

CONFIDENTIALITY CLAUSES: ARE THEY WORTH THE PAPER THEY'RE WRITTEN ON?

Confidentiality and control of information is important in business. Valuable and sensitive information, such as specialised know-how, trade secrets and client, supplier or employee data give each business their own unique formula for success.

Generic or 'boilerplate' confidentiality clauses are not always enforceable, putting your confidential information at risk. The key is to properly and as comprehensively as possible define and set out what the information that you seek to protect actually is.

Fortunately there are remedies available in cases of breach of confidence, including compensation or an account of profits, an injunction or a declaration. In addition to setting out what the information actually is, the following must be proved in such cases:

1. The communicated information must be confidential in nature;
2. The information was imparted in circumstances where there was an obligation of confidence; and
3. The use of the imparted information was unauthorised and detrimental for the party who communicated it.

Parties should therefore clearly define their expectations in a written agreement, including:

1. Specifying the information to be kept confidential;
2. Clearly specifying the persons who are to have access to the confidential information;
3. Clearly specifying for what purpose(s) the information can be used;
4. Being carefully drafted so they are not construed as an unreasonable restraint of trade;
5. Being carefully drafted so there is no unintentional transfer of ownership of the information through disclosure;
6. Specifying the remedies available in the event of a breach; and
7. Stating that the obligations of confidentiality survive termination of the agreement.

It is useful to know that several statutory regimes and public interest policies exist which may require the disclosure of confidential information even if there is a confidentiality agreement in place including:

1. The ATO's powers to examine and require production of documents under the *Taxation Administration Act 1953* (Cth);
2. The ACCC's power to examine and require production of documents under the *Trade Practices Act 1974* (Cth);
3. ASIC's power to examine and inspect documents under the *Australian Securities and Investments Commission Act 2001* (Cth); and
4. The litigation processes of discovery and subpoenas.

If you need advice about protecting confidential information or you suspect someone has accessed or used your confidential information, please contact [Sven Burchartz](#) or [Heather Richardson](#).

For over 20 years Kalus Kenny InteleX have been providing expert legal and proactive strategic advice for some of Melbourne's most successful property developers, entrepreneurs and business people. Underpinning this success, and what really sets us apart from other firms, is the way we work with our clients. What exactly does this mean for you? It means providing clarity. It means understanding strategy and risk. It means being a different kind of lawyer.