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TRADE SECRETS AND PRIVACY

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COMMENTARY

Gordon Hughes has written new commentary on:

TRADE SECRETS

Breach of Confidence

Elements of breach of confidence

Nature of information – Know-how

In *Europa International Pty Ltd v Child* [2016] NSWSC 923, the Supreme Court of New South Wales considered the distinction between "general know-how" and "confidential information" when rejecting an application by a manufacturer of alcoholic products to restrain the use by ex-employees of its recipe for aromatic bitters on the grounds that the information was confidential. McDougall J emphasised that accumulated knowledge, skill and experience acquired by an employee in a particular field, even if imparted by the employer to the employee in confidence, might not be protected in circumstances where it had metamorphosed into the employee's "general know-how". See [30.1590]. See also "Intermixed information" at [40.4900] and "Restraint of trade covenants" at [40.6700].

Secrecy

Relative secrecy

In *Kafataris v Davis* [2016] FCAFC 134, the Full Federal Court concluded that information which the applicant claimed was confidential did not have the requisite qualities required by equity for protection as it was information which had been freely circulated by the applicant without any express proviso of confidentiality (and none could be implied), and to some extent was sourced from a public website. See [30.2230].

Fiduciary Relationships

Defining a fiduciary relationship

The Full Federal Court concluded in *Kafataris v Davis* [2016] FCAFC 134 that no fiduciary relationship existed between the respondents, who had filed a

provisional application in respect of a card game, and the applicant, who was subsequently introduced to the respondents in order to explain a possible application for embodiment of the invention. The court concluded that there was no evidence that the respondents had agreed to act for or on behalf of the interests of the applicant in a legal or practical sense. See [40.1010].

The employer/employee relationship

Direct means to protect commercial secrets with respect to the employee/employer relationship

In *TICA Default Tenancy Control Pty Ltd v Datakatch Pty Ltd* (2016) 120 IPR 98; [2016] FCA 815, the Federal Court found that a former staff member of the applicant company had misused the applicant's confidential information when developing an IT system for use in a rival business, even though there was insufficient evidence to support a claim for breach of copyright. The breach of confidence related to the appropriation of user names and passwords related to the applicant's customers by the second respondent, contrary to an implied confidentiality term of the respondent's employment contract and also in breach of his equitable duty of confidentiality. See [40.2150]. See also "Fiduciary obligation or implied term?" at [60.510].

Emails – Protection

In *Croft v Smarter Insurance Brokers Pty Ltd* [2016] FWC 6859, the Fair Work Commission held that accessing pornography using an employer's computer equipment did not represent a valid reason for dismissal in the absence of a clear and understood workplace policy confining the use of the employer's equipment to work-related activities. See [40.8250] and [300.2510].

Remedies

Interlocutory injunction

Other matters – Where confidential or private information sought

In *Tikiri Pty Ltd v Fung* [2016] VSC 460, the Supreme Court of Victoria refused to allow a plaintiff access to the names of a doctor's patients. In *Merial, Inc v Intervet International BV* [2016] FCA 1047, the Federal Court granted the in-house counsel at Merial, Inc. with access to a number of unredacted

confidential product development reports of its direct competitor, Intervet International B.V., in an appeal against a decision of the Commissioner of Patents concerning a patent application filed by Intervet. See [90.1245].

Final injunction

Employer-employee situations – General

In *SAI Global Property Division Pty Ltd v Johnstone* [2016] FCA 1333, the Federal Court awarded damages for breach of contract and breach of copyright against an employee who copied his employer's files onto a USB before resigning. See [90.2660].

Restraint of Trade – Covenants and Protection of Goodwill

Restraint of trade covenants – Onus and evidence

Evidence

In *Amalgamated Pest Control Pty Ltd v SM & SE Gillece Pty Ltd* [2016] QCA 260, the court dismissed an appeal against a decision to refuse an injunction restraining the establishment by the respondent of a competing business in breach of a restraint clause. See [100.1210].

Assignable?

Innovateq Australia Pty Ltd v Barnes [2016] VSC 618 considered whether an employer is able to assign a restraint of trade covenant in an employment contract. See [100.1230].

Reasonableness when?

In *Just Group Ltd v Peck* [2016] VSC 614, a restraint in an employment contract was held to be unenforceable as post-employment restraints imposed upon the defendant were not considered to be reasonable and therefore not enforceable. A subsequent appeal was dismissed. See [100.1240].

Confidential information

Definition of confidential information

In *Europa International Pty Ltd v Child* [2016] NSWSC 923, a purported employee constraint on the use of "widely defined" information was rejected, emphasising that if contractual constraints on the use of confidential information are to be effective, it is important to define what is embraced by the term "confidential information" as precisely as possible. See [100.2900].

Post-employment restraint covenants

In *News Life Media Pty Ltd v Janeke* [2016] NSWSC 1835, it was held that an employment restraint did not prevent the employee working for a competitor in a different role which did not necessitate the use of her former employer's confidential information. See [100.2940].

PRIVACY

Privacy in Australia

Statutory initiatives in New South Wales

The *Civil Remedies for Serious Invasions of Privacy Bill 2016* (NSW) was introduced in the New South Wales Legislative Assembly on 13 October 2016 and lapsed on 2 December 2016. The object of the Bill was to implement proposals for reform as set out in a report of the Standing Committee on Law and Justice, published by the Legislative Council in March 2016. See [300.105].

Statutory Protection of Privacy

State and Commonwealth Telecommunications (Interception and Access) Act

Means of interception

In *Furnari v Ziegert* [2016] FCA 1080, Murphy J considered it "critical" for the applicant to establish how a recording had been made in order for a breach of s

7(1) of the *Telecommunications (Interception and Access) Act 1979* (Cth) to be established. See [300.5020].

Unauthorised use

South Australia

The *Listening and Surveillance Devices Act 1972* (SA) is to be replaced by the *Surveillance Devices Act 2016* (SA) (No 2 of 2016; assented to 18 February 2016), once proclaimed. Upon proclamation, the 2016 Act is set to restrict use of listening, optical, tracking and data surveillance devices. See [300.5340].

Tasmania

In *Dimech v Tasmania* [2016] TASCCA 3, the Supreme Court of Tasmania considered the *Listening Devices Act 1991* (Tas) when it ruled that evidence in a criminal trial of a recorded telephone conversation between the appellant and a gambling company had not been unlawfully obtained. See [300.5360] and [300.6250].

Intrusiveness – Commonwealth

Do Not Call Register Act

In November 2016, the Australian Communications and Media Authority (ACMA) announced the commencement of the process for remaking of the *Telemarketing and Research Industry Standard 2007* by releasing a consultation paper entitled *Automatic sunseting of legislative instruments – Proposal to remake the Telemarketing and Research Industry Standard 2007*. The then current Standard had a sunset clause which would cause it to lapse on 1 April 2017 unless remade beforehand. See [300.6310].

Broadcasting privacy

Privacy issues are to some extent addressed by the *Commercial Television Industry Code of Practice*, the most recent version of which was registered by the ACMA on 10 November 2015 and came into effect on 1 December 2015. The Code is developed under the *Broadcasting Services Act 1992* (Cth) as part of a co-regulatory model whereby a sector of the broadcasting industry must develop a code of practice to be registered by ACMA. See [300.6325].

Existing Data Protection Laws

Privacy Act 1988

Definition of “personal information”

An appeal by the Privacy Commissioner against the decision of the Administrative Appeals Tribunal was dismissed by the Full Court of the Federal Court: *Privacy Commissioner v Telstra Corporation Ltd* [2017] FCAFC 4. The court focused its attention on the words "about an individual" in the definition of "personal information" (as it was prior to amendment in March 2014). Although the definition has since changed, those words remain in the new definition and the reasoning of the Full Court remains apposite. See [610.1010].

Australian Privacy Principles (APPs) – Interpretation of privacy principles

In *Jurecek v Director, Transport Safety Victoria* [2016] VSC 285, the Victorian Supreme Court emphasised that the concept underlying privacy principles is to provide flexibility and "future proofing", meaning that courts should avoid an unnecessarily narrow or literal interpretation. See [610.1312] and [610.1540].

Guide to APP concepts – Security

In *'IX' and Business Services Brokers Pty Ltd t/as TeleChoice* [2016] AICmr 42, the Privacy Commissioner awarded compensation to a claimant whose personal information had been stored by a telecommunications company in a shipping container which was accessed by trespassers. The Commissioner held that the company had failed to take "reasonable steps" to ensure the security of the information as required by APP 11.1. See [610.1620].

Tax file number guidelines

The *Data-matching Program (Assistance and Tax) Act 1990* (Cth), which regulates the matching of records between the Australian Taxation Office and assistance agencies such as the Department of Human Services and the Department of Veterans' Affairs, is of relevance to the handling of tax file numbers. The Act is supplemented by statutory guidelines in the form of the *Guidelines for the Conduct of the Data-Matching Program* (31/10/1994). A breach of the Act or Guidelines constitutes an infringement with privacy under s 13 of the *Privacy Act 1998* (Cth). See [610.2000].

Anti-Money Laundering – privacy implications

Under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), reporting entities must provide individuals with information about how their Know Your Customer (KYC) information will be used and disclosed, and the purpose of collection. See [610.2050]ff.

Telecommunications Privacy Legislation

Permissible disclosure

Section 275B of the *Telecommunications Act 1997* (Cth) defines "emergency management person" and s 275D defines "emergency law". A new *Telecommunications (Data for emergency warning systems) Instrument 2016* (Cth) was issued in October 2016 to give effect to ss 275B and 275D. See [610.2820].

Reporting obligations under the Telecommunications Act

Under s 308 of the *Telecommunications Act 1997* (Cth), carriers, carriage services providers and number/database operators are required to provide a written report to the ACMA if, during the preceding financial year, it has made a record (or been given a copy of a record) regarding authorised disclosures as described in ss 306 or 306A. See [610.2825].

Data Sharing, Open Government and Big Data

Guidelines for the Conduct of the Data-Matching Program

The *Guidelines for the Conduct of the Data-Matching Program* are mandatory statutory guidelines issued under s 12 of the *Data-Matching Program (Assistance and Tax) Act 1990* (Cth). The *Guidelines* require each matching agency, in consultation with the source agency or agencies, to maintain a program protocol. The program protocol is filed with the Privacy Commissioner and made available for public inspection. The *Guidelines* further require the establishment of technical standards in relation to data quality, integrity and security. The *Guidelines* go on to require the establishment of reasonable procedures for confirming the validity of results, the destruction of personal information no longer required and the provision of periodic reports to the Privacy Commissioner. See [610.3410] and [610.3610].

Guidelines on Data Matching in Australian Government Administration

The *Guidelines on Data Matching in Australian Government Administration*) are voluntary guidelines issued by the Office of the Australian Information Commissioner (OAIC) for use in circumstances not involving the use of tax file numbers in comparing personal information held by the Australian Taxation Office and other assistance agencies. The *Guidelines* are issued under s 28(1)(a) of the *Privacy Act 1988* (Cth) and represent the OAIC's view of best practice with respect to undertaking data-matching activities. The *Guidelines* may be taken into account by the OAIC in assessing whether an agency has complied with the Australian Privacy Principles (APPs) when handling personal information in the course of data-matching activities. See [610.3420] and [610.3620].

State Data Protection Legislation

Victoria – Publicly available information

In *Jurecek v Director, Transport Safety Victoria* (2016) 260 IR 327; [2016] VSC 285, Bell J rejected the proposition that personal information entered on Facebook which was accessible by persons other than the individual's Facebook friends would necessarily metamorphose into a "generally available publication". See [610.3940] and [610.3970].

Significant New South Wales privacy decisions

In *APV v Department of Finance and Services* [2016] NSWCATAD 168, the NSW Civil and Administrative Tribunal ordered the NSW Department of Finance and Services to pay \$5,000 in damages to two individuals arising out of the Department's misuse of personal information which had been disclosed by them to the Department.

In *CJN v University of Sydney* [2016] NSWCATAD 173, the Civil and Administrative Tribunal dismissed an application by a student at the University of Sydney in which it was asserted the university had disseminated personal information in breach of the Information Protection Principles contained in the *Privacy and Personal Information Protection Act*.

See [610.4280].

Significant Queensland privacy decisions

In *Millar v Right to Information and Privacy Unit, Public Safety Business Agency* [2016] QSC, the Supreme Court of Queensland dealt indirectly with the *Information Privacy Act 2009* (Qld) when rejecting an application for a review of a decision by the Queensland Police and the Crime and Corruption Commission to deny access to an individual of records allegedly in their possession. See [610.4470].

Health Information

Significant Victorian health privacy decisions

In *Tikiri Pty Ltd v Fung* [2016] VSC 460, the Supreme Court of Victoria refused to allow a plaintiff access to the names of a doctor's patients.

In *Kitson v Medhealth Pty Ltd* [2017] VCAT 41, VCAT found that a company which specialised in supplying medical specialists to solicitors for the purpose of providing medico-legal reports did not breach the *Health Records Act 2001* (Vic) when it disclosed medical information about the complainant to a psychiatrist.

See [610.6350].

Australian Capital Territory

The *Health Records (Privacy and Access) (Fees) Determination 2016 (No 1)* (ACT), made pursuant to s 34 of the *Health Records (Privacy and Access) Act 1997*(ACT), provides a table of fees applicable to the accessing and transfer of health records. See [610.6600].

Queensland

A consultation paper released by the Queensland Government in December 2016 queried whether the National Privacy Principles, along with the Information Privacy Principles, should be replaced with a revised set of principles mirroring the Commonwealth's Australian Privacy Principles, thereby reducing the existing compliance burden for Queensland health agencies. See [610.6800].

Conducting Business Overseas

Conducting business in Europe

EU Directive

It can be assumed, that European countries with privacy laws implemented pursuant to the EU Directive satisfy the necessary threshold under APP 8.2(a)(i) of being "substantially similar" to the APPs. This was assumed, for example, by the Privacy Commissioner's determination in *'HW' and Freelancer International Pty Ltd* [2015] A1Cmr 86. See [630.510].

United Kingdom – The impact of “Brexit”

With the advent of "Brexit", and subject to the terms on which that occurs, Britain may be free from its obligations as a member of the EU when legislating in relation to privacy and data protection. See [630.520].

Conducting business in North America

United States of America

The EU-US Privacy Shield was adopted by the European Commission on 12 July 2016, with self-certification becoming available from 1 August 2016. US organisations which for whatever reason do not participate in the Privacy Shield self-certification option remain free to rely on other mechanisms recognised by European law, such as the Standard Contractual Clauses. See [630.1010].

Conducting business in Asia

China

China has not signed any treaties with the European Union or any other sovereignty on data protection, and is not a member of the APEC Cross-border Privacy Enforcement Arrangement (CPEA) or the Asia-Pacific Privacy Authorities. It has no single authority responsible for enforcing provisions relating to the protection of personal information. On 1 August 2016, the *Provisions on the Management of Mobile Internet Applications' Information Services* came into effect, Article 7 of which required mobile application service providers to adopt user information security

mechanisms, inform users as to how data is being used and obtain express user consent for certain uses of personal data. See [630.1510].

Indonesia

Indonesia does not have specific data protection laws although there is some measure of protection for individuals under the *Law Concerning Electronic Information and Transactions* (11/2008) and its implementing legislation, the *Government Regulation Concerning Electronic Systems and Transaction Providers* (82/2012). See [630.1535].

Amending Legislation

Health Records and Information Privacy Act 2002 (NSW)

Purpose of amendments

To amend the Act to correct a reference in Schedule 1.

Amended provisions

Amended: Sch 1

Amending legislation

Statute Law (Miscellaneous Provisions) Act (No 2) 2016 (NSW) (Act No 55 of 2016) – with effect from 6 January 2017.

Health Records Act 2001 (Vic)

Purpose of amendments

To amend the Act in relation to definitions and to make minor and consequential amendments to substitute references to Health Services Commissioner.

Amending provisions

Amended: s 3, Sch 1

Amended legislation

Health Complaints Act 2016 (Vic) (Act No 22 of 2016) – with effect from 1 February 2017.

Information Privacy Act 2009 (Qld)

Purpose of amendments

To amend the Act to replace a reference to the repealed *Grammar Schools Act 1975* with a reference to *Grammar Schools Act 2016*.

Amending provisions

Amended: Sch 2

Amended legislation

Grammar Schools Act 2016 (Qld) (Act No 52 of 2016) – with effect from 1 January 2017.

Information Privacy Act 2014 (Act)

Purpose of amendments

To amend the Act to recognise privacy protection measures in contracts that do not make specific reference to the Territory Privacy Principles (TPPs).

Amending provisions

Amended: s 21

Amended legislation

Justice and Community Safety Legislation Amendment Act 2017 (ACT) (Act No 5 of 2017) – with effect from 2 March 2017.

Privacy Regulation 2013 (Cth)

Purpose of amendments

To amend the Regulation to permit energy and water utilities in the Australian Capital Territory (the ACT) and the Northern Territory to disclose credit information until 1 January 2018.

Amending provisions

Inserted: s 14A

Amended legislation

Privacy Amendment (Energy and Water Utilities) Regulations 2017 (Cth) (F2017L00170) – with effect from 1 March 2017.