

PREVENTION in focus

Use of non-disclosure agreements – what are the corruption risks?



NDA's do not prohibit people from reporting suspected corrupt conduct to an appropriate authority

What you should know

- Non-disclosure agreements (NDAs) — also known as confidentiality agreements — aim to protect against the sharing of confidential information. Their uses can range from protecting information about the specific work undertaken by an employee to preventing disclosure of the circumstances and terms of an employee's separation and any payment involved.
- The CCC has identified concerns about the use of NDAs as part of employee separations to conceal suspected wrongdoing, unjustified terminations or excessive separation payments.
- NDAs do not prohibit people from reporting suspected corrupt conduct to an appropriate authority. The *Crime and Corruption Act 2001* and the *Public Interest Disclosure Act 2010* provide safeguards that allow people who have signed an NDA to report suspected wrongdoing, including corrupt conduct, maladministration and the misuse of public resources.
- An agency's use of, or attempted use of, an NDA to prevent a person from reporting a criminal offence may itself be a criminal offence (section 133 of the Criminal Code – Compounding an indictable offence).

This publication aims to raise awareness about the use of NDAs and the corruption risks associated with them. It draws on CCC corruption investigations and intelligence holdings to illustrate situations where these agreements have been used. Further, it advises what action can be taken by public sector and local government employees who suspect (or know of) wrongdoing but have signed an NDA.



Use of NDAs to prevent employees reporting corruption may be a criminal offence



What is a non-disclosure agreement (NDA)?

An NDA, also known as a confidentiality agreement, is a legal contract between two or more parties requiring that particular information known by one or both parties is to be kept secret. NDAs aim to protect against the sharing of confidential information, for example, by preventing employees or contractors disclosing sensitive information gained during the course of their employment.

NDAs can operate in parallel with other statutory obligations that employees have to their employer not to disclose any confidential information gained during the course of their employment. NDAs are typically used in circumstances where an employee has access to, or has become aware of, particularly sensitive information that an agency wants to protect from further disclosure, such as information that could cause financial or reputational damage to the agency.

Information obtained by the CCC indicates that non-disclosure agreements are being included in public sector employee separation settlements. These agreements usually oblige the separating employee to maintain secrecy about particular information considered by the agency to be sensitive. This may include information about their work or workplace, details of the circumstances leading to their separation or termination, the termination payment received or the existence of the settlement itself.

Case study



NDA signed by local government employee

A local government employee who raised concerns about the behaviour of an elected official signed an NDA as part of their separation from the council. The deed of settlement and release signed by the employee included an NDA which included a clause stating that the concerns raised about the conduct of the elected official were not intended to be a complaint, that the matters had been resolved to the employee's satisfaction and that no further action would be taken. The agreement also included a clause that the employee would not make any disparaging comments that could bring the council into disrepute. The NDA accompanied a significant termination payment.

Corruption risks associated with NDAs

Recent investigations have identified that corruption risks can arise when NDAs are used as part of public sector separations to prohibit employees from reporting suspected wrongdoing in an agency or to cover up their own wrongdoing. NDAs obtained by the CCC show that they can include acknowledgements and agreements that could be perceived by separating employees as prohibiting them from reporting allegations of wrongdoing to oversight or integrity agencies.

NDAs that seek to prevent employees from disclosing suspected wrongdoing to an oversight or integrity agency are in conflict with the principles of good governance and an open and transparent public sector. They are also contrary to the *Public Interest Disclosure Act 2010*, which encourages public sector employees to disclose suspected wrongdoing that is in the public interest, and may be an offence under section 133 of the Criminal Code.

I suspect (or know of) wrongdoing but have signed an NDA. What should I do?

Breaches of NDAs can have serious consequences, including possible legal action and an obligation to refund any separation payment received. However, **under no circumstances do they oblige people who have signed them to maintain secrecy about suspected wrongdoing.** You can still report suspected wrongdoing despite signing an NDA.



The *Crime and Corruption Act 2001* and the *Public Interest Disclosure Act 2010* provide protections to people who suspect (or know of) wrongdoing but have signed an NDA. Under these Acts, a person does not breach any obligation to maintain confidentiality by making a public interest disclosure or by reporting information to the CCC for use in the performance of its functions.¹

Crime and Corruption Act 2001

s. 343 Information disclosure and privilege

- (1) No obligation to maintain secrecy or other restriction on the disclosure of information obtained by or furnished to a person, whether imposed by any Act or by a rule of law, applies to the disclosure of information to the commission for the performance of the commission’s functions.
- (2) A person who discloses information under subsection (1) does not, only because of the disclosure—
 - (a) contravene a provision of an Act requiring the person to maintain confidentiality in relation to the disclosure of information; or
 - (a) incur any civil liability, including liability for defamation; or
 - (a) become liable to disciplinary action.
- (2) To remove any doubt, it is declared that only a person who is an individual may claim self-incrimination privilege under this Act.

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Public Interest Disclosure Act 2010

s37 Confidentiality provisions do not apply

Without limiting section 36, a person who makes a public interest disclosure does not by doing so—

- (a) commit an offence under any Act that imposes a duty to maintain confidentiality in relation to a matter or any other restriction on the disclosure of information; or
- (a) breach an obligation by way of oath or rule of law or practice or under an agreement requiring the person to maintain confidentiality or otherwise restricting the disclosure of information in relation to a matter.

Advice to agencies

Public sector agencies are encouraged to consider the use and content of NDAs to ensure they do not attempt to prevent, or are perceived as attempting to prevent, a public sector employee’s right to disclose suspected wrongdoing. In circumstances where they are used, these agreements should include information that makes it clear to employees that they can still make a disclosure to a relevant entity under the *Public Interest Disclosure Act 2010* or provide information to the CCC.



More information

Further information about how to report corruption is available on the CCC’s website:

www.ccc.qld.gov.au/corruption/report-corruption

1 Further information about the Commission’s functions is detailed in the *Crime and Corruption Act 2001*