



# Confidential Business Information & Business Sales

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## Introduction

When selling a business, the seller will need to provide information to the prospective buyer in order for them to make an assessment of their interest in the business. At the outset, this includes the following information<sup>i</sup>:

1. An overview of the business including key features and history;
2. Business plan;
3. List of assets to be sold;
4. List of liabilities to be assumed;
5. Financial accounts for last year;
6. Actuals, budgets and forecasts for current period;
7. Details of staff levels;
8. Debtors listing;
9. Stocktake listing;
10. Book depreciation schedules; and
11. Copy of licences, leases and other agreements for the conduct of the business.

This information is often included in an information memorandum (IM) prepared by the seller's business broker.

Subsequently, a prospective buyer may seek to enquire in more detail about this information or the business's "trade secrets". They may want to know how certain business functions work in order to assess the goodwill and value of the business. This is often done in due diligence after a sale contract has been signed and deposit paid.

The seller and the business broker must take great care to ensure that this confidential business information is not misused by a prospective buyer of the business or another third party.

## What is confidential business information?

Confidential business information is some identifiable business or technical information that is kept private for the purpose of economic gain. If the nature of the information was publicly known, any competitive advantage would be lost. There are potentially five categories<sup>ii</sup>:

1. Specific product secrets (such as a chemical formula);
2. Technological secrets (that is, knowledge of some process or know-how that nobody else has yet developed);
3. Strategic business information (secret marketing information or customer lists);
4. Specialised complications of information that in sum, are not publicly known and have value on that account;
5. Day-to-day generated information which is required to be kept private (e.g. financials).

These are the types of information that a seller and broker must consider in the process of providing information to a prospective buyer. The mishandling of this information may lead to the seller suffering losses and the business broker being liable. Therefore, great care must be taken to protect it.

## How to protect it?

The first way to protect confidential business information is not to disclose it. However, if the information is critical to a prospective buyer's assessment of the business, this will interfere with the process of selling the business.



As information is likely to be disclosed, the buyer should be required to sign a confidentiality deed (sometimes also referred to as a non-disclosure agreement) and the seller must control the manner in which a prospective buyer may receive the information.

### **What are the key issues to consider?**

The key issues with respect to confidential business information are:

1. What information is there?
2. What is particularly sensitive to the seller?
3. What is the seller prepared to provide to a prospective buyer?
4. How is the seller prepared to provide it?
5. For what purpose can the buyer use the information?
6. To whom can the buyer give it?
7. Should the seller disclaim its accuracy or integrity?
8. Under what circumstances is the buyer required to return or destroy it?

The seller and the business broker need to assess these issues carefully to ensure that the confidentiality deed adequately reflects the seller's requirements. Legal advice should be sought in the preparation of the confidentiality deed and in dealing with particularly sensitive information, which will require special consideration. For example: will it be given in the information memorandum? Will it be given after a business sale contract and/or deposit is paid? Will it be a matter of inspection only or for discussion only, with no copying allowed of photocopies provided?

### **Protect against identity error or fraud**

Unfortunately, the proper assessment and handling of all these issues will have no benefit if the correct party to the confidentiality agreement is not identified or if they are not who they say they are.

What if a person is looking at a seller's business not to buy it, but to steal its confidential information to compete with it? This is not unforeseeable and a business broker could be liable for releasing confidential information to such a person.

Whilst you may not be able to avoid a fraud, good practices to protect against it include:

1. If the prospective buyer is a company, include the directors as parties to the confidentiality deed;
2. Do a company search to ensure that the correct company details are reflected in the deed and that the person is in fact a director of the company;
3. Ask the person you are dealing with to provide you with a copy of their drivers licence or passport (or otherwise 100 points of ID);
4. Ask pertinent questions to determine the integrity of the enquirer.

### **Conclusion**

Confidential business information must be considered and protected in the process of selling a business. A business seller must work closely with their business broker and lawyer to determine what should be disclosed and how it should occur. The seller and business broker should also ensure that they are in fact dealing with whom they think they are; otherwise they might find confidential business information in the hands of a competitor.



**What to do next:** If you would like more information on dealing with this issue, or for all queries regarding business sales and assistance, call Joe Kafrouni or Rob Montes on (07) 3354 8888 or [joe@klaw.com.au](mailto:joe@klaw.com.au) or [rob@klaw.com.au](mailto:rob@klaw.com.au).

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<sup>i</sup> CCH: Australian Business Advisers Guide: Selling a Business: [75-405] at 1

<sup>ii</sup> (points 1 -4) Alberta Law Reform Institute, Edmonston, Alberta and a Federal Provincial Working Party, Report No 46, Trade Secrets (1986), p6 referred to in Jackson, M: A Practical Guide to Protecting Confidential Business Information: 2003: p8

