



**Australian  
Human Rights  
Commission**

Our ref: 2020-15230

18 January 2021

Mr Roger Karge

Sent by email only: 9999roger@gmail.com

Dear Mr Karge

**Your complaint against Affirm Press Pty Ltd, Diversity Arts Australia, Sweatshop Literacy Movement Incorporated and the Australia Council for the Arts**

I refer to the above complaint alleging racial hatred under the *Racial Discrimination Act 1975* (Cth) (RDA).

All of the information that has been provided to the Commission to date has been reviewed. I am writing to advise you of the current assessment of the complaint and provide you with the opportunity to provide further information in support of the complaint, if you wish to do so.

**The complaint**

Complaint documents

Your complaint consists of the following documents:

- Your initial complaint form dated 5 October 2020.
- Your email to the Commission dated 28 November 2020 with two attachments which are a revised complaint form dated 26 November 2020 and a cover letter dated 28 November 2020.
- Copies of letters dated 29 July 2020 that you sent to Affirm Press, Diversity Arts Australia, Sweatshop Literacy Movement Inc and the Australian Council for the Arts.
- A copy of an email dated 4 August 2020 that you received from the Australian Council for the Arts.
- A copy of the book cover that is the subject of your complaint.

## Summary of complaint

In the complaint you say as follows:

- You are a white Australian of European descent.
- You are complaining about the cover of the book, 'After Australia' which was published by Affirm Press on 9 June 2020, and its associated marketing material.
- You have found the book displayed in public book shops and online.
- The book cover depicts a white family whose faces have been defaced in thick, black, forceful scribbles and the words on the front cover say – *"After empire, after colony, after white supremacy...twelve diverse writers imagine an alternative Australia"*.
- Historically, 'defacement' is well known as a powerful, discriminatory, violent and hateful act.
- Your father and his family only narrowly escaped death at the hands of the Soviets during the second World War. Because of your family background, you find the act of defacement highly offensive.
- Recent examples of 'defacement' of candidate's posters in the federal election campaign of 2019, were widely condemned as examples of racial hatred and the book cover falls into the same 'racial hatred' category.
- The cover is gratuitous, and the image selected on the basis that it depicts a white family and is therefore chosen for purely racist (skin colour) reasons.
- It is based on race and colour of 'white people' and is likely to offend, insult humiliate and intimidate 'white people' in general and white children in particular.
- The defaced images of the white family and the accompanying words has a heightened capacity to convey implications beyond the literal meaning of the words alone and leads a non-white reader to be incited to racial hatred in the belief that if white Australians are removed, 'diverse', non-white Australians will be the beneficiaries by the replacement of a more just, equitable, de-colonised and non-white Australian society.
- The book cover incites racial hatred by an ordinary reasonable reader or viewer and the act of 'defacement' has a 'profound and serious effect'. In your case you feel a deep unease and heightened anxiety and concern for yourself, your family and other white families in Australia after viewing the book-cover.
- The publishing of the images was done deliberately to: provoke the ire of 'white' Australians; threaten 'white' Australians; provoke some readers to be aggressive, vocal, hateful and violent in their attitudes and dealings with 'white' Australians; and incite some readers to believe that current Australian society consisting predominantly of 'white' men, women and children can be defaced and therefore 'erased' 'eliminated' or greatly curtailed for the future benefit of 'non-white' men, women and children in Australia.

## **Current assessment**

The *Australian Human Rights Commission Act 1986* (Cth) (AHRCA) says that after a complaint has been received, the President of the Commission must consider whether to inquire into the complaint or terminate the complaint without inquiry under section 46PF(1)(b) of the AHRCA.

Section 46PH of the AHRCA sets out the grounds on which a complaint may be terminated. Section 46PH(1B)(a) of the AHRCA says that the President may terminate a complaint if she is satisfied that the complaint is misconceived and/or lacking in substance.

Based on the information currently before the Commission, the President's Delegate may consider terminating your complaint under sections 46PF(1)(b) and 46PH(1B)(a) of the AHRCA. The reasons for this assessment are explained below.

## **Reasons for current assessment**

### The law

Section 18C under Part IIA of the RDA covers offensive behaviour because of race, colour or national or ethnic origin and provides that:

- (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.

## Consideration of the information before the Commission

The Commission understands that the act you are complaining about is the publication of the cover of the book 'After Australia' and its associated marketing material that includes the image and words from the cover of the book. The Commission understands that the book is an anthology of creative writing by Indigenous writers and writers of colour in Australia.

You say that the cover image of a white skinned family with black scribble on their faces, accompanied with the words "*After empire, after colony, after white supremacy...*", is offensive to you as a white Australian of European descent and constitutes racial hatred. You refer to historical issues regarding 'defacement', and the history of your own family. You say that you interpret the scribble on the faces, combined with the words, as an intention to threaten and/or eliminate white Australians.

The Commission understands that the book is displayed and available to purchase in bookshops and online and therefore, with reference to the definition of racial hatred, would constitute an act done 'otherwise than in private'. However, as explained below, the information before the Commission at this time does not appear to sufficiently support that the act you are complaining about would meet the requirements of section 18C(1)(a) of the RDA.

### *Consideration of section 18C(1)(a)*

To support a claim of racial hatred, a complainant is required to provide sufficient information to support that the act they are complaining about is reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group of people. The test in section 18C(1)(a) is an objective one. That is, if a matter proceeded to court, the question to be considered is not whether the person making the complaint was offended, insulted, humiliated or intimidated; but rather whether the act complained of was reasonably likely to have that effect on a hypothetical representative member of the relevant group of people, in this case the relevant group being white Australians of European descent.

Case law regarding section 18C of the RDA supports that the hypothetical representative of the relevant group should not be a person who is particularly susceptible to be aroused or incited<sup>1</sup>, and that for an act to be racial hatred it must have '*profound and serious effects*' and '*not be likened to mere slights*'<sup>2</sup>.

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<sup>1</sup> *Kelly-Country v Beers* [2004] FMCA 336.

In the case *McLeod v Power*<sup>3</sup>, which related to a claim of racial hatred by a white Australian prison officer, the court said that context is central in determining the impact of conduct alleged to be in breach of section 18C. Further, courts and tribunals have found that white people are the dominant people historically and culturally within Australia, are not in any sense an oppressed group, and communications about an historically oppressed minority group are far more likely to cause harm to that group than communications which relate to the dominant majority<sup>4</sup>.

The cover that is the subject of your complaint relates to a book of creative writing by members of minority groups within Australia and it exists in a context in which white Australians of European descent could not be said to be an oppressed minority group. The Commission appreciates that you have a particular view about the book cover and personally, find it offensive. However, when the image and words on the book cover are considered in context, there appears to be insufficient information to support that it could be considered reasonably likely in all the circumstances to offend, insult, humiliate or intimidate a hypothetical representative member of the relevant group in terms of having profound and serious effects.

#### *Exemptions in section 18D of the RDA*

The RDA aims to strike a balance between the right to live free from racial hatred and the right to communicate freely. In accordance with this aim, section 18D of the RDA includes several exemptions – that is, situations which would not constitute racial hatred. These situations include anything said or done reasonably and in good faith in the performance, exhibition or distribution of an artistic work. It would appear that the book cover is an artistic work. You can read section 18D [here](#).

Even if it could be established that the book cover is reasonably likely to offend, insult, humiliate or intimidate a hypothetical representative member of the relevant group, the act you are complaining about may be covered by the exemptions in Section 18D.

Please note that as it appears that your complaint does not meet the requirements of section 18(1)(a) of the RDA, the Commission has not formed a view on the applicability of section 18D to your complaint.

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<sup>2</sup> *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352.

<sup>3</sup> *McLeod v Power* [2003] FMCA 2.

<sup>4</sup> *McLeod v Power* [2003] FMCA 2 & *Kazak v John Fairfax Publications Limited* [2000] NSWADT 77.

### *Named respondents*

You have named the Australia Council for the Arts (the Council) as a respondent to the complaint. However, the provided documents indicate that the Council advised you that it did not fund the publication of 'After Australia' or its cover artwork and even for the projects they do fund, the Council does not exercise editorial control.

It therefore appears that your complaint against the Council is misconceived.

### Conclusion

The Commission appreciates that you feel very strongly about the issues raised in your complaint. However, for the above-mentioned reasons, the President's Delegate may decide to terminate your complaint on the basis that she is satisfied the complaint is misconceived and/or lacking in substance.

### **Possible next steps**

#### If you want to continue with the complaint

If after reviewing this letter you want to continue with the complaint, please confirm this by contacting me by **1 February 2021**. Please note that if you advise the Commission that you want to continue with the complaint, the Commission will provide a copy of the complaint (excluding your contact details) to the organisations you are complaining about.

If you want to provide further information in support of the complaint you should also do so by **1 February 2021**. Any additional information you provide will be considered and the President's Delegate will then make a decision about the complaint.

If the complaint is terminated under sections 46PF(1)(b) and 46PH(1B)(a) of the AHRCA, you may be able to apply to the Federal Circuit Court of Australia or the Federal Court of Australia to have the allegations decided by the court. The law says an application to the court can only be made if the court concerned grants leave to make the application.

#### If you do not contact the Commission

If I do not hear from you by **1 February 2021**, the President's Delegate may decide to close the complaint on the basis that she is satisfied you do not want to continue with the complaint. If the complaint is closed on this basis, you will not be able to make an application to have the allegations decided by the court.

**Who should you contact?**

If you have any questions about this letter, please contact me.

Yours sincerely

A handwritten signature in black ink that reads "S. Peeligama". The signature is written in a cursive style with a large, looping 'P' and a long, sweeping underline.

Shyamika Peeligama  
**Principal Investigator/Conciliator**