

NDAS & CONFIDENTIALITY AGREEMENTS

WHAT BUSINESS OWNERS OFTEN MISS



Confidential

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What Most People Miss About Confidentiality Agreements

Hidden Complexities That Affect Protection and Enforcement

Confidentiality agreements seem straightforward—someone signs, promises to keep information private, and you're protected. Many business owners treat them as routine paperwork, assuming the signed document provides comprehensive protection for sensitive information.

The reality is more nuanced. Confidentiality agreements establish legal obligations, but several critical aspects are commonly misunderstood or overlooked entirely. These gaps can leave you less protected than you think, create enforcement difficulties when breaches occur, or impose obligations that don't actually suit your circumstances.

This resource reveals what experienced commercial practitioners know about confidentiality agreements - the considerations that significantly affect whether they actually protect your interests but are frequently missed by those using them for the first time.

When to Use This Guide

Use this before: Creating your first confidentiality agreement, or reviewing agreements you've used in the past

Best completed: When establishing confidentiality practices for your business or evaluating current protection measures

What Gets Overlooked

OVERLOOKED CONSIDERATION 1

Professional Obligations Often Make NDAs Redundant

Many business owners routinely ask lawyers, accountants, and certain other professionals to sign confidentiality agreements, not realising these professionals already have statutory and regulatory obligations to maintain client confidentiality. These professional duties often carry stronger consequences than confidentiality agreements—including loss of practising certificates, professional discipline proceedings, and reputational damage extending far beyond any single client relationship.

Lawyers are bound by solicitors' rules requiring strict confidentiality. Accountants have professional standards enforced by CPA Australia and Chartered Accountants ANZ. Other professionals including certain healthcare providers, financial advisors, and patent attorneys have similar obligations built into their professional frameworks.

Requiring confidentiality agreements from these professionals can suggest you don't understand professional duties. It adds paperwork without meaningful additional protection, and may create unnecessary friction in relationships where confidentiality is already legally required and professionally enforced.

The consequence:

You spend time negotiating and executing confidentiality agreements that provide little actual additional protection beyond what already exists. Worse, insisting on formal agreements with professionals who already have confidentiality duties might signal inexperience with commercial relationships.

The reality:

Focus confidentiality agreements on parties who genuinely lack inherent confidentiality obligations—contractors, potential business partners, consultants without professional duties, investors, and others who need legal obligations established because none exist naturally in the relationship.

OVERLOOKED CONSIDERATION 2

Technical Protection Matters as Much as Legal Documents

Business owners often focus entirely on getting confidentiality agreements signed while neglecting practical measures that prevent breaches from occurring in the first place. A signed agreement establishes what happens after information is misused, but technical controls reduce the likelihood of misuse happening at all.

Time-limited links to documents ensure access expires automatically rather than remaining open indefinitely. Access controls limit who can view, download, or forward materials. Tracking systems monitor who accesses information and when, creating audit trails useful if disputes arise. Watermarking documents allows you to trace their source if they're shared inappropriately.

Staged disclosure—sharing only necessary information at each relationship stage rather than everything upfront—limits exposure if discussions break down. Providing view-only access rather than downloadable files, or screenshots rather than editable documents, makes unauthorised redistribution more difficult.

These practical measures complement legal agreements rather than replacing them. Together, they create layered protection where technical controls prevent most problems and legal agreements provide recourse for the breaches that occur despite controls.

The consequence:

Relying solely on signed agreements without technical protection means depending entirely on good faith and legal remedies after breaches occur. By the time you're enforcing a confidentiality agreement, damage has already happened and information cannot be "undisclosed."

The reality:

Good information management prevents breaches more effectively than legal remedies repair them. Use confidentiality agreements alongside practical protection measures, not as your only safeguard against information misuse.

OVERLOOKED CONSIDERATION 3

Enforcement Is Often Costly and Difficult

Many people assume that signing a confidentiality agreement means they can easily sue if information is disclosed. The reality of enforcement is considerably more complex and expensive than most expect.

Proving breach requires evidence that the recipient actually disclosed your information, that the disclosure violated the agreement, and that you suffered quantifiable damage as a result. If information was disclosed verbally, if the recipient claims they developed it independently, or if multiple sources could have disclosed similar information, proof becomes difficult.

Legal action involves substantial costs—often tens of thousands of dollars even for relatively straightforward cases. The time involved can extend to months or years. Even successful litigation might not fully compensate you for information that's already been disclosed, and obtaining injunctive relief to prevent further disclosure requires moving quickly once you discover the breach.

Commercial disputes over confidentiality often settle because litigation costs exceed potential recovery. While confidentiality agreements provide legal rights, the practical reality is that prevention through careful relationship selection and information management provides better protection than relying on post-breach legal action.

The consequence:

Treating confidentiality agreements as comprehensive protection without understanding enforcement realities means you may be less protected than you believe. Once information is disclosed, legal remedies rarely make you whole, and pursuing litigation may cost more than the information was worth.

The reality:

Confidentiality agreements establish your legal rights and signal that information protection matters, but they work best when you don't need to enforce them. Choose who you share information with carefully, use technical controls to limit exposure, and treat legal agreements as backstop protection rather than your primary defence.

OVERLOOKED CONSIDERATION 4

One-Way Versus Mutual Structures Create Different Obligations

Many business owners sign "mutual" confidentiality agreements without fully considering what obligations they're accepting. Mutual agreements mean both parties undertake confidentiality obligations, even if the information flow is actually one-sided.

If you're the only party disclosing sensitive information—such as when hiring contractors, sharing data with service providers, or pitching to investors—a one-way (unilateral) agreement establishes clear, simple obligations. The recipient agrees to confidentiality, but you don't take on reciprocal commitments about information you're not receiving.

Mutual (bilateral) agreements suit situations where both parties will share confidential material. Partnership discussions, joint ventures, and merger negotiations typically involve balanced information exchange warranting mutual protection. However, mutual agreements mean you're legally bound to protect information you receive, creating obligations and potential liability even if the other party's disclosures are minimal.

The structure affects not just your obligations but also negotiation dynamics. Mutual agreements can feel more balanced and fair, making them easier to propose in new relationships. One-way agreements clearly identify who has what responsibilities but may prompt questions about why obligations aren't reciprocal.

The consequence:

Signing mutual agreements when information flow is genuinely one-way means accepting unnecessary legal obligations and potential liability for protecting information you may not even want or need. One-way agreements in situations requiring mutual protection leave one party unprotected and may damage relationship trust.

The reality:

Match the agreement structure to actual information exchange. One-way for unilateral disclosure, mutual when both parties share sensitive material. The structure should reflect commercial reality, not what sounds fair in practice.

OVERLOOKED CONSIDERATION 5

Duration Must Match Commercial Sensitivity, Not Arbitrary Timeframes

Confidentiality obligations often include timeframes that sound impressive but don't match how long information actually remains commercially sensitive. Ten-year confidentiality periods for financial projections that become obsolete in 18 months, or indefinite obligations for technical specifications in rapidly evolving industries.

Information has different sensitivity lifecycles. Client lists might remain valuable for years if customer relationships are stable. Strategic business plans lose relevance as market conditions change. Technical specifications become less sensitive as technology evolves.

Transaction details matter until deals complete or discussions end, then often lose commercial sensitivity entirely.

Overly long confidentiality periods can be difficult to enforce because courts may view them as unreasonable restraints. Extremely short periods might leave genuinely sensitive information unprotected while it still matters. The timeframe should reflect how long disclosure would actually harm your commercial interests.

Agreements should also clarify when confidentiality obligations begin. Starting from agreement signing when no information has been shared means obligations run before there's anything to protect. Starting from each separate disclosure ensures protection aligns with actual information sharing.

The consequence:

Confidentiality periods disconnected from commercial reality may be unenforceable when you need them, or impose obligations far beyond information's actual useful life. Both create problems—insufficient protection when it matters, or unreasonable restraints that courts might not uphold.

The reality:

Base confidentiality duration on genuine commercial sensitivity. Two to five years from final disclosure works for many business relationships. Transaction-specific information might need shorter periods. Technical or strategic information in stable industries might warrant longer protection. Let commercial reality drive the timeframes, not what sounds comprehensive.

IMPORTANT NOTE

These overlooked considerations reveal complexity in confidentiality agreements that affects how well they actually protect your interests. Every business situation has unique elements requiring tailored approaches to structure, duration, and implementation. This guide highlights common gaps in understanding, but professional advice ensures confidentiality protection matches your specific circumstances and commercial objectives.

READY TO STRENGTHEN YOUR CONFIDENTIALITY PROTECTION?

Next Steps: From Understanding to Implementation

Understanding what gets missed helps you avoid common pitfalls in confidentiality agreements. The next step is establishing protection that combines appropriate legal agreements with practical information management—protection that suits your actual information sharing patterns and commercial relationships.

I work with business owners to implement confidentiality practices that address these commonly overlooked considerations. Together, we can structure agreements that match your information flow, establish realistic protection measures, and avoid unnecessary complexity in relationships where protection already exists.

Ready to discuss confidentiality protection that accounts for these realities? Contact Jackie Atchison at LexAlia Property & Commercial Law to explore approaches tailored to your specific circumstances.

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