

ACCESSORIAL AND VICARIOUS LIABILITY UNDER THE TRADE PRACTICES ACT

1. Often a “scattergun” approach is taken to issuing Trade Practices Act proceedings against potential defendants in order to maximise the prospects of recovery.
2. Under the Trade Practices Act 1974 (TPA) and the State fair trading legislation, a corporation or individual can be held liable in one of three ways:
 - (a) by directly contravening a provision and being held liable as principal;
 - (b) by being “knowingly concerned” in a contravention within the meaning of section 75B¹; and
 - (c) (for a company) by being vicariously liable for conduct engaged in by a servant or agent on its behalf within the meaning of TPA section 84(2) or FTA s. 144(1).
3. This paper addresses the latter two indirect ways in which liability can be attributed. Specifically, this paper contends that section 84(2) is increasingly being used as a means of attributing liability to a viable corporate defendant because of the evidentiary difficulties of section 75B.

Accessorial liability

4. Section 75B of the TPA provides that:

“(1) A reference in this Part to a person involved in a contravention of a provision of Part IV, IVA, V, or VC, or of section 75AU or 75 AYA, shall be read as a reference to a person who:

- (a) has aided, abetted, counselled or procured a contravention;*
- (b) has induced, whether by threats or promises or otherwise, the contravention;*

¹ Section 75B is replicated in section 145 of the Victorian Fair Trading Act 1999. This provision commenced operation in 2003 but between 1999 and 2003 there was no accessorial liability provision under that Act.

The High Court in Houghton v Arms (2006) 225 CLR 553 discussed this curious legislative position and found that an employee was principally liable for misleading conduct under section 9 of that Act. For conduct post-2003, an analysis of accessorial liability under the Fair Trading Act will follow the Yorke v Lucas principles.

- (c) *has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or*
- (d) *has conspired with others to effect the contravention.”*

5. Section 75B imports the requirements of the criminal law and therefore requires proof of an element of intention: Caple v All Fasteners (WA) (a firm) [2005] FCA 1558; Yorke v Lucas (1983) 49 ALR 672.
6. To establish that a person was involved in or knowingly concerned in a contravention within section 75B, it must be shown that the person intentionally participated in a contravention and knew the facts constituting the contravention: Yorke v Lucas (1985) 158 CLR 661; Quinlivan v ACCC (2004) ATPR 42-010.
7. The joint judgment of Mason ACJ, Wilson, Deane and Dawson JJ in Yorke v Lucas remains authoritative. Their Honours, at [667-668] said:

*“A contravention of s 52 involves conduct which is misleading or deceptive or likely to mislead or deceive and the conduct relied on in this case consisted of the making of false representations. Whilst Lucas was aware of the representations – indeed they were made by him – he had **no knowledge of their falsity and could not for that reason be said to have intentionally participated in the contravention**”*
[emphasis added]

(See also “Accessorial Liability for Misleading or Deceptive Conduct”, Pearce, (2006) 80 ALJ 104)

Examples of persons being found to have been “knowingly concerned” in a contravention within the meaning of section 75B include the following:

- (a) A newspaper publisher was found to be knowingly concerned in misleading advertising: Australian Society of Accountants v Federation of Australian Accountants Inc (1987) ATPR 40-796

- (b) An executive who exceeded his authority in negotiations was found to be knowingly concerned in the misleading representations thereby made by his company: Sellars v Adelaide Petroleum NL (1994) 179 CLR 332
 - (c) A director and employee of a company were found to have been knowingly concerned in misleading representations made to prospective franchisees: Bell v Australasian Recyclers (WA) Pty Ltd (1986) ATPR 40-644
8. The real difficulty in establishing accessorial liability is the requirement of actual rather than constructive knowledge of the matters said to constitute the contravention². Although s.75B is commonly pleaded as a means of capturing potential defendants, it is a challenging evidentiary exercise to prove knowledge.
9. The following examples demonstrate this difficulty:
- (a) In Robertson St Properties Pty Ltd v RPM Promotions Pty Ltd [2005] QCA 389, an appeal was allowed in respect of two individuals who were found by the trial judge to have been knowingly concerned in misleading or deceptive conduct, on the basis that there were no specific findings of fact that they each had actual knowledge of the facts said to comprise the misleading conduct;
 - (b) In Yorke v Lucas, the misrepresentations were made by Lucas, the managing director of the selling agent for the vendor. Lucas was found not to be liable as a person knowingly concerned because he was not aware that the figures represented were not correct.
 - (c) In Medical Benefits Fund of Australia Ltd v Cassidy (2003) 135 FCR 1, an advertising agent was found not to be involved in misleading advertisements for a health care fund because the agent did not know that the statements in the advertisement were false.

² However, it has been suggested that a combination of suspicious circumstances and a failure to make inquiry can give rise to liability under section 75B: Compaq Computer Australia Pty Ltd v Merry [1998] FCA 968; King v GIO Australia Holdings Ltd [2001] 184 ALR 98

(d) In Citibank Ltd v Liu [2003] NSWSC 569, claims were successfully brought against corporate lenders for producing false documentation but were not successful against the individuals because the Court was “unable to come to the conclusion in respect of any of the many representations sued upon that the [individual] defendant is established in the requisite way to have had the necessary state of mind at the relevant time”.

10. This longstanding interpretation of section 75B often leads to the curious result that corporate defendants are found liable for an individual’s actions in circumstances where the same individual is not liable because he or she is found not to have actually known the matters comprising the contravention: *Houghton v Arms* (2006) 225 CLR 553..

Liability for conduct engaged in on behalf of a corporation

11. Section 84(2) of the TPA provides that:

“(2) Any conduct engaged in on behalf of a body corporate:

(a) by a director, servant or agent of the body corporate within the scope of the person’s actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent;

shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate”³

12. At common law, a principal is liable only for the acts of his or her agent that are within the scope of actual, apparent or ostensible authority of the agent: Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964]2 QB 480.

³ This provision is mirrored in section 144 of the Victorian Fair Trading Act 1999, which like section 145, commenced operation in 2003. See footnote 1 on section 145.

13. Section 84(2) is a deeming and enlarging provision of general application designed to facilitate proof of the responsibility of a corporation: Walplan Pty Ltd v Wallace (1985) 8 FCR 27 (FCFCA) at 38 (per Lockhart J); approved in *Houghton v Arms* (2006) 225 CLR 553 at 556.
14. More importantly the section extends and does not merely reflect the common law. It applies to conduct engaged by a person beyond their actual or implied authority and it is not limited to situations where the corporation benefits from the conduct: Walplan Pty Ltd v Wallace (1986) ATPR 40-650; Trade Practices Commission v Sun Alliance Australia Ltd (1994) ATPR-41-286; Lisciandro v Official Trustee in Bankruptcy (1996) 69 FCR 180.
15. In Walplan, Lockhart J at p.38 said of section 84(2):

“It is a statutory provision designed to facilitate proof of the responsibility of a corporation for the acts of its directors, servants, agents and others. It is designed to attribute to a corporate conduct of others for which the corporation would not necessarily be otherwise responsible.

The phrase “on behalf of” is not one with a strict legal meaning and it is used in a wide range of relationships. ... In the context of subsec.84(2) the phrase suggests some involvement by the persons concerned with the activities of the company. The words convey a meaning similar to the phrase “in the course of the body corporate’s affairs or activities”. The words “on behalf of” also encompass acts done by a corporation’s servants in the course of their employments; but those words are not confined to the notion of the master/servant relationship. Subsection 84(2) refers to conduct by directors and agents of a body corporate as well as its servants. Also, the second limb of the subsection extends the corporation’s responsibility to the conduct of other persons who act at the behest of a director, agent or servant of the corporation. Hence, the phrase “on behalf of” casts a much wider net than conduct by servants in the course of their employment, although it includes is...

...

Subsection 84(2) attributes responsibility to a corporation for a wide range of conduct engaged in by others provided that it was engaged in on behalf of the corporation whether actually authorised by it or not.

...

Although for some purposes of company law it may be sufficient to show that conduct of an agent was “on behalf of” the corporation if it is established that it was for the benefit of the corporation, I see no justification in importing this concept into the construction of subsec. 84(2). It would unduly restrict the ordinary and natural meaning of the language of the subsection.”

16. Recent authority suggests that something is done “on behalf of” a corporation within subsection 84(2) if the person engages in conduct either:
 - (a) intending to do so “as representative of” or “for” the corporation; or
 - (b) in the course of the corporation’s business, affairs or activities: Lisciandro v Official Trustee In Bankruptcy (1996) 69 FCR 180; NMFM Property Pty Ltd v Citibank (No 10) (2000) 186 ALR 442; Downey v Carlson Hotels Asia Pacific Pty Ltd [2005] QCA 199

17. Examples of cases in which the Courts have attributed liability to a corporation for the acts of third parties by virtue of section 84(2) include:
 - (a) A hotel operator was found to have engaged in misleading conduct with respect to brochures it did not prepare or distribute but which it approved for the sale of units in a hotel development it was to manage, even though it had no direct beneficial interest in the sale of the units: Downey v Carlson Hotels Asia Pacific Pty Ltd [2005] QCA 199
 - (b) An insurance company was found to be liable for misleading advertisements placed by a bank because it benefited financially from the advertising through sales of insurance policies: TPC v Sun Alliance Australia Ltd (1994) ATPR 41-286

18. In Downey, the Queensland Court of Appeal said at [para 59 – 60]:

“[59] An act is done "on behalf of" a corporation for the purposes of s 84(2) of the Act if the actor "engaged in the conduct in the course of the corporation's business, affairs or activities".⁴¹ It may be accepted that the appellant is not in the business of marketing units; but it is in the business of operating hotels including, by its own admission, suite hotels; and it intended to operate a hotel in the complex.

[60] The promotion of the Radisson Suites development of which the appellant was to be the hotel manager was indisputably a promotion of the appellant's own business having regard to its active participation in a promotion the success of which was important in relation to its proposed role as hotel manager. Further, the evidence showed that the appellant identified the Radisson Suites project as calculated to advance its wish to re-establish its presence in the Brisbane hotel market. That being so, it seems to me that, whatever the position otherwise, s 84(2) operated to deem the publication of the advertising material as conduct engaged in by the appellant.”

19. In Walplan, Lockhart J at p.38 said of section 84(2): The courts have recognised that by force of subsection 84(2), the conduct of a corporation which is associated with a contravening party but who is not its authorised agent could still render the corporation liable: Lisciandro v Official Trustee In Bankruptcy (1996) 69 FCR 180.

20. A recent Federal Court case in which this provision was relied on involved a corporate fraudster conducting its business at the offices of an authorised real estate agent. It was contended that the conduct of the fraudster in marketing and selling units in the development using a fraudulent price list was done in the course of the authorised real estate agent's business, affairs or activities and therefore was conduct engage in on behalf of the real estate agent and accordingly, the real estate agent ought to be principally liable under section 84(2). This submission was considered by the Court but ultimately this matter was settled before this issue was decided.

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21. Part of the reason the Federal Court case ultimately proceeded on this basis was the realisation that there were significant evidentiary difficulties in proving that the individual real estate agent knew that the fraudster was perpetrating a scam on his employer's premises.

22. Section 84(2) is worth considering each time a corporation has business dealings with a person or another corporation that has engaged in conduct in contravention of the Trade Practices Act⁴.

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⁴ Equivalent provisions to sections 75B and 84 are also found in the ASIC Act 2001 which broadly covers financial services: see sections 12GB and 12GH