

Guide to confidentiality agreements



This information sheet is a brief guide to confidentiality agreements and some of the issues that commonly arise in relation to such agreements.

Should you disclose?

Whether you are at the start of discussions with a potential business partner, or are closing the deal, confidentiality is almost always important.

Even if the person you are talking to agrees to treat your valuable information as confidential, it may sometimes be prudent to limit what you disclose.

- If what you are disclosing relates to a patentable invention, it is always risky to disclose anything before you have filed a patent application for that invention. In some cases, your disclosure may make it harder for you to get a patent for the invention. You should talk to us before going ahead with any disclosure.
- If you disclose information to a global company or to a prospect on the other side of the world, it may be difficult to determine whether they are subsequently misusing that information. In such cases, a confidentiality agreement may be of only limited value.
- Make sure any person or company that signs a confidentiality agreement has some substance. If you sign an agreement with a company that has no assets or business, and if there is a breach of confidentiality, the other party may not be worth suing.

Some companies that receive a lot of unsolicited ideas refuse on principle to sign confidentiality agreements.

That does not necessarily mean they cannot be trusted. In many cases, they simply don't wish to be bound by obligations of confidentiality in case the information disclosed to them happens to also relate to something they are developing independently.

If this happens you need to make a commercial decision whether to take a risk and proceed with the disclosure. However, if you do proceed you should make sure you have considered whether to apply for any intellectual property (IP) protection that may be available for your idea before disclosing.

What should you disclose?

It makes sense not to disclose too much. Even though the other party may have signed an agreement, how can you be sure they will honour it, or that someone within the organisation won't misuse the information? It can sometimes be difficult to prove someone is in breach of a confidentiality agreement.

So take steps to ensure that you disclose to the other person only what they actually need to see.

What should the confidentiality agreement say?

Not all confidentiality agreements are the same. A badly drafted agreement can be as dangerous as no agreement at all. So make sure your agreement has been reviewed by an expert.

The agreement should include the following provisions.

- A restriction on the recipient party using or disclosing the information, other than for a specific purpose.
- A provision that ensures the recipient only discloses the information to its staff and contractors on a need to know basis, and only to those who have agreed to keep it confidential.

- A clear definition stating what information is to be considered confidential. This may be all information relating to a certain project or technology, or it may simply be everything the disclosing party discloses.
- A list of exceptions to confidentiality. It goes without saying that some information cannot be treated as confidential. One example is information that is already publicly known.
- Provisions making it clear for how long the obligations of confidence continue. The obligations may be indefinite, or may expire after a certain period.
- Provisions dealing with the destruction or return of the information on termination of the agreement.
- A provision requiring the recipient party to tell the disclosing party if it becomes aware of a breach or loss of confidence.
- If the disclosure is purely for evaluation purposes to see whether a future deal might be possible, a provision making it clear no warranty or representation is given about the information disclosed.
- A governing law provision that means you have to litigate any disputes in another country.
- In some cases, where you are the person receiving the information, it can be useful to include some of these provisions in any agreement.
- You should always get legal advice before signing another person's confidentiality agreement.
- Contact AJ Park's commercial team for advice about confidentiality agreements.

Confidentiality agreement traps

Confidentiality agreements will often contain provisions that limit the obligations of the recipient party. If you are disclosing significant information you should watch out for these. They might include the following.

- A very limited definition of confidential information.
- A definition of confidential information that is too broad and doesn't have carve-outs for public domain information – agreements with these sorts of definitions have been held by Australian courts to be unenforceable.
- Terms that limit disclosure of the information but not use.
- A requirement that all information disclosed be marked as confidential.
- A requirement that information disclosed orally be summarised in writing afterwards.
- A short confidentiality period.