

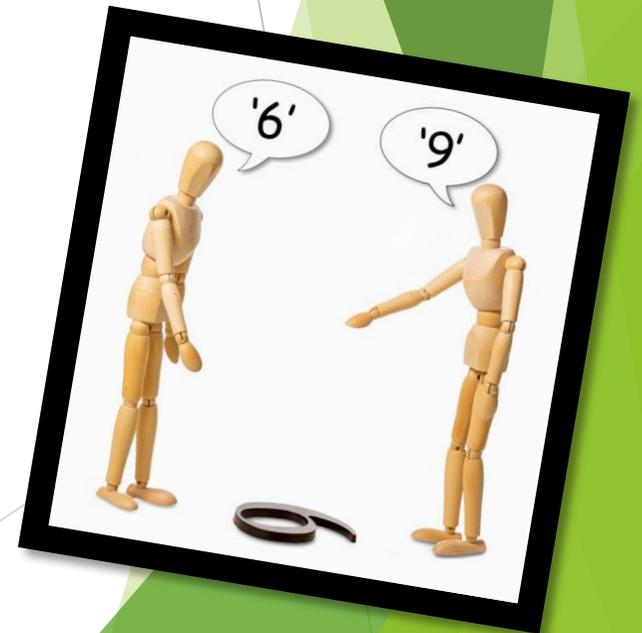
A photograph of the Lynn & Brown Lawyers building, a modern structure with large glass windows and a sign that reads 'Lynn & Brown LAWYERS'. The image is overlaid with a dark blue semi-transparent banner containing white text.

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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THANK YOU

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