

## Commentary on the “Long Arm of Accessory Liability in New Zealand –

### How Far is Too Far”

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1. Derek Johnston and Sarah Keene have prepared an enlightening paper on accessory liability. The paper focuses on two recent New Zealand High Court decisions, both of which are on appeal to the Court of Appeal. The first is *Commerce Commission v New Zealand Bus Limited* (“NZ Bus”) and the second is *Commerce Commission v Koppers Arch* (“Koppers Arch”). In this brief commentary paper I refer to the relevant sections of the TPA, highlight some of the established principles, and then comment on NZ Bus which I consider raises issues of particular relevance to Australia.
2. In Australia, the starting point is s.75B TPA. It is the first section of Part VI (Enforcement and Remedies) and provides as follows:

#### Interpretation

- (1) A reference in this Part to a person involved in a contravention of a provision of Part IV, IVA, IVB, V or VC, or of section 75AU, 75AYA or 95AZN, 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.
3. The sections in Part VI which refer to a person “involved in a contravention” and therefore pick up the extended definition of s.75B are (s.82 (Actions for Damages), s.83 (Finding in Proceeding to be

Evidence) and s.87 (Other Orders)). The language in s.75B is used in a number of other sections in the Act, including s.76 (Pecuniary Penalties) and s.80 (Injunctions).

4. Section 75B TPA was inserted into the Act by the Trade Practices Amendment Act 1977. The language used mirrored the then language of section 5, Crimes Act 1914 (Cth). This was regarded as significant in interpreting the section. In *Yorke v Lucas* (1985) 158 CLR 661 at 669 Mason ACJ, Deane, Wilson and Dawson JJ stated that “*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*”. In that appeal an argument was put, and rejected, that the use of the term “*party*” in s.75B(1)(c) without qualification meant that a mental element was not required.
5. It may be helpful for some if I set out what I understand to be some of the basic principles of accessory liability in Australia.
  - First, in order to establish accessory liability, it is necessary for the defendant to have knowledge of all of the essential facts constituting the contravention: *Yorke v Lucas* (1985) 158 CLR 661 at 670 (a phrase initially used by Lord Goddard CJ in *Johnson v Youden* [1950] 1 KB 544 at 546-547). This is so irrespective of whether the primary contravention imports a mental element. It is necessary to plead the essential facts which constitute the contravention and not merely state that the alleged accessory was “*knowingly concerned*” in the contravention: *ACCC v Giraffe World Australia Pty Ltd (No 2)* (1999) 95 FCR 302 at [187]. The onus will always lie with the plaintiff, notwithstanding that the onus may rest with the defendant under the primary contravention (for example, where a contravention is alleged in respect of a breach of s.52 and the representation is as to a future matter): *ACCC v Michigan Group Pty Ltd* [2002] FCA 1439, *Quinlivan v ACCC* [2004] FCFCFA 175.

- Secondly, knowledge means actual knowledge, including willful blindness. The latter will occur “when a person deliberately refrains from making inquiries because he prefers not to have the result, when he willfully shuts his eyes for fear that he may learn the truth”: *Giorgianni v R* (1985) 156 CLR 473 at 482 – 483, *R v Crabbe* (1985) 156 CLR 464 at 470 – 471. Knowledge does not include mere recklessness or negligence: *Giorgianni v R* (1985) 156 CLR 473 at 482.

The position of knowledge under s.75B and related sections can be compared with the position of knowledge in the case of “strangers” who assist in the breach of a trust. The High Court has considered different degrees of knowledge recently in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 236 ALR 209 in the context of the second limb of *Barnes v Addy* (knowing assistance). Their Honours set out the 5 categories which were referred to in *Baden v Societe Generale pour Favoriser le Development du Commerce et de l’Industrie en France SA*:

(i) actual knowledge; (ii) wilfully shutting one’s eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which would put an honest and reasonable man on inquiry.

The High Court seemed to accept the view that the first three categories involved “actual knowledge”: at [174]. The High Court went on to find that the first four categories would be sufficient to answer the requirement of knowledge in the second limb of *Barnes*, but “does not travel fully into the field of constructive notice by accepting the fifth category. In this way, there is accommodated, through the acceptance of the fourth category, the proposition that the morally obtuse cannot escape by failing to recognise an impropriety

*that would have been apparent to an ordinary person applying the standards of such persons*". It seems clear enough that neither category (iv) or (v) would answer the requirement of knowledge in s.75B, so that the "*morally obtuse*" would escape.

- Thirdly, the accessory need not appreciate that he or she is contravening the law: *Yorke v Lucas* at 667, *Giorgianni v R* at 481. Whether it is necessary for the accessory to appreciate the falsity of a contravention under s.52 is a matter of some controversy. According to the Full Court of the Federal Court (Moore and Mansfield JJ, Stone J in dissent) appreciating the falsity of conduct is not required and all that is necessary is for the accessory to be aware of the matters that enable the conduct to be characterised that way: *Medical Benefits Fund of Australia v Cassidy* (2003) 135 FCR 1 at [15]. Similarly, where there has been a breach of s.45(2), it is not necessary for an accessory to know that the effect of an arrangement was substantially to reduce competition in the market ultimately identified by the Judge. It is sufficient for the accessory to be aware, in a more general sense, of the market and consequences of the conduct: *Rural Press Ltd v ACCC* (2003) 216 CLR 53.
  
- Fourthly, it is necessary for the accessory to be involved in the contravention. When s.75B(1)(c) speaks of being "*knowingly concerned*" in a contravention it is "*not a concern personal to the [defendant] in the sense of being in his mind, but it is a concern which can be demonstrated objectively by reference to his association, whatever it may be, with the [primary offence]*": *R v Tannous* (1987) 10 NSWLR 303 at 308, cited with approval in *Practices Commission v Australian Meat Holdings Pty Ltd* (1988) ATPR 40-876 at 49,512 and by the Full Court of the Federal Court in *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354 at [154]. If all that the section required was a mere concern personal to the defendant in the sense of being his or her state of mind, it is

unlikely that the section would be constitutionally valid: *Fencott v Muller* (1982 - 1983) 152 CLR 570, per Gibbs CJ at 583.

### NZ Bus

6. The facts of *NZ Bus* are summarised in Johnston & Keene's paper. The trouble started when the Vendors of the shares (the "Waddell Interests") waived a contractual requirement in the share sale agreement that required approval by the New Zealand Commerce Commission. NZCC instituted proceedings seeking injunctive relief and pecuniary penalties against a number of parties, including individuals collectively described as the Waddell Interests, for being knowingly concerned in a breach of s.47, Commerce Act. Miller J considered that there was a breach of s.47. He found that the effect of the transaction was to substantially lessen competition. This required his Honour to consider the economic consequences and, in particular, the counterfactual. It was agreed by all that if the Waddell Interests did not sell their shares to NZ Bus that they would still have looked to sell the shares. The defendants argued that there would have been no substantial lessening of competition if the shares were sold to another entrant because any new entrant would most likely adopt the non-compete status quo to avoid the possible detrimental consequences of direct competition.
7. What makes the case particularly interesting is that the waiver occurred after the Waddell Interests received legal advice from NZ Bus's QC and solicitor that the sale would not substantially lessen competition and after being told that the NZCC had given the "*firm hint to withdraw the application [for clearance]*": [112] of the Judgment. Could it be said that, in those circumstances, the Waddell Interests had the requisite mental element?
8. Miller J answered the question in the affirmative, relying on *Rural Press Ltd v ACCC* (2003) 216 CLR 53. He said:

[Counsel for the Waddell Interests] resisted this conclusion, pointing out that in this case it could result in liability although Infratil had legal advice to the effect that the transaction did not contravene s47 and knew that the Commission itself had expressed uncertainty. But a requirement that an accessory know the transaction contravened s47 would deprive s83 of most of its substance; as the Court pointed out in *Rural Press*, few people think in those terms. Nor would it be consistent with accessory liability provisions in the criminal law, where it is immaterial to liability that the accessory did not appreciate that the principal was committing an offence.

Miller J was of the view that the essential facts included “*what is likely to happen to the assets or shares concerned if the transaction does not proceed, since these facts establish the factual and counterfactual against which the Court applied the competition test*”: at [239]. Miller J then considered the knowledge of the Waddell Interests. He found that the participants knew: the market position of NZ Bus and Mana; that both Mana and NZ Bus had power over prices vis-à-vis certain routes; that those companies could compete in each others area but that there was a tacit agreement that they would not; that the counterfactual involved a sale to another major bus company; and that there had been a waiver: [246].

9. Notwithstanding the comments at [239] no express factual findings are recorded as to whether the Waddell Interests were aware that under the counterfactual another major bus company would have expanded the existing routes to engage in direct competition against NZ Bus. Perhaps it could be said that when Miller J’s reasons are read as a whole His Honour would be taken to have found that the Waddell Interests were aware that that there was likely that under the counterfactual such competition would have occurred. Alternatively, Miller J might have considered that this was not an essential fact (ie. knowledge that it was likely that an alternative purchaser would have competed with NZ Bus). The High Court warned against approaching accessory provisions with economic and lawyers glasses in *Rural Press Ltd v ACCC*.
10. In that case *Rural Press* was found to have contravened s.45(2), and McAuliffe (Regional Manager) and Law (General Manager, Special Projects) were found to be knowingly concerned in the contraventions. The trial judge had found that the officers of *Rural Press* were aware of the

“general financial strength” and “physical resources” of Rural Press, that they were aware of the “general market in which Standard competed”. Mansfield J thought it unnecessary for the ACCC to demonstrate that each of them explicitly thought about the concepts to which s.45(2) draws attention. It was unnecessary to establish that each, in a precise, way thought about the nature of Standard’s market, or the extent of the power of the participants in that market, or whether their conduct on behalf of Rural Press involved the exercise of any such market power.

11. On appeal to the High Court it was contended that the Rural Press officers did not know that Rural Press’s conduct was engaged in for the purpose or had the likely effect of substantially lessening competition in the market as defined. Justices Gummow, Hayne & Heydon JJ didn’t like the argument much. They thought it *“wholly unrealistic to seek to characterise knowledge of circumstances in that way. Only a handful of lawyers think or speak in that fashion, and then only at a late stage of analysis of any particular problem. In order to know the essential facts, and thus satisfy s.75B(1) of the Act and the like provisions, it is not necessary to know that those facts are capable of characterisation in the language of the statute”* (at [48]).
12. *NZ Bus* provides limited scope for individuals to defend an allegation of accessory liability on the basis that they relied on legal or economic advice to the effect that the relevant conduct would not breach a proscribed restrictive trade practice. This approach is consistent with the High Court’s stance in *Rural Press*.

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