

Protection of Trade Secrets in Australia

In Australia, the unauthorised disclosure of confidential information (including trade secrets) can be prevented in situations where there the person receiving the information is under an obligation to maintain its confidentiality. Confidential information may be protected under the general law (by the action for breach of confidence) or under contract (by an action for breach of contract).

In order to protect confidential information under general law, the owner of the information must show that:-

- (a) the information is "confidential"
- (b) the information was received in circumstances giving rise to an obligation of confidence; and
- (c) the information is used or about to be used without the owner's consent.

A few factors which a Court would consider when determining whether information was "confidential" are:

- the measures taken to maintain its secrecy;
- whether the information had been disclosed publicly without restrictions;
- the extent the information was known outside the owner's business,
- the value of the information to the owner's competitors; and
- the amount of time and effort required to produce the information.

A Court will not consider that information has been received in circumstances giving rise to an obligation of confidence if it was disclosed publicly or with reckless disregard for its secrecy.

Information is however deemed to be received in confidential circumstance, if it was stolen from the owner or obtained by reprehensible means. A third party who knowingly receives such stolen information will also be bound by confidence to the original owner.

The effectiveness of the action for breach of confidence in Australia depends on the fact situation in each case. As the factors above show, the owner of the information has a heavy burden to show that its information was truly "confidential". An owner should take the following practical steps to preserve the confidentiality of information:

- entering into confidentiality agreements with technical employees, outside consultants, researchers, contract manufacturers, etc. who create, develop or receive the information;
- labelling all confidential documents "secret and confidential. © [date] [name of author/company]";
- keeping documents and products on the business premises and storing them securely;
- restricting access to confidential documents and products (including computer access);
- supervising visitor entry onto business premises and ensuring that confidential information is not visible;
- informing employees of the importance of secrecy;



- limiting the number of employees with access to secret information;
- keeping records of what is disclosed, when and to whom;
- conducting exit interviews with employees;
- reviewing and putting in place document destruction procedures;
- reviewing general office and plant security;
- documenting and dating the above procedures and circulating them to employees regularly.

Although the general law provides protection of confidential information even in the absence of a contract, the obligation should, if possible, be supported by signed confidentiality agreements obtained from every person who has knowledge of the information, so as to provide further protection through the law of contract. The owner can seek the following remedies against a person who has breached the confidence:

- an Anton Piller order allowing the search of premises and the seizure of documents and products (if there is a risk that evidence will be destroyed);
- injunctions restraining the use and disclosure of the information (including interim injunctions until the trial);
- orders requiring the return of the information; an account of profit or for damages to compensate the owner.

An owner who suspects that confidential information has been stolen or is being used unlawfully should contact a lawyer immediately. Delay may prejudice the owner's ability to take certain action, such as seeking an Anton Piller order or an interim injunction.

A person who steals confidential documents or products or unlawfully "hacks" into a computer system may also be charged by the Australian police with criminal offences.

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