

Employment Law

Williams Love & Nicol is a premier commercial law firm providing full client services from our base in Canberra. Our practice is focused on providing commercially realistic and practical advice that is timely, accurate and delivers value for money.



**JOHN WILSON - PARTNER,
EMPLOYMENT AND INDUSTRIAL
LAW GROUP**

**Next newsletter:
Employees v Independent
Contractors**

The Courts continue to strike down so-called independent contracting arrangements. Next issue we will consider how to avoid the expensive pitfalls involved in incorrectly characterizing employees as contractors.

The Employment Relationship and Confidential Information

As the workforce becomes more skilled, many workers acquire or develop knowledge and information during their employment. Employers may have occasion to ask the question “Who owns this knowledge or information?”

The employment relationship imposes many obligations on both employers and employees. Employees have duties of fidelity, good faith and confidentiality to their employers – and, with employers, increasingly share mutual obli-

gations of trust and confidence. In the context of workplace information, these duties essentially mean neither party should misuse information gained during the employment relationship to the detriment of the other. This general rule may be affected either by legislation such as privacy, freedom of information and copyright laws where applicable, or by any expressly agreed terms in an employee’s contract of employment.

Workers retain the right to use any general skill, experience and knowledge gained in the course of employment. However, this right must be balanced against an employer’s right to protect its confidential and other corporate information.

Generally, where an employee has retained confidential information, or taken active steps to acquire same, they cannot use that information without the employer’s authority.

As to what constitutes ‘confidential information’, for the benefit of this employer protection, it may come in a number of guises. It includes intellectual property such as trade secrets, and information which is not in the public domain such as customer, price and product lists, and internal organisational procedures (etc). The essential element of ‘confidential information’ is that the information must be secret to the organisation .



Strategies for Protecting Confidential Information

Some practical measures to protect confidential information include:

- *implementing effective internal security procedures* e.g. marking documents as confidential, using passwords and firewalls on computer systems, training staff to be aware of the confidential nature of organisational information and the rationale for maintaining information security;
- *effectively managing the employment relationship* – using appropriate disclosure and/or questioning during recruitment and orientation, using employment agreements to restrain employees from using, disclosing or removing confidential information during and after employment;
- *effectively managing contractual and consultancy arrangements* – generating agreements for independent contractors or consultants that cover information, confidentiality and restraint of trade obligations. For example a prop-

erly drafted restraint of trade clause may provide some protection against former employees/contractors/consultants who seek to work in direct competition with their former employer or who try to take its clients, suppliers or staff.

Legal Remedies for Breach of Confidence

Remedies such as injunctions may prevent the unauthorised use or disclosure of confidential information. If the disclosure or misuse has already occurred, the Courts may also award appropriate compensation in the form of an account of profits or damages. To be successful in a claim for breach of confidence, the person who “owns” the information must establish a number of elements including:

- the confidentiality of the information;
- disclosure in circumstances where a duty of confidence was owed; and
- unauthorised use to the detriment of the information owner.



Meet the Team

Sebastian McIntosh

In March Williams Love & Nicol welcomed Sebastian McIntosh to the Employment team. Sebastian has recently completed a Bachelor of Law/Music at the Australian National University, graduating with Honours in both. He is currently undertaking the Graduate Diploma in Legal Practice. He has a passion for Consumer Protection Law, as well as Jazz Saxophone, for which he was awarded the university medal for Music.

WILLIAMS LOVE & NICOL LAWYERS

- John Wilson: NSW Accredited Specialist in **Employment and Industrial Law**
- Alan Bradbury: NSW Accredited Specialist in **Planning and Local Government Law**
- Mark Love: NSW Accredited Specialist in **Business Law**
- David Toole: NSW Accredited Specialist in **Property Law**



GABRIELLE SULLIVAN - SENIOR ASSOCIATE
EMPLOYMENT AND INDUSTRIAL LAW

NEWS ALERT | WorkSafe ACT Anti-Bullying Seminars

- [Bullying Awareness](#)
8th Aug 2011, 9:15am — 1:00pm
- [Bullying Prevention & Management](#)
10th Aug 2011, 9:15am — 4:30pm
19th Sep 2011, 9:15am — 4:30pm
- [The Work Safety Act Explained](#) **FREE**
14th Sep 2011, 10:00am — 11:30am

see www.worksafe.act.gov.au for more details