

## CG LAW BULLETIN

### **CONFIDENTIAL BUSINESS INFORMATION: HOW DO I PROTECT IT?**

When a valuable employee leaves it can be a costly event for most businesses. If they leave with critical, confidential information and use it in competition to you the impact can be devastating. How well protected is your information from misuse by former employees?

A recent decision involving misuse of confidential information by ex-employees shows what you need to do to be able to take to action to stop misuse of confidential information.

In the recent Federal Court decision of RLA Polymers Pty Ltd v Nexus Adhesives Pty Ltd and Others ex-employees were ordered to pay their former employer damages for the misuse of confidential information which they obtained during the course of their employment.

Two former employees of RLA Polymers Pty Ltd (RLA Polymers) founded a company in competition to RLA Polymers. The court found that the two ex-employees had used information confidential to RLA Polymers in order to speed up their own product development. The damages awarded equated to the sales made during the period of time that was saved as a result of using the confidential information.

The factors which RLA Polymers needed to satisfy in order to prove their case were:

1. The information which is the subject of the action must be confidential;
2. The information must have been disclosed in a manner which signified an obligation of confidence; and
3. Unauthorised use or publication of the confidential information must have occurred or have been foreshadowed.

The Court held that each of these elements was satisfied. RLA Polymers argued that as a result of this misuse it should be entitled to relief that reflected the advantage that Nexus Adhesives Pty Ltd (Nexus) got from the use. This is known as the “springboard doctrine”.

The basis of the springboard doctrine is that recipients of confidential information should not be allowed to use the information to “springboard” themselves into a better position than they would have achieved through their own skill and ingenuity or from the use of publicly available information.

The Court looked at how long Nexus would have taken to research, develop and launch its product using the RLA Polymers information compared with how long it would have taken without reference to the confidential information. It held that using the confidential information gave Nexus a 5 ½ month advantage over not using it. It therefore ordered Nexus to account for profits made for a period of 5 ½ months from first sales of the product.

## WHAT CAN YOU DO TO PROTECT YOUR CONFIDENTIAL INFORMATION?

Most employee contracts contain confidential information clauses. However you may like to consider a specific confidentiality agreement to be signed by those employees who have access to confidential information and trade secrets which have the most competitive advantage to your company. Such an agreement should also be entered into with third parties prior to them receiving confidential information or trade secrets from your company.

For employees in strategic positions you may like to consider a post employment restraint preventing them operating in competition for a specified period of time and/or in a specified geographical area. It is important to get such restraints right as if they are worded incorrectly they can be unenforceable.

It is important to be specific about what information is actually confidential. Some information while of worth to the company is in the public domain and employees cannot be prevented from using or disclosing it.

Limit access to trade secrets and confidential information and put security measures in place to protect it.

If you have any questions in relation to this bulletin please do not hesitate to contact any of the members of CG Law's litigation team.

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