



## AIDING AND ABETTING A CONTRAVENTION OF THE LAW – AND NOT THE CRIMINAL KIND!!

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When one hears the term “*aiding and abetting*”, it conjures up images of people being involved in criminal activities. Whilst the term is also used regularly in the trade practices area, it is far less familiar in the context of corporate law. Consideration must be given to the possible liabilities and consequences which may be encountered by professional advisors when giving advice to their clients, particularly in circumstances where their client may be suffering financial difficulties.

Under section 79 of the *Corporations Act* 2001 (“the Act”), liability can be attributed to a person (and it may also include a company) where their actions, among other things, have aided and abetted a contravention of the Act, for example, breaches of director’s duties under sections 181, 182 or 183. There does not appear to be any case law where accountants (or insolvency practitioners) have been found liable under section 79, the implications which arise under that section may be applicable to their clients. Although there is some case law in the trade practices area relating to professional advisors and liability imposed by the aiding and abetting provisions of the *Trade Practices Act* 1974.

Section 79 provides that:

“A person is involved in a contravention if, and only if, the person:

- a) *has aided, abetted, counselled or procured the contravention; or*
- b) *has induced, whether by threats or promises or otherwise, the contravention; or*
- c) *has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or*
- d) *has conspired with others to effect the contravention.”*

In actions under section 79, it must be shown that (a) the person was an intentional participant in the contravention<sup>1</sup> and (b) that the person had knowledge of the essential matters which comprise the contravention (whether or not they knew that it would amount to a contravention).<sup>2</sup>

<sup>1</sup> *Yorke & Anor v Lucas* (1985) ATPR 40-622 at p 47,056

<sup>2</sup> *Yorke & Anor v Lucas*, *ibid.*; *Wilkinson & Ors v Feldworth Financial Services Pty Limited & Ors*, *Katalin Ottilia Abeles v PA (Holdings) Pty Ltd* (2000) 18 ACLC 867



Beyond actual knowledge, there is still debate within the caselaw as to what knowledge will be sufficient in these cases but it does include:

- i. wilful blindness or the deliberate shutting of a person's eyes to the obvious;
- ii. knowledge of particular circumstances which would be obvious to a reasonable and honest person.<sup>3</sup>

In the decision of *Courtenay Polymers Pty Ltd v Leonilo Deang & Ors*<sup>4</sup>, a company was found liable under section 79. Justice Whelan found that the company, Asia Pacific Holdings ("APC"), upon its incorporation, had actual knowledge of the essential facts relating to contraventions of the Act by its de facto directors, Mr Chan and Mr Deang. Those facts constituted, among other things, breaches by Mr Deang of his fiduciary and/or statutory duties by Mr Deang assisting in the establishment of a competing business whilst he was still an employee and director of Courtenay Polymers (the Plaintiff in the proceeding). APC was found to be liable under section 79 as a person involved in Mr Deang's contravention of his statutory duties as a director of Courtenay Polymers (and whilst Mr Chan had knowledge of the essential matters relating to the contravention, he was not a party to these proceedings). APC aided and abetted the contravention of the law by Mr Deang and it was knowingly concerned in it.<sup>5</sup> The Court also found that actual knowledge of the contraventions is required and not merely constructive knowledge.<sup>6</sup>

The above decision illustrates how persons can be exposed to liability under section 79<sup>7</sup>. Whilst the facts of that case did not relate to advice being given to a client, it is a possibility that anyone who gives advice to a client could potentially be found liable under section 79 if that advice or action leads to the advisor having, among other things, aided or abetted, induced or is knowingly concerned with contraventions of the Act. Section 79 simply refers to "a person" so the categories of people who may be found liable are very wide.

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<sup>3</sup> Katalin Ottilia Abeles v PA (Holdings) Pty Ltd, ibid

<sup>4</sup> [2005] VSC 318

<sup>5</sup> Ibid. paragraph [141]

<sup>6</sup> Ibid. paragraph 133

<sup>7</sup> Also see various cases in the trade practices area which specifically focus on professional advisers



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Steps which could be undertaken by a professional advisor to limit their exposure under section 79 may be:

1. Ensure you have an engagement letter setting out the scope of advice and work to be undertaken on behalf of the client;
2. Give independent opinions and options which might be adopted by the client (which includes advice about contraventions which may potentially arise and how to avoid them) – be clear not to give instructions to the director and the company;
3. Ensure you allow the directors to make the decisions and take the actions themselves based on the options which are given to them; and
4. Keep detailed file notes of conversations which are conducted with directors and the company in relation to the advice given to them.