

- Facts of the case, in which what the job entails may not be clear: *Keays v J P Morgan Administrative Services Australia* [2012]
- Distinction between change of duties or work, and a change of method of doing the same work.
 - Employee is obliged to adapt to different work methods, e.g. computer system: *Cresswell v IRC* [1984]
 - Cannot set up a competing business during employment: *Schindler Lifts v Debelak* (1989) (see 7.3.1)
 - Cannot solicit or canvas the employer's clients for the employer's clients for the employees existing business: *Pedley v PMS Pty Ltd* [2013] (see 7.3.1)
- Based on a number of different principles: contract, fiduciary relations, unjust enrichment

7.3 Duty of Fidelity, Loyalty and Good Faith

- Covers many obligations:
 - such as attending work on time, and
 - remaining to the end of the allotted period of employment
 - performing one's work in a competent manner and honestl
 - Obeying lawful and reasonable orders
 - Confidentiality: *Blyth Chemicals v Bushnell* (1933)¹⁶
 - Fiduciary relationships above the duty of fidelity¹⁷
 - * May give rise to more extensive duties than an action for breach of contract: *Schindler Lifts v Debelak* (1989)
 - * Duties prevent employees promoting their own interests at the expense of the employer: *Ramsay v BigTinCan Pty Ltd* [2014]
 - * In Australia, the fiduciary duty is a negative duty not to engage in conduct which conflicts with the duty to the employer or to misuse their position to their own advantage: *Blackmagic Designs Pty Ltd v Overliese* [2010]
 - No receipt of secret commissions

¹⁶Chemist was employed to develop a spray which was sold by employer—employee left the employment and set up his own business selling the same spray—form of theft—injunction was granted

¹⁷*Hospital Products Ltd v United State Surgical Corporations* (1984)

7.3.1 Soliciting Customers, Establishing or Working for a Competing Business

- Employees cannot make use of an employer's time in a conscious and secret manner to advantage themselves in setting up a business in opposition to the employer: *Wessex Dairies v Smith* [1935]
- Does not prevent **preliminary** preparations, which are a matter of degree: e.g. making enquiries, developing a business plan,¹⁸ and incorporating a company¹⁹ are unlikely to be sufficient.

Non-Compete Covenants

- See 4.7.2
- Although an employer is not entitled to protect itself against competition from a form employee who has left the employment, the employer is entitled to protect its interests in customer connection by an appropriately limited restraint: *Wallis Nominees (Computing) Pty Ltd v Pickett* [2013]
- The restraint may be contained in a variety of instruments such as a contract of employment or a deed of separation of release.

7.3.2 Confidentiality (Contractual)

- The very nature of the activity for which the employee is engaged: *Saltman Engineering Co Ltd v Campbell Engineering Co* [1948]

¹⁸*Manildra Laboratories v Campbell* [2009]

¹⁹*Volunteer Eco Students Abroad Pty Ltd v Reach Out Volunteers Pty Ltd* [2013]—using a work laptop to advise that he was leaving to set up his own business

- The existence of a policy of secrecy on the part of the employer: *Ansell Ruber Co Pty Lt v Allied Rubber Industries Pty Ltd* [1967]
- Factors that may be relevant to a finding of confidentiality include the following:²⁰
 1. The extent to which the information is known outside the business
 2. The extent to which the trade secret was known employees and others involved in the plaintiff's business
 3. The extent of measures taken to guard the secrecy of the information
 4. The value of the information to the plaintiff and their competitors
 5. The amount of effort or money expended by the plaintiff in developing the information
 6. The ease or difficulty with which the information could be properly acquired or duplicated by others
 7. Whether it was plainly made known to the employee by the employer that the material was confidential
 8. The fact that the usages and practices of the industry support the assertions of confidentiality
 9. The fact that the employee has been permitted to share the information only by reason of their seniority or high responsibility
 10. That the owner believes these things to be true and that belief is reasonable.
 11. The greater the extent to which the "confidential" material is habitually handled by an employee, the greater the obligation of the confidentiality imposed
 12. That the information can be readily identified
- May be an artificial distinction: *Del Casale v Artedomus (Aust) Pty Ltd* [2007]—courts reluctant to grant relief
- ✘ That a particular chemical worked best at a certain level of dilution: *GlaxoSmithKline Australia Pty Ltd v Ritchie* [2008]
- ✘ The source of supply of particular types of paper: *E Wolsley & Co Ltd v Cooper* [1939]
- ✘ the name of a particular type of stone: *Del Casale v Artedomus (Aust) Pty Ltd* [2007]

7.3.3 Confidentiality (Equity)

- Judicial preference to relying on this head: *Del Casale v Artedomus (Aust) Pty Ltd* [2007]
- Requires that the information is confidential in nature (with sufficient specificity): *Liberty Financial Pty Ltd v Scott (No 3)* [2004]
 - Must not be public knowledge: *Attorney-General v Blake* [1998]
- The information was received in circumstances of confidence: *Del Casale v Artedomus (Aust) Pty* [2007]
- Unauthorised use or disclosure of the information to the original owner's (detriment?—questionable in Australia): *Smith Kline v French Laboratories (Aust) Ltd v Secretary, Dept of Community Services and Health* (1990)
- ✓ Can be enforced against a third party: *Ansell Ruber Co Pty Lt v Allied Rubber Industries Pty Ltd* [1967]

7.3.4 Confidentiality (Express Covenants)

- ✘ Information that is freely available (*Glaxosmithkline Pty Ltd v Ritchie* [2009]) or trivial: (*Tullet Prebon (Australia) v Purcell* [2008])
- Relevant (*Wright v Gasweld* (1991))
 - That skill and effort is required to obtain the information

Distinguishing Know-How From Confidential Information

²⁰*Del Casale v Artedomus (Aust) Pty* [2007]

- The employer regards it as confidential information available only to restricted employees
- The employee is aware the information is confidential
- It is regarded as confidential within the relevant industry
- The information was made available to the employee because of their seniority and special responsibility in the employer's business

7.3.5 Contractual Duty of Loyalty

- Implied duty of good faith does not prevent a former employee whose employment has ended from approaching other employees at their former workplace with a view to their giving lawful notice to move to a new workplace: *UBS Wealth Management (UK) Ltd v Vestra Wealth* [2008]
- Nor in the absence of restrictive covenants or evidence of persuasion is it a breach of fiduciary duties for senior managers responsible for the day-to-day running of a business to leave at the same time and go to work for a competitor: *Deason Henry Haulage Pty Ltd v Cox* [2009]

Anti-Poaching/Non Recruitment Covenants

- See also 4.7.2
- Protectable interests:
 - ✓ Retaining employees critical for the continued success of the business: *Tullet Prebon PLC v BGC Brokers* [2010]
 - ✓ Employees with access to confidential information: *Cactus Imaging Pty Ltd v Peters* [2006]
 - ✓ Significant client connection: *Allison v BDO (NSW-VIC) Pty Ltd* [2010]
 - ✓ Retention of a stable workforce: *John Fairfax Publications Pty Ltd v Birt* [2006]
 - ✓ Special knowledge of the terms and conditions of employment of staff: *Cactus Imaging Pty Ltd v Peters* [2006]

- ✓ Employer has expended considerable sums on training: *Cactus Imaging Pty Ltd v Peters* [2006]
- ✗ Imposition of restraints on employees on modest wages: *Aussie Home Loans v X Inc Services* [2005]

7.3.6 Public Interest Disclosures

- Predominant Australian view is that certain types of information are not “confidential” and an employee who discloses that information not guilty of the breach of duty of confidence—no implied term to maintain confidence in an iniquity: *Corrs Pavey Whiting & Byrne v Collector of Customs*—

7.3.7 Bribes and Secret Commissions

- Breach of employee's obligation of fidelity and good faith, and a breach which renders the employee liable to dismissal.
- *Boston Deep Sea Fishing & Ice Co v Ansell* (1888)
- Employee is liable in damages for the value of what was received.
- It also seems that the employer is entitled to retain any money which the employee has obtained by improper means: *Reading v Attorney-General* [1951]

7.3.8 Intellectual Property

- *VU v Wilson* (2004)—**Nettle J**: implied term that “any invention or discovery made in the course of the employment of the employee in doing that which he is engaged and instructed to do during the time of his employment, and during working hours, and using the materials of his employers, is the property of the employer and not the employee.”
 - Whether the invention was made in the course of the employment by the employee doing what the employee was engaged and instructed to do

- And using the time, opportunity, information and facilities provided by the employer.
- *Western Australia v Gray* (2009)—specific duty to invent before the employer was entitled to the benefit of the invention

7.4 Duty to Report Derelictions and Answer Questions

- Not obliged as a prospective employee to volunteer information about past misdeeds outside of statutory requirements: *Bell v Lever Bros* [1932]
- ✓ **However** if a prospective employee is asked questions by the employer and answers them dishonestly, this may lead to dismissal where the dishonesty was material to the contract of employment

7.4.1 Duty to Report Misdeeds of Others

- Contractual binding: *QBE Management Services (UK) Ltd v Dymoke* [2012]
- No general duty:

8 Safety at Work

8.1 Worker's Compensation

- *Workplace Injury Rehabilitation and Compensation Act 2013*
 - Strict liability
1. Person must be an 'employee' or a 'worker' as defined by the legislation²¹
 2. Injury occurred in the course of person's employment
 - The time it happened

²¹ s 3: "worker" means an individual— (a) who— (i) performs work for an employer; or (ii) agrees with an employer to perform work— at the employer's direction, instruction or request, whether under a contract of employment (whether express, implied, oral or in writing) or otherwise; or (b) who is deemed to be a worker under this Act;

- Where it happened
- The particular conduct involved (whether in the terms of the employment or whether it involved serious misconduct)²²

3. Injury not caused by employee's own serious & wilful misconduct²³

8.1.1 How does a Worker Make a Claim?

- Employer must be given a claim form, with medical certificate setting out:²⁴
 - Nature of injury
 - Nature of the incapacity
- Employer must forward claim to WorkCover²⁵
 - WorkCover must make a decision (accept or deny liability) within 28 days
- If claim is disputed, conciliation and if this failed, either party may take dispute to court.

8.1.2 Commonwealth Employees

- *Safety, Rehabilitation and Compensation Act 1988* (Cth)

8.2 Common Law Liability

- Direct liability
- Non-delegable Duties
- Vicarious liability
- Breach of statutory duty²⁶

²² *Comcare v PVYW* (2013)—not sufficient merely that injury occurred at the place where employer required employee to stay; requisite connection that must be shown to exist between the employee's injuries and employment depends on the employer's encouragement or inducement

²³ Unclear what refers to serious & wilful misconduct, see 9.2.3 and 9.2.3

²⁴ s 20 *Workplace Injury Rehabilitation and Compensation Act 2013*

²⁵ s 73 *Workplace Injury Rehabilitation and Compensation Act*

²⁶ *Occupational Health and Safety Act 2004* (Vic) s 21(1) excludes actions for breach of statutory duty