

Our ref: 2020-15230

6 April 2021

Mr Roger Karge

Sent by email only: 9999roger@gmail.com

Dear Mr Karge

Termination of the complaint

I am writing to advise you of my decision regarding your complaint against Affirm Press Pty Ltd (Affirm Press), Diversity Arts Australia, Sweatshop Literacy Movement Incorporated (Sweatshop Literacy Movement Inc) and the Australia Council (the Australia Council for the Arts), alleging racial hatred under the *Racial Discrimination Act 1975* (Cth) (RDA).

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 Australia Council for the Arts.
- A copy of an email dated 4 August 2020 that you received from the Australia Council for the Arts.
- A copy of the book cover that is the subject of your complaint.

A copy of the collated documents that make up your complaint is provided with this letter and marked 'Attachment B'.

Summary of the 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 last 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.
- In addition, you are profoundly affected given that the editor of the book, Michael Mohammed Ahmad, who has responsibility for the 'defaced' book-cover, said in a podcast interview about the book on 9 July 2020 that:
"...Australia...for tens of thousands of years starts with an Indigenous voice and that the end of this country has to be an Indigenous voice as well; that, this is a black country and that's what we are on, and we need eventually to be in a time where the country is led by Indigenous people."

- 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, woman 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.

Assessment of the complaint and opportunity to provide further information

In a letter dated 18 January 2021, an assessment of all the information before the Commission was set out. You were invited to provide any further information or comments in support of the complaint.

You provided further information in support of your complaint in an email dated 31 January 2021 and seven attachments and a further email sent on 13 March 2021 with two attachments. All of this information has been considered, including the full transcript of the interview with the editor of the book that is referenced in your complaint.

Your comments in the additional information include the following:

- At this stage you have no extensive, objective data to support your claim that, 'the act complained of was reasonably likely to have that effect on a hypothetical member of the relevant group of people, in this case the relevant group being white Australians of European descent'. In an attempt to obtain sufficient objective data to support your claim, should the matter proceed to court, you have initiated an online public petition outlining the details of your complaint on Change.org.
- Should this matter proceed to court, you would argue that there may be a case to be made that the publisher and the twelve contributors may, in fact, be in a relatively higher position of power than you and many other 'white Australians of European decent'. To support this claim, you note that:
 - the publisher Affirm Press has funding and backing from powerful sources, such as the Australian Government via the Australia Council;
 - the management and staff members of Affirm Press do not appear to be representatives of either a 'victimised group' or an 'oppressed minority';
 - all the contributors to the book have been able to express their views publicly in a very wide number of journals and literary publications, and many have been awarded literary prizes;

- some of the contributors, for example, Michelle Law, have very successful careers and are widely published and have material that is produced for TV;
- Affirm Press and some contributors to the book are members of a 'social elite' that gives them 'privileges' that enables them to publish 'racist' images, such as a 'defaced white family' without fear of censure.
- Should your complaint ultimately reach a position where a determination of section 18D is required, you would make the point that even though the book cover would appear to be an artistic work, its publication would still need to comply with being, 'done reasonably and in good faith'.
- There may be evidence that the book cover was not done, by at least some of the contributors, 'in good faith,' and that an exemption under section 18D might not be possible.
- For example, one of the contributors, Michelle Law, has been selected by the publishers in their marketing program to prominently display the book-cover with its 'defaced white family' clearly visible.
- Ms Law is not acting in 'good faith' given that on 10 July 2020, it was reported in The Sydney Morning Herald that she '*...has apologised for a "racist" scene that "depicted dangerous stereotypes" in a film she wrote. Law issued an "apology without reservation" for a scene in her 2013 short film Bloomers that "...involved black-facing 'a white girl and boy and an Asian girl..'*' You understand that, at about the time Ms Law was making the above unreserved apology she was promoting, apparently unashamedly, a book that had a cover depicting a 'defaced' white family.
- The acknowledgement page in the book clearly shows that the Australia Council did provide financial support to the publisher. With reference to the Australia Council's position, that even if they did provide funds for the project, they do not exercise any editorial control of the grant recipients, this is rather a lame and irresponsible excuse. Surely the Australian taxpayer would expect the Australia Council to have some oversight of the projects it funds?
- The Australia Council sent you an email on 15 February 2021, confirming that it provided a grant to Diversity Arts Australia in 2018, to support a series of workshops with culturally and linguistic diverse communities and writers to create ten new commissioned work. The Australia Council considers that 'About Australia' has developed from the project, which would explain why the Australia Council was acknowledged in the book alongside other supporters.

The Commission notified Affirm Press, Sweatshop Literacy Movement Inc and the Australia Council of the complaint on 15 March 2021 and Diversity Arts Australia on 16 March 2021.

My decision

Sections 46PF(1)(a) and 46PF(1)(b) of the *Australian Human Rights Commission Act 1986* (Cth) (the AHRCA) provides that the President must consider whether to inquire into the complaint, having regard to the matters set out in section 46PH of the AHRCA, and if the President is of the opinion that the complaint should be terminated, terminate the complaint without inquiry.

Section 46PH(1B)(a) of the AHRCA says that the President must terminate a complaint if she is satisfied that the complaint is lacking in substance.

I have considered all the information that has been provided and I wish to advise that I have decided to terminate the complaint under sections 46PF(1)(b) and 46PH(1B)(a) of the AHRCA.

I understand you may be disappointed by my decision and I would like to explain the reasons for my decision.

Reasons for my decision

The law

As you are aware, section 18C under Part IIA of the RDA covers offensive behaviour because of race, colour or national or ethnic origin. This section 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 provided information

I understand 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. I understand that the book is an anthology of creative writing by Indigenous writers and writers of colour in Australia.¹

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. You also say you are profoundly affected by the book cover, given the comments of the editor of the book, Michael Mohammed Ahmad as quoted in your complaint.

I understand 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, I am of the view that the information does not 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)

As you are aware, 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.

¹ <https://affirmpress.com.au/publishing/after-australia/>

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 incited², and that for an act to be racial hatred it must have '*profound and serious effects*' and '*not be likened to mere slights*'³.

In the case of *McLeod v Power*⁴, 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. The court also said that white people are the dominant people historically and culturally within Australia and are not in any sense an oppressed group whose political and civil rights are under threat. Therefore, 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.

The book 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 people are not in any sense an oppressed group whose political and civil rights are under threat. I have noted your comments that the publisher and contributors to the book may be in a relatively higher position of power than you and many other white Australians of European decent. However, I am of the opinion that the context to be considered is not only the comparative social position of particular individuals, but also the historical, cultural and political context of Australian society.

I appreciate that you have a particular view about the book cover and find it personally offensive. However, I am of the opinion that when the image and words on the book cover are considered in light of the context as set out above, there is insufficient information to support that the book cover could be considered reasonably likely in all the circumstances to offend, insult, humiliate or intimidate a hypothetical representative member of the relevant group of people – namely white Australians of European descent, in terms of having profound and serious effects.

Exemptions contained in section 18D of the RDA

As previously advised, 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 a number of exemptions– that is

² *Kelly-Country v Beers* [2004] FMCA 336.

³ *Creek v Cairns Post Pty Ltd* (2001) 112 FCR, 352, 356-357 [16].

⁴ *McLeod v Power* [2003] FMCA 2.

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. You can read section 18D of the RDA again [here](#).

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

I have noted your comments regarding section 18D of the RDA. However, as I am of the view that there is insufficient information to support a claim in terms of section 18(1)(a) of the RDA, I have not formed a final view on the applicability of section 18D to your complaint.

Conclusion

I acknowledge that you feel very strongly about the issues raised in your complaint. However, for the reasons outline above, I have decided to terminate your complaint without inquiry as I am satisfied that the complaint is lacking in substance.

Possible further action

The AHRCA says that after a complaint is terminated, the person affected by the alleged discrimination may be able to apply to the Federal Circuit Court of Australia (FCCA) or the Federal Court of Australia (FCA) to have the allegations decided by the court.

The law also says that if a complaint is terminated under sections 46PH(1)(b) and 46PH(1B)(a), an application to the court can only be made if the court concerned grants leave to make the application.

If you apply to the FCCA or the FCA, you will need to attach the following documents to the application:

- this letter;
- the enclosed Notice of Termination; and
- the enclosed copy of the complaint.

Any application to the court must be made within 60 days of the date on the Notice of Termination.

If a matter proceeds to court, the FCCA and FCA can award costs against either party. Information about the court or the court process is available from a court registry or from its websites at www.federalcircuitcourt.gov.au and www.fedcourt.gov.au.

Yours sincerely

A handwritten signature in black ink that reads "Jodie Ball". The signature is written in a cursive, flowing style.

Jodie Ball

Delegate of the President