CASE NOTE

UNIVERSAL TELECASTERS QUEENSLAND LTD v. GUTHRIE[1]

Trade Practices Act — misleading advertisement — made by defendant — liability of media — defences — reasonable precautions and due diligence — attribution of knowledge and reason to suspect — nexus between Ss. 84(1), (2); 85(1), (3)

Early in April 1975 suburban Brisbane, whilst engrossed by prime time viewing, was confronted by the man from Metro Ford. This announcement was made:

> Dr Jim's lovely tax cuts are guaranteed till only April 30 . . . Metro Ford offer immediate delivery of automatic Falcon 500 sedans that save you $335.00. If you don't take delivery by April 30 you're up for an extra 335 bucks in tax.

The announcement led to three prosecutions[2] by the Trade Practices Commission for making false or misleading statements concerning the existence of price reductions in breach of the original sub-section 53(e) of the Trade Practices Act 1974 (Cth).[3] At first instance St. John J., in separate judgments, held that the three defendant companies had contravened sub-section 53(e).[4]

Universal Telecasters, the company which conducted TVQ Channel O, the television station that broadcast the advertisement, successfully appealed to the Full Federal Court. The High Court refused an application by the Trade Practices Commission for special leave to appeal from the decision of the Federal Court.[5]

The decision of the Full Court and its implications will be examined.

The Facts

During the evening of the advertisement's initial screening a Mr Paterson rang the station to complain that it was misleading. As no one was available to handle the complaint he was advised to ring the next

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[1] (1978) 18 A.L.R. 531; A.T.P.R. 17, 633; 3 T.P.C. 221; T.P.R.S. 304, 209. Federal Court of Australia; Bowen C.J., Nimmo and Franki JJ.

[2] The prosecutions were brought against Metro Ford, the advertising company and Universal Telecasters.

[3] At the time s. 53 provided "A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services—
(e) make false or misleading statements concerning the existence of, or amounts of, price reductions;"
In 1977 (e) was widened to "make a false or misleading statement with respect to the price of goods or services".

[4] *Guthrie* v. *Metro Ford Pty Ltd* (1977) A.T.P.R. 17, 390; *Guthrie* v. *Doyle Dane & Bernbach Pty Ltd* (1977) 16 A.L.R. 241; *Guthrie* v. *Universal Telecasters (Qld) Ltd* (1977) 16 A.L.R. 247.

[5] *Guthrie* v. *Universal Telecasters (Qld) Ltd* (1978) A.T.P.R. 17, 701. Gibbs J. stated that the Court was "not necessarily endorsing the views expressed in the Federal Court".

day. On doing this he was put through to the station sales manager, Mr Garry. On being questioned by Garry as to the basis of his knowledge Paterson informed Garry of his recent employment by a finance company and awareness of the sales tax proposals. However, Garry neither acted upon nor referred the complaint to his superiors. Following a complaint to the Trade Practices Commission an officer contacted the station and was referred to Garry. Without indicating the Commission's view the officer informed Garry that a complaint had been received and obtained a copy of the transcript. The advertisement continued to run until the officer formally advised Garry that the Commission had an objection.

The Judgments

Of the five points of appeal the first three were quickly dismissed by the Court.

It was argued that the appellant did not make a statement but only published a statement of another. Franki J. stated that:[6]

> in general, where a television station telecasts an advertisement that contains spoken words, it is proper to hold that the television station has made a statement.

The Court considered that the "media defence" in sub-section 85(3) added weight to this interpretation.[7]

Bowen C.J. appeared to accept that there may be cases where a statement is expressly or by necessary implication that of the advertiser and not the television station. He emphasised that such a doctrine would have to be closely confined as the relevant provisions of the Act "are directed to protecting all viewers including those who are particularly susceptible to the influence of persuasion by advertisement".[8]

The second argument put to the Court was that the advertisement was not misleading concerning the existence of a price reduction. "Price" is defined in sub-section 4(1) to include "a charge of any description". This was taken to cover sales tax.[9] Two approaches were taken by the Court in rejecting this argument. Nimmo J. stated that the section was not restricted to present price reductions.[10] This reasoning appears to conflict with the approach taken by Franki J.[11] His

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[6] (1978) 18 A.L.R. 531, 547.

[7] *Id.* 547, 539, 534, upholding the view of St John J. on this point.

[8] *Id.* 533. Note this supports the wide view that advertisements are also directed toward ingenuous and inexperienced recipients expressed in *C.R.W.* v. *Sneddon* [1972] A.R. (N.S.W.) 17, 28 and adopted by St John J. in *Parish* v. *World Series Cricket* (1977) A.T.P.R. 17, 417. Contrast the view of Smithers J. in *Ransley* v. *Black & Decker (A'Asia) Pty Ltd* 28 July 1977 (unreported) that a representation of performance characteristics in s. 53(c) "is made to people who are going to take reasonable care to acquaint themselves with the reasonable qualities of the machine . . .".

[9] (1978) 18 A.L.R. 531, 547 *per* Franki J. The rest of the Court must have also accepted this. See also *Guthrie* v. *Metro Ford Pty Ltd* [1977] A.T.P.R. 17, 390.

[10] *Id.* 539.

[11] *Id.* 547. For an elucidation of His Honour's view of the distinction between a statement as to an existing fact and a promise or prediction about the future see

Honour treated the statement as one of existing fact, *i.e.* "that the then price reduction of $335 due to sale tax cuts had a limited life and would cease at 30 April 1975",[12] rather than a statement as to the future.

The argument that the prosecution had not established beyond a reasonable doubt that the appellant was a corporation falling within the Act was given even shorter shrift. The Court held that the fact that the appellant broadcast advertisements for profit was sufficient to discharge this onus.

The more substantial arguments upon which the appeal was based involved the defences under sub-section 85(3) and sub-section 85(1).

Sub-section 85(1)

At the time of the contravention sub-section 85(1) provided:[13]

> Subject to sub-section (2), in a prosecution under this part in relation to a contravention of a provision of Part V, it is a defence if the defendant establishes—
> (a) that the contravention in respect of which the proceeding was instituted was due to a mistake, to reliance on information supplied by another person, to an accident or to some other cause beyond his control; and
> (b) that he took reasonable precautions and exercised due diligence to avoid the contravention.

The Court proceeded on the basis that sufficient notice had been given under sub-section 85(2).[14] The trial judge's finding that the appellant had established the facts, on the civil onus, necessary to satisfy paragraph 85(1)(a) was not challenged on appeal and thus the Court did not analyse the requirements of this paragraph.[15]

The Court focussed on the requirements of paragraph 85(1)(b).[16] It was considered that the deeming provisions in section 84 were not relevant in establishing the defence.[17]

Thompson v. *Mastertouch T.V. Services* (1977) 15 A.L.R. 487 where the approach of the House of Lords in *British Airways Board* v. *Taylor* (1976) 1 W.L.R. 13 was applied.

[12] *Id.* 539, 548.

[13] The Swanson Committee recommended a restructuring of sub-section 85(1), see Trade Practices Act Review Committee *Report to the Minister for Business and Consumer Affairs*, August 1976 para. 9.144, as it considered that the two linked requirement which covered all the defences operated "unduly harshly". The Committee's recommendations were acted upon and the second requirement that the defendant take reasonable precautions and exercise due diligence to avoid the contravention no longer applies to a defendant seeking to establish a defence of reasonable mistake or reasonable reliance on information supplied by another person.

[14] (1978) 18 A.L.R. 531, 550 *per* Franki J.

[15] *Id.* 543. Duggan, "Misleading Advertising and the Publishers' Defence—a Critique of *Universal Telecasters (Qld) Limited* v. *Guthrie*" (1978) 6 Australian Business Law Review 309, 319 refers to another line of reasoning which the Court may have followed if this finding had not been made.

[16] This is substantially the same as the present s. 85(1)(c)(ii).

[17] (1978) 18 A.L.R. 531, 550 *per* Franki J. Although the other members of the Court did not advert to this point their approach implies acceptance of this reasoning.

Bowen C.J. construed the paragraph as requiring:[18]

> that it [the defendant corporation] had laid down a proper system to provide against contravention of the Act and that it [the defendant corporation] had provided adequate supervision to ensure the system was properly carried out.

Franki J.[19] and Nimmo J.[20] in examining the system established by Universal Telecasters to deal with complaints had regard to these two requirements even though they did not expressly refer to them. This construction of the requirements is consistent with the interpretation the English courts have given to a similar provision of the Trade Descriptions Act 1968 (U.K.).[21] Franki J. specifically referred to the observations in *Tesco Supermarkets Ltd* v. *Nattrass*[22] that this provision "required diligence from the employer personally and not anyone else".[23]

In examining the adequacy of the system and the provision for supervision Bowen C.J. emphasised that the mere fact that the system did not prevent error did not knock down the defence.[24] Neither Bowen C.J. nor Franki J. considered that it was necessary to have the advertisement checked with the relevant government department or to be verified by the advertiser.[25]

The Court found that Universal had established a proper system for "vetting advertisements" before they were telecast and that the system was adequately supervised.[26] However, it was found to be inadequate because there was no provision for referring complaints made after the advertisement was screened, which was evening prime time, to an appropriate officer of the corporation.[27]

Sub-section 85(3)

The "media defence" is available[28] to a defendant whose business it is to publish or arrange for the publication of advertisements and who received the offending advertisements in the ordinary course of business. Universal Telecasters clearly satisfied these criteria. Under the sub-

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[18] *Id.* 534.

[19] *Id.* 551.

[20] *Id.* 554.

[21] See s. 24(1)(b) of the Trade Descriptions Act 1968 (U.K.). Interpretations of this paragraph are given by the House of Lords in *Tesco Supermarkets Ltd* v. *Nattrass* [1972] A.C. 153 and a Divisional Court in *Nattrass* v. *Timpson Shops Ltd* [1973] Crim.L.R. 197.

[22] [1972] A.C. 153.

[23] (1978) 18 A.LR.. 531, 551. He quoted the observations of Lord Diplock [1972] A.C. 153, 203 that a contrary interpretation "would be to render the defence of due diligence nugatory and so thwart the clear intention of Parliament in providing it".

[24] *Id.* 534.

[25] *Id.* 534, 553. Overruling St John J. (1977) 16 A.L.R. 247, 250-251.

[26] The sales service manager, a senior employee but not an executive, was given responsibility to check advertisements before transmission and was to refer any doubts about the legality of a commercial to the general manager or company secretary.

[27] (1978) 18 A.L.R. 531, 534, 544-545, 554.

[28] Unlike s. 85(1) this defence is not restricted to prosecutions.

section the defendant must then establish that he "did not know and had no reason to suspect" that publication of the advertisement would amount to a contravention of the Act.

Following Paterson's complaint there was little doubt that Garry had reason to suspect that the continued publishing of the advertisement would amount to a contravention.[29] Thus the central issue was whether Garry's knowledge and reason to suspect could be attributed to the appellant who would thereby be precluded from raising the defence.

The Court accepted that the "organic theory" of corporate liability applied in *Tesco Supermarkets Ltd* v. *Nattrass*,[30] to determine what natural persons are to be treated in law as being the corporation, was applicable to the question of knowledge in sub-section 85(3). Bowen C.J. and Franki J. adopted Lord Diplock's test, *viz.*, whether the employee by the memorandum and articles of association, or as a result of action taken by the directors, or by the corporation in general meeting pursuant to the articles, has been entrusted with the exercise of the powers of the corporation.[31]

The Chief Judge concluded, without stating his reasons, that Garry did not fall within the class of persons which was to be treated as the corporation.[32] Franki J. considered that Garry's knowledge and reason to suspect could not be treated as that of the corporation as he had not been delegated with a general power to deal with all complaints. As an example of the limitation of Garry's delegation Franki J. stated that in cases of a possible breach of broadcasting legislation or where any trade practices matters were involved Garry was to refer the matter to Mr Archer (the general manager) or Mr Lusk (the secretary).

The dissenting judge, Nimmo J., held that the knowledge and reason to suspect of Garry could be attributed to the corporation. In reaching his conclusion Nimmo J. extensively quoted from the judgment of Lord Reid in *Tesco's* case. His Lordship stated, *inter alia*:[33]

> the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company.

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[29] (1978) 18 A.L.R. 531, 535, 543, 549.

[30] [1972] A.C. 153. For further discussions of the organic theory see Gower *The Principles of Modern Company Law* (3rd ed. 1969) Chapter 8; Ford *Principles of Company Law* (2nd ed. 1978) Chapter 6. For comments on *Tesco's* case see Fisse, "Consumer Protection and Corporate Criminal Responsibility" (1974) 4 Adelaide Law Review 113; Muir, "Corporate Liability and Fault" (1973) 5 New Zealand Universities Law Review" 357; Howill (1971) 34 M.L.R. 676 and Duggan, "The Criminal Liability of Corporations for Contravention of Part V of the Trade Practices Act" (1977) 5 Australian Business Law Review 223.

[31] (1978) 18 A.L.R. 531, 535, 548.

[32] *Id.* 535. It can be inferred that His Honour agreed with the reasoning of Franki J. on this point as "speaking generally" he agreed with the reasoning of Franki J., *id.* 532.

[33] [1972] A.C. 153, 171; referred to by Nimmo J. (1978) 18 A.L.R. 531, 540-541.

Although there is a view[34] that Lord Diplock's test is narrower than Lord Reid's, in that Lord Diplock's test does not admit of delegation, this is not apparent from the judgments. Bowen C.J. and Franki J. refer to the judgment of Lord Reid in such a way as to suggest that they regard the two tests as equivalent.[35] Furthermore, Lord Diplock's test appears to allow delegation by the directors and certainly the analysis of Franki J. admits this view.

The basis of the dissent by Nimmo J. was not in the application of a different test but in the determination of what was a *necessary delegation* for the knowledge and reason to suspect of Garry to be attributed to the corporation. Central to the majority's reasoning was the fact that the nature of the delegation made to Garry was such that his knowledge and reason to suspect could not be imputed to the corporation, not that Garry was a "mere delegate".[36] Franki J. would have required a delegation to *deal* with, that is receive and act upon, all complaints before making this attribution to the corporation. This is to be contrasted with Nimmo J. who required a delegation to *receive* complaints. His rationale was that receipt by Garry must be regarded as receipt by the company of that complaint and its subject matter. Thus any knowledge or reason to suspect arising out of such a complaint must be that of the company.

The logic of the view taken by Nimmo J. appears sound. Receipt of information, from an informed source, must form the embryo of knowledge or reason to suspect. The formation of knowledge or reason to suspect does not depend on, or require an ability to act upon, such knowledge or reason to suspect. It is on this point that the analysis of Franki J. appears to be less satisfactory—in requiring an ability to *deal* with complaints.

It is considered that the view taken by Nimmo J. is preferable from a policy aspect. As His Honour states:[37]

> If it were otherwise, how could a member of the public . . . who made his complaint to the person designated by the company to receive it and to whom he was directed to make it communicate to the company that it had telecast a misleading advertisement?

Following the approach taken by the majority there will be a strong inducement for the media and agencies to delegate to lower echelon employees the power to *receive* complaints, and indeed direct that complaints be referred to them, without delegating a concurrent ability to deal with or handle the complaints, particularly complaints relating to trade practices matters. This clearly goes against the policy of the Act. The advertising industry is aware of this device and will certainly use it to avoid prosecution, thereby rendering nugatory an important self-enforcing provision of the Act.[38]

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[34] *E.g.* Duggan n. 29 *supra* 238.
[35] (1978) 18 A.L.R. 531, 535 *per* Bowen C.J., 548 *per* Franki J.
[36] Transcript of Proceedings, Queensland Registry No. 16 of 1978 p. 12.
[37] (1978) 18 A.L.R. 531, 542.
[38] The Trade Practices Commission in its 4th Annual Report for the Year Ending

The Relationship Between Section 84 and Section 85

Although the Court did not find it necessary in reaching a decision to reconcile the application of these sections, the dicta on the operation of these sections may have far-reaching implications for the defence provisions of the Act.

The operation of section 84[39] on section 85 potentially alters the liability of corporations for the "conduct" of its directors, servants or agents. It was argued that section 84 altered the applicability of the *Tesco* principles to the Australian Act.[40] This was rejected in relation to the "reasonable precautions and due diligence" defence.[41] Bowen C.J. accepted that section 84 did alter the liability of a corporation for its employees in so far as the intention of the corporation and its conduct were involved.[42] However, he did not accept that knowledge or reason to suspect, the critical elements in sub-section 85(3), or a failure to act, fell within either of the concepts in section 84.[43]

Prior to this case two possible interpretations of the relationship between section 84 and section 85 had been put forward.[44] The first was that section 84 only applied to the *prima facie* liability of corporate defendants while section 85 went to ultimate liability. This view would fully incorporate the *Tesco* principle to the Australian Act. Thus a corporate defendant could rely on the conduct of any employee who is not treated as the company as being that of "another person" for the purposes of establishing a defence under sub-section 85(1).

The opposite view was that section 84 overrode the application of the *Tesco* approach to section 85. Thus a corporate defendant could

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June 1978 note this and refer to the following extract from *Adbrief*, a trade newsletter "NEW CASE LAW REDUCES BITE OF TRADE PRACTICES COMMISSION:
This new case law makes defence under the TPA easier. It means media and agencies should delegate TPA problems to second ranking staffers."

[39] S. 84 provides:

"(1) Where, in a proceeding under this Part in respect of any conduct engaged in by a body corporate, being conduct in relation to which a provision of Part V applies, it is necessary to establish the intention of the body corporate, it is sufficient to show that a servant or agent of the body corporate by whom the conduct was engaged in had that intention.

(2) Any conduct engaged in on behalf of a body corporate by a director, agent or servant of the body corporate or by any other person at the direction or with the consent or agreement (whether express or implied) of a director, agent or servant of the body corporate shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate."

S. 84(1) the "intention" sub-section is inapplicable to the operation of s. 85 as the question of intent is irrelevant to the establishment of the statutory defences; s. 84(1) operates where "it is necessary to establish the intention of the body corporate".

[40] The U.K. legislation has no equivalent to s. 84.

[41] See n. 17 *supra*.

[42] (1978) 18 A.L.R. 531, 536.

[43] *Ibid.* For a discussion of the possible constructions of term "intention" in s. 84(1) see Duggan n. 15 *supra* 312-315.

[44] See Duggan n. 29 *supra* 233-236 for more detailed discussion.

never rely on the conduct of an employee as being that of "another person" for the purposes of establishing a defence under sub-section 85(1) and thus could only rely on the due diligence defence in the rare case where the act or default was due to the default of someone unconnected with the corporation.

In *Ballard* v. *Sperry Rand Australia Ltd*[45] the Full Court of the Australian Industrial Court rejected the view that the *Tesco* principle could be applied where the defence was that the contravention was due to the act or default of "another person" (a company salesman), relying on the deeming provision in sub-section 84(2).[46] This clearly supports the dominance of sub-section 84(2) but as the comments on this issue were dicta they cannot be regarded as conclusive. The Court added that "the making of the statement was, in this case, the act of the corporation"[47] even without section 84; it is not specified on what basis this was found. Also the criticisms of the case made by Mr A. J. Duggan[48] strongly support the view that *Sperry Rand* is not decisive on the interpretation of the relationship between the two sections. Further it can be questioned whether, if *Sperry Rand's* reasoning is accepted, the Court's interpretation of the operation of sub-section 84(2) can be extended to sub-section 84(1).

The effect of the dicta in *Universal Telecasters* is to give a middle view with section 84 prevailing over section 85 but with section 84 being given a strict interpretation. Outside the concepts of "intention" and "conduct" the *Tesco* principles operate in section 85. This interpretation of *Universal Telecasters* supports the view of *Sperry Rand* that where an employee's conduct is under consideration that employee cannot be regarded as "another person" for the purposes of sub-section 85(1). This is to be contrasted with the position that would arise if *Tesco* were to apply. Then if the employee did not fall within the class of persons who are considered to act as the company he could be treated as "another person".

A contrary view of the case is taken by Professor Harland.[49] He considers that on this point *Universal Telecasters* is in conflict with *Sperry Rand* and that *Tesco* applies to the exclusion of section 84. However, the dictum of Bowen C.J.[50] is inconsistent with this view.

Possible Amendments Suggested to the Trade Practices Act Arising From the Case

Following the decision of the Federal Court and the refusal of the High Court to grant special leave to appeal against that decision the

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[45] (1975) 6 A.L.R. 696, 705.

[46] See n. 38 *supra* for s. 84(2). This view was reinforced by the notice requirement in s. 85(2) which the Court felt assumed that the prosecution was not in a position to identify the "other person" referred to in s. 85(1).

[47] (1975) 6 A.L.R. 696, 706.

[48] *Op. cit.* 235. (1) The Court did not advert to the contrary view of s. 84, (2) There is a surprising inconclusiveness in the findings of fact.

[49] Taperell, Vermeesch and Harland, *Trade Practices and Consumer Protection* (2nd ed. 1978) para. 1607, 1612.1 (loose-leaf edition).

[50] See n. 41 and text *supra.*

Trade Practices Commission has recommended to the Minister for Business and Consumer Affairs that section 84 of the Act be amended so that the *knowledge* or *reason to suspect* of directors, agents or servants will be imputed to a corporation.[51] The Commission also recommended that it be made clear that the corporation is responsible for the *failure* of such persons to act as well as for their acts.[52]

It is submitted that the recommendation of the Commission is not the best means of amending the law as it stands after *Universal Telecasters*. To draw on the example given by Bowen C.J. in *Universal Telecasters*,[53] the effect of such an amendment would be to attribute the knowledge or reason to suspect a contravention of the Act held by a lift driver or telephonist, to the corporation. It is clear that such a provision would not advance the purpose of the Act.[54]

The problem is, to paraphrase Gibbs J.,[55] a question of fact, *viz.*, where the line ought to be drawn for the purposes of imputing knowledge and reason to suspect to the corporation. The difficulties inherent in attempting to provide a cut-off line for such attribution to a corporation appears throughout the cases. Any attempt to change the state of the law by legislative amendment which seeks to attack the problem in the same way, *i.e.* by trying to drawn such a line, must be encumbered with similar difficulties.

As to the Commission's recommendation with respect to failure to act, which is a response to the statement made by Bowen C.J. that sub-section 84(2) does not apply to a failure to act,[56] it is suggested that as the definition of conduct in sub-section 4(2) expressly includes refusing to do an act, which includes a reference to refraining (otherwise than inadvertently) from doing an act, a failure to act (otherwise than inadvertently) by an employee will be deemed by the operation of sub-section 84(2) to have been also engaged in by the body corporate.[57] However, the Court in *Universal Telecasters* did not advert to the even wider definition of conduct under sub-section 4(1) prior to the 1977 amendments. Also as many "failures to act" may be inadvertent they will still not be caught by sub-section 84(2).

Conclusion

This case highlights the difficulties in applying sections 84 and 85 concurrently. Further, the dictum of Bowen C.J. which accepted the dominance of section 84 in relation to intention and conduct of employees may not be followed where the issue arises squarely for decision, such as where a large corporate employer has taken all reason-

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[51] The Trade Practices Commission: *Report for the Year Ending June 1978* para. 4.19.

[52] *Ibid.*

[53] (1978) 18 A.L.R. 531, 535.

[54] *Cf.* the comments of Gibbs J. in the application for special leave. Transcript of Proceedings, Queensland Registry No. 16 of 1978 pp. 12-13.

[55] *Id.* 13.

[56] (1978) 18 A.L.R. 531, 536. A similar view is expressed by Franki J. *id.* 550.

[57] This point is also raised by Duggan n. 15 *supra* 321.

able efforts to avoid a contravention and the conduct of a lower echelon employee, over whose actions the corporation cannot exercise total control, would contravene the Act.

When the *Tesco* principle applies, that is to matters not within the strict reading of sub-section 84(2), *Universal Telecasters* demonstrates the difficulties of characterising what delegation is necessary before knowledge and reason to suspect will be imputed to the corporation. The majority's characterisation of what is a necessary delegation provides the media defendant with a convenient loophole which will hinder the effective enforcement of the Act.

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