



## MCA INDUSTRY TOOLKIT

*The minerals industry is committed to eliminating sexual harassment in its workplaces and has adopted a national Industry Code that provides clear expectations on members to establish both preventative and response measures to address sexual harassment.*

*This document is part of the MCA Industry Toolkit that has been developed for our members and their employees and comprises a suite of Fact Sheets, Guidance and Templates.*

## FACT SHEET

# Non-disclosure Agreements

Non-disclosure agreements (NDAs) are also known as confidentiality agreements. They are contracts that create legally enforceable obligations.

NDAs or confidentiality clauses are often used in the settlement of sexual harassment cases, as well as other workplace matters. Not all NDAs or confidentiality agreements are the same.

For example, parties may agree to keep the terms of a settlement agreement (or particular terms, such as the amount of a settlement payment) confidential, except where disclosure is required by law and/or where disclosure is necessary to effect the terms of the agreement.

Settlement agreements in workplace sexual harassment matters also commonly include non-disparagement clauses, where parties agree not to discredit or criticise each other to any third party in relation to the subject matter of the settlement agreement (for example, the sexual harassment complaint). Parties may also agree to keep a complaint confidential. While concerns have been raised about all types of NDAs, particular concerns have been raised about these sorts of agreements that prevent a person talking about their experience of sexual harassment.

The Respect@Work Report<sup>1</sup> noted **some benefit in the use of NDAs**:

- Privacy or anonymity to protect reputation, professional standing or workplace wellbeing
- Greater bargaining power for financial recompense
- Better chance of reaching a settlement, and avoiding the uncertainty and financial and emotional costs associated with litigation
- Providing incentive for the employer to settle a legal claim, rather than proceeding to litigation
- Providing a definitive resolution to the matter.

**Equally, a range of concerns were identified:**

- Disempowering victims and impeding recovery
- Silencing the discussion around sexual harassment in a workplace and therefore, dampening the awareness and stunting social change
- Enabling a standard of silence and secrecy within organisations

<sup>1</sup> Respect@Work: Sexual Harassment National Inquiry Report (2020)

- Protecting 'high value' perpetrators
- Instilling a culture that facilitates a perpetrator to repeat offend
- Business reputation prioritised over unlawful behaviour and individual harm
- Reinforcing an imbalance of power.

The minerals industry Code recognises that honest, respectful and open communication is the key to eliminating sexual harassment. A transparent dialogue needs to be opened in workplaces regarding the repercussions of sexual misconduct in the workplace, and the use of NDAs can be seen as a significant barrier to such a change.

**The minerals industry commits to avoiding the use of NDAs in any agreements with persons impacted by sexual harassment, unless at the request of victims of sexual harassment.**