth) and was unlawful in that:

    (a) the articles were reasonably likely to offend, insult, humiliate or intimidate some Aboriginal persons of mixed descent who have a fairer, rather than darker, skin and who by a combination of descent, self-identification and communal recognition are and are recognised as Aboriginal persons, because the articles conveyed imputations to those Aboriginal persons that:

(i) there are fair-skinned people in Australia with essentially European ancestry but with some Aboriginal descent, of which the individuals identified in the articles are examples, who are not genuinely Aboriginal persons but who, motivated by career opportunities available to Aboriginal people or by political activism, have chosen to falsely identify as Aboriginal; and

(ii) fair skin colour indicates a person who is not sufficiently Aboriginal to be genuinely identifying as an Aboriginal person.

(b) the Newspaper Articles were written and published, including because of the race, ethnic origin or colour of those Aboriginal persons described by the articles; and

(c) that conduct was not exempted from being unlawful by s 18D of the *Racial Discrimination Act 1975* (Cth) because the Newspaper Articles were not written or published reasonably and in good faith:

(i) in the making or publishing of a fair comment on any event or matter of public interest; or

(ii) in the course of any statement, publication or discussion, made or held for a genuine purpose in the public interest.

AND THE COURT ORDERS THAT:

3. On two occasions within 14 days of the date of this Order, the Second Respondent, publish in the *Herald Sun* newspaper (both in print and online) in a position immediately adjacent to the First Respondent's regular column, a corrective notice in the form of the annexure to these Orders and of the same or similar size.

4. (a) The Respondents, whether by their servants, their agents or howsoever otherwise, are restrained from further publishing or republishing the Newspaper Articles or any substantial parts thereof.

(b) This Order does not prevent the Second Respondent from continuing to publish the Newspaper Articles on the *Herald Sun* website for historical or archival purposes, provided that such publication is accompanied by an

immediately adjacent and prominent publication of a corrective notice in the form of the annexure to these Orders and of the same or similar size.

5. The Applicant pay the costs of the Respondents reserved by the order made on 10 December 2010, to be taxed if not agreed.

6. The Respondents pay the costs of the Applicant, other than any costs of the directions hearing held on 10 December 2010 and any costs thrown away by reason of the vacation of the trial due to have commenced on 13 December 2010, to be taxed if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011

Annexure

EATOCK v BOLT AND THE HERALD & WEEKLY TIMES PTY LTD

CORRECTIVE NOTICE

ORDERED BY THE FEDERAL COURT OF AUSTRALIA

In legal proceedings brought by Pat Eatock against Andrew Bolt and The Herald & Weekly Times Pty Ltd, the Federal Court of Australia ordered that this notice, including the following declaration made by the Court on 19 October 2011, be published in the *Herald Sun* in print and online. The reasons for judgment of the Federal Court of Australia in this matter (including a summary of those reasons) are accessible from the Federal Court website [*and in relation to the publication of this notice online* – "and via the following link (*insert hyperlink*)"].

The Court declares that:

On 15 April 2009, the Herald and Weekly Times Pty Ltd published in the *Herald Sun* newspaper an article written for publication by Andrew Bolt under the title "It's so hip to be black". On or about 15 and 16 April 2009, that article was also published by the Herald and Weekly Times Pty Ltd on its website, under the title "White is the new black". On 21 August 2009, the Herald and Weekly Times Pty Ltd published a second article written for publication by Andrew Bolt in the *Herald Sun* newspaper under the title "White fellas in the black". On 21 August 2009, that article was also published by the Herald and Weekly Times Pty Ltd on its website, under the title "White fellas in the black" (collectively "the Newspaper Articles").

The writing of the Newspaper Articles for publication by Andrew Bolt and the publication of them by the Herald and Weekly Times Pty Ltd contravened s 18C of the *Racial Discrimination Act 1975* (Cth) and was unlawful in that:

(a) the articles were reasonably likely to offend, insult, humiliate or intimidate some Aboriginal persons of mixed descent who have a fairer, rather than darker, skin and who by a combination of descent, self-identification and communal recognition are and are recognised as Aboriginal persons, because the articles conveyed imputations to those Aboriginal persons that:

  (i) there are fair-skinned people in Australia with essentially European ancestry but with some Aboriginal descent, of which the individuals identified in the articles are examples, who are not genuinely Aboriginal persons but who, motivated by career opportunities available to Aboriginal people or by political activism, have chosen to falsely identify as Aboriginal; and

  (ii) fair skin colour indicates a person who is not sufficiently Aboriginal to be genuinely identifying as an Aboriginal person.

(b) the Newspaper Articles were written and published, including because of the race, ethnic origin or colour of those Aboriginal persons described by the articles; and

(c) that conduct was not exempted from being unlawful by s 18D of the *Racial Discrimination Act 1975* (Cth) because the Newspaper Articles were not written or published reasonably and in good faith:

  (i) in the making or publishing of a fair comment on any event or matter of public interest; or

  (ii) in the course of any statement, publication or discussion, made or held for a genuine purpose in the public interest.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 770 of 2010**

BETWEEN:	**PAT EATOCK** **Applicant**
AND:	**ANDREW BOLT** **First Respondent**
	HERALD AND WEEKLY TIMES PTY LTD (ACN 004 113 937) **Second Respondent**
JUDGE:	**BROMBERG J**
DATE:	**19 OCTOBER 2011**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

1 The Court published reasons for judgment in this matter on 28 September 2011. Those reasons are reported as *Eatock v Bolt* [2011] FCA 1103 ("earlier reasons for judgment"). Having delivered those reasons, I gave the parties an opportunity to file proposed minutes of orders reflecting my judgment and an opportunity to make further submissions on particular issues relating to relief, including the question of costs. I received further extensive submissions from the parties. I have taken into account those submissions. Broadly speaking, they raise the following issues which I have, by these reasons, determined:

- The extent to which the declaration to be made by the Court should include the principal findings of the Court?: [3]-[7];
- The terms of an injunction restraining republication: [8]-[13];
- Whether an order requiring the publication of a corrective notice should be made and the terms of such a notice?: [14]-[23];
- Whether Ms Eatock should pay the costs thrown away as a result of the vacation of the trial due to have commenced on 13 December 2010?: [24]-[28]; and
- Whether as a result of an offer of settlement made prior to the trial by Mr Bolt and HWT, Ms Eatock should be ordered to pay the costs of the trial?: [29]-[52].

2 These reasons for judgment should be read with my earlier reasons for judgment. Words and phrases which I have defined in my earlier reasons for judgment are adopted and applied in these reasons.

DECLARATORY RELIEF

3 The parties agree that it is appropriate for the Court to make a declaration that the writing and publication of the Newspaper Articles contravened s 18C of the *Racial Discrimination Act 1975* (Cth). However, they differ as to the form of declaratory relief that the Court should make.

4 In my earlier reasons for judgment at [459], I indicated that the terms of the declaration I had in mind should identify the broad elements of the conduct that constitutes the contravention of s 18C found by the Court. Ms Eatock largely supports that approach but adds that findings relevant to s 18D should also be included. Mr Bolt and HWT contend that such an approach is unnecessary and suggest a declaration in brief terms.

5 The making of a declaration and the terms in which it should be framed are in the Court's discretion but any declaration made by the Court should reflect the final outcome of the case with certainty and precision: *Stuart v Construction, Forestry, Mining and Energy Union* (2010) 185 FCR 308 at [89] (Besanko and Gordon JJ with whom Moore J agreed at [35]). Besanko and Gordon JJ at [91] and [94] followed observations made by Goldberg and Jessup JJ in *Cruse v Multiplex Limited* (2008) 172 FCR 279 at [59], that there may be utility in using a declaration to define and publicise the type of conduct that constitutes the contravention the subject of the Court's declaration.

6 This is a case where there is utility in defining and publicising the elements of the conduct that constituted the contravention of s 18C of the RDA by the terms of the declaration made by the Court. That utility includes providing a sufficient public record of the way in which the applicant's application was resolved in relevant respects: *Cruse* at [59]. There is utility in assisting to redress the harm done by the contravening conduct: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582 (Mason CJ and Dawson, Toohey and Gaudron JJ). Further, the form of declaration I have in mind will assist in setting out the foundation upon which consequential orders are grounded: *Australian Competition and Consumer Commission v Midland Brick Co Pty Ltd* (2004) 207 ALR 329 at

[21], (Lee J). For reasons I later explain, it will also facilitate the making of orders requiring the publication of a corrective notice.

7 If defining the elements of the contravening conduct can be done by reference to the principal findings the Court has made and can be stated with certainty and precision, I see no reason why a declaration of contravention ought not take that form. That is the approach that I have adopted in the declaration which the Court will make. In so doing, I have included a reference to the imputations which the Court found were conveyed by the Newspaper Articles. I have done that in order to more precisely define the cause of the reasonably likely offence, insult, humiliation or intimidation found by the Court. A sufficient record of the principal findings made by the Court as to why the impugned conduct was unlawful should, given the exemptions from unlawfulness provided by s 18D of the RDA, include the Court's determination as to those elements of s 18D which were relied upon. To do so, serves to properly record the way in which the Court resolved the application before it.

INJUNCTIVE RELIEF

8 The Court's findings with respect to granting an injunction are found at [460]-[464] of my earlier reasons for judgment. Both parties initially agreed that the Court should make an order restraining Mr Bolt and HWT from further publishing or republishing the Newspaper Articles "or any substantial part thereof".

9 In their reply submissions, Mr Bolt and HWT sought to resile from their earlier submission that the words "or any substantial part thereof" be included. They contended that only the publication or republication of the Newspaper Articles in their entirety should be restrained. That submission fell outside of the leave given to Mr Bolt and HWT to respond to the submission made by Ms Eatock.

10 There is, however, a more fundamental reason for its rejection. The purpose of an injunction preventing republication is to prevent a repetition of the harm done by the contravention of s 18C. If the Court were to permit the republication of substantial parts of the Newspaper Articles, I am not satisfied that this objective would be assured. Mr Bolt and HWT contend that there are substantial parts of the Newspaper Articles which are innocuous. They provide as examples paragraphs [37]-[38] of the first article and paragraphs [44]-[48] of the second article as containing arguments that they may want to republish. Each of those

parts include inflammatory language which I specifically relied upon at [414] of my earlier reasons for judgment as part of the conduct which contributed to the contravention of s 18C.

11 That observation reinforces my concern that the Newspaper Articles are not comprised of separate and distinct substantial parts which may be regarded as entirely innocuous in the sense of having made no contribution to the harm caused. In coming to that view, I have had regard to the fact that in the context of what is here being considered, innocuous words may lose that character when republished as a recognisable republication of articles which were reasonably likely to offend, insult, humiliate or intimidate.

12 The orders of the Court have to be effective and there is a need for clarity. The best way of achieving those objectives and the primary objective of the injunction is to restrain the publication or republication of the Newspaper Articles or any substantial parts thereof. As I have made clear in my earlier judgment at [461], such an order does not restrain the publication of other articles which deal with the arguments raised by the Newspaper Articles.

13 Consistently with my findings at [463] of my earlier judgment, that order will be qualified by a further order that HWT is not prevented from continuing the publication of the Newspaper Articles on the internet archives of the *Herald Sun* for historical or archival purposes, provided that a corrective notice is prominently displayed immediately adjacent to those articles. The form of a corrective notice is a matter on which the parties disagree for this purpose and also for the purpose of any separate order requiring the publication of a corrective notice in forthcoming editions of the *Herald Sun*. I have come to the view that the terms of any corrective notice ought to be the same for both purposes and I turn to consider that matter next.

CORRECTIVE NOTICE

14 In her claim for relief, Ms Eatock sought an apology from HWT. As I said in my earlier reasons for judgment at [465], I am not persuaded that I should compel HWT to articulate a sentiment that is not genuinely held. I noted, however, that an apology is but one means of addressing the public vindication sought by those who have been injured by the contravention of s 18C.

15 I indicated in my earlier reasons for judgment that I held the preliminary view that an order should be made by the Court requiring HWT to publish what I called a corrective notice. I identified at [466] four purposes which such an order would serve to facilitate. Those purposes are:

- redressing the hurt felt by those injured;
- restoring the esteem and social standing which has been lost as a consequence of the contravention;
- informing those influenced by the contravening conduct of the wrongdoing involved; and
- helping to negate the dissemination of racial prejudice.

16 Similar purposes were relied upon by the Canadian Human Rights Tribunal when considering remedies under an Act which proscribed communications likely to expose a person to hatred or contempt by reason of race: see *Citron v Zundel* (2002) 41 CHRR D/274 (CHRT) at [300]-[301], referred to by Branson J in *Jones v Toben* [2002] FCA 1150 at [111].

17 I have received submissions on whether the Court should make an order requiring a corrective notice of the kind identified by my earlier reasons for judgment. Having considered the submissions made and in the absence of HWT having offered to publish an appropriate apology, I have determined that I will make an order consistent with the preliminary view that I earlier expressed. Such an order will require HWT to publish a corrective notice in the *Herald Sun* in print and online in a prominent position immediately adjacent to Mr Bolt's regular column. That will be required to be done on two separate occasions over the course of the next two weeks. The form and content of the corrective notice is attached to the orders of the Court.

18 The notice that I will require publication of begins with an introduction but is otherwise limited to the publication of the terms of the declaration made by the Court. In that respect, I have not accepted the submissions of Ms Eatock that a corrective notice should include an explanation of the claim made by Ms Eatock and a summary of the judgment of the Court. I accept that the Court has the power to make a corrective notice in more comprehensive terms than that which I have determined to make and that there may be occasions on which it would be appropriate for that to be done. On this occasion, the

declaration which the Court will make and which the corrective notice will include, sufficiently identifies the basis for the Court's determination that s 18C was contravened. Additionally, the notice will refer the reader to the Court's earlier reasons for judgment as well as the summary of those reasons. Having done that, the notice I will require publication of sufficiently serves the purposes I have identified at [15] above.

19 Mr Bolt and HWT contended that an order requiring the publication of a corrective notice serves no necessary purpose and would thus be punitive. It was contended that as a result of the extensive media reporting of the Court's judgment since my earlier reasons were published, the public vindication of Ms Eatock and the group of people affected by the contravening conduct has been fully achieved. Reliance was placed on decisions of this Court in relation to orders for corrective advertisements made in commercial cases, including upon the following passage from the reasons for judgment of Gordon J in *Australian Competition Consumer Commission v Telstra Corporation Limited* [2007] FCA 2058 at [5]:

> …the reasons for decision have already been widely reported in many forms of media and a trade rival of the Respondent has taken full page advertisements in major newspapers recording the findings that I made. In these circumstances, the objectives of corrective advertising have been addressed by those media reports and other advertising: *ACCC v CG Berbatis Holdings Pty Ltd* (2001) ATPR 41-802 at [10].

20 The purposes of Court ordered corrective advertising in response to misleading or deceptive conduct in trade or commerce were identified by Gordon J at [4]. Those purposes to some extent correspond with the purposes which I have identified at [15] above. They include informational and educative objectives but there are significant differences. Authorities dealing with corrective advertising are of some assistance, but the fact that different purposes are being addressed in those cases needs to be borne in mind.

21 An affidavit of James William Berman was filed and is sought to be relied upon by Mr Bolt and HWT. I will receive the affidavit. The affidavit exhibits a range of media articles relating to this case, to the RDA and to the issue of freedom of expression. The articles are not confined to publications in the *Herald Sun* and range across a number of media outlets. Ms Eatock filed and sought to rely upon an affidavit of Joel Meir Zyngier. To the extent that this affidavit refers to and exhibits articles published by the media, I will receive it. This affidavit exhibits four articles published in the *Herald Sun.* There are two editorials and two articles written by Mr Bolt. The articles were not included in Mr Berman's

affidavit. They deal with broadly the same subject matter dealt with by the articles which Mr Berman exhibited.

22 There are a number of difficulties with the contention of Mr Bolt and HWT that the media coverage to which I was referred should be regarded as sufficiently satisfying the four purposes which I have identified at [15] above.

23 It may be accepted that it is likely that most people in Victoria would now be aware that Mr Bolt and HWT were found to have contravened the RDA. However, the publication of the corrective notice that the Court will require serves a wider informational and educative purpose. It will inform those most likely to have been exposed to the Newspaper Articles, of the precise conduct of Mr Bolt and HWT which contravened s 18C and why that conduct was found by the Court to have contravened that provision. The articles to which I have been referred do not inspire me with confidence that this objective has already been sufficiently achieved. Unlike the situation before Gordon J in *ACCC v Telstra*, the findings made by the Court have not been the subject of a full page advertisement. Some of the Court's findings which the corrective notice will refer to may be gleaned from some of the articles. But I think it likely that, a reader exposed to the competing and often conflicting media commentary made upon the Court's judgment, will be better informed by access to a concise, authoritative statement formulated by the Court of the principal findings made by the Court. The notice will serve that purpose. It has useful work to do in relation to each of the purposes identified at [15]. It is neither unnecessary nor punitive.

COSTS RESERVED ON 10 DECEMBER 2010

24 On 29 September 2010, at the first directions hearing held in this matter, a trial date was allocated and the proceeding was listed for trial on 13 December 2010 on an estimate of four days. On 10 December 2010, at the instance of Mr Bolt and HWT, the matter was listed for a further directions hearing. At that hearing, it became clear that the matter was not ready to proceed to trial and that the listed trial dates needed to be vacated and new trial dates allocated. On that day, I reserved for later consideration the issue of who should pay for the costs of that directions hearing and any costs thrown away by the vacation of the trial.

25 Mr Bolt and HWT contend that Ms Eatock should be ordered to pay the reserved costs. Ms Eatock contends that given that she has succeeded in her claim, those costs should be paid by Mr Bolt and HWT.

26 At the first directions hearing, orders were made for the exchange of pleadings and for the parties to exchange witness summaries on or before 19 November 2010. As at 10 December 2010, witness summaries had not been exchanged and I accept that Mr Bolt and HWT were not at fault. Ms Eatock's lawyers had come to the view sometime earlier than 10 December 2010 that, unless full witness statements were exchanged prior to trial (rather than an exchange of summaries of the intended evidence of witnesses), the trial could not be completed in the four days allocated. As at 10 December 2010, full witness statements from the witnesses which Ms Eatock intended to call were in preparation but could not be completed in time to permit the trial to start as scheduled. In the preparation of those statements, it had also become apparent to Ms Eatock's advisors that amendments were required to Ms Eatock's statement of claim in order to raise additional matters upon which Ms Eatock wanted to rely. The exchange of full witness statements was not resisted by Mr Bolt and HWT. In fact, full witness statements had been suggested by them at the first directions hearing. In vacating the trial, I ordered that witness statements be exchanged and made orders for the filing and exchange of amendments to the pleadings.

27 Ms Eatock contended that the trial dates allocated on 29 September 2010 provided insufficient time for preparation. She contended that the exchange of full witness statements was a good idea. She said that the pursuance of that process by her was vindicated by the fact that court time was saved because most of Ms Eatock's witnesses were not required to attend for cross-examination. In essence, Ms Eatock points to good intentions being overtaken by unexpected circumstances and says that in the end, the vacation of the December trial dates had its benefits.

28 It may be accepted that the directions made on 29 September 2010 were overly ambitious given the nature of the case. Ms Eatock and her advisors were best placed to come to a realisation of that fact and it seems to me should have done so earlier than they did. The difficulty with Ms Eatock's argument is that it fails to explain why the need to recast the directions made on 29 September 2010 was not realised at a sufficiently early time to avoid Mr Bolt and HWT incurring unnecessary costs in the anticipation of a 13 December 2010

trial. The extent to which any preparation in anticipation of a trial commencing at that time had to be redone later is unclear. Insofar as there are costs thrown away of that kind, it seems to me that Ms Eatock should pay those costs. She should also pay Mr Bolt and HWT's costs of the directions hearing held on 10 December 2010. I will order that Ms Eatock pay the costs of Mr Bolt and HWT that were reserved on 10 December 2010.

THE OFFER OF SETTLEMENT MADE BY MR BOLT AND HWT

29 Ten days before the trial of this matter commenced, a confidential offer of settlement was made to Ms Eatock by Mr Bolt and HWT. The offer was conveyed in a letter from the solicitor for Mr Bolt and HWT to Ms Eatock's solicitors and was expressed in the following terms:

> We are instructed to make the following offer of settlement to your client in full and final resolution of the Federal Court proceedings:
>
> 1. Our clients would consent to the making by the Court of a declaration of a contravention of section 18C of the Act in the following terms:
>
> > *"The Court makes a declaration that the publication of the following articles:*
> > *i. 'One of these woman is Aboriginal' which was published on the First Respondent's blog on or about 20 March 2009 (**the First Blog Article**);*
> > *ii. 'It's so hip to be black' which was published in the Herald Sun on or about 15 April 2009 and online under the title 'White is the new Black' (**the First Article**);*
> > *iii. 'Aboriginal man helped' which was published on the First Respondent's blog on or about 19 August 2009 (**the Second Blog Article**); and*
> > *iv. 'White fellas in the black' which was published in the Herald Sun on or about 21 August 2009 (**the Second Article**)*
> >
> > *collectively **the Articles**,*
> >
> > *while it did not constitute and was not based on racial hatred or racial vilification, contravened section 18C of the Racial Discrimination Act in that the publication of the Articles was reasonably likely, in all of the circumstances, to offend, insult, humiliate or intimidate another person or group of people being the group members as defined in this proceeding, and the publication of the Articles was done because of the race, colour or national or ethnic origin of the group members".*
>
> 2. The Herald and Weekly Times Pty Ltd will undertake to the Court to add, as a prominent and permanent qualification to the online versions of the Articles, the wording of the declaration set out in paragraph 1 together with a statement to the effect that a declaration in that form was made by the Federal Court of Australia and the date on which the declaration is made.
>
> 3. Our clients will consent to an injunction restraining them from republishing any

of the Articles (other than the online versions as qualified in accordance with paragraph 2 hereof).

4. We understand that the proceeding has been instituted and prosecuted on a pro bono basis. We are conscious that there may be some costs for which a liability has arisen - such as filing fees and the like. To the extent to which the Applicant has incurred a legal liability to pay costs, our clients will consent to an order being made by the Court to the effect that the Respondents will pay any such costs on the usual party/party basis. For the sake of clarity, this offer does not include any attempt to retrospectively claim costs for work performed on a pro bono basis.

30 The letter also offered Ms Eatock an opportunity to publish material in the opinion pages of the *Herald Sun*, of a prominence and size equivalent to that of the first article for the purpose of responding to the Articles written by Mr Bolt. The letter identified that if the offer was rejected, Mr Bolt and HWT reserved the right to bring the making of the offer to the attention of the Court and rely upon it on the question of who should pay the costs of the proceeding. That Mr Bolt and HWT were making a *Calderbank* offer in reliance upon the principles enunciated in *Calderbank v Calderbank* [1975] 3 All ER 333 was also specified.

31 Ms Eatock rejected the offer on 21 March 2011. Mr Bolt and HWT contend that the offer made by them was reasonable. They say that Ms Eatock has achieved an outcome at trial that is no more favourable than the result Ms Eatock would have achieved if she had accepted the offer. They contend that the ordinary principle is that where a party fails to obtain judgment in terms as favourable as those of a *Calderbank* offer which has been rejected, that party should pay the costs of the other party after the date of rejection on an indemnity basis.

32 There is a strong public interest in disputes being settled sensibly without the need for a determination by a Court. Parties should be encouraged to settle their litigation if an appropriate compromise is available. In determining who should pay for the costs of litigation which could have been sensibly and appropriately resolved at an earlier time without the additional costs of a trial, the Court is entitled to use its very wide discretion to allocate the costs burden generated by a trial in a manner which rewards reasonable behaviour and penalises unreasonable conduct where that conduct has generated an unnecessary trial. It is possible therefore that the costs of a trial may be awarded against the party who succeeded at trial.

33 There are principles which condition the exercise of the Court's discretion to award costs against the successful party. The starting point is that ordinarily, a successful party is entitled to its costs. There must be some positive ground or good reason for departing from the ordinary course: *Australia Wide Airlines Limited v Aspirion Pty Ltd* [2006] NSWCA 365 at [54] (Bryson JA, with whom Basten and McColl JJA agreed). Unreasonable conduct can provide a basis for departing from the usual rule.

34 It is not sufficient that Mr Bolt and HWT simply establish that the offer they made was reasonable. It is necessary that they establish that Ms Eatock's rejection of their offer was unreasonable so as to justify an order that the subsequent costs incurred by Mr Bolt and HWT be paid by Ms Eatock: *Black v Lipovak* (1998) 217 ALR 386 at [217]-[218] (Miles, Heerey and Madgwick JJ); *Australian Competition and Consumer Commission v Harris Scarfe (No 2)* [2009] FCA 433 at [12] (Mansfield J); *Alpine Hardwood (Aust) Pty Ltd v Hardys Pty Ltd (No 2)* (2002) 190 ALR 121 at [38] (Weinberg J); *Review 2 Pty Ltd v Redberry Enterprises Pty Ltd (No 2)* [2008] FCA 1805 at [23] (Kenny J). Whether the rejection was unreasonable is to be considered in the light of the circumstances that existed at the time of the rejection: *Black* at [218]; *Seven Network Ltd v News Ltd* [(2007) 244 ALR 374 at [65] (Sackville J); *Review 2* at [24] (Kenny J).

35 Ms Eatock contended that it has not been established that her rejection of the offer was unreasonable. There are a number of reasons why, in my view, Ms Eatock is correct. Mr Bolt and HWT have not demonstrated that at the time Ms Eatock rejected their offer, she did not have a reasonable or realistic prospect of obtaining a better result at trial: *Seven Network* at [71]-[84] (Sackville J). The reasonable pursuance of a better result at trial will ordinarily negate a conclusion that the rejection of an offer was unreasonable. The result actually achieved will be a significant consideration but is not determinative of whether a reasonable prospect of success existed at the time of the rejection of the offer.

36 To evaluate whether Ms Eatock had a reasonable prospect of achieving a better result than that which was offered, it is necessary to take into account what was sought by Ms Eatock and what she has achieved or could reasonably have achieved.

37 It is important at the outset to appreciate that Ms Eatock has made no claim for money. This is not a commercial dispute in which victory can be measured in monetary

terms. It is a proceeding in which the relief sought was confined to a declaration, the publication of an apology and an injunction restraining republication of the Articles. The extent of any victory in a case like this was always going to be measured, at least to a significant degree, by the nature and extent to which wrongdoing was found in the conduct of Mr Bolt and HWT and the extent to which Ms Eatock and the group for whom she brought the proceeding, had their position vindicated by the findings and orders made by the Court.

38 As Mansfield J said in *Harris Scarfe* at [10], whilst ordinarily compromises are to be encouraged, there may be circumstances where having regard to the nature of the allegations made, compromises may not be appropriate at all because "a party may properly seek the vindication which a favourable court determination will recognise". The judge there referred by way of example to a party seeking to vindicate allegations of serious fraud or dishonesty, as providing a possible justification for a court not exercising its costs discretion as it might otherwise have done in the face of the rejection of a *Calderbank* offer. Mansfield J recognised that there may be circumstances "where the particular issues are of such importance that it is proper to seek a judicial determination of them": at [10].

39 The circumstances of this case may support a conclusion that this is a case of the kind that falls within the scope of what Mansfield J had in mind. However, it is not necessary that I should resolve the exercise of my discretion on that basis. In my view, the orders made by the Court were reasonably in prospect at the time Ms Eatock rejected the offer made by Mr Bolt and HWT. What Ms Eatock has achieved by those orders is significantly superior to that which would have been achieved if the offer had been accepted. In those circumstances, I am not satisfied that Ms Eatock's rejection of the offer made was unreasonable.

40 To explain why I have come to that view, I shall consider first the declaration offered and the declaration obtained. The offer made was for the parties to consent to the Court making a declaration in particular and specific terms which included the Court declaring that s 18C of the RDA had been contravened. It is apparent, however, that even if Ms Eatock had accepted the offer, what was offered would not have been achieved for a number of reasons.

41 Firstly, the consent of the parties is not a basis upon which the Court could have made a declaration, unless the Court was first satisfied that it should do so. The Court's power to grant any relief in this case, including by way of a declaration, is provided by s 46PO(4) of

the *Australian Human Rights Commission Act 1986* (Cth). The Court's power under that provision can only be exercised if the Court is itself satisfied that there has been unlawful conduct in contravention of Part IIA of the RDA. Evidence or at least a statement of agreed facts demonstrating that Mr Bolt and HWT had contravened s 18C was required to be put before the Court before any declaration could have been made: see the cases discussed by Perram J at [10] to [27] of *Australian Competition and Consumer Commission v MSY Technology Pty Ltd (No 2)* (2011) 279 ALR 609.

42 The offer made by Mr Bolt and HWT made no mention of the evidentiary basis upon which the Court would be asked to make the declaration which was offered. Many of the evidentiary findings achieved by Ms Eatock through the resolution of her application by the Court's judgment have contributed in a significant way to the vindication which she has achieved. Those findings include findings that many of the facts asserted by the Newspaper Articles were untrue or substantially untrue including the assertion that Ms Eatock and the people dealt with in the Articles chose to identify as Aboriginal people. A statement of agreed facts could have achieved a similar result. No such proposal was made. More fundamentally, no proposal at all was made for an evidentiary basis to be put before the Court in support of the Court making the declaration offered. In the absence of that evidentiary basis, the Court would not have made the declaration offered and, in that respect, the offer of a declaration was hollow.

43 Secondly, there is considerable uncertainty as to whether the Court could have made any consent declaration at all even if the evidentiary basis for it had been agreed. The presence of a contradictor (in the sense of a party contesting the declaratory relief sought) is arguably a mandatory pre-condition for the Court making a declaration. That pre-condition is absent in the case of a declaration sought by consent. There are conflicting decisions of the Court as to the requirement of a contradictor: *MSY Technology* at [28]-[43] (Perram J); *Australian Competition and Consumer Commission v Willesee Health Care Pty Ltd (No 2)* [2011] FCA 752 at [22]-[44] (Dodds-Streeton J). It is sufficient for relevant purposes to say that in the context of that uncertainty and in the absence of an agreed evidentiary basis to support the declaration offered, it was not unreasonable for Ms Eatock to have rejected the offer.

44 There is also a third point. Even if all of the impediments to which I have referred could have been overcome, the Court could not have made a declaration in the terms offered by Mr Bolt and HWT. The declaration which was offered was to expressly state that the publication of the Articles "did not constitute and was not based on racial hatred or racial vilification". At [458] of my earlier judgment, I rejected the inclusion of such a qualification in the declaration which the Court will make. I did so including because the declaration the Court makes has to be based upon facts or matters which the Court is called upon to determine. Section 18C calls upon the Court to determine whether the conduct impugned is done "because of…race". It does not call upon the Court to determine whether or not the conduct was "based on racial hatred or racial vilification" and nor does it call upon the Court to determine whether or not the conduct constituted "racial hatred or racial vilification". The Court is not empowered to grant relief falling outside the boundaries drawn by the power granted to it: *Thomas Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 161 (Gibbs CJ, Stephen, Mason and Wilson JJ). A declaration of the kind offered would not have been made and if made would not have been valid. For that reason also, Ms Eatock's rejection of the offer made for a consent declaration was not unreasonable.

45 Furthermore, assuming for the moment that a valid declaration in the terms offered could have been made, it was not unreasonable for Ms Eatock to reject the offer because the terms of the declaration offered were inferior to the terms which Ms Eatock had a reasonable prospect of achieving and has achieved. The following differences demonstrate that inferiority which, in each case, is of some consequence to the extent to which wrongdoing is acknowledged and vindication is provided:

- The declaration offered did not identify Mr Bolt and HWT as contravening s 18C but only that the publication of the Articles contravened that provision;
- The declaration offered sought to qualify the nature of the contravention by the inclusion of the words "did not constitute and was not based on racial hatred or racial vilification". This was a significant qualification (cf *Harris Scarfe* at [20]-[23]). The qualification sought to exculpate the conduct in question by reference to terms that are not defined and are of an uncertain reach. The inclusion of those words would have left the declaration open to being interpreted as though only a technical or insignificant, rather than a serious, contravention of s 18C had been found by the Court;

- The declaration offered failed to set out all of the principal findings which the declaration which the Court will make does and in that respect it did not clearly reflect the expression of the contravention adopted by the Court: *Harris Scarfe* at [23].

46 I should say that, in this last respect, I do not accept the contention of Mr Bolt and HWT that a comparison of the terms of the declaration offered should only be made against the terms of the declaration claimed in the Amended Application. The form of a declaration sought by an initiating application is often skeletal and is ultimately fashioned by the findings the court has made. Ms Eatock was entitled to consider the terms of the declaration offered by reference to the form of declaration which would likely be made if she succeeded on the matters at issue which, at the time of the rejection of the offer, were apparent from the entirety of the pleadings and the statements of evidence filed and exchanged.

47 By her Amended Application, Ms Eatock claimed an injunction restraining the republication or further publication of the Articles or articles the content of which is the same as, or substantially similar to, that contained in the Articles. The offer made by Mr Bolt and HWT was for an order restraining republication of "any of the Articles". It is not clear whether the offer extended to the republication of any part of the Articles or was intended only to restrain the republication of the entirety of the Articles. A party making a *Calderbank* offer needs to do so in clear terms: *Grbavac v Hart* [1997] 1 VR 154 at 160 (Tadgell JA with whom Winneke P agreed); *John Goss Projects Pty Ltd v Thiess Watkins White Constructions Ltd (In liq)* [1995] 2 Qd R 591 at 595 (Williams J); *Becker v Queensland Investment Corporation and Bovis Lend Lease Pty Ltd (No 2)* [2009] ACTSC 147 at [12] (Refshauge J). Ms Eatock is entitled to take the benefit of any ambiguity. Doing so results in a conclusion that the orders offered were inferior to those that will be made, because those orders extend to restraining the republication of not only the entirety of the Newspaper Articles but any substantial parts thereof. I should add that I do not regard as unreasonable any insistence by Ms Eatock upon the claim made by her for an injunction restraining the publication of an article in substantially similar terms to those of the Newspaper Articles. Although I declined to make orders of that kind, other judges of this Court have made orders in those or similar terms in relation to contraventions of s 18C: see *Jones v Scully* (2002) 120 FCR 243; *Jones v Toben* [2002] FCA 1150; *Silberberg v The Builders Collective of Australia* (2007) 164 FCR

475. For those reasons, I am also not satisfied that it was unreasonable for Ms Eatock to reject the offer that was made for an injunction restraining republication.

48 The offer of a declaration and injunction made by Mr Bolt and HWT extended beyond the Newspaper Articles and included the first and second blog article. I have taken into account that Ms Eatock only succeeded in relation to the Newspaper Articles. To that extent the declaration and injunction offered were superior to that obtained. It may be accepted that for the reasons set out at [269]-[277] of my earlier reasons for judgment, as at the time the offer was rejected, there was no reasonable or realistic prospect of Ms Eatock obtaining relief in relation to the blog articles. However the importance of the blog articles to the case run by Ms Eatock was minor relative to the importance of the Newspaper Articles. The blog articles were only pressed in relation to two people in the group on behalf of whom the claim was brought: [277] of earlier reasons for judgment. When that is taken into account together with all the countervailing factors to which I have already referred, the conclusions I have reached about whether Ms Eatock's rejection of the offer was unreasonable are not altered.

49 Ms Eatock also sought an order that both Mr Bolt and HWT publish an apology. At trial, Ms Eatock only pressed for an apology from HWT. The publication of an apology was not included in the offer made by Mr Bolt and HWT but the offer made included an opportunity for an article written by Ms Eatock to be published in the *Herald Sun*.

50 I determined that I would not compel an apology if HWT was unwilling to give one and that, in the absence of an apology, I would consider an order for a corrective notice to be published twice in the *Herald Sun*. I have now determined to make such an order. Although I determined that I would not compel an apology, other judges have indicated a preparedness to make such an order in cases of this kind: *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at [34] (Kiefel J).

51 Ms Eatock's claim for such an order was not unreasonable and neither was her rejection of an offer which in essence offered her the publication of an article instead of the publication of an apology. An apology includes an acknowledgment of wrongdoing together with an act of contrition. The publication of an article had value to Ms Eatock but offered neither of the elements which Ms Eatock was seeking through an apology. By reference to the orders I have determined to make, Ms Eatock has not achieved contrition from Mr Bolt or

HWT but has achieved, through the publication of a corrective notice, the publication of the Court's acknowledgment that they were involved in wrongdoing. That is a superior result to that which was offered and it has been achieved because of Ms Eatock's pursuance of an apology. That pursuance, and the rejection of what was offered in its stead, was not unreasonable.

52 For all those reasons, I am not persuaded that the ordinary course should not be followed. Having succeeded in her claim, Ms Eatock's costs should be paid by Mr Bolt and HWT.

53 There is one other matter which has been raised by the submissions of the parties, despite the fact that on 7 October 2011 I ruled that I would not determine that issue at this juncture. The issue relates to whether or not Ms Eatock has incurred any liability to pay for her solicitor and her counsel. That matter goes to the quantification of costs and not to the liability of Mr Bolt and HWT to pay Ms Eatock's costs. If it remains an issue, it may be dealt with together with any other costs quantification issues that may require determination upon a taxation of Ms Eatock's costs.

I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromberg.

Associate:

Dated: 19 October 2011