



## Business Insight Series - Chapter 15

### COMPETING WITH YOUR EMPLOYER:

### EMPLOYEES IN BREACH OF THEIR DUTIES OF LOYALTY AND FIDELITY

# The employer's perspective:

The employee is:

- a) contacting the employer's clients or customers;
- b) using the employer's confidential information;
- c) competing with the employer's business by offering services or goods at a cheaper rate; and
- d) making defamatory statements about the employer and/or its business.



# The employee's perspective:

Employees often seek legal advice because they:

- a) have created a business that competes with employer or they work for a competitor;
- b) are concerned about being sued and having to account for profits; or
- c) have received a warning letter from the employer and seek assistance with a reply.



# Sources of law:

- The employment contract;
- Legislation; and
- Common law.



## Implied duties:

- a) The employee's duty of obedience;
- b) The employee's duty of cooperation and proper conduct;
- c) The employee's duty to exercise care and skill;
- d) The employee's duty of loyalty and fidelity;  
and
- e) The employee's duty to maintain confidentiality.



# Employee's duty of confidentiality

- When an employee has left his or her employment with valuable information about the employer's business operations, it can be difficult for the employer to legally restrain the former employee.
- It can be difficult for a former employer to enforce post-enforcement duties of confidentiality, except in the case of highly specific trade secrets.



# What is lawful and what is unlawful?

1. Soliciting the employer's clients to move to the new business;
2. Recruiting staff that work for the employer;
3. Deliberately removing, copying, or memorising the employer's valuable information;
4. Assisting a rival business that the employee intends to join.



Breach of the duty of loyalty



# Multiple jobs

- Where an employee has multiple jobs, this may be a breach of the duty of loyalty.
- The nature of the second job will be relevant to any determination of whether the second job constitutes a breach of the duty of loyalty.





# The employment relationship:



- Courts commonly describe the employment relationship between an employer and an employee as having a fiduciary character.
- The employee's fiduciary duty will usually end when the employment is terminated.
- The position is different for directors because a director may continue to have a fiduciary duty to the company for a reasonable period of time after resigning.

# The Corporations Act 2001 (Cth)

- Provisions in the Corporations Act apply not only to directors or company officers, but also to employees.
- The provisions deal with misconduct of various forms.
- Section 182 prohibits an employee, director or officer from improperly using his or her position to gain an advantage or to cause detriment.



# The Corporations Act 2001 (Cth)

- Section 183 has a similar prohibition concerning the improper use of information acquired while in that position.
- These provisions have been interpreted by courts as creating obligations that go only as far as obligations created by the common law.
- Conduct is ‘improper’ when it would breach the employee’s duty of loyalty or the duty of confidentiality.



# Law on the restraint of trade doctrine

1. The employee has access to confidential information and he or she may be in a position to use that knowledge to the employer's detriment; or
2. The employee's work involves personal contact with the employer's customers and the employee may be able to use that connection to entice those customers away.



# The court's approach to restraints

1. The duration of the restraint (e.g. 12 months);
2. The area to which it applies; and
3. The nature of the activities that the restraint seeks to control.



# Questions & Discussion

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