YORKE v. LUCAS[1] HAMILTON v. WHITEHEAD[2]

The decision of the High Court in *Yorke v. Lucas* to restrict the ancillary liability of a person 'involved in a contravention' of the Trade Practices Act 1974 (Cth) ('the Act') to cases where the person involved in the contravention of another had 'knowledge of the essential matters which go to make up' the contravention contrasts accessorial liability with the strict liability imposed upon principal defendants under the Act. The decision is particularly noteworthy because the requirement of knowledge was imported from the criminal law into ancillary liability for a breach of s. 52,[3] for which only civil remedies are available.

The decision to import principles of the criminal law into a construction of s. 75B (now s. 75B(1)) of the Act, which defines the parameters of ancillary liability, has given rise to confusion about the position of company directors. The Act creates prohibitions which are, for constitutional reasons, limited to corporations. Hence company directors only attract ancillary liability. A problem arises where a company director makes false representations on behalf of the company. A consistent application of criminal law principles would characterize the director as a principal offender rather than as an accessory, as required by s. 75B(1). In *Yorke v. Lucas*, the High Court foresaw this problem, observing, in an *obiter dictum*, that a plaintiff in these circumstances may have difficulty establishing that such a director was involved in the contravention of the corporation within the meaning of s. 75B(1). This undesirable result has recently been addressed by the High Court in *Hamilton v. Whitehead*, where it was established that such a director will be a true accessory since the contravention committed by the company was not a consequence of vicarious liability for the action of its director, but rather a consequence of actions undertaken directly by the company through a person who was the embodiment of the company.[4]

In another *obiter dictum*, the Court in *Yorke v. Lucas* raised the possibility that, despite the strict liability associated with s. 52 of the Act, a corporation which purported to do no more than pass on information supplied by another would not be in breach of s. 52 if the information turned out to be false.

The issues arising out of these cases will be discussed under the headings 'The Mental Element of Ancillary Liability', 'Company Directors as Accessories' and 'The Mere Conduit'.

I *THE MENTAL ELEMENT OF ANCILLARY LIABILITY*

The Trade Practices Amendment Act (No. 1) 1977 (Cth) expanded the scope of the remedy of damages under the Act by providing for ancillary liability. The amending Act repealed the former narrowly-framed s. 82 and substituted the present s. 82, which extended liability in an action for damages to a 'person involved in the contravention of a provision of Part IV or V' of the Act in addition to the extant liability of the person by whose conduct the plaintiff suffered loss or damage. Section 75B of the Act was inserted at the same time to provide for the interpretation of a reference to 'a person involved in a contravention'.

The intention of the Parliament in enlarging the class of persons liable for contraventions of the Act is not revealed by an examination of extrinsic materials such as the explanatory memorandum accompanying the amending Bill or the Parliamentary debate on the Bill. Although the primary target of the whole Act is, for constitutional reasons, the conduct of corporations, Pincus J. noted in *T.P.C. v. Frendship Aloe Vera Pty Ltd,that:*

[1] (1985) 158 C.L.R. 661. High Court, 3 September, 3 October 1985, Mason A.C.J., Wilson, Brennan, Deane & Dawson JJ.

[2] (1988) 63 A.L.J.R. 80. High Court, 28 October, 7 December 1988, Mason C.J., Wilson & Toohey JJ.

[3] A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[4] (1988) 63 A.L.J.R. 80, 83.

> s. 75B has the principal purpose of bringing within the scope of the Act the activities of natural persons participating in the affairs of those corporations.[5]

The Parliament was evidently keen to trap company directors who, it was feared, may often have more assets than the companies they control. This objective is consistent with the desire of the Commonwealth Parliament, apparent throughout the Act, to legislate to the outer limit of its constitutional competence. Section 75B(1) relies on the involvement of individuals being incidental to the corporations power to net natural persons 'involved' in a contravention by a corporation: *Fencott v. Muller*.[6]

The scope of ancillary liability under the Act was the primary question before the High Court in *Yorke v. Lucas*. The issue turned on the construction of s. 75B(1) of the Act. Section 75B(1) provides that:

> A reference . . . to a person involved in a contravention . . . shall be read as a reference to a person who —
> (a) has aided, abetted, counselled or procured the contravention;
> (b) has induced, whether by threats or promises or otherwise, the contravention;
> (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.

A. *The Facts of* Yorke v. Lucas

The facts of *Yorke v. Lucas* may be shortly stated. Ross Lucas Pty Ltd, a licensed land agent, acted for Treasureway Pty Ltd in the sale of its business to Miles and Sue Yorke. At the trial, Fisher J. held that Treasureway had engaged in misleading and deceptive conduct contrary to s. 52 of the Act by falsely representing the amount of the average weekly turnover of its business. Fisher J. found that the Lucas company had also contravened s. 52 by acting as agent for Treasureway, but that it had not known that the information it had supplied to the Yorkes was false; liability was strict. The Managing Director of Treasureway was held to have aided and abetted or, alternatively, to have been knowingly concerned in the contravention of Treasureway pursuant to s. 75B. The trial judge dismissed the claim against the Managing Director of the Lucas company, Ross Lucas, on the ground that Lucas was insufficiently aware of the relevant facts for him to be involved in the contravention within the meaning of s. 75B. The Full Court of the Federal Court dismissed an appeal against the judgment in favour of Lucas.[7] The Yorkes appealed to the High Court.

B. *The Appellants' Arguments*

The trial judge found that Lucas had made false representations, but that he had no knowledge of their falsity and thus could not be said to have intentionally participated in the contravention. The appellants' case proceeded on the basis that s. 75B should not be construed by reference to principles of the criminal law, and that no intent — that is, knowledge of the material facts which constitute the contravention — was necessary. They argued that a contravention of s. 52 requires no intent and it follows that there was no reason why intent should play any part in ancillary participation in a contravention of that section. It was submitted that such a construction was consistent with the policy of the Act because the corporate liability of a 'straw' company should be met by a director whose involvement on behalf of the company brought about its liability.

C. *The Judgments*

Two separate sets of reasons were delivered. Mason A.C.J., Wilson, Deane and Dawson JJ. prepared a joint judgment. Brennan J. gave a separate judgment which relied on similar reasoning. The judgments need not be referred to separately, except where specific reference is made to Brennan J. The High Court rejected the argument that the words of s. 75B did not import criminal law concepts into the Act.

[5] (1988) 82 A.L.R. 557, 560.
[6] [1983] A.T.P.R. 40-350.
[7] (1985) 80 F.L.R. 143; 49 A.L.R. 672.

> Notwithstanding that s. 75B operates as an adjunct to the imposition of civil liability, its derivation is to be found in the criminal law and there is nothing to support the view that the concepts which it introduces should be given a new or special meaning.[8]

Although s. 75B governs civil liability, it is couched in the language of the criminal law. Brennan J. identified use of the same language in ss 76(1)(c) to (f) and 78(c) to (f). Section 76(1) defines the persons who are liable to pay a fine for a contravention of Part IV. Section 78 precludes the bringing of criminal proceedings for contraventions of Part IV. Brennan J. concluded that clearly the meaning ordinarily attributed to

> those terms by the criminal law should be attributed to them in ss 76(1) and 78, and that meaning should be attributed to those terms in s. 75B.[9]

The decision to interpret s. 75B in the light of the criminal antecedents of the language of the section enabled the Court to rely on the decision of *Giorgianni v. The Queen*[10] to rebut the appellants' argument

> that because the application of s. 75B(a) may occur in conjunction with a provision such as s. 52, which requires no intent, it must also be construed so as to dispense with intent as an element of aiding, abetting, counselling or procuring.[11]

In *Giorgianni* the appellant had been convicted of culpable driving as someone who had aided, abetted, counselled or procured the commission of the offence. The offence of culpable driving is one of strict liability and no proof of any mental state on the part of the accused is required. Nevertheless, the High Court held in that case that secondary participation in a strict liability offence requires intent based on knowledge of the essential matters which make up the offence in question. It is not necessary that the secondary participant recognize his participation in a criminal offence — ignorance of the law is no defence — 'but his participation must be intentionally aimed at the commission of the acts which constitute it'.[12]

The Court found nothing in paragraph (c) (of s. 75B) to suggest that it imposed a stricter liability than paragraph (a). The appellants conceded that an intent was necessary in order to be 'knowingly concerned in' a contravention. However they argued that there was no mental element in being a 'party to' a contravention. Brennan J. best explained why this argument was rejected:

> A 'party to' an offence is one who, by the principles of the common law, would be held to be criminally liable for the offence. . . . As s. 75B transports the criteria of the criminal law into the definition of the parties who are civilly liable for the contraventions . . . , the criminal law definition of parties to an offence furnishes the definition of those who are civilly liable as a party to a contravention under s. 75B(c).[13]

The *ratio decidendi* of *Yorke v. Lucas* reflects a simple application of criminal principles to the construction of s. 75B(1): the liability under the Act of a 'person involved in a contravention' turns on proof of the necessary intent based on knowledge of the essential elements which constitute a contravention. It is not necessary that the secondary participant knows that those matters amount to an offence, merely that he has knowledge of the facts which constitute the contravention. Hence, the finding of the trial judge in *Yorke v. Lucas* that Mr Lucas did not know, and 'had no reason to suspect', that the information he supplied to the Yorkes was false was sufficient basis for the claim against Lucas to be dismissed.

D. *The Policy of the Act*

As an exercise in statutory construction, the High Court was undoubtedly correct in deciding that the language of s. 75B(1) imported a mental element into ancillary liability under the Act. This is so

[8] (1985) 158 C.L.R. 661, 669.
[9] *Ibid.* 673.
[10] (1985) 156 C.L.R. 473.
[11] (1985) 158 C.L.R. 661, 668.
[12] (1985) 156 C.L.R. 473, 506.
[13] (1985) 158 C.L.R. 661, 677.

despite the recognition, at least by Brennan J., that the interpretation was arguably at odds with the policy behind Part V of the Act — 'Consumer Protection'. Brennan J. recognized that:

> The operation of s. 75B(a) in conjunction with s. 52 may be incongruous, for s. 52 throws a strict liability on the corporation, but s. 75B(a) does not extend liability for a s. 52 contravention to a person who procures the corporation to engage in contravening conduct if that person is honestly ignorant of the circumstances that give that conduct a contravening character.[14]

The asymmetry between the strict liability imposed on a corporation and the requirement that a director, who embodies the company, have an intent before he attracts liability as an accessory, points to a defect in the scheme of the Act. It is not unlikely that plaintiffs, such as the Yorkes, will obtain judgment for a breach of s. 52 against a company with no assets, but not against the managing director who is capable of satisfying the judgment. If this is indeed a defect, the remedy lies in redrafting s. 75B(1), rather than in judicial intervention to implement the policy of the Act. In practice, the harshness of the result in *Yorke v. Lucas* is partially ameliorated by the fact that a plaintiff need only establish intent on the part of the accessory to the civil standard of proof.

II *DIRECTORS' LIABILITY*

In the joint judgment of Mason A.C.J., Wilson, Deane and Dawson JJ., it was observed, by way of *obiter dictum*, that the appellants may

> have encountered difficulty in establishing that Lucas was involved within the meaning of s. 75B in the contravention constituted by the making of the false representations, having regard to the fact that the representations, albeit made on behalf of the Lucas company, were made by Lucas himself.[15]

The judges relied on the comments of Dixon J. in *Mallan v. Lee*:

> It would be an inversion of the conceptions on which the degrees of offending are founded to make the person actually committing the forbidden acts an accessory to the offence consisting in the vicarious responsibility for his acts.[16]

In the recent case of *Hamilton v. Whitehead*[17] the High Court found that the judge's 'reservation, made no doubt out of an abundance of caution, was unnecessary'.[18] The High Court decision does not refer to the refusal of Pincus J. to apply the *Yorke obiter dictum* in the recent Federal Court case of *Frendship Aloe Vera*[19]; however, it achieves the same result with superior reasoning and greater authority.

A. *The Facts of* Hamilton v. Whitehead

Hamilton v. Whitehead involved a similar statutory scheme to that of the Trade Practices Act 1974 (Cth). Section 169 of the Companies (Western Australia) Code 1982 prohibits a person (which is defined to include a company: Interpretation Code 1981 (W.A.) s. 9) from offering or issuing an interest in a syndicate trust. Section 174 renders a contravention of s. 169 an offence. The respondent was managing director of a company convicted of four offences under ss. 169 and 174 of the Companies Code. The applicant brought proceedings against Whitehead personally, relying on s. 38(1) of the Interpretation Code, which deemed a person who aids, abets, counsels or procures, or . . . is in any way . . . knowingly concerned in or party to, . . . an offence' to have committed that offence.

B. *The Judgment in* Hamilton v. Whitehead

The respondent relied on *Mallan v. Lee*, arguing that he could not be personally liable as an accessory when his acts had constituted the offence of the company which was vicariously liable for

[14] *Ibid.*
[15] *Ibid.* 671.
[16] (1949) 80 C.L.R. 198, 216.
[17] (1988) 63 A.L.J.R. 80.
[18] *Ibid.* 83.
[19] (1988) 82 A.L.R. 557.

his actions. However, the High Court distinguished the scheme provided by the Code from that provided by the Income Tax Assessment Act 1936 (Cth) ('Tax Act') in *Mallan v. Lee*. Section 230(1) of the Tax Act made 'any person who, or any company on whose behalf the public officer . . . in any return knowingly and wilfully understated the amount of any income . . .' guilty of an offence. The company was convicted of an offence under s. 230(1). Mallan, the company's public officer, was charged on the basis that he was knowingly concerned in the commission of the offence of the company, and reference was made to s. 5 of the Commonwealth Crimes Act 1914, which is similarly worded to s. 38(1) of the Interpretation Code. It was held that the charge against Mallan could not be based on accessorial liability under s. 5, because s. 230 made him directly liable as a principal for the offence of knowing and wilful understatement of income in a return.

In *Hamilton, Mallan v. Lee* was distinguished from the case before the Court. Under the Tax Act, Mallan was guilty of an offence as a principal and therefore could not be properly charged as an accessory; the company's liability derived from its vicarious responsibility for Mallan's acts on its behalf. By contrast, s. 169 of the Companies Code 'speaks directly to the company'.[20] The 'inversion' of which Dixon J. spoke is not relevant:

> The company is not vicariously liable for the actions of the respondent. The company is the principal offender and the respondent is charged as an accessory.[21]

The fact that the respondent could be charged personally as an accessory for the identical acts relied on to make out the company's liability was a logical consequence of the decision in *Salomon*'s case.[22] *Salomon* established that the company is a legal entity apart from its members and has a legal personality separate from that of its human controller. The Court agreed with Bray C.J. that

> the individual controller of the company . . . can aid and abet what the company speaking through his mouth or acting through his hand may have done.[23]

Neither was the Court persuaded that s. 38 of the Interpretation Code should be read down so as to apply only to servants or officers of a company, rather than to 'those whose actions were themselves the actions of the company'.[24] It was held that such a construction would be at odds with the literal meaning of the Section which was 'crystal clear' and contrary to the 'fundamental purpose' of the Code — 'to ensure the protection of the public' — which would be

> seriously undermined if the hands and brains of a company were not answerable personally for breaches of the Code which they themselves had perpetrated.[25]

C. *The Position Under the Trade Practices Act*

The statutory scheme provided by the Act is similar to that of the Code, but distinguishable from that of the Tax Act. A company director is a true accessory, since the Act imposes liability directly on the company ('A corporation shall not . . .') rather than as 'the consequence of a vicarious liability for the actions of its servants carried out on its behalf'.[26] The liability of the company is 'the consequence of actions undertaken directly by it, that is to say by a person who was the embodiment of the company'.[27] Hence, a company director will not escape liability by demonstrating that his participation in certain breaches of the Act was such that, under the criminal law, he would have been a principal in the first degree.

III *THE MERE CONDUIT*

Although the Lucas company did not appeal to the High Court, in *Yorke v. Lucas* the Court expressed some doubt as to the guilt of the company. In the judgment of Mason A.C.J., Wilson,

20 (1988) 63 A.L.J.R. 80, 82.
21 *Ibid.*
22 [1897] A.C. 22.
23 *R. v. Goodall* (1975) 11 S.A.S.R. 94, 101.
24 (1988) 63 A.L.J.R. 80, 82.
25 *Ibid.* 82-3.
26 *Ibid.* 83.
27 *Ibid.*

Deane and Dawson JJ., it was said that the fact that no intent was necessary to make out a contravention of s. 52 did not

> mean that a corporation which purports to do no more than pass on information supplied by another must nevertheless be engaging in misleading or deceptive conduct if the information turns out to be false.[28]

The circumstances in which a company acting as a mere conduit would avoid liability were narrowly framed by the Court:

> If the circumstances are such as to make it apparent that the corporation is not the source of the information and that it expressly or impliedly disclaims any belief in its truth or falsity, merely passing it on for what it is worth, we very much doubt that the corporation can properly be said to be itself engaging in conduct that is misleading or deceptive.[29]

This *dictum* may be explained as a reference to the requirement in s. 52 that conduct be 'misleading'. If the conduit company 'expressly or impliedly disclaims any belief' in the 'truth or falsity' of information, 'merely passing it on for what it is worth', the plaintiff would have difficulty in establishing that the conduit company 'itself' had engaged in misleading conduct.[30] In the case of a real estate agent, a company which stuck to the guidelines outlined by the High Court could not be said to have misled any hypothetical representee whether 'reasonable'[31] or of less than average intelligence.[32] A similar point may be made in relation to an action for damages under s. 82 where the plaintiff must show that the misleading conduct 'induced' his loss or damage; it would be difficult to do so if the representing company remained within the Court's guidelines.

On its face the High Court's *dictum* is inconsistent with the media proprietor's defence provided by s. 65A. This defence would appear unnecessary if mere conduits, such as media outlets, did not attract liability for breaches of s. 52. However the mere conduit category envisaged by the four judges in *Yorke v. Lucas* would only operate where an express or implied disclaimer as to the veracity of information is made. The Court did not have the advantage of argument on this point and clearly identified its view as *obiter dictum*; nevertheless the issue remains live and deserves further judicial or legislative consideration.

IV *CONCLUSION*

The scope of ancillary liability under the Act has now been authoritatively defined by the High Court. A mental element is necessary to attract liability as an accessory under s. 75B(1) and it will be no defence for a director to argue that, because his actions constituted the corporation's contravention, he cannot be liable as an accessory. The issue of the mere conduit raised in *Yorke v. Lucas* requires further consideration, but would appear to have some merit provided the exception was retained within strict guidelines.

DAVID RAVECH*

28 (1985) 158 C.L.R. 661, 666.
29 *Ibid.*
30 *Ibid.*
31 *Parkdale Custom Built Furniture Pty Ltd v. Puxu Pty Ltd* (1982) 149 C.L.R. 191, 197.
32 *Parish v. World Series Cricket Pty Ltd* (1977) 16 A.L.R. 172.

* B.A., LL.B. (Hons) (Melb.), Arthur Robinson & Hedderwicks.