

**ACTS SUPPLEMENT**

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**Act 2**

*Trade Secrets Protection Act*

**2009**

**THE TRADE SECRETS PROTECTION ACT, 2009.**

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*Section.*

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**THE TRADE SECRETS PROTECTION ACT, 2009**

**An Act to provide for the protection of undisclosed information in commercial transactions and to provide for other related matters.**

DATE OF ASSENT: 25th April, 2009.

*Date of Commencement:* 12th June, 2009.

BE IT ENACTED by Parliament as follows:

**PART I—PRELIMINARY****1. Application.**

(1) This Act applies to governmental agencies, and persons regardless of the nature of the entity or the purpose for which it exists.

(2) Nothing in this Act is intended to impose on any person a liability for the acquisition, disclosure or use of information, where that information is acquired in the course of that person's work, and the information is of a character that the acquisition would amount to not more than an enhancement of that person's personal knowledge, skill or expertise.

(3) This Act does not affect any rules of equity or the common law by virtue of which obligations of confidence arise with respect to the disclosure, acquisition or use of confidential information.

**2. Interpretation.**

In this Act, unless the context otherwise requires—

“acquisition” means the act by which a person acquires or procures property in anything;

“court” means the High Court;

“disclosure” means an act of disclosing or revealing information which is secret or generally unknown;

“person” means an individual or a legal or juridical entity;

“trade secret” means information including but not limited to a formula, pattern, compilation, program, method, technique, or process, or information contained or embodied in a product, device or mechanism which—

- (a) is, or may be used in a trade or business;
- (b) is not generally known in that trade or business;
- (c) has economic value from not being generally known; and
- (d) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

PART II—PROTECTION OF TRADE SECRETS

**3. Right to prevent disclosure, acquisition or use of trade secrets.**

A person has the right to prevent information lawfully within his or her control from being disclosed to or acquired, or used by others without his or her consent, in a manner contrary to honest commercial practice.

**4. Conditions for protection.**

(1) Information protected under this Act must—

- (a) be a secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- (b) have commercial value because it is secret; and
- (c) have been subject to reasonable steps under the circumstances, by a person lawfully in control of the information, to keep it secret.

(2) For the avoidance of doubt, a trade secret shall be taken to be protected so long as the conditions prescribed in subsection (1) are complied with in relation to it.

## 5. Right of action.

(1) Disclosure, acquisition or use of a trade secret by improper means constitutes an infringement and, subject to this Act, a person entitled to the benefit of the trade secret may bring proceedings in respect of the infringement.

(2) For the purposes of this section, a trade secret is not disclosed, acquired or used by improper means if it is arrived at by independent development or reverse engineering alone.

(3) Disclosure, acquisition and use of undisclosed information are only contrary to this Act when they are accomplished in a manner contrary to honest commercial practice.

(4) For the purposes of this section—

“improper means” includes commercial espionage by electronic or other means;

“reverse engineering” means the process of discovering the technological principles of a device, object or system through analysis of its structure, function and operation as long as it is obtained lawfully.

**6. Disclosure contrary to honest commercial practice.**

Acts contrary to honest commercial practice include but are not limited to the following—

- (a) discovery of another person's undisclosed information by physical force or unauthorized entry into a place of business or a particular part of a place of business of the person who possesses that undisclosed information, either directly or through a third party;
- (b) discovery of another person's undisclosed information through fraudulent misrepresentation to induce disclosure or through an act of deceit, either directly or through a third party;
- (c) discovery of another person's undisclosed information by eavesdropping, electronic listening, unauthorized access to the person's private correspondence or files or any other improper means;
- (d) disclosure or use of another person's undisclosed information in breach of contract or in breach of confidence;
- (e) disclosure or use of another person's information where, by virtue of the place or manner in which that information is obtained, circumstances reasonably suggest that the information is subject to an expectation of privacy;
- (f) disclosure or use of another person's undisclosed information obtained unlawfully;
- (g) disclosure or use of another person's undisclosed information by a person to whom it is disclosed without being informed that the information is subject to an obligation of confidentiality, after being informed that that information is in fact subject to an obligation of confidentiality; or

- (h) disclosure or use of another person's undisclosed information by a person who lawfully obtained that information from a third person who obtained it unlawfully, where the person disclosing or using the information knew or should have known that the information was obtained unlawfully.

## **7. Acts not contrary to honest commercial practice.**

Acts not contrary to honest commercial practice include—

- (a) obtaining information from a publicly available source such as a library, government records available to the public, publication, or product available on the market, or from another person lawfully in possession of that information without an obligation of confidentiality;
- (b) obtaining information by inspection or analysis of a commercially available product embodying the undisclosed information;
- (c) independent invention or discovery of the undisclosed information;
- (d) obtaining the information by gift, purchase, or inheritance from the owner;
- (e) disclosing or using information that is generally known among or readily accessible to persons within the circles that normally deal with that kind of information;
- (f) disclosure of information by a recipient of information who at the time of disclosure to him or her is not informed that it is subject to an obligation of confidentiality.

## **8. Right not exclusive.**

The right in a trade secret shall not prejudice rights in other forms of intellectual property.

**9. Right to assign, transfer or license.**

(1) A person entitled to the benefit of a trade secret may assign, transfer or license the right to that trade secret, wholly or partially and generally or subject to territorial limitation.

(2) In the case of a licence arrangement, the licensee, is obliged to protect the trade secret against disclosure other than as authorized under the contract and has the same rights as the owner against unauthorized disclosure.

**10. Rights and obligations to be set forth in contract.**

In each case of assignment, transfer or licence the rights and obligations of the parties shall be stated in a written contract and signed by the owner of the right or by a person authorized by him or her for that purpose and by the person to whom the rights are being assigned or transferred or licensed.

**11. Information furnished to a government department.**

(1) Where information that would otherwise be a trade secret is required to be furnished to a government department, that department shall protect that information submitted to it from disclosure.

(2) Where a law provides that the approval of a government agency is necessary as a condition for marketing of pharmaceutical or agricultural products which utilize new commercial entities, the submission of undisclosed text or other data, the origination of which involves a considerable effort, the government agency shall protect the data against unfair commercial use.

(3) In particular the government agency shall protect the data against disclosure except where necessary to protect the public or unless steps are taken to ensure that the data are protected against unfair commercial use.



## PART III—REMEDIES AND DEFENCES

**12. Remedies.**

(1) In proceedings for improper disclosure, acquisition or use of a trade secret, the court may, subject to subsections (2) and (3) and section 10, do any one or more of the following—

- (a) grant an injunction in accordance with section 13;
- (b) award damages in accordance with sections 14 and 16;
- (c) order an account of profits under section 15;
- (d) make an adjustment order under section 17; or
- (e) order the defendant to deliver up or destroy anything in which the trade secret to which the improper disclosure, acquisition or use relates is contained or embodied.

(2) The court shall not exercise its discretion to award both compensatory damages and an account of profits in such manner as to allow a plaintiff to recover twice for the same loss.

(3) Nothing in this section shall prejudice any jurisdiction of the court to grant auxiliary or incidental relief.

**13. Injunction.**

(1) The court may, subject to section 12 grant an interlocutory or permanent injunction with respect to the improper disclosure, acquisition or use of a trade secret.

(2) Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for such additional period as the court thinks fit in order to eliminate any commercial advantage that would otherwise accrue to the defendant from the improper disclosure, acquisition or use.

**14. Damages.**

An owner may, subject to section 12, recover damages for the loss caused by the improper disclosure, acquisition or use of a trade secret.

**15. Account of profits.**

The court may, subject to section 12, order the defendant to account to the plaintiff or owner for any profits that have accrued, or that may subsequently accrue to the defendant by reason or in consequence of the improper disclosure, acquisition or use of the trade secret.

**16. Exemplary damages.**

The court may, subject to section 10, award exemplary damages for the improper disclosure, acquisition or use of a trade secret.

**17. Adjustment orders.**

(1) The court may, subject to section 9, make an adjustment order regulating future exploitation of the trade secret by the defendant or by the plaintiff and the defendant.

(2) An adjustment order under subsection (1) may include any or all of the following—

- (a) payment of the plaintiff of a royalty with respect to the future use by the defendant of the trade secret in such amount and upon such terms as the court thinks fit;
- (b) contribution by the defendant to the plaintiff for expenses incurred by the plaintiff in connection with acquiring or developing the trade secret, and which are liable to be wasted by reason of the defendant being permitted to exploit the trade secret in the future; or
- (c) determination of any incidental question relating to the extent to which both the plaintiff and the defendant shall be free to exploit the trade secret in future and the rights and liabilities of each.

**18. Disclosure, acquisition or use in good faith.**

(1) Where a person in good faith discloses, acquires or uses a trade secret, and subsequently learns that a person entitled to the benefit of that trade secret under this Act has been deprived of it by improper means or by mistake, either the person entitled to that benefit or the person who has disclosed, acquired or used that trade secret in good faith may bring an action for a declaration of the rights of the parties.

(2) In an action under subsection (1) the court shall determine the rights of the parties in accordance with the following principles—

- (a) a person entitled to the benefit of a trade secret shall be protected under this Act;
- (b) notwithstanding paragraph (a), a person who discloses, acquires or uses a trade secret in good faith is entitled to disclose, use and transfer the trade secret to the extent which is just and reasonable having regard to—
  - (i) the economic and social value of the consideration given by that person for the trade secret;
  - (ii) any change in the position of that person in reliance upon or in order to exploit the trade secret made before he or she discovered that the person entitled to the benefit of the trade secret has been deprived of it by improper means or mistake as the case may be; and
  - (iii) the protection granted by this Act to the person entitled to the benefit of a trade secret.

(3) In an action under subsection (1), the court may—

- (a) make an interim order to protect the interests and preserve the rights of the parties as may be just; or
- (b) award, grant, order or make such remedy as may be appropriate in the circumstances of the particular case as if the action were an action referred to in section 5.

**19. Defences.**

(1) In proceedings for improper disclosure or use of a trade secret, it is a defence to prove that the disclosure was required to be made to a court under an order of the court.

(2) In any proceedings for improper disclosure or use of a trade secret, the defendant is not liable to the plaintiff in any respect if the defendant satisfies the court that—

(a) in view of the nature of the trade secret, there is, or in the case of apprehended disclosure or use there will be at the time of that disclosure or use a public interest involved in the trade secret being disclosed or used; and

(b) the public interest outweighs the public interest involved in upholding the trade secret.

(3) For the purposes of subsection (2), public interest in the disclosure or use of a trade secret means the interest of the public at large in being made aware of the existence of a crime, fraud, other unlawful conduct or matter affecting public health or safety in relation to the creation, composition or utilization of the trade secret.

(4) When balancing the public interest involved for the purposes of subsection (2), the court shall have regard to all the circumstances of the case, including—

(a) the nature of the trade secret;

(b) the circumstances under which the trade secret is disclosed or used by the defendant; and

(c) the extent and nature of the particular disclosure or use of the trade secret in issue as compared with the extent and nature of the disclosure or use which appears to be justified by the public interest in which the defendant relies.

(5) Defences generally available in tort proceedings are available in proceedings for the improper disclosure, acquisition or use or of a trade secret.

PART IV—MISCELLANEOUS.

**20. Preservation of secrecy.**

(1) In proceedings under this Act, the court may, at any time, upon application make an order directing by what means the secrecy of a trade secret involved in the proceedings shall be preserved.

(2) Without prejudice to the general effect of subsection (1), the court may—

(a) hold hearings in camera;

(b) order that all or any of the records of the proceedings be sealed; or

(c) order any person involved in the proceedings not to disclose an alleged trade secret without the prior approval of the court.

**21. Limitation.**

(1) Proceedings for the improper disclosure, acquisition or use of a trade secret must be commenced within two years from discovery of disclosure, acquisition or use as the case may be.

(2) For the purpose of this section, a continuing disclosure or use constitutes a single claim.