EMPLOYEE RESTRAINT OF TRADE: A VALUABLE TOOL IN THE SOCIAL MEDIA AGE

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A revolution

Over the last 10 years, Facebook, Twitter, Instagram and Snapchat have revolutionised the way people socialise and conduct business in the global economy. No social media site has truly captured the professional market as comprehensively as LinkedIn. Beginning in 2003, LinkedIn now boasts a subscription of up to 300 million followers spanning across 200 countries and is universally recognised by all businesses as a crucial marketing and networking tool.

Indeed, social media and networking sites have offered businesses a way to reach out to far more contacts than previously imagined and all with the ease of simply clicking 'connect'.

Nevertheless, as with all technological developments, a myriad of legal issues inevitably arise as individuals push the boundaries of the technology's originally intended use. By turning all employees into marketers, LinkedIn and Twitter have created a dilemma for employers who wish to protect valuable customer connections from former employees and competitors.

The legal dilemma facing social media connections

The marketing benefits that these social media sites offer businesses do not come without a price. Numerous jurisdictions, including those of the UK, USA and Australia have been forced to consider the following questions:

1. Who owns social media connections gained through the course of an employee's employment?
2. Are social media connections 'trade secrets' capable of protection?
3. Can an employer restrict the post-employment use of social media?

The importance of such questions should not escape the attention of employers as former employees can inflict significant financial harm through their use of an employer's customer lists and connections.

Trade secrets

Most employees are privy to confidential information during the course of their employment. Employers usually include provisions in employment contracts prohibiting an employee from disclosing or misusing information that is confidential or essential to the employer's business.

In this context, the generally accepted test[1] to establish a breach of confidence claim is that:

1. the employer's information has the necessary quality of confidence;
2. the information was imparted to the employee in circumstances importing an obligation of confidence; and
3. the employee used the information without the authority of the employer and to the employer's detriment.

Many confidential information claims fail because the information sought to be protected does not have the necessary quality of confidence, due to the information being accessible to, or becoming part of, the public domain. Although each case must be determined on its own facts, Australian courts have held that customer lists have the necessary quality of confidence to be categorised as a trade secret. However, under Australian law it is questionable whether:

- social media connections gained by an employee during the course of employment still retain the necessary quality of confidence to be categorised as a trade secret; and
- employers are legitimately entitled to own these connections.

Here are a couple of recent examples:

The position in Australia was to be tested in the 2012 case of *Naiman Clarke Pty Ltd v Marianna Tuccia*.[2] In this case Naiman Clarke alleged that a former employee, Ms Tuccia, used the employer's confidential candidate database to establish connections on LinkedIn, prior to ceasing her employment to work for a competitor, in breach of confidentiality and restraint of trade clauses in her employment contract. Naiman Clarke sought, amongst other things, an injunction requiring Ms Tuccia to delete all information concerning the candidates from her LinkedIn profile and damages for breach of contract. This case did not proceed to judgement, but is noteworthy for being the first case of its kind in Australia where an employer attempted to assert ownership of an employee's LinkedIn connections.

In *Bradford Pedley v IPMS Pty Ltd T/A peckvonhartel*[3] the employee during the course of employment attempted to solicit the employer's customers for his own private business interests. He did through the use of LinkedIn connections gained by him during the course of his employment.

Mr Pedley filed an unfair dismissal claim with the Fair Work Commission alleging that his dismissal was harsh, unjust or unreasonable. Commissioner Deegan concluded that Mr Pedley had breached the fundamental provisions of his employment contract by using LinkedIn to solicit work from his employer's customers for his own private design business.

While this 2013 decision clarified that an employee's use of social media must be consistent with the employee's obligations to act in the interests of the employer, it did not:

- consider ownership of business-related social media connections; and
- determine whether an employee's LinkedIn connections could be categorised as a trade secret.

Currently, the Australian courts lack a clear precedent with respect to the ownership of social media connections, including whether such connections constitute a trade secret.

In contrast, the UK High Court has recognised that LinkedIn connections can constitute an employer's confidential information. In a recent 2013 case in *Whitmar Publications Ltd v Gamage*[4] the UK High Court granted an injunction preventing ex-employees from exploiting the employer's confidential information for the purpose of marketing their own competing business. Ms Wright, the ex-employee who managed the LinkedIn groups on the company's behalf, was ordered to hand over the account to her former employer. Although decided in England, this decision provides guidance as to whether LinkedIn connections can belong to an employer and be categorised as a 'trade secret'. Time will tell how this plays out in the Australian courts.

Importance of restraint of trade provisions

Employers are increasingly relying on post-employment restraints in employment contracts to protect their businesses when former employees begin working for a competitor. Employers now recognise that post-employment restraints are a valuable source of protection in today's environment, given ownership of business-related social media connections is still to be settled by the Australian courts.

By restricting an employee's conduct post-employment, restraint of trade clauses attempt to protect an employer's:

- trade secrets;
- confidential information; and
- customer and employee connections.

Courts will only enforce restraint clauses if they are 'reasonable'. In deciding whether a restraint is reasonable, the Australian courts will look at whether:

- the restraint protects a legitimate business interest of the employer; and
- the restricted time period and geographical area are no greater than required to protect that interest.

The extent to which an employer can regulate a former employee's use of social media post-termination and whether such a restraint would be considered 'reasonable' remains a 'grey' area. Therefore, caution should be exercised when drafting restraint of trade clauses as they may be the employer's first and only line of defence against the misuse of social media connections by former employees.

Tips for in-house on the steps to be taken

Given the prevailing fog surrounding the issue of trade secrets and ownership of social media contacts, it is recommended that employers consider taking the following steps to protect their business-related social media connections.

1. Incorporating restraint of trade clauses into employment contracts which explicitly refer to the use of social media connections, including non-solicitation obligations during the post-employment restraint period.
2. Incorporating terms into employment contracts which restrict the use of an employee's social media profile during the post-employment restraint period (e.g. former employees are restrained from updating, publishing or sharing content on social media, including updating their job status during the post-employment restraint period).
3. Incorporating terms into employment contracts which require employees to open new social media profiles on the commencement of employment, and to close these social media profiles (including deleting passwords) at the conclusion of their employment. The employer may also wish to prohibit its employees from opening and using any duplicate social media profiles during the course of employment as such devices are commonly used to circumvent post-employment restraints.
4. At the commencement of employment, obtain a list of all current social media connections of the employee and incorporate a clause into employment contracts that any new connections gained during the course of employment is the property of the employer.
5. Paying for their employees' access to work-related social media (e.g. paying for an employee's premium LinkedIn account may be prima facie evidence that the employer is the owner of the social media profile).
6. Developing comprehensive social media policies including guidelines for employees on appropriate social media use during the course of employment and during the post-employment restraint period.

Until Australian courts adopt the principle that the misuse of social media connection is an actionable right for employers, carefully drafted post-employment restraints which capture the use of social media connections will be a vital protection for employers against a former employee's misuse of those social media connections.

Footnotes

1 *Coco v AN Clark (Engineers) Ltd [1969] RPC 41*

2 *Naiman Clarke Pty Ltd v Marianna Tuccia [2012] NSWSC 314 para 6*

3 *Bradford Pedley v IPMS Pty Ltd T/A peckvonhartel [2013 FWC 4282*

4 *Whitmar Publications Ltd v Gamage and other [2013] 11 EWHC 1881 (Ch)*