

MEDIA RELEASE

Litigation on the rise over divulgence of confidential corporate information

As disputes over confidential information increase, employers are warned to check their employment contracts

Sydney, 26 June 2008 – A number of recent court cases suggest that employers might not be sufficiently safeguarding themselves from former employees who divulge confidential and sensitive corporate information.

According to Shana Schreier-Joffe, Partner at Harmers Workplace Lawyers, many companies do not pay enough attention to confidentiality clauses in their employment contracts and frequently find themselves insufficiently protected when former employees disclose valuable information and knowledge about their companies.

“Unfortunately many employers simply copy-and-paste generic confidentiality clauses into their contracts and letters of employment even though they might have little relevance to their business. As a result, these contracts leave them with little protection against future breaches of confidentiality by former employees,” said Ms Schreier-Joffe.

Ms Schreier-Joffe referred to a recently concluded case¹ as a prime example of this issue. The case addressed a former employee’s use of his former employer’s [Digital Products Group] prices and sales volume information when working in his new role for a competitor. Digital Products petitioned for injunctions to restrain the former employee from using documents in written or electronic form, as well as any knowledge gained during the course of his employment.

Digital Products was protected by the common law principle preventing the divulging of ‘trade secrets’, allowing the company to successfully restrain the former employee from using confidential documents still in his possession. However, the company had no further legal recourse to restrain the former employee from using knowledge gained during the course of his employment, because the wording of his employment contract did not match its intended meaning.

“While the letter of employment provided a good definition of what was ‘confidential information’, the term ‘confidential information’ was not used in the actual confidential information clause, nor had the former employee signed the letter before starting full-time employment,” said Ms Schreier-Joffe, explaining that incongruous wording in the contract had severely limited the company’s legal recourse to restraining the employee from further divulging confidential knowledge.

¹ Digital Products Group v Opferkuch (June 2008)

Ms Schreier-Joffe also referred to a 2007 case in the NSW Court of Appeal² where an Australian marble company brought action against two of its past directors. The issue in question was the past directors' use of confidential knowledge about a secret and highly confidential source of marble from Italy. The directors had used this knowledge in contacting and forming a business relationship with the supplier in competition to their old employer. In this case, the court found the information was confidential but not in the nature of a trade secret and that the former directors had no obligation to refrain from using the information for their benefit. It was also found that although there was a contractual provision which required the directors to keep the information confidential, it did not prevent them from using the information, as they had not actually breached the clause by divulging the information.

Ms Schreier-Joffe explained that during employment the law expects an employee to act in 'good faith' towards their employer, which includes an obligation not to divulge confidential information or use it in a way that could be detrimental to their employer. However, she explained that when an employee moves on to another job, the employer needs to rely on a strong contract to protect their interests and confidential information.

"Many employers might not realise that confidential information applies not only to paper and electronic documents, but also knowledge that an employee has gained about the business during the course of their employment. While the common law protects employers from former employees divulging 'trade secrets' about their companies, most other forms of confidential information can only be protected through a strong and carefully worded confidentiality agreement," she said.

Ms Schreier-Joffe said employers wishing to protect their companies' confidential information during and after an employee's period of employment should:

- Conduct pre-employment contract discussions and specify the information they consider to be confidential
- Ensure employees know they are dealing with confidential information
- Audit sensitive information
- Develop and implement workplace policies around confidentiality
- Develop and implement in-house security measures
- Conduct a debrief with the employee on termination of employment, explaining their obligation to confidentiality
- Conduct a post-employment audit
- Review current contracts of employment and seek legal advice

Ms Schreier-Joffe said, "Clear communication and thorough confidentiality clauses help ensure that employees are fully aware of their obligations and may reduce the likelihood of a breach of confidentiality. However, if a former employee does break their contractual obligations, then a strong contract will place the employer in the best position to be able to protect their business."

Ends

Note to editors:

About Harmers Workplace Lawyers

² Del Casale & Ors v. Artedomus (Aust) Pty. Limited [2007]

Harmers Workplace Lawyers was established in 1996 as a boutique employment law firm. Since then it has become one of Australia's leading employment and industrial law firms, with offices in Sydney, Melbourne and Brisbane. The firm has been awarded Australasian Legal Business's 'employment specialist firm of the year' for the past three years running.

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