

Trade Secrets

- A trade secret is generally any business information used in a business that gives the proprietor an opportunity to gain an advantage over competitors who do not know or use it. They are vital to the success of most businesses. Such information may include business plans, practices, strategies, customer lists, contact information, sales reports, business systems and methods, business formulas, recipes, patterns, devices and the like.
- Business proprietors usually recognise the need to take measures to protect the secrecy of such information but fail to take adequate measures.
- The threat of trade secret theft is virtually always present. The more valuable the information, the higher the stakes. Secrecy can be difficult to enforce where inadequate measures have been taken - with the result that trade secrets litigation can require considerable time and resources.
- Appropriate preventative measures can minimise the occurrence of trade secret theft and ensure a strong litigious position in cases where misappropriation does occur.
- It is important to implement measures to protect sensitive information at the first opportunity. Such measures will need to be tailored to the particular business and take account of the form of the information and the people who will have access to the information. An important step in all situations is to restrict access to sensitive information on a “need to know” basis.
- In appropriate cases confidentiality and non-competition agreements may be obtained from those who have knowledge of the information. Employment agreements may also contain confidentiality and non-compete clauses. If such an agreement is breached, the IP owner has evidence of what was agreed and the extent of such agreement, and the IP owner’s rights in the event of a breach. Such documents however should be carefully drafted to reflect the situation at hand and the state of the law, otherwise any agreement may be unenforceable or of no practical effect.
- Specific organisational procedures should also be devised to respond to foreseeable situations where others will have access to sensitive information. These can include limiting access to certain materials, and maintaining a register of persons who have had access to such information.
- You should note that confidentiality undertakings of themselves do not stop anyone else from inventing the same product or process independently and exploiting it commercially. Nor do such undertakings give you exclusive rights so IP owners remain vulnerable when employees with this knowledge leave the employment of the IP owner. Also, proving a breach of confidentiality under common law can be complex and is potentially more costly than defending registered rights.

Lawyers at DLS can:

- draft and negotiate confidentiality and non-compete agreements;
- provide advice on the interpretation of confidentiality undertakings
- act in relation to breaches of confidentiality.

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