

Article Information

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Service: Corporate & Commercial, Privacy & Data Protection

Protecting confidential information

You have identified a potential party with whom you would like to explore the potential opportunities to do business. The parties are keen to commence negotiations to learn about each other's business.

In order to progress discussions, one or both parties may be required to exchange commercially sensitive and confidential information. However, your confidential and commercially sensitive information is a valuable asset which needs to be protected.

Whilst the best protection is to not disclose such information, if disclosure is necessary for commercial reasons, to manage the use and disclosure of such information, businesses commonly use confidentiality or non-disclosure agreements (NDAs). Practically, whilst there is a risk that the recipient may disclose your confidential information despite being prohibited under a NDA, it is still better to have a NDA to strengthen your position in protecting your interests.

Best protection

As a starting point and as discussed above, the best protection of your valuable confidential information is simply to not disclose confidential information at all. The reason for this is, once the information has been disclosed by you to another party, such information is no longer within your control and the other party, if so motivated, could use or disclose that information to any other person. Even with a well-drafted and comprehensive NDA, once confidentiality has been breached, it is very difficult (if not almost impossible) to undo the damage caused by such use or disclosure. The time, costs and effort required to enforce the NDA may also be prohibitive to most businesses.

Purpose and benefit

Notwithstanding the above, it would be difficult for the parties to have any meaningful discussion regarding the potential business opportunities without any information being exchanged. As such, if any confidential or commercially sensitive information is to be disclosed, it is important to have a comprehensive NDA which maximises the protection of your interests and your confidential information. In addition to strengthening your ability to take steps to protect your confidential information and seek recourse against the other party, a well-drafted NDA may also act as an effective deterrent in discouraging any unauthorised use or disclosure in the first place.

Key Issues

The key issues to consider when using a NDA include:

- **Template NDAs vs customised NDAs** – template NDAs, whilst cheap and easy to obtain, are not likely to provide adequate protection of the valuable information that is specific to your business or be suitable for the current circumstances. However, a NDA which is customised to address the parties' intentions, describes your business fulsomely, and appropriately captures the relevant confidential information would provide additional protection of such information.
- **One-way vs mutual** – a one-way NDA should only be used where only one party is disclosing information. However, whilst there may be some disparity in the level of disclosure made by the parties, in reality, both parties are usually disclosing information. In this case, it is crucial that a mutual NDA is used which protects both parties' confidential information. Where a mutual NDA is used with both parties under mirrored obligations, a balance needs to be struck between broadening and expanding your protections, and managing the obligations that are imposed on you.
- **Definition of "confidential information"** – it is crucial to accurately define the confidential information being

disclosed as the obligations, protections and restrictions relate to such definition. This needs to be broad enough to capture all confidential information being disclosed. If the fact of negotiations is also confidential, then the definition of confidential information needs to be drafted to include that fact.

- **Your NDA vs the other party's NDA** - the supplier of goods or service provider is often the party that will present its own NDA for the other party to review. If you do not have your own NDA and the other party presents their NDA, care should be taken in reviewing that NDA critically to ensure that it is not biased and heavily in favour of the other party. The benefit of having your own NDA that is customised for your specific purposes is having the confidence that it adequately defines and captures your confidential information.
- **Obligations to prevent unauthorised use or disclosure** - the NDA should generally set out the circumstances in which the confidential information can be used or disclosed (such as in circumstances required by law or to a party's professional advisors). The NDA should also require the other party:
 - to treat and protect your confidential information in the same manner as they would treat and protect their own confidential information; and
 - to immediately notify you of any unauthorised use or disclosure.
- **Return of confidential information** - the NDA should also provide for the return or destruction of confidential information received under the NDA, including any notes or records or other documents created which incorporate such confidential information, at the end of the relevant term. However, where you are also the recipient of confidential information, the NDA should include a carve out to enable you to retain copies where required by law, or for accounting, tax or insurance purposes.
- **Jurisdiction** - particularly in instances where you are negotiating with a foreign entity, it is important that the jurisdiction set out in the NDA is the jurisdiction in which you operate your business, to facilitate the enforcement of the NDA, and to manage the inherent costs and difficulties already associated with such enforcement.

The above is a high-level summary of the issues that should be considered when dealing with NDAs. It is common for businesses to be presented with an inadequate NDA which have not been customised for the specific circumstances and the relevant confidential information, and which, in effect, provide no protections to the parties at all. If it is not possible to develop a business relationship and explore opportunities without disclosing confidential information, then it is crucial to have a suitable NDA that best protects your interests.