Federal Court of Australia

Jones v Toben (includes explanatory memorandum) [2002] FCA 1150 (17 September 2002)

Last Updated: 17 September 2002

FEDERAL COURT OF AUSTRALIA

[2002] FCA 1150

JONES v TOBEN

EXPLANATORY MEMORANDUM

1 By this proceeding the applicant sought orders of the Court for the enforcement of determinations made by the Human Rights and Equal Opportunity Commission ("HREOC") on 5 October 2000. HREOC found that the respondent had engaged in conduct rendered unlawful by section 18C of the *Racial Discrimination Act 1975* (Cth) ("the Racial Discrimination Act") by publishing on a website material that vilified Jews.

2 The proceeding before the Court was finally determined on an application made by the applicant for summary judgment. The application for summary judgment was made approximately fourteen months after the proceeding was instituted in the Court.

3 The Court has exercised its discretion to give judgment on the application for summary judgement because it was satisfied that the respondent was unwilling to co-operate with the Court and the applicant in bringing the proceeding to trial within an acceptable timeframe or at all. Although the respondent did not defend the application for summary judgment, the applicant was required to place evidence before the Court to justify the orders sought by him.

4 The Court was satisfied on the evidence adduced by the applicant that the respondent, as director of the Adelaide Institute, has published material on the World Wide Web which is reasonably likely, in all of the circumstances, to offend, insult, humiliate and intimidate Jewish Australians or a group of Jewish Australians ("the offending material"). The Court was further satisfied that the respondent published the offending material because of the ethnic origin of Jewish Australians. As the respondent filed no defence in the proceeding there was no occasion for the Court to consider whether the respondent's conduct fell within any exemption to the operation of s 18C of the Racial Discrimination Act.

5 The Court has made an order declaring that the respondent has engaged in conduct rendered unlawful by Part IIA of the Racial Discrimination Act. It has also made orders requiring the respondent to remove the offending material, and any other material the content of which is substantially similar to the offending material, from all World Wide Web sites controlled by him or the Adelaide Institute and not to publish or republish such material.

6 The respondent sought to characterise this proceeding as one raising important issues concerning freedom of speech in this country. The debate as to whether the Racial Discrimination Act should proscribe offensive behaviour motivated by race, colour or national or ethnic origin, and the extent to which it should do so, was conducted in the Australian Parliament by the democratically elected representatives of the Australian people. The Parliament resolved to enact Part IIA of the Racial Discrimination Act which includes s 18C. Australian judges are under a duty, in proceedings in which reliance is placed on Part IIA of the Racial Discrimination Act, to interpret and apply the law as enacted by the Parliament.

7 This memorandum and the reasons for judgment will be available on the internet at www.fedcourt.gov.au after the delivery of judgment.

Federal Court of Australia

Sydney

17 September 2002

FEDERAL COURT OF AUSTRALIA
Jones v Toben [2002] FCA 1150

HUMAN RIGHTS AND DISCRIMINATION LAW - racial discrimination - racial vilification - proceedings to enforce determination of Human Rights and Equal Opportunity Commission - hearing *de novo* of original complaint - representative claim - necessity for class to be closed - entitlement of applicant alone to institute proceeding - whether Jews in Australia constitute a group of people with common "ethnic origin" - whether non-password protected website caused material to be `communicated to the public' - meanings of the words offend, insult, humiliate, or intimidate - ordinary meaning -- whether publication of material on website reasonably likely to offend or intimidate Jews in Australia - objective test - real effects - whether "ethnic origin" one factor in the content of material on website

RACIAL VILIFICATION - applicable principles in determining whether material reasonably likely to offend, insult, humiliate or intimidate - principles of defamation - objective test - whether imputations would be conveyed to an ordinary reasonable reader

PRACTICE AND PROCEDURE - Federal Court Rules - summary judgment - repeated failure of respondent to file a defence - respondent unwilling to cooperate in bringing proceeding to trial

RELIEF - injunctions - utility of injunction to restrain Internet publication - whether apology or retraction should be ordered

WORDS AND PHRASES - "likely", "offend, insult, humiliate or intimidate", "because of"

Racial Discrimination Act 1975 (Cth) ss 18C, 18D, 22, 25L, 25Y, 25Z, 25ZC

Human Rights Legislation Amendment Act (No 1) 1999 (Cth) Part 2 ss 4-22

Acts Interpretation Act 1901 (Cth) s 8(e)

Human Rights and Equal Opportunity Commission Act 1986 ss 46PQ, 46PR and 46PT

Federal Court Rules O 4 r 3(1)(b), O 10 r 7, O 11 r 23, O 19, O 20 r 1

Executive Council of Australian Jewry v Scully (1998) 79 FCR 537 cited

Jones v Scully [2001] FCA 879 cited

Fisher v Rural Adjustment & Finance Corporation of Western Australia (1995) 57 FCR 1 referred to

Lenijamar Pty Ltd v AGC (Advances) Ltd [1990] FCA 520; (1990) 27 FCR 388 cited

Citron v Zündel (No. 4) (2002), 41 C.H.R.R. D/274 (C.H.R.T.) referred to

Miller v Wertheim [2002] FCAFC 156 cited

Jones v Scully [2002] FCA 1080 cited and followed

Tilmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union [1979] FCA 85; (1979) 42 FLR 331 followed

Creek v Cairns Post Pty Ltd [2001] FCA 1007; (2001) 112 FCR 352 cited and followed

Vincent v Peacock [1973] 1 NSWLR 466 at 468 referred to

The Macquarie Dictionary 2nd ed and *The Oxford English Dictionary* 2nd ed

JEREMY JONES v FREDRICK TOBEN

N 327 OF 2001

BRANSON J

17 SEPTEMBER 2002

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY N 327 of 2001

BETWEEN: JEREMY JONES

	APPLICANT
AND:	FREDRICK TOBEN
	RESPONDENT
JUDGE:	BRANSON J
DATE OF ORDER:	17 SEPTEMBER 2002
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. It be declared that the respondent has engaged in conduct rendered unlawful by Part IIA of the *Racial Discrimination Act 1975* (Cth) by publishing to the public on the World Wide Web the document headed *"About the Adelaide Institute"* a true copy of which is part of annexure `PJW4' to the affidavit of Peter John Wertheim sworn 29 March 2001 and filed in this proceeding (`the document headed *"About the Adelaide Institute"*').

2. The respondent:

(a) within seven days of the date of this order do all acts and things necessary to remove from the website http://www.adelaideinstitute.org and from all other World Wide Web websites the content of which is controlled by him or by the Adelaide Institute:

(i) the document headed *"About the Adelaide Institute";*

(ii) any other material with substantially similar content to the document *"About the Adelaide Institute"*; and

(iii) any other material which conveys the following imputations or any of them -

A there is serious doubt that the Holocaust occurred;

B it is unlikely that there were homicidal gas chambers at Auschwitz;

C Jewish people who are offended by and challenge Holocaust denial are of limited intelligence;

D some Jewish people, for improper purposes, including financial gain, have exaggerated the number of Jews killed during World War II and the circumstances in which they were killed.

3. The respondent be restrained, and is hereby restrained, from publishing or republishing to the public, by himself or by any agent or employee, on the World Wide Web or otherwise:

(i) the document headed *"About the Adelaide Institute"*;

(ii) any other material with substantially similar content to the document *"About the Adelaide Institute*; and

(iii) any other material which conveys the following imputations or any of them -

A there is serious doubt that the Holocaust occurred;

B it is unlikely that there were homicidal gas chambers at Auschwitz;

C Jewish people who are offended by and challenge Holocaust denial are of limited intelligence;

D some Jewish people, for improper purposes, including financial gain, have exaggerated the number of Jews killed during World War II and the circumstances in which they were killed.

This order is not intended to derogate from the time allowed by Order 2 hereof for the removal of material from World Wide Web websites controlled by the respondent or by the Adelaide Institute.

4. The respondent pay the applicant's costs of the proceeding, including reserved costs if any.

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY N 327 of 2001

BETWEEN:	JEREMY JONES APPLICANT
AND:	FREDRICK TOBEN RESPONDENT
JUDGE:	BRANSON J
DATE:	17 SEPTEMBER 2002
PLACE:	SYDNEY

REASONS FOR JUDGMENT

INTRODUCTION

1 This proceeding was commenced on 30 March 2001 by the filing of an application in the Court. Filed with the application was an affidavit sworn by Peter John Wertheim ("Mr Wertheim") on 29 March 2001. The application seeks, in effect, to enforce determinations of the Human Rights and Equal Opportunity Commission ("HREOC") made on 5 October 2000 pursuant to s 25Z(1)(b) of the *Racial Discrimination Act 1975* (Cth) ("the RDA").

2 The applicant is described in the application and subsequent documents filed in the Court as *"Jeremy Jones for himself and for the members for the time being of the Committee of Management of the Executive Council of Australian Jewry".* I return to this description below. The respondent is the Director of the Adelaide Institute.

3 By an amended notice of motion dated 4 June 2002 the applicant has applied for summary judgment in the proceeding.

4 The determinations of HREOC were made following an inquiry conducted on 2 November 1998 into a complaint made to HREOC on 31 May 1996. The complaint was made by a letter dated 28 May 1996 on the letterhead of the Executive Council of Australian Jewry. It is signed, apparently by the applicant, over the name and description *"Jeremy Jones Executive Vice-President".* The letter, which is addressed to the Race Discrimination Commissioner, reads:

> *"Subject: Complaint against `The Adelaide Institute'*
> *Dear Ms Antonios,*
>
> *This Council wishes to lodge a formal complaint with your office under the* Racial Hatred Act, 1995 *concerning the World Wide Web site for The Adelaide Institute (http://www.adam.com.au/~fredadin/adins.html).*
>
> *At this site the Adelaide Institute has published material which constitutes malicious anti-Jewish propaganda. Not only does the home page contain denial of the Nazi Genocide of the Jews and blames Jews for the crimes of Stalin, but in other directories, particularly the `Adelaide Institute Update', material is reproduced which makes statement such as `the well-connected Jewish Loby* [sic] *wants to signal to those who are aware of their various rackets and schemes, that if you "cross" them as an individual, or as a nation, then they will boycott, hound, persecute and ultimately punish you, using Gentile Government agencies and Gentile Taxpayers money' and `one day, in the not too distant future the tables might well have turned and the aroused Gentile world will mete out Justice and Vengeance ...'.*
>
> *The site has been advertised in the national press and its existence is unambiguously a `public act' which is `reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people' and `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'."*

5 By letter dated 10 April 1997 the Race Discrimination Commissioner referred the complaint, which she had concluded was not amenable to conciliation, to HREOC for inquiry.

6 Section 18C of the RDA provides:

> *"(1) 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.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:
(a) causes words, sounds, images or writing to be communicated to the public; or

(b) is done in a public place; or

(c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

public place includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place."

7 The determinations made by the Inquiry Commissioner following her inquiry were as follows:

"(1) I find the complaint substantiated;
(2) I declare that the respondent Dr Fredrick Toben, representing the Adelaide Institute, has engaged in conduct rendered unlawful by section 18C of this Act in the publication of material racially vilificatory of Jewish people, on the Adelaide Institute's Internet site. This conduct is rendered unlawful by Part IIA of the Act;

(3) I declare that the respondent Dr Fredrick Toben, representing the Adelaide Institute, should remove the contents of the Adelaide Institute website from the World Wide Web and not re-publish the content of that website in public elsewhere;

(4) I declare that the respondent Dr Fredrick Toben, representing the Adelaide Institute, should make a statement of apology to Mr Jeremy Jones and those members of the Jewish community of Australia who he represented in this complaint. That apology should be made in writing to Mr Jones, and further should appear on the home page of the Adelaide Institute website. The terms of the apology are to be as follows:

`I hereby unreservedly and unconditionally apologise to you and to the Australian Jewish community for having published materials inciting hatred against the Jewish people in contravention of the Racial Discrimination Act. I undertake that neither I nor any employee or agent of mine (actual or ostensible) will publish any such material in the future and that all such material

> which is presently published by me, or by any employee or agent of mine (actual or ostensible) in any print or electronic media (including the Internet) will forthwith be withdrawn from publication'."

APPLICATION TO THE COURT

Cause of Action

8 The application in this proceeding is headed:

> *"An application under the* Human Rights and Equal Opportunity Act 1986 *and the* Human Rights Legislation (Amendment) Act 1999 [sic] *to enforce a determination of unlawful discrimination by the Human Rights and Equal Opportunity Commission under the* Racial Discrimination Act 1975*."*

The accuracy of this description depends upon the proper construction of the *Human Rights Legislation Amendment Act (No 1) 1999* (Cth) ("the Amendment Act"). The Amendment Act amended Commonwealth anti-discrimination legislation to alter the functions and structure of HREOC and to respond to the decision of the High Court in *Brandy v HREOC* [1995] HCA 10; (1995) 183 CLR 245 by providing for complaints which cannot be conciliated but require determination to be heard in the Court rather than by HREOC.

9 The Amendment Act contains transitional provisions concerning complaints which had been lodged with HREOC under the pre-existing statutory regime but which had not been completed at the commencement of Part 2 of the Amendment Act. Part 2 of the Amendment Act, which is comprised of ss 4-22, is headed *"Transitional and application provisions".* It commenced operation on the "starting day" which proved to be 13 April 2000.

10 Section 13 of the Amendment Act is concerned with complaints where an inquiry had commenced at the "starting day". The section relevantly provides:

> *"(1) A complaint is treated in the way set out in subsection (2) if, before the starting day:*
> *(a)* a holding of an inquiry into the complaint had started under the ... old RDA ... ; and
>
> *(b)* the complaint had not been withdrawn under whichever of the following sections is applicable:
>
> *(i)* ...
>
> *(ii)* section 25A of the old RDA;
>
> *(iii)* ...
>
> *(2)* The amendments made by Schedule 1 to the Act do not apply in relation to the complaint."

11 The Amendment Act defines the expression "old RDA" to mean the RDA before it was amended by Schedule 1 of the Amendment Act. The substantive amendments of the Commonwealth anti-discrimination legislation, including the RDA, effected by the Amendment Act are contained in Schedule 1 of the Amendment Act.

12 The holding of an inquiry into Mr Jones' complaint against Dr Toben had started before 13 April 2000 and the complaint had not been withdrawn. Consequently the amendments made by Schedule 1 of the Amendment Act did not apply in relation to the complaint (s 13 of the Amendment Act - see [7] above). As a written submission signed by Mr Rothman SC, counsel for the applicant, recognised, it is thus s 25ZC of the RDA which gives this Court jurisdiction to impose the determination made by HREOC (s 8(e) of the *Acts Interpretation Act 1901* (Cth)).

13 Section 25ZC relevantly provides:

> *"(1) The Commission, the complainant, or a trade union acting on behalf of the complainant, may commence proceedings in the Federal Court for an order to enforce a determination made under subsection 25Y(1) or 25Z(1) after the commencement of this Division, except where the respondent to the determination is a Commonwealth agency or the principal executive of a Commonwealth agency.*
> *(2)* If the Court is satisfied that the respondent has engaged in conduct or committed an act that is unlawful under this Act, the Court may make such orders (including a declaration of right) as it thinks fit.
>
> ...
>
> *(5)* In the proceedings, the question whether the respondent has engaged in conduct or committed an act that is unlawful under this Act is to be dealt with by the Court by way of a hearing de novo, but the Court may receive as evidence any of the following:
>
> *(a)* a copy of the Commission's written reasons for the determination;
>
> *(b)* a copy of any document that was before the Commission;
>
> *(c)* a copy of the record (including any tape recording) of the Commission's inquiry into the complaint.
>
> *(6)* In this section:
>
> **`complainant'**:
>
> *(a)* in relation to a representative complaint - means any of the class members ..."

14 Nonetheless ss 46PQ, 46PR and 46PT of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) as amended by Schedule 1 of the Amendment Act apply to the conduct of this proceeding. Only s 46PR is relevant. It has the effect that, subject to Chapter

III of the Constitution, the Court is not bound by technicalities or legal forms. I place reliance on s 46PR in treating as immaterial the failure of the application to specify accurately the legislative provision upon which the relief claimed depends as required by O 4 r 3(1)(b) of the Federal Court Rules.

The Applicant

15 Section 22 of the RDA authorises a complaint in writing alleging that a person has done an act that is unlawful by virtue of a provision of Part II or Part IIA to be lodged with HREOC by, amongst others, *"a person aggrieved by the act, on that person's own behalf or on behalf of that person and ... other persons aggrieved by the act"*. A complaint where the persons on whose behalf the complaint was made include persons other than the complainant is a *"representative complaint"* within the meaning of the RDA (see s 3(1) of the RDA). It appears from the reasons for decision of the Inquiry Commissioner that she proceeded on the basis that the original complaint in the matter (ie the complaint lodged with HREOC on 31 May 1996) was lodged by *"Jeremy Jones and members of the Committee of Management of the Executive Council of Australian Jewry, on behalf of those members of the Jewish Community of Australia who are members of organisations affiliated to the Executive Council of Australian Jewry".* The Inquiry Commissioner determined that the original complaint was a representative complaint within the meaning of the RDA and that it complied with the requirements of s 25L of the RDA.

16 Section 25L governs the circumstances in which a representative complaint may be lodged, and the content of a representative complaint. At the time of her determination in this regard the Inquiry Commissioner did not have the guidance later provided by the decision of Wilcox J in *Executive Council of Australian Jewry v Scully* (1998) 79 FCR 537. It may be that the class of persons on whose behalf she regarded the complaint as having been made was too wide. It seems unlikely that every member of the Jewish Community of Australia who was as at the date of the complaint a member of an organisation affiliated with the Executive Council of Australian Jewry would have been a person actually aggrieved by the conduct of which complaint was made. Some members of this wide class may never have heard of the Adelaide Institute or seen its website. It is unnecessary, however, to pursue this issue. The application to the Court has not been made by the members of the class to which the Inquiry Commissioner gave consideration.

17 Section 25ZC of the RDA relevantly provides that *"the complainant"* before HREOC may commence proceedings in the Federal Court for an order to enforce a determination made by HREOC. Any of the class members in relation to a representative complaint is a *"complainant"* for the purposes of s 25ZC (see s 25ZC(6)). Jeremy Jones was a complainant before HREOC and was therefore entitled to commence this proceeding.

18 However, if the words *"the members for the time being of the Committee of Management of the Executive Council of Australian Jewry"* are intended to describe a class the members of which will vary over time as individuals join the Committee of Management of the Executive Council of Australian Jewry and other individuals leave the Committee, difficulties arise in treating all members of that class as complainants. First, more than five years have

passed since the lodging of the original complaint with HREOC. The present members of that class are unlikely all to have been *"members of the Committee of Management of the Executive Council of Jewry"* when the original complaint was lodged. That is, they are unlikely all to have been complainants before HREOC. Secondly, nothing in the RDA or elsewhere provides any support for the idea that a proceeding may be commenced in this Court by a class of persons identified in such a way that the membership of the class is not constant. Were such a course possible the rules of the Court touching on the addition and removal of parties would be entirely overridden.

19 It is not necessary to decide in this case whether only individuals or bodies corporate identified by name may commence proceedings in this Court in reliance on s 25ZC of the RDA. Even if the class intended to be described by the words *"the members for the time being of the Committee of Management of the Executive Council of Australian Jewry"* is the members of the Committee at the time that this proceeding was instituted, there would still be the difficulty that every member of the class has not been shown to have been a complainant before HREOC.

20 Jeremy Jones ("Mr Jones") was not authorised, in my view, to commence the proceeding *"for the members for the time being of the Committee of Management of the Executive Council of Australian Jewry".* However, as is mentioned above, where a representative complaint has been made to HREOC, s 25ZC authorises any member of the class to commence an enforcement proceeding in this Court (*Jones v Scully* [2001] FCA 879 at [11]-[17]). Mr Jones was a complainant before HREOC. He is to be regarded as the applicant in this proceeding. The words of description or qualification which follow his name in the title of the proceeding may be disregarded as surplusage.

Nature of the Proceeding

21 Section 25ZC(5) of the RDA provides:

> *"In the proceedings, the question whether the respondent has engaged in conduct or committed an act that is unlawful under this Act is to be dealt with by the Court by way of a hearing* de novo, *but the Court may receive as evidence any of the following:*
> *(a)* a copy of the Commissioner's written reasons for the determination.
>
> *(b)* A copy of any document that was before the Commission;
>
> *(c)* A copy of the record (including any tape recording) of the Commission's inquiry into the complaint."

22 In my view, the clear intention of s 25ZC is that the complaint which gave rise to the determination of HREOC made under s 25Y(1) or 25Z(1) is to be substantiated before this Court following a hearing *de novo.* Section 25ZC does not authorise the initiation in this Court of a proceeding in respect of an act alleged to be unlawful under the RDA concerning which HREOC has not made a determination.

23 A copy of the Inquiry Commissioner's written reasons for determination, copies of documents that were before the Inquiry Commissioner and a transcript of the proceeding before the Inquiry Commissioner on 2 November 1998 were received in evidence. In addition, certain evidence was adduced for the first time before this Court.

HISTORY OF THE PROCEEDING

24 This proceeding, like the enquiry before the Inquiry Commissioner, has had a troubled history.

25 The application was filed in the Court on 30 March 2001. The first directions hearing was delayed from early May to 1 June 2001 to accommodate the respondent's convenience. The respondent had advised the Court that he would be overseas during May 2001 and from the second week of June 2001 for about three weeks.

26 On 1 June 2001 a first directions hearing was held. The respondent participated, without legal representation, by telephone. He indicated that he denied having engaged in conduct rendered unlawful by the RDA. As I considered that the parties, and especially the respondent, would be assisted by:

(a) the question of the applicant's entitlement to relief (ie the question of whether the respondent had done an act that was unlawful under s 18C of the RDA) being determined ahead of consideration of any other questions; and

(b) having the hearing dates for the separate question fixed so that they could plan accordingly,

I fixed 12, 13 and 14 November 2001 as the hearing dates for the separate question. The directions hearing was otherwise stood over to 10 July 2001 when I was scheduled to be in Adelaide. I indicated that on 10 July 2001 directions would be made for the purpose of ensuring that the question of the applicant's entitlement to relief could be heard in November 2001. The respondent indicated that he would seek legal advice before that time and I urged him to do so.

27 On 10 July 2001 the directions hearing resumed in Adelaide. The respondent again appeared without legal representation. Mr Rothman SC, counsel for the applicant, appeared by video link from Sydney. The respondent indicated that he had been unsuccessful in obtaining legal representation and would continue to represent himself. He sought leave to file in Court a document headed *"Response and Counterclaim"* and an affidavit. I briefly perused the documents. The first did not comply in almost any respect with the requirements of the Federal Court Rules concerning a defence and counterclaim. This was not surprising as the applicant had not been directed to, and had not, filed a statement of claim. It claimed, amongst other things, certain "relief" on the basis that the applicant had initiated *"Stalinist -like court actions"* and behaved in *"blatant totalitarian behaviour"*. The content of the affidavit was discursive and argumentative in nature. It was largely irrelevant to any question to be decided in the proceeding and included serious personal attacks on

the applicant and other individuals including another judge of the Court. I refused the respondent leave to file the documents in Court. The documents were returned to him.

28 The respondent asked that the proceeding be moved to the South Australia District Registry and that the application be struck out on the basis that the applicant *"is a known Zionist, racist, who is very active in international politics".* During the course of the hearing on 10 July 2001 Dr Toben indicated that he regarded me as biased on the basis that I had said, in the context of his having asked that the proceeding be moved to the South Australia District Registry and for an order striking out the application, that:

> *"The appropriate way, Dr Toben, is to issue a notice of motion out of the Court identifying the orders that you seek to have made and supporting that notice of motion by appropriate evidentiary material. Material that is simply scandalous in nature, Dr Toben, will not support either of those applications."*

I indicated to Dr Toben that if he wished to make an application that I disqualify myself from continuing involvement in the proceeding an order to that effect could also be included in a notice of motion which identified the orders sought by him.

29 I directed on 10 July 2001 that if the respondent proposed to proceed with the applications foreshadowed by him, or any of them, he should file and serve an appropriate notice of motion, and the affidavits upon which he proposed to rely, by 20 July 2001. Additional directions were made to facilitate a hearing of the foreshadowed motions on 7 August 2001. A further directions hearing was also scheduled for 7 August 2001.

30 No notice of motion seeking the making of the above orders, or any orders, was filed by the respondent by 20 July 2001 or at any time before 7 August 2001. On 1 August 2001 a letter from the respondent dated 31 July 2001 was received by a Deputy Registrar of the Court. The letter requested an adjournment of the directions hearing until at least 14 August 2001. A medical certificate certifying that the respondent was *"unable to work and attend court"* from 31 July - 14 August 2001 was enclosed.

31 With the consent of the applicant, the directions hearing scheduled for 7 August 2001 was relisted for 15 August 2001. The time set aside for the hearing of the motions foreshadowed by the respondent was vacated. The respondent was advised by my Associate of the above matters and of the need for directions to be made on 15 August 2001 to facilitate the hearing scheduled for November 2001.

32 Correspondence from the respondent received by my Associate suggested that the respondent considered that he had filed a notice of motion. A search of the file revealed that on 23 July 2001 a document had been filed in the New South Wales District Registry headed *"Defence and Counterclaim*". The document set out in paragraph 1 ten grounds upon which the application was opposed and concluded:

> *"2. A Declaration is sought that I am not in breach of the Racial Discrimination Act, and further or alternatively that if the material posted on the website constituted a breach, it has now been removed.*

3. An Order that all further procedure be heard in Adelaide.

4. An Order that, on the ground of actual bias, or alternatively of perceived bias, Justice Branson be replaced by another judge.

5. An Order that the Applicant pay my costs.

6. Such further or other Orders that the Court may deem appropriate."

33 A document was also filed by the respondent on 23 July 2001 headed *"Affidavit in Support of Dismissing the Matter"*. The document, like the affidavit which the respondent had earlier sought to file in Court, is discursive and argumentative in nature. I set out an excerpt from it to illustrate its character:

> *"2. There are two effective ways of eliminating an opponent: 1. By injuring a person or his reputation, and 2. By dragging the person though the law courts. The Applicant has stated publicly that it is his desire to stop me "from functioning". When I took this matter up with the Human Rights and Equal Opportunity Commission (HREOC), it was dismissed because it did not fit into their framework for action. The Applicant began his court action against me in 1996. Unfortunately, the prior public media action designed to intimidate me, remained fruitless. This is because I consider truth to be my defence, and that is a powerful moral argument from which I derive great strength. The intimidation from the Applicant's organisation is legendary but this, too, has no effect on me. However, I have contact with a number of legal counsels who fear being pressured by the Applicant's Zionist racist organisation because this would have adverse effects on their place of work, their families and on their social standing."*

34 The document, amongst other things, questions the policy behind s 18C of the RDA and the motives of those who supported its introduction into the RDA, likens those involved in the administration of s 18C to the accused at Nuremberg who claimed to be *"just following orders"*, argues that it *"is a judge's moral, social and legal duty to stand up against deficient legislation because compliance is complicity"* and questions the applicant's motives and integrity. Comments defamatory of a number of individuals, including another judge of the Court, appear throughout the document. It would be inappropriate to give them further publicity.

35 My Associate communicated with the parties to indicate that even though no notice of motion had been filed by the respondent, I was willing to entertain an application on 15 August 2001 that I disqualify myself from further involvement in the proceeding. As to the other orders apparently sought by the respondent, she drew the respondent's attention to Orders 19 and 20 of the Federal Court Rules which are respectively concerned with Motions and Summary Disposal and Stay of Proceedings. She advised him that he could, if he wished, read the rules at the Adelaide Registry of the Court. The parties were again

reminded that the matter was listed for the hearing of the preliminary question in November 2001.

36 On 10 August 2001 a further medical certificate concerning the respondent was received in the New South Wales Registry of the Court. It certified that the respondent was unable to work or attend court from 15 August 2001 to 29 August 2001. An accompanying letter from the respondent asked that the certificate be passed *"to the judge concerned so that a further postponement of the Directions Hearing is effected"*.

37 On 28 August 2001 a document was received in the New South Wales District Registry headed *"Application for Adjournment"*. It was apparently signed by the respondent and bore an indication that a copy had been provided to the applicant's solicitor. The document indicated that the respondent sought an adjournment of the proceeding for *"at least six months"* for, in summary, the following reasons:

(a) he had not been able to work on the matter during the past months because of a medical condition;

(b) he remained without legal representation and that three counsel who were to assist him *"behind the scene"* had advised him that they could not do so because they *"fear the Australian Jewish Zionist's power"*;

(c) he could not find competent and fearless legal representation and consequently the proceeding should be stayed;

(d) the proceeding involved constitutional technicalities and required thought and research; and

(e) his eighty-three year old father was bed-bound at home and dying and his parents required his help at their home in country Victoria.

38 The direction hearing scheduled for 15 August 2001 was ultimately rescheduled for 18 October 2001, a date when the respondent indicated that he would be in Sydney. On that day the respondent did not ask that I disqualify myself but indicated that that was a matter that he would leave to my judgment. The parties made submissions on the respondent's application for an adjournment. I declined to stay the proceeding or to adjourn it for six months. However, even though the respondent had placed no evidence before the Court touching on the issue, I decided that it would be appropriate for some recognition to be accorded to the respondent's responsibilities in respect of his elderly parents, one of whom was apparently dying. The respondent advised the Court that he and his siblings proposed to share the responsibilities and he was to assume principal responsibility for his parents during the months November, December and January. The hearing dates in November 2001 were vacated and the proposal to determine the issue of the applicant's entitlement to relief ahead of other questions abandoned. It was ordered that the matter proceed on pleadings and a timetable was set for the filing and serving of pleadings. The applicant was ordered to file and serve a statement of claim by 1 November 2001. The respondent was not required to file and serve his defence until 15 February 2002. Orders were made for evidence-in-chief to

be given by affidavit and a timetable set for affidavits to be filed and served which expired on 15 March 2002. I directed the respondent's attention to Order 11 of the Federal Court Rules which is concerned with pleadings, and briefly described how a defence should be drawn. A further directions hearing was scheduled for 21 March 2002. I stated that I did not consider that I was unable to bring a fair mind to the hearing and determination of the proceeding, nor did I think that an informed, reasonable person might think that I would be unable to do so. I did not disqualify myself from further involvement in the proceeding.

39 On 25 February 2002 the respondent purportedly filed a document headed *"Continuing: Defence and Application to Dismiss Matter".* The document, like earlier documents provided to the Court by the respondent, is discursive and argumentative. In part it appears to reproduce matters originally published elsewhere by individuals who are not parties to this proceeding and who have no direct connection with this proceeding. It extends well beyond matters of fact of which the respondent is able to give evidence. It has not been read on any application before the Court, or otherwise sought to be placed in evidence. Little of it would have been admissible had the respondent sought to rely on it as evidence. It is not a pleading: it is in no way responsive to the statement of claim. It does not purport to be a notice of motion. The respondent filed separately a document which did purport to be a notice of motion which sought an order that the application be dismissed. At best, it seems to me, the document purportedly filed on 25 February 2002 is to be understood to constitute written submissions by the respondent.

40 The next directions hearing was in fact held on 14 March 2002. The respondent attended in person. Counsel for the applicant also attended. No defence had been filed or served by the respondent and his departure overseas was apparently imminent. Neither party had filed a notice of motion seeking interlocutory or other relief. Nonetheless the respondent indicated that it was still his intention to apply to have the application summarily dismissed. The directions hearing was stood over to a date to be fixed. I indicated to the parties that until one or other or both of them filed and served a notice or notices of motion seeking the making of a particular order or orders the matter would not be relisted. A point had been reached, in my view, when the Court could not of its own motion usefully advance the progress of the matter.

41 On 20 March 2002 the applicant filed a notice of motion seeking summary judgment and the making of the declaration and orders sought in the original application. On 2 April 2002 the respondent filed a notice of motion seeking, amongst other orders, an order for the summary dismissal of the application. The affidavit filed by the respondent in purported support of his notice of motion contained the assertion, amongst much other material, that the RDA is unconstitutional. The two notices of motion were listed for directions on 4 April 2002.

42 On 4 April 2002 the respondent again asked that the proceeding be adjourned indefinitely because, as he asserted, he could not obtain legal representative. No evidence was placed before the Court to support this assertion. In any event, as I advised the respondent, the applicant was entitled to have his claim heard and determined. To facilitate

the hearing of the respondent's notice of motion, I directed the applicant to issue the notices required by s 78B of the *Judiciary Act 1903* (Cth) to be issued before argument could be entertained with respect to the constitutional validity of the RDA. I further set a timetable for the filing of addition evidence, if any, and listed both notices of motion for hearing on 4 June 2002.

43 The respondent sought leave to appeal to the Full Court from the above directions. The application for leave to appeal was heard and dismissed on 21 May 2002. It appears from the judgments of the members of the Full Court that the respondent's principal matter of complaint before that Court was that I had not indefinitely adjourned the substantive proceeding by reason of the respondent's inability to obtain legal advice. The respondent also sought an order from the Full Court that I be excused from the case on the ground of bias.

44 On 4 June 2002 the applicant was again represented by counsel and the respondent appeared in person by video link from Adelaide. He was accompanied by Mr John Bailey. The respondent sought leave to have Mr Bailey, who is not a legal practitioner, act on his behalf and foreshadowed that, if such leave were granted, he would request a twenty-eight day adjournment to allow Mr Bailey time to prepare the case. I briefly adjourned the hearing, leaving the video link open, to allow counsel for the applicant an opportunity to seek instructions, and if he considered it appropriate, explore with Dr Toben the nature of Mr Bailey's relevant experience.

45 Ultimately the applicant opposed both the grant of leave to allow Mr Bailey to represent the respondent and the adjournment of the hearing of the notices of motion. Mr Bailey confirmed, in response to questions from me, that he was not, and never had been, a legal practitioner. He indicated that he had some limited experience of court procedures but had no familiarity with the Federal Court Rules or of Federal Court practice. He said that he had, in relation to a matter in the Magistrates Court, done some work in a law library and was able to understand court rules.

46 I indicated to the respondent that I was not minded immediately to grant leave for him to be represented generally by Mr Bailey. I advised him that I was willing to give consideration to making a fresh order that he file a defence, allowing him ten days to file the defence, and to scheduling a further directions hearing shortly thereafter to allow further consideration to be given to his application for leave to be represented by Mr Bailey. The respondent was not happy with this proposal and pressed for an order allowing Mr Bailey to conduct his case. The transcript records the following exchange between me and the respondent:

> *"HER HONOUR: Well, Dr Toben, I am not willing to do that now because I don't have enough information about whether or not I think Mr Bailey is a suitable and appropriate person to do that. I have not ever known it to happen for a lay person to be authorised to do as you ask. As Mr Rothman points out it is much more common for the Court, if a lay person is to be involved at all, to allow them to sit at the bar table with the person that they are assisting and to assist them.*

> *What I am trying to do, because I think that it would be in your interest, is to delay making a final decision. We make orders for the filing of a defence to see whether having Mr Bailey assist you is genuinely helpful. If I found that it was genuinely helpful you might find me more amenable to the idea that Mr Bailey play a larger rather than a smaller role in your proceedings. But without having information as to how useful his involvement will be,* [it] *would be very difficult for me to make any order about his involvement."*
>
> *DR TOBEN: Your Honour, if I may, your Honour, I now wish to make use of my rights to remain silent. I cannot accept your intentions and therefore I will be silent."*

47 Although the video link to Adelaide remained open, the respondent remained silent for the remainder of the hearing on 4 June 2002. He did not respond when asked if he pressed his notice of motion that was listed for hearing that day. I ordered that the notice of motion be dismissed for want of prosecution. He failed to respond when asked if he wished to be heard in response to the applicant's application for an order that the respondent pay his costs of the notice of motion. I ordered the respondent to pay the applicant's costs of the notice of motion.

48 When the applicant's notice of motion was called for hearing, an application was made for leave to amend the notice of motion. The respondent did not oppose the application. Leave was granted and directions made with respect to the filing and service of the amended notice of motion. A hearing on the amended notice of motion was listed for 18 June 2002. The respondent was so advised and reminded that if he required a video link to be established on that day the Associate should be so advised promptly. He did not respond when asked if there was anything further that he wished to raise.

49 The respondent did not request that a video link be established for the hearing on 18 June 2002. Nor did he appear at the hearing. The hearing of the applicant's amended notice of motion was not completed on that day but adjourned to 2 July 2002 to allow the applicant to place further evidence before the Court. Directions were made for the applicant to advise the respondent of the adjourned hearing date, of the additional evidence to be relied upon and of the need for the respondent to contact the Associate should he require a video link on that day.

50 On 2 July 2002, when the amended notice of motion was again called for hearing, the respondent appeared in person and made submissions to the Court. At the conclusion of the hearing I indicated that I would take time to consider my decision.

THE AMENDED NOTICE OF MOTION

51 By his amended notice of motion the applicant seeks the following substantive orders:

> *"1. An Order that Summary Judgment be given in favour of the Applicant pursuant to Order 10 Rule 7, Order 11 Rule 23 and/or Order 20 sub Rule 1(1).*

2. An Order that the document filed herein by the Respondent and dated 25 February 2002, to the extent that it purports to be a pleading, be struck out pursuant to paragraphs (a), (b), and/or (c) of Order 11 Rule 16.

3. A Declaration and Orders in terms of paragraphs 1-5 of the Application dated and filed herein on 30 March 2001."

52 For the reasons set out in [39] above, I have concluded that the document filed by the respondent on 25 February 2002 is not a pleading and that no formal order need be made in respect of it.

FEDERAL COURT RULES

53 The rules upon which the applicant places reliance for the purpose of his motion for summary judgment are set out below.

Order 10 Rule 7

"(1) Where a party fails to comply with an order of the Court directing that party to take a step in the proceeding, any other party may move the Court on notice:

(a) [not here relevant];

(b) if the party in default is a respondent -- for judgment or an order against him; or

(c) for an order that the step in the proceeding be taken within the time limited in that order.

(2) The Court may make an order of the kind mentioned in subrule (1) or any other order or may give such directions, and specify such consequences for non-compliance with the order, as the Court thinks just.

(3) This rule does not limit the powers of the Court to punish for contempt."

Order 11 Rule 23

"(1) Where a party is in default in filing and serving any pleading as required by this Order, any other party may move the Court on notice:

(a) [not here relevant];

(b) if the party in default is a respondent -- for judgment or an order against him; or

(c) for an order that pleadings be filed and served within the time limited in the order.

(2) The Court may make an order of the kind mentioned in subrule (1) or any other order or may give such directions, and specify such consequences for non-compliance with the order, as the Court thinks just.

(3) This rule does not limit the powers of the Court to punish for contempt."

Order 20 Rule 1

"(1) Where, in relation to the whole or any part of the applicant's claim for relief, there is evidence of the facts on which the claim or part is based, and:

(a) there is evidence given by the applicant or by some responsible person that, in the belief of the person giving the evidence, the respondent has no defence to the claim or part; or

(b) the respondent's defence discloses no answer to the applicant's claim or part;

the applicant may move on notice for such judgment for the applicant on that claim or part and the Court may pronounce such judgment and make such orders as the nature of the case requires.

(2) Where the Court pronounces judgment against a party under this rule, and that party claims relief against the party obtaining the judgment, the Court may stay execution on, or other enforcement of, the judgment until determination of the claim by the party against whom the judgment is directed to be entered.

(3) The Court in any application under this rule may give such directions, whether for amendment of the pleadings or otherwise, as may be thought fit."

54 For present purposes O 10 r 7 and O 11 r 23 confer the same discretion on the Court. The order of the Court directing the respondent to take a step in the proceeding upon which the applicant relies for the purpose of O 10 r 7 is the order of 18 October 2001 by which the respondent was required to file and serve a pleading, namely his defence, by 15 February 2002.

55 In *Fisher v Rural Adjustment & Finance Corporation of Western Australia* (1995) 57 FCR 1 at 18-19, the Full Court cited with approval the following passage from the joint judgment of Wilcox and Gummow JJ in *Lenijamar Pty Ltd v AGC (Advances) Ltd* [1990] FCA 520; (1990) 27 FCR 388 at 395-396:

"It is to be noted that the power given by this rule is conditioned on one circumstance only: the failure of a party to comply with an order of the Court directing that party to take a step in the proceeding. There is no requirement of intentional default or contumelious conduct, although the attitude of the applicant to the default and the Court's judgment as to whether or not the applicant genuinely wishes the matter to go to trial within a reasonable period will usually be important factors in weighing the proper exercise of the discretion confirmed by the rule. There is no requirement of `inordinate or inexcusable delay' on the part of the applicant or the applicant's lawyers, although any such delay is likely to be a significant matter. There is no

requirement of prejudice to the respondent, although the existence of prejudice is also likely to be significant. And it must be remembered that, in almost every case, delay adversely affects the quality of the trial and is an additional burden upon the parties ....

The discretion conferred by O 10, r 7 is unconfined, except for the condition of non-compliance with a direction. As it is impossible to forsee all of the circumstances under which the rule might be sought to be used, it is undesirable to make any exhaustive statement of the circumstances under which the power granted by the rule will appropriately be exercised. We will not attempt to do so. But two situations are obvious candidates for the exercise of the power: cases in which the history of non-compliance by an applicant is such as to indicate an inability or unwillingness to cooperate with the Court and the other party or parties in having the matter ready for trial within an acceptable period and cases - whatever the applicant's state of mind or resources - in which the non-compliance is confirming and occasioning unnecessary delay, expense or other prejudice to the respondent."

56 In my view, it was apparent by 14 March 2002 at the latest that the respondent was unwilling to co-operate with the Court and the applicant in bringing this proceeding to trial within an acceptable period of time or at all.

57 The respondent has asserted an inability to obtain legal representation. I accept that the respondent has made efforts to obtain legal representation but I do not know the details of those efforts. It seems more likely than not, however, that the respondent's efforts have been limited to seeking legal representation on a *pro bono* basis. I am not aware of the financial means available to the respondent to pay for legal advice. It is clear, however, that the respondent travels regularly, including to overseas destinations. He may, therefore be presumed not to be wholly impecunious. Even if it be assumed that he lacks the financial means to retain general legal representation, nothing suggests that the respondent made any endeavours to obtain the help of a legal practitioner for the limited purpose of drawing a defence on the basis of instructions provided by him. In the absence of evidence that the respondent has sought other than *pro bono* legal representation, I place no weight on his assertion that he is unable to obtain legal representation because members of the legal profession *"fear the Australian Jewish Zionists' power".*

58 In any event, I am satisfied that if the respondent had wished to co-operate with the Court and the applicant in bringing this proceeding to trial, he could have drawn an adequate defence without professional assistance. The statement of claim filed in this matter is not a complicated document. It raises matters of fact and matters of mixed law and fact with which the respondent is familiar not least by reason of the earlier proceedings before HREOC. Dr Toben professes a level of formal education which well exceeds that of the majority of unrepresented litigants in this Court (see [66] below). Most unrepresented litigants are able, with the assistance of Registry staff and the Federal Court Rules, to draw simple pleadings. I do not doubt that the respondent could have done so also had he so

wished. The history of this matter, and the content of the documents placed before the Court by the respondent, indicate clearly that the respondent did not so wish. I am satisfied that the respondent's non-compliance with the direction of the Court to file and serve a defence is not explicable solely by the fact that he did not have legal representation.

59 I conclude that, provided the applicant has placed before the Court proof of the facts necessary to establish his entitlement to all or part of the relief claimed by him, the circumstances of this case warrant the exercise by the Court of the discretion given to it by O 10 r 7, and O 11 r 23, to grant summary judgment.

THE APPLICANT'S CLAIM AND SUPPORTING EVIDENCE

60 The applicant accepted that he was required to establish *de novo* the complaint made to HREOC on 31 May 1996. That is, he was required to provide proof that as at 31 May 1996 the respondent had engaged in conduct that was unlawful by reason of s 18C(1) of the RDA. Proof of later conduct of the respondent might well be relevant to the issue of the relief, if any, that the Court might think fit to grant (s 25ZC(2)) but will not of itself substantiate the relevant complaint.

61 Paragraph 1 of the applicant's statement of claim, which was filed on 5 November 2001, alleges:

> *"The Applicant is, and at all relevant times was, a member of the Committee of Management of the Executive Council of Australian Jewry, and holds the position of Executive Vice-President."*

62 I accept that, as at the date of the original complaint addressed to the Race Discrimination Commissioner, the applicant held the position of Executive Vice Chairman of the Executive Council of Australian Jewry. The evidence establishes that on 2 December 2001 he was elected to the position of President of the Executive Council of Australian Jewry. I find that at all relevant times the applicant has been a member of the Committee of Management of the Executive Council of Australian Jewry. I am satisfied that the applicant was a person aggrieved by the act the subject of the letter of complaint dated 28 May 1996, namely the act of publishing the material referred to in the letter on the Adelaide Institute's World Wide Web website (s 22(1)(a) of the RDA). I am further satisfied, as is mentioned above, that he was a complainant in respect of the complaint lodged with HREOC on 31 May 1996 and therefore entitled to commence this proceeding.

63 Paragraph 2 of the statement of claim pleads that the respondent is, and has at all material times been, responsible for the actions of the unincorporated association known as the "Adelaide Institute" and for the placing of material on the Adelaide Institute website.

64 Section 144 of the *Evidence Act 1995* (Cth) ("the Evidence Act"), in my view, renders proof of the nature of the Internet and the World Wide Web unnecessary for the purposes of this case. The general nature of both the Internet and the World Wide Web is now well known. The Canadian Human Rights Tribunal in *Citron v Zündel (No. 4)* (2002), 41 C.H.R.R. D/274 (C.H.R.T.) at [60] described the Internet as follows:

> *"The Internet is a means of global communication that relies on a universal set of protocols or standards for the transmission of information. Two related sets of communication instructions, Transmission Control Protocol, (TCP) and Internet Protocol, (IP), govern how information will move through the system, defining addresses, routing systems, and all the regulation necessary to permit communication among users."*

65 At [67] the Tribunal described the World Wide Web in the following way:

> *"The World Wide Web, (the "Web"), is a specific application that uses the Internet to send and display data, including text, graphics, audio and video. There are two active components on the Web: a server that stores and transmits information, and a client or browser that requests, receives and displays the information obtained from the server. A "web site" is a collection of computer files that are coded in a specific way ... to allow information to be sent on request to a browser. The files are then displayed in a way consistent with the instructions provided by the creator of the web site. Every web site has a unique Uniform Resource Locator (URL), akin to their Internet address. Once connected to the Internet, the URL ... is necessary to gain access to a given web site ...."*

66 The respondent has made it plain during the course of the proceeding that he does not dispute that he controls the Adelaide Institute. He describes himself as the director of the Adelaide Institute and in correspondence utilises the letterhead of the Adelaide Institute. The letterhead includes the notation "Director: Fredrick Töben, PhD, MACE". I am satisfied that the respondent is responsible for the actions of the Adelaide Institute. In particular I am satisfied that at all material times it has been the respondent who has caused the material which is displayed on the websites of the Adelaide Institute to be displayed on those websites.

67 Paragraphs 3 and 4 of the statement of claim contain pleas relating to the making of the complaint to HREOC on 31 May 1996 and as to the nature of that complaint. I am satisfied that on 31 May 1996 the complaint identified in [4] above was made to HREOC in the way outlined in that paragraph.

68 Paragraph 5 of the statement of claim pleads:

> *"Australian Jews constitute a group of people with an ethnic origin for the purposes of s 18C of the* Racial Discrimination Act*."*

69 In *Miller v Wertheim* [2002] FCAFC 156 at [14] the Full Court of this Court observed:

> *"...it can be readily accepted that Jewish people in Australia can comprise a group of people with an `ethnic origin' for the purposes of the Act* [ie the RDA] *(see* King-Ansell v Police *[1979] 2 NZLR 531)...."*

See also *Jones v Scully* [2002] FCA 1080 ("*Jones v Scully")* per Hely J at [110]-[113]. I am satisfied that Jews in Australia are a group of people with a common "ethnic origin" within the meaning of s 18C of the RDA. I did not understand the applicant to place reliance on the additional plea in paragraph 6 of the statement of claim that Australian Jews who immigrated to Australia from nations in Europe, and their direct descendents, constitute a group of people with a "national origin" in respect of each such nation for the purposes of s 18C of the RDA.

70 The statement of claim by paragraph 8 provides details of three Adelaide Institute websites capable of being located by a browser, such as Microsoft Internet Explorer or Netscape Navigator, namely:

http://www.adam.com.au/~fredadin/adins.html

http://203.2.124.7/fredalin.index.html

http://www.adelaideinstitute.org

The evidence does not disclose whether all of these websites were operative on or about 31 May 1996. The complaint dated 31 May 1996, and the evidence of the applicant as to material seen by him before that date (see [79] below), makes reference only to the first listed website.

71 Paragraph 10 of the statement of claim pleads that placing material on a website which is not password protected and is available to the public is an act done otherwise than in private.

72 Section 18C(2) of the RDA relevantly provides:

> *"For the purposes of subsection (1), an act is taken not to be done in private if it:*
> *(a)* causes words, sounds, images or writing to be communicated to the public;
> ...."

73 In my view, the placing of material, whether text, graphics, audio or video, on a website which is not password protected is an act which causes words, sounds, images or writing to be communicated to the public in the sense that they are communicated to any person who utilises a browser to gain access to that website.

74 I conclude that the placing of material on a website which is not password protected is an act which, for the purposes of the RDA, is taken not to be done in private. This conclusion is supported by the affidavit evidence of the applicant, which I accept, that the Executive Council of Australian Jewry has received numerous complaints by members of the Jewish community concerning websites maintained by the Adelaide Institute. It appears that a search of the World Wide Web using terms such as "Jew", "Holocaust" and "Talmud", search terms which I accept are likely to be used by a member of the Jewish community interested in Jewish affairs, lead the searcher to one or more Adelaide Institute website.

75 I further conclude that the act of placing text and graphics on a website which is not password protected is an act of publication, or perhaps more accurately an act which causes repeated publications, in that it allows individuals who access the website with a browser to read that text and see those graphics.

76 Paragraph 14 of the statement of claim pleads that *"from some time before 31 May 1996 and on or before 28 March 2001"* the respondent *"caused or procured or was responsible for"* the placing of certain material, identified by web page addresses, on the Adelaide Institute website identified as http://www.adelaideinstitute.org.

77 It seems to me that the complaint made to HREOC on 31 May 1996 (see [4] above) is to be understood as a complaint concerning material that was found on the website referred to in the complaint on or shortly before the date of the complaint. This interpretation of the complaint is supported by s 24(2) of the RDA which provides that the Race Discrimination Commissioner may decide not to inquire into an act if a period of more than twelve months has elapsed since the act was done. There is no suggestion that the Race Discrimination Commission in this case was required to give consideration to the discretion conferred by s 24(2).

78 Paragraph 16 of the statement of claim pleads the publication of certain Adelaide Institute Newsletters. However, as the earliest such newsletter is alleged to be dated December 1996 it is not presently necessary to give further consideration to this plea.

79 The evidence as to the material published on the Adelaide Institute website on or shortly before 31 May 1996 is contained in the affidavit of the applicant sworn 26 June 2002. Paragraph 9 of the affidavit is in the following terms:

> *"A true copy of my letter of complaint dated 28 May 1996 to the Race Discrimination Commissioner concerning the Respondent's website at http://www.adam.com.au/-fredadin/adins/html appears at page 14 of my first Affidavit.* ***Before I prepared that letter****, I had accessed the said website on more than one occasion. To the best of my knowledge and belief, the material which I observed on the Respondent's website prior to 28 May 1996 included material of the same or substantially the same content as:*
> *(a)* Document headed `About the Adelaide Institute' a true copy of which is a part of annexure `PJW-4' to the Affidavit of Peter John Wertheim sworn 29 March 2001 and filed in these proceedings;
>
> *(b)* Adelaide Institute Issue number 39 of May 1996 a true copy of which appears at pages 76-90 of my first Affidavit;
>
> *(c)* Adelaide Institute Issue number 34 of January 1996 a true copy of which appears at pages 99-106 of my first Affidavit;
>
> *(d)* Adelaide Institute Issue number 35 of February 1996 a true copy of which appears at pages 107-114 of my first Affidavit;

(e) Adelaide Institute Issue number 36 of March 1996 a true copy of which appears at pages 115-126 of my first Affidavit." (emphasis added)

It is reasonable, in my view, to construe the words emphasised above as meaning "shortly before I prepared that letter ....".

80 There is no evidence before the Court which links any of the material identified in paragraph 9 of the applicant's affidavit, other than the material identified in subparagraph (a), with the material identified in paragraph 14 of the statement of claim.

81 The document headed *"About the Adelaide Institute"* referred to in sub-paragraph 9(a) of the applicant's affidavit includes the following material:

"We are a group of individuals who are looking at the Jewish-Nazi Holocaust, in particular we are investigating the allegation that Germans systematically killed six million Jews, four million alone at the Auschwitz concentration camp. In our investigations we refuse to be intimidated by anyone because we believe that the first step in any murder investigation is to forensically test the alleged murder weapon. In the Auschwitz murder case, certain individuals wish to prevent us from focusing upon such an investigation.
The latest version of how the Germans gassed millions of Jews at Auschwitz is propagated by Professor Deborah Lipstadt of Emory University in the U.S.A. who claims that mortuaries were converted into homicidal gas chambers. Proof of this is apparently found in so-called `conversion plans'. We have requested of Professor Lipstadt and of the Holocaust Museum, Washington, to provide us with copies of such conversion plans. We are still waiting for them to provide us with these plans.

In the meantime we have noted the original four million Auschwitz death figure had been reduced by Jean Claude Pressac to a maximum of 800,000. This in itself is good news because it means that around 3.2 million people never died at Auschwitz - a cause for celebration.

We are worried about the fact that to date it has been impossible to reconstruct a homicidal gas chamber. Even the Holocaust Museum in Washington informed us that it could not bring one across from Europe because there are none available. This is like a space museum without a rocket or the Vatican without a Crucifix. We are justifiably sceptical about the homicidal gas chamber claims.

We reject outright that a questioning of the alleged homicidal gas chamber story constitutes `hate talk', is `anti-Semitic', or `racist', or even `neo-Nazi' activity.

The director of the ***Adelaide Institute****, Dr Fredrick Töben, puts it thus:*

`If I offend anybody because I show poor taste in my sometime blunt and honest questioning, then I apologise. However, if I offend because if am

politically incorrect by asking uncomfortable questions, then I claim it as my right, under the free speech principle, to say these things.'

We at the **Adelaide Institute** also focus on the Jewish-Bolshevik Holocaust, a matter which Australian author Helen Demidenko-Darville has raised in her book The Hand That Signed The Paper. The controversy generated by this novel still continues.

Adelaide Institute associate, Mr David Brockschmidt, sums up the essence of Demidenko-Darville's "crime" in writing this book:

`The merit of Helen Demidenko-Darville's novel - and hidden agenda of the anti-Demidenko affair - is that she has revealed a basic historical fact, viz, that Lenin's henchman, Trotzky (Bronstein) and Stalin's henchman, Kaganovich, were Jewish mass murderers. This historical fact clearly shows that Jews are not always victims in history, but also murderers. Australia's mass media has failed to publicise this important fact. Why?'

...

So, be warned - this final intellectual journey is not for the faint-hearted. If you dare to seek the truth, in particular about the alleged homicidal gassings, then you will be smeared, libelled and defamed by those who are intellectual midgets but materialistic giants.

If you are mentally strong enough to seek the truth of the matter, then force an open debate. Don't get side tracked by details and always refocus on the basics. Too many individuals drown in a sea of particulars.

People who claim that during World War II, the Germans gassed millions of Jews are levelling three allegations at the Germans:

1 They planned the construction of huge chemical slaughter houses;

2 They constructed these huge chemical slaughterhouses during the middle of WWII; and

3 They used these huge slaughterhouses to exterminate millions of Jews.

Any normal person familiar with bureaucratic red tape will now ask: What proof is there to back up these claims? Firstly, where are the plans of this enterprise? Secondly, where is the budget needed to finance the massive enterprise? Finally, it is inconceivable that such a massive undertaking would get past first base without an executive order. To date, we have been led to believe that "a wink and a nudge" began the alleged extermination project.

We at **Adelaide Institute** believe that those who level the homicidal gassing allegations at the Germans owe it to the world to come up with irrefutable evidence that this happened.

> Instead, these defamers and libellers of the Germans use legal means to stifle debate on the topic. They claim that anyone who asks questions is engaging in "hate-talk", is "anti-Semeitic" [sic] is a "racist", even a "neo-Nazi".
>
> If that doesn't work, then physical violence is used to silence those who want to know the truth.
>
> So, come on board if you have the courage to look for the truth. We naturally maintain that should -after fifty years - proof of the homicidal gassings be forthcoming, we shall gladly publicise this as well. To date, there has been no proof offered to the world. Robert Faurisson sums it up well; `no holes, no Holocaust!'
>
> We are not `holocaust deniers'. We proudly proclaim that to date there is no evidence that millions of people were killed in homicidal gas chambers. That is good news all round. Why would anyone find this offensive? We are celebrating the living who were thought dead. How can this be an offence - unless it offends those who have their snout in the trough which Jewish academic, Dr Frank Knopfelmacher called, "the Holocaust racket"."

82 It is necessary to determine two issues. First, whether the publication of the above material, or any of it, *"is reasonably likely, in all of the circumstances, to offend, insult, humiliate or intimidate"* a Jewish Australian or a group of Jewish Australians (s 18C(1)(a)). Secondly whether the publication of the above material was done because of the ethnic origin of Jewish Australians (s 18C(1)(b)).

83 In *Jones v Scully* at [98]-[99] Hely J said:

> "*The use of the words `reasonably likely' in s 18C(1)(a) sets up an objective test or standard: see* Hagan v Trustees of the Toowoomba Sports Ground Trust *[2000] FCA 1615;* Creek v Cairns Post Pty Ltd *[2001] FCA 1007 at [12]. In* Hagan*, Drummond J stated at [15]:*
> `It is apparent from the wording of s 18C(1)(a) that whether an act contravenes the section is not governed by the impact the act is subjectively perceived to have by a complainant. An objective test must be applied in determining whether the act complained of has the necessary offensive, insulting, humiliating or intimidatory quality for it to be within the sub-section. The question so far as s 18C(1)(a) is concerned is not: how did the act affect the particular complainant? But rather would the act, in all the circumstances in which it was done, be likely to offend, insult, humiliate or intimidate a person or a group of people of a particular racial, national or ethnic group?'
>
> As the test is an objective one, it is not necessary for an applicant to prove that any person was actually offended, insulted, humiliated or intimidated by the conduct in question. But the analogy provided by the cases on s 52 of the Trade Practices Act 1974 (Cth) suggests that evidence, for example, that a

> member of a particular racial group was offended by the conduct in question would be admissible on, but not determinative of, the issue of contravention. In the s 52 context, idiosyncratic evidence from consumers about how they reacted when reading documents said to be misleading is not to be ignored, but it is not determinative. The Court must make an objective assessment of the position itself: ACCC v Optell Pty Ltd (1998) ATPR 41-640 at 41,082. Whether that evidence is of any, and if so, what weight depends upon the circumstances. However, in his second reading speech on the Racial Hatred Bill the Attorney-General said:
>
> `The Bill requires an objective test to be applied by the Commission so that community standards to behaviour rather than the subjective views of the complainant are taken into account.'"

I respectfully adopt the approach taken by his Honour.

84 There is no direct evidence before the Court tending to establish that any person was offended, insulted, humiliated or intimidated by the material from the Adelaide Institute website set out in [81] above. However, as Hely J observed, this is not necessary. The Court must make an objective assessment itself of what is reasonably likely.

85 As Bowen CJ pointed out in *Tilmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* [1979] FCA 85; (1979) 42 FLR 331 at 339:

> *"The word `likely' is one which has various shades of meaning. It may mean `probable' in the sense of `more probable than not' - `more than a fifty per cent chance'. It may mean `material risk' as seen by a reasonable man `such as might happen'. It may mean `some possibility' - more than a remote or bare chance. Or, it may mean that the conduct engaged in is inherently of such a character that it would ordinarily cause the effect specified."*

In the same case at 346 Deane J observed:

> *"The word `likely' can, in some contexts, mean `probably' in the sense in which that word is commonly used by lawyers and laymen, that is to say, more likely than not or more than a fifty per cent chance (`an odds-on-chance', per Lord Hodson in* Koufos v C. Czarnikow Ltd *[1969] 1 AC 350 at 410) .... It can also, in an appropriate context, refer to a real or not remote chance or possibility regardless of whether it is less or more than fifty per cent. When used with the latter meaning in a phrase which is descriptive of conduct, the word is equivalent to `prone', `with a propensity' or `liable'."*

86 I received no submissions in this case as to the meaning to be attributed to the word "*likely"* in s 18C of the RDA. In the circumstances, without reaching any concluded view as its actual meaning, I consider it appropriate to proceed on the basis that it is used in the

strongest of the senses identified in *Tilmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union,* namely in the sense of more probable than not.

87 In *Jones v Scully,* Hely J considered that an approach modelled on the law of defamation provided a useful tool for the consideration of the issues raised by s 18C(1)(a) of the RDA. At [125]-[126] his Honour observed:

> *"In the law of defamation, the principles which apply in determining whether material conveys a pleaded imputation were summarised in* Amalgamated Television Services Pty Ltd v Marsden *[1998] NSWSC 4; (1998) 43 NSWLR 158 by Hunt CJ at CL (with whom Mason P and Handley JA agreed) at 165-166, where his Honour said:*
> `The ordinary reasonable meaning of the matter complained of may be either the literal meaning of the published matter, or what is implied by that matter, or what is inferred from it: ... In deciding whether any particular imputation is capable of being conveyed, the question is whether it is **reasonably** so capable (Defamation Act, s 7A, reflecting the common law: ...), and any strained or forced or utterly unreasonable interpretation must be rejected: ... The ordinary reasonable reader (or listener or viewer) is a person of fair average intelligence ..., who is neither perverse ..., nor morbid or suspicious of mind ..., nor avid for scandal: .... That person does not live in an ivory tower but can and does read between the lines in the light of that person's general knowledge and experience of worldly affairs: ...
>
> The mode or manner of publication is a material matter in determining what imputation is capable of being conveyed: ... The reader of a book, for example, is assumed to read it with more care than he or she would read a newspaper. The more sensational the article in a newspaper, the less likely is it that the ordinary reasonable reader will have read it with the degree of analytical care which may otherwise have been given to a book ..., and the less the degree of accuracy which would be expected by the reader: ... The ordinary reasonable reader of such an article is understandably prone to engage in a certain amount of loose thinking:... There is a wide degree of latitude given to the capacity of the matter complained of to convey particular imputations where the words published are imprecise, ambiguous, loose, fanciful or unusual: ...
>
> What must be emphasised is that it is the test of reasonableness which guides any court in its function of determining whether the matter complained of is capable of conveying any of the imputations pleaded by the plaintiff. In determining what is reasonable in any case, a distinction must be drawn between what the ordinary reasonable reader, listener or viewer (drawing on his or her own knowledge and experience of human affairs) could understand from what the defendant has said in the matter complained of and the conclusion which the reader, listener or viewer could reach by taking into account his or her own belief which has been excited by what was said. It is the former approach,

> not the latter, which must be taken: .... The publisher is not held responsible, for example, for an inference which the ordinary reasonable reader, listener or viewer draws from an inference already drawn from the matter complained of, because it is unreasonable for the publisher to be held so responsible:...'

(emphasis in original)

> *The above principles were recently followed in this Court by Tamberlin J in* Versace v Monte *[2002] FCA 190 at pars [144] - [146]. At [145] his Honour said:*
> `In determining what will be conveyed to an ordinary reasonable reader, listener or viewer of fair average intelligence, one must not look at the statement or matters complained of in isolation. Rather, they must be considered in the whole context of the material in which they are published: John Fairfax & Sons Ltd v Hook [1983] FCA 83; (1983) 72 FLR 190 at 195. The reference to the `context' of the publication is a broad reference which embraces all the attendant circumstances, including both the surrounding matter and the mode of publication.'"

88 Having regard to the total content and format of the document headed *"About the Adelaide Institute"* and the mode of its publication (ie on a website which is not password protected), I am satisfied that the material set out in [81] above conveys the following imputations:

(a) there is serious doubt that the Holocaust occurred;

(b) it is unlikely that there were homicidal gas chambers in Auschwitz;

(c) Jewish people who are offended by and challenge Holocaust denial are of limited intelligence; and

(d) some Jewish people, for improper purposes, including financial gain, have exaggerated the number of Jews killed during World War II and the circumstances in which they were killed.

89 As Hely J pointed out in *Jones v Scully* at [176] it is not for the Court in a case of this kind to seek to determine whether or not the Holocaust occurred. No doubt it is for that reason that no attempt was made in this case to lead evidence on that topic. The role of the Court is to determine whether the applicant has substantiated his complaint that the respondent engaged in conduct rendered unlawful by s 18C of the RDA. However, it is appropriate to note, as the document headed *"About the Adelaide Institute"* itself recognises, that it is generally accepted in Australia and elsewhere that the Holocaust did occur.

90 The RDA does not define the words *"offend, insult, humiliate or intimidate"* or any of them. They are therefore to be given their ordinary meanings. *The Macquarie Dictionary* 2nd ed and *The Oxford English Dictionary* 2nd ed contain the following relevant definitions:

Offend

* *"to irritate in mind or feelings; cause resentful displeasure in"* (Macquarie)

* *"to hurt or wound the feelings or susceptibilities of; to be displeasing to or disagreeable to; to vex, annoy, displease, anger; now* esp. *To excite a feeling of personal annoyance, resentment, or disgust in (any one). (Now the chief sense)."* (Oxford)

Insult

* *"to treat insolently or with contemptuous rudeness, affront."* (Macquarie)

* *"to assail with offensively dishonouring or contemptuous speech or action; to treat with scornful abuse or offensive disrespect; to offer indignity to; to affront, outrage."* (Oxford)

Humiliate

* *"to lower the pride or self-respect of; cause a painful loss of dignity to; mortify."* (Macquarie)

* *"to lower or depress the dignity or self-respect of; to subject to humiliation; to mortify."* (Oxford)

Intimidate

* *"to make timid, or inspire with fear; overawe; cow."* (Macquarie)

* *"to render timid, inspire with fear; to overawe, cow; in modern use* esp. *to force or deter from some action by threats or violence."* (Oxford)

91 Each of the words *"offend, insult, humiliate or intimidate"* bears a slightly different meaning. It would seem that the first two words involve closely related concepts and the same may, perhaps to a lesser extent, be said of the final two words.

92 In *Creek v Cairns Post Pty Ltd* [2001] FCA 1007; (2001) 112 FCR 352 at [16] Kiefel J observed:

> *"To "offend, insult, humiliate or intimidate" are profound and serious effects, not to be likened to mere slights."*

I do not understand her Honour to have intended by the above observation to imply that a gloss should be placed on the ordinary meaning of the words that Parliament chose to include in s 18C of the RDA. Rather, I understand her Honour to have found in the context provided by s 18C of the RDA a legislative intent to render unlawful only acts which fall squarely within the terms of the section and not to reach to *"mere slights"* in the sense of acts which, for example, are reasonably likely to cause technical, but not real, offence or insult (see also *Jones v Scully* per Hely J at [102]). It would be wrong, in my view, to place a gloss on the words used in s 18C of the RDA.

93 The applicant gave evidence that the Australian Jewish community has the highest percentage of survivors of the Holocaust of any Jewish community in the world outside of Israel. Each of the first two of the imputations identified in [88] above thus challenges and

denigrates a central aspect of the shared perception of Australian Jewry of its own modern history and the circumstances in which many of its members came to make their lives in Australia rather than in Europe. To the extent that the material conveys these imputations it is, in my view, more probable than not that it would engender feelings of hurt and pain in the living by reason of its challenge to deep seated belief as to the circumstances surrounding the deaths, or the displacement, of their parents or grandparents. For the same reason, I am satisfied that it is more probable than not that the material would engender in Jewish Australians a sense of being treated contemptuously, disrespectfully and offensively.

94 I am also satisfied that it is more probable than not that the third and fourth of the imputations identified above, by reason of their calumnious nature, would offend, insult, hurt and wound members of Australian Jewry and engender in them a sense of being treated contemptuously, disrespectfully and offensively.

95 For the above reasons I am satisfied that the publication of the material set out in [81] above on an website which is not password protected was an act reasonably likely in all of the circumstances to offend and insult a group of people, namely Australian Jewry.

96 It also seems to me to be objectively likely, in the sense discussed above, that the publication of the material set out in [81] above on an website which is not password protected would cause damage to the pride and self-respect of vulnerable members of the Australian Jewish community, such as, for example, the young and the impressionable. The World Wide Web is now an important tool which many people, including students, may be expected to utilise when searching for information. Vulnerable members of the Jewish community, as a result of being exposed to material of the kind set out in [81] above, might well experience, whether consciously or unconsciously, pressure to renounce the cultural differences that identify them as part of the Jewish community. I am satisfied that it is more probable than not that there are members of the Australian Jewish community who will become fearful of accessing the World Wide Web to search for information touching on their Jewish culture because of the risk of insult from the material set out in [81] above. For these reasons I am satisfied that the act of publishing that material was an act reasonably likely, in all of the circumstances, to humiliate and intimidate a group of people, namely members of the Australian Jewish community vulnerable to attacks on their pride and self-respect by reason of youth, inexperience or psychological vulnerability.

97 It is necessary to determine whether the act of publishing on the World Wide Web the material identified in [81] above was an *"act done because of the ... ethnic origin"* of the groups which I have identified above.

98 In *Jones v Scully* at [114] Hely J said:

> *"The phrase "because of" requires consideration of the reason or reasons for which the relevant act was done:* Hagan *(Full Federal Court) [2001] FCA 123; (2001) 105 FCR 56 at 60. It is important to note that if an act is done for one or more reasons, it is enough that one of the reasons is the race, colour or national or ethnic origin of a person or group of people, whether or not it is the*

> *dominant reason or a substantial reason for doing the act: s 18B. The applicant submits that the test to be applied in a consideration of s 18C(1)(b) is whether race is a "material factor" in the performance of the act. In* Creek*, Kiefel J notes at pars [19] - [27] that there have been differences of opinion expressed about the meaning of phrases such as "on the ground of" and "by reason of" in the context of discrimination legislation. It is not necessary for me to repeat what her Honour said there, except to say that, at the end of her discussion of the relevant authorities, her Honour adopted an approach to s 18C(1)(b) which enquired into whether "anything suggests race as a factor in the respondent's decision to publish" the work in question. I respectfully propose to follow that approach."*

I also propose to adopt the approach adopted by Kiefel J in *Creek v Cairns Post Pty Ltd*.

99 In my view, it is abundantly clear that race was a factor in the respondent's decision to publish the material set out in [81] above. The material includes many references to Jews and events and people characterised as Jewish. It is particularly concerned with the Holocaust and with the conduct of German forces during World War II, matters of particular importance to Jewish people. It is, in my view, plainly calculated to convey a message about Jewish people (see *Jones v Scully* per Hely J at [116]-[117]).

100 I am satisfied that the act of publishing on the World Wide Web the material set out in [81] above was done because of the ethnic origin, namely the Jewishness, of the people in the groups which I have identified above (see [95] and [96]).

101 Section 18D of the RDA provides certain exemptions from the operation of s 18C. In particular s 18D(b) provides, in effect, that s 18C does not render unlawful anything done reasonably and in good faith in the course of any publication made for any genuine academic or other genuine purpose in the public interest. The onus of proof with respect to an exemption provided for by s 18D rested on the respondent (*Jones v Scully* per Hely J at [127]-[128]). The respondent did not comply with the direction of the Court to file and serve a defence. This application for summary judgment is to be determined solely on the basis of the evidence placed before the Court by the applicant. Even if the Court were free to have regard to the various material produced to the Court by the respondent, none of that material establishes that the respondent relevantly acted *"in good faith".* No further consideration need, in the circumstances, be given to s 18D of the RDA.

102 For the above reasons I am satisfied that the respondent has committed an act that is unlawful under the RDA and I find that the complaint made to HREOC on 31 May 1996 by the applicant has been substantiated.

RELIEF

103 Section 25ZC(2) provides:

> *"If the Court is satisfied that the respondent has engaged in conduct or committed an act that is unlawful under this Act, the Court may make such*

orders (including a declaration of right) as it thinks fit."

104 The relief formally sought by the applicant is as follows:

> *"1. A Declaration that the Respondent has engaged in conduct rendered unlawful by Part IIA Section 18C of the Racial Discrimination Act by having published on the World Wide Web at websites collectively known as "the Adelaide Institute Website" (the internet addresses of which include* http:\\www.adam.com.au\-fredadin\adins.html, http://203.1.124.7/fredadin/index.html ***and*** http://www.adelaide institute.org) *material which is racially vilifactory of Jewish people.*
>
> *2. An Order that the Respondent forthwith do all acts and things necessary to remove the contents of the Adelaide Institute Website from the World Wide Web.*
>
> *3. An Order that the Respondent be restrained from republishing, directly or through any agent or employee, the contents of the Adelaide Institute Website or any part of such contents on the World Wide Web or in public elsewhere.*
>
> *4. An Order that the Respondent forthwith deliver to the Applicant, Jeremy Jones, a written statement of apology, signed by the Respondent, in the following terms:-*
>
> *`I hereby unreservedly and unconditionally apologise to you and to the Australian Jewish community for having published materials inciting hatred against the Jewish people in contravention of the* Racial Discrimination Act. *I undertake that neither I nor any employee or agent of mine (actual or ostensible) will publish any such material in the future and that all such material which is presently published by me, or by any employee or agent of mine (actual or ostensible) in any print or electronic media (including the Internet) will forthwith be withdrawn from publication'.*
>
> *5. An Order that the Respondent pay the Applicant's costs.*
>
> *6. Such further or other Orders as the Court may deem appropriate."*

The claims for relief formulated by the applicant are, in my view, too wide.

105 The applicant is, I consider, entitled to a declaration that by causing the document headed *"About the Adelaide Institute"* to be published to the public on the World Wide Web the respondent did an act that was unlawful under s 18C of the RDA.

106 I do not understand the applicant to have pressed his claim for an apology. In any event I do not consider it appropriate to seek to compel the respondent to articulate a sentiment that he plainly enough does not feel. As Hely J pointed out in *Jones v Scully* at [245], *"*prima facie *the idea of ordering someone to make an apology is a contradiction in terms".* The applicant did press for an order requiring a "retraction" by the respondent. I understood the

applicant to be seeking a statement of retraction by the respondent. In the circumstances, it seems to me that the practical distinction between an apology and a statement of retraction is slight. I do not consider it appropriate to order the respondent to issue any statement of retraction.

107 The respondent sought to characterise this proceeding as one raising important issues concerning freedom of speech in this country. The debate as to whether the RDA should proscribe offensive behaviour motivated by race, colour or national or ethnic origin, and the extent to which it should do so, was conducted in the Australian Parliament by the democratically elected representatives of the Australian people. The Parliament resolved to enact Part IIA of the Racial Discrimination Act which includes s 18C. Australian judges are under a duty, in proceedings in which reliance is placed on Part IIA of the Racial Discrimination Act, to interpret and apply the law as enacted by the Parliament.

108 Nonetheless, I raised with the applicant's counsel, during the course of the motion for summary judgment, whether any practical benefit would ensue from ordering the respondent to remove material from Adelaide Institute websites or from ordering him not to publish material on the World Wide Web. The applicant, by his counsel, argued that practical benefits would ensue. He did not elaborate on the nature of those benefits other than to note the desirability of upholding the determination of HREOC.

109 Futility is a relevant factor to be taken into account in exercising a discretion to grant relief. However, as the Court of Appeal pointed out in *Vincent v Peacock* [1973] 1 NSWLR 466 at 468:

> *"... it is not a ground for refusing an injunction that it would not have a practical effect, where its failure to have a practical effect is because the defendant disobeys it."*

110 In this case there is a risk that the practical effect of an injunction might be undermined by individuals other than the respondent. As the Canadian Human Rights Tribunal pointed out in *Citron v Zündel* at [296]:

> *"One of the unique features of the Internet is the ease with which strangers to the creator of a particular site can access material and, if they choose, replicate the entire site at another web address."*

Any order enjoining the respondent from publishing material on the World Wide Web might prompt others, for whatever motive, to publish that material either on the World Wide Web or elsewhere.

111 The approach ultimately adopted by the Canadian Human Rights Tribunal at [299]-[300] was as follows:

> *"Nonetheless, as a Tribunal we are charged with the responsibility of determining the complaints referred to us, and then making an Order if we find that the Respondent has engaged in a discriminatory practise. We cannot be*

> *unduly influenced in this case by what others might do once we issue our Order. The Commission, or individual complainants, can elect to file other complaints, or respond in any other manner that they consider appropriate should they believe that there has been a further contravention of the* Act.
> *Any remedy awarded by this, or any Tribunal, will inevitably serve a number of purposes: prevention and elimination of discriminatory practises is only one of the outcomes flowing from an Order issued as a consequence of these proceedings. There is also a significant symbolic value in the public denunciation of the actions that are the subject of this complaint. Similarly, there is the potential educative and ultimately larger preventative benefit that can be achieved by open discussion of the principles enunciated in this or any Tribunal decision."*

I find the approach adopted by the Canadian Human Rights Tribunal persuasive in the circumstances of this case.

112 The evidence discloses that since the date of the determination of HREOC considerable material of the same general character as the document *"About the Adelaide Institute"* has been published by the respondent both on the World Wide Web and in the form of newsletters. I am satisfied that in the circumstances it is appropriate for orders to be made which reach not only to the document *"About the Adelaide Institute"* but also to material of the same character.

113 It will be ordered that the respondent:

(a) within seven days of the date of this order do all acts and things necessary to remove from the website http://www.adelaideinstitute.org and from all other World Wide Web websites the content of which is controlled by him or by the Adelaide Institute:

(i) the document headed *"About the Adelaide Institute";*

(ii) any other material with substantially similar content; and

(iii) any other material which conveys the following imputations or any of them -

A there is serious doubt that the Holocaust occurred;

B it is unlikely that there were homicidal gas chambers at Auschwitz;

C Jewish people who are offended by and challenge Holocaust denial are of limited intelligence;

D some Jewish people, for improper purposes, including financial gain, have exaggerated the number of Jews killed during World War II and the circumstances in which they were killed.

(b) be restrained from publishing or republishing to the public, by himself or by any agent or employee, on the World Wide Web or otherwise:

(i) the document headed *"About the Adelaide Institute";*

(ii) any other material with substantially similar content; and

(iii) any other material which conveys the following imputations or any of them -

A there is serious doubt that the Holocaust occurred;

B it is unlikely that there were homicidal gas chambers at Auschwitz;

C Jewish people who are offended by and challenge Holocaust denial are of limited intelligence;

D some Jewish people, for improper purposes, including financial gain, have exaggerated the number of Jews killed during World War II and the circumstances in which they were killed.

114 The respondent will be ordered to pay the applicant's costs of the proceeding, including reserved costs if any.

I certify that the preceding one hundred and fourteen (114) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Branson.

Associate:

Dated: 17 September 2002

Counsel for the Applicant:	Mr S Rothman SC
Solicitor for the Applicant:	Geoffrey Edwards & Co
Counsel for the Respondent	The respondent appeared in person on 2 July 2002
Date of Hearing:	18 June and 2 July 2002
Date of Judgment:	17 September 2002