

Social Enterprise fact sheet

How to protect your ideas using a Non-Disclosure Agreement

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Non Disclosure Agreements (sometimes called Confidentiality Agreements) are commonly used when a party discloses his or her idea to a potential business partner or investor.

This fact sheet sets out some key terms to protect your idea when you are negotiating an NDA:

1. Define your 'confidential information'

- You should ensure that the definition of confidential information accurately describes all the information that you regard as confidential. If the definition is too wide it will be difficult to seek an injunction to stop the recipient using the information.

Tip. If your idea is detailed, for example in the form of a diagram or method then attached that detail as a schedule to the NDA and refer to the schedule in the definition of confidential information.

- Ensure that the manner in which you provided the information is covered. For example the information may be communicated verbally.
- You should ensure that the definition sets out what information is excluded from the definition.

2. Define the 'purpose'

- The definition of a purpose should accurately describe the purpose for which the recipient may use the confidential information disclosed under the NDA.

3. Ensure all recipients are bound by the obligation of confidentiality

- It is important to ensure that, not only the direct recipients, but any other person such as board members, key employees or subsidiaries that the confidential information is intended to be disclosed to is bound by the obligation of confidentiality.
- Ensure any disclosure to other persons is on a 'need to know' basis.

Tip. If the contracting party is an organisation (and not an individual) attached a confidentiality deed poll to the NDA and have the individual also sign to be bound by an obligation of confidentiality.

Tip. If the recipient will be disclosing the confidential information to other persons such as employees include a provision to ensure that the employee is bound by an obligation of confidentiality in their employment contracts or alternately have they sign a confidentiality deed poll.

4. Ensure the recipient maintains security and control of the confidential information

- If the confidential information will be held in the recipient's possession or control ensure that the recipient is bound by obligations to ensure the security and control of the confidential information.

Tip. You may wish to require the recipient to notify you immediately if they suspect or become aware of unauthorized use or disclosure of the confidential information.

5. Ensure the return or destruction of confidential information

- Similar to the above, if the confidential information will be held in the recipient's possession or control ensure that the recipient is required to return the confidential information if, for example, the purpose is completed or negotiations/ discussion cease.
- Sometime, it is difficult to return confidential information, for example when sent by an email and is in electronic format. In such circumstances, you may wish to ensure that the confidential information is destroyed (i.e permanently deleted).

6. When does the obligation of confidentiality cease?

- Some NDA's will be effective for a specified time, i.e 1-2 years, or alternately and preferably the obligation of confidentiality would continue for as long as the confidential information remains confidential in nature (and not because of a breach of the NDA by the recipient). That is, until the confidential information comes into the public domain.



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