

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

ANTI DISCRIMINATION LIST

VCAT REFERENCE NO. A392/2002

CATCHWORDS

Racial and Religious Tolerance Act 2001 (Vic) - Remedy to be applied upon breach of s.8 of the Act

COMPLAINANT: Islamic Council of Victoria
FIRST RESPONDENT: Catch The Fire Ministries Inc.
SECOND RESPONDENT: Daniel Nalliah
THIRD RESPONDENT: Daniel Scot
WHERE HELD: Melbourne
BEFORE: Judge Higgins, Vice President
DATE OF REASONS: 22 June 2005
ORDERS: The Tribunal makes the orders set out at pages 5 and 6 of this decision.

[2005] VCAT 1159

**JUDGE HIGGINS
VICE PRESIDENT**

APPEARANCES:

For Applicant: Mr B Woinarski QC, Ms D Mortimer SC &
Mr K Farouque

For First, Second &
Thirddnamed Respondents: Mr D Perkins

REMEDY

- 1 In this matter I have determined that the respondents have performed acts which constitute a breach of s.8 of the *Racial and Religious Tolerance Act* 2001.
- 2 There is an agreement between the parties that the question of remedy be held over until there was a determination as to whether the Act has been breached.
- 3 In the course of the hearing as to remedy, Mr Perkins, on behalf of the respondents, announced to the Tribunal that he appeared under protest. The reasons why he did so were said to be:
 - (1) An argument that the *Racial and Religious Tolerance Act* was unconstitutional.
 - (2) Further, that an Originating Motion had been issued at the Supreme Court of Victoria seeking relief in the form of an injunction to prevent the further hearing of the matter until questions of law had been determined. It is common ground that that matter came on before Hansen J. and the application for injunctive relief was refused. His Honour took the view that he would not grant injunctive relief and in fact the matter should proceed to be heard by this Tribunal in the usual way. I propose to do so.
- 4 The complainant seeks orders -
 - (a) requiring the respondent to make public statements which acknowledge the Tribunal's findings; and
 - (b) require the respondent to provide an undertaking not to engage in future vilifying conduct or an injunction to that effect.
- 5 The powers of the Tribunal are set out in s.23 of the *Racial and Religious Tolerance Act* 2001 in the sense that it incorporates the powers which exist under s.136 of the *Equal Opportunity Act* 1995. The latter section is in the following terms:

“After hearing the evidence and representation that the parties to a complaint desire to adduce or make the Tribunal may -

 - (a) find the complaint or any parts of it proven and make any one or more of the following orders -
 - (i) an order that the respondent refrain from committing any further contravention of this Act in relation to the complaint;
 - (ii) an order that the respondent pay to the complainant within a specified period an amount the Tribunal thinks fit to compensate for the loss, damage or injury suffered in consequence of the contravention;

- (iii) an order that the respondents do anything specified in the order with a view to redressing any loss, damage or injury suffered by the complainant as a result of the contravention;
or
- (b) find the complaint or any part of it proven but decline to take any further action in the matter; or
- (c) find the complaint or any part of it not proven and make an order that the complaint or part be dismissed."
- 6 At paragraph 13 of the complainant's written submissions a set of proposed orders are sought. In essence, they seek an apology and an undertaking, alternatively an injunction preventing the respondents from repeating the conduct which I have found breaches the Act.
- 7 The Tribunal has the power to order an apology pursuant to s.136(a)(iii) of the Act. The existence of such a power was clearly recognised by the Supreme Court of Victoria in *De Simone v. Bevacqua* (1994) 7 V.A.R. 246. It also has the power to order that such apology be published, for example, in a newspaper - see *White v. Gollan* (1990) E.A.C. 92-303.
- 8 The next question is whether it is appropriate in the present case to order an apology. In my view, it is so appropriate. When one has regard to the preamble and to the objects of the Act, the intention of Parliament is to protect freedom of speech in an open and multi-cultural democracy, but to place limits upon such freedom by prohibiting the vilification of persons or classes of persons. Section 4, which contains the objects of the Act, make that position clear.
- 9 Section 136(a)(iii) requires the existence of "loss, damage or injury suffered". However, the victim of the *Racial and Religious Tolerance Act* 2001 does not need to have suffered loss, damage or injury capable of being compensated for by the payment of damages or money. Whilst monetary compensation can be paid, it is not sought, nor do I believe it would be appropriate in a case of this nature.
- 10 Accordingly, I propose to order a public apology as set out in the annexure to this ruling.
- 11 I have read paragraph 13 of the complainant's submissions and believe that each of them is appropriate, save for (d). Furthermore, I do not believe it is appropriate at this stage to grant an injunction.
- 12 Insofar as the issue of an undertaking is concerned, the circumstances in which such relief may be sought is set out in the decision of *In the Marriage of English*, a decision of the Family Court of Australia at 85 F.L.R. 9. In that decision the Full Court of the Family Court of Australia said that undertakings are serious matters and it is necessary that any such undertaking be clear and unambiguous. See the passages at pp.18-19 of that judgement.

- 13 During the course of argument, Mr Perkins made the point that his clients had received legal advice not to give any undertaking. Furthermore, there was evidence which was given at the hearing of the substantive matter by both Pastor Scot and Pastor Nalliah, that in the future they would still perform the same acts, even if they were found to be in breach of the *Racial and Religious Tolerance Act 2001*.
- 14 It was submitted by the complainants that, having regard to those comments, I should grant an injunction.
- 15 I have given this matter careful thought and I have determined that I propose to give the respondents an opportunity to rethink their position, given the findings of the Tribunal and, should they indicate upon reflection that they will not give the undertakings, then it will be necessary for further orders to be made.
- 16 In determining what orders should be made, I have had regard to a number of matters:
- (a) the legislation which was introduced by Parliament is comparatively new. Furthermore, it is legislation which is not easy to interpret and apply. The circumstances where a person desires to, and does express an opinion upon a subject matter constitutes his prima facie right to freedom of expression. The difficulty with regard to the legislation is that it is not an easy task to determine whether an individual has gone too far, and has breached the relevant provisions of the Act, including those which specifically exempt what would otherwise be a breach by reason of s.11. This section deals with the fact that s.8 is not contravened if a person can establish that the conduct was engaged in reasonably, and in good faith, for any genuine religious purpose or purpose that is in the public interest.
 - (b) Furthermore, there is no case law in this State which assists a citizen to determine when "the line has been crossed". Having said that, it is clear that the respondents in this matter were aware of the existence of the legislation prior to the seminar and the publication of the article, together with comments which were made in the newsletters. The respondents were not individuals who were ignorant of the existence of the legislation, and at least knew that there were some restrictions on what could or could not be said.
 - (c) I have also taken into account the fact that the Second and Third Respondents are individuals who, despite the adverse findings I have made, are otherwise of good character. They have passionate religious beliefs which

I think have caused them to transgress the law. That does not excuse their conduct, but does go some way to explain why they acted as they did. I have decided to allow the tender of two books, one relating to Pastor Scot and the other to Pastor Nalliah, which demonstrate both their history and background.

The Tribunal Orders

- (a) On or before 31 August 2005, the First, Second and the Third Respondents are jointly to publish a statement on the First Respondent's website (currently located at www.catchthefire.com.au) and on the front page of its standard Newsletter which reproduces exactly, without addition or qualification and at least in a font size 10, the statement set out in the Annexure to these orders ("the statement").
- (b) The First Respondent is to maintain that statement on its website for a period of 12 months, namely until 31 August 2006.
- (c) On or before 31 August 2005, the First, Second and the Third Respondents are jointly to place the statement, over two consecutive weeks in:
 - (i) a Saturday edition (News Book One) and a Monday edition of The Age newspaper, on pages 5, 7 or 9, with the size for the area of the statement not less than 17cm wide x 10.8cm high; and
 - (ii) a Saturday edition and a Monday edition of the Herald Sun newspaper, on pages 7 or 9, with the size for the area of the statement not less than 14.9cm wide x 12.2cm high,and, with a heading, in bold and in at least font size 20, reading "Breach of Racial and Religious Tolerance Act".
- (d) Within 30 days of this date each of the Second and Third Respondents provide an undertaking to the Tribunal that:
 - (i) from the date of these orders, he will not make, publish or distribute in Victoria (including on the internet), whether in writing or orally and whether directly or indirectly, any statements and, or alternatively, information, suggestions and implications, to the same or similar effect as those found by the Tribunal to have breached the *Racial and Religious Tolerance Act 2001 (Vic)* (see paragraphs 80, 379, 387, 388 390);
 - (ii) from the date of these orders, he will not make, publish or distribute in any other State or Territory of Australia (including on the internet), whether in writing or orally and whether directly or indirectly, any statements and, or alternatively, information, suggestions and implications, to the same or similar effect as those found by the Tribunal to have breached the *Racial and Religious Tolerance Act 2001 (Vic)*.

- (e) The Second Respondent is to provide an undertaking to the Tribunal on behalf of the First Respondent, its officers, employees and agents, in the same terms as those set out to in paragraphs (d)(i) and (ii) above.
- (f) An order releasing all parties and their legal representatives, from the usual implied undertaking not to use evidence and documents for any purposes other than the purposes of this proceeding in VCAT.

ANNEXURE

This statement is made pursuant to an order of the Victorian Civil and Administrative Tribunal ("VCAT"). In November 2002 the Equal Opportunity Commission of Victoria referred a complaint by the Islamic Council of Victoria against Catch The Fire Ministers Inc, Pastor Daniel Nalliah and Pastor Daniel Scot to VCAT. On 17 December 2004, VCAT found the complaint was proven and that each of the respondents had breached s.8 of the Victorian *Racial and Religious Tolerance Act 2001*, and further that none of the defences under the Act had been made out. The complaint concerned statements made by Pastor Daniel Scot in a seminar organised by Catch The Fire Ministries and held on 9 March 2002 in Surrey Hills, articles written by Pastor Daniel Nalliah in the Newsletters of Catch The Fire Ministries Inc and an article written by an American called Richard Braidich published on Catch The Fire's website in 2001. VCAT found the seminar was not a balanced discussion, that Pastor Scot presented the seminar in a way that was essentially hostile, demeaning and derogatory of all Muslim people, their God, their prophet Mohammed and in general Muslim beliefs and practices, that Pastor Scot was not a credible witness and that he did not act reasonably and in good faith. VCAT found the statements by Pastor Nalliah in the newsletter were likely to incite hatred towards Muslims and sought to create fear against Muslims, that Pastor Nalliah was not a credible witness and did not act reasonably and in good faith. Finally, VCAT found that the statement by Mr Braidich made no attempt to distinguish between mainstream and extremist Muslims, and incited hatred and contempt towards people who are Muslims, that Pastor Nalliah performed an act inciting hatred and contempt against Muslims by placing this article on the website and that Pastor Nalliah did not act reasonably and in good faith in doing so. Each of the respondents acknowledges the findings of VCAT that the statements breached the *Racial and Religious Tolerance Act 2001* (Vic) and will in future refrain from making, publishing or distributing (including on the internet) any statements, suggestions or implications to the same or similar effect.

This statement is issued by Catch The Fire Ministries Inc, Pastor Daniel Nalliah and Pastor Daniel Scot.