THE SCOPE OF THE PUBLIC INTEREST DEFENCE IN ACTIONS FOR BREACH OF CONFIDENCE

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ABSTRACT

Judicial opinion, at least in Australia, on the scope of the so-called 'public interest' defence to actions for breach of confidence is divided. Proponents of a broad view of the defence assert that there exists a separate public interest defence based upon freedom of the press and the public's right to know the truth. On the other hand, there is some judicial support for the proposition that the public interest defence should encompass no more than an application of the general equitable defence of clean hands, or alternatively, that information which exposes danger or harm to the public should not be classified as confidential in any case. This paper examines these differing views and the tests required to establish that disclosure is justified in the public interest.

INTRODUCTION

There is much attraction in presenting a case as one of abuse of confidence.[1] Indeed, it is recognised that such an action is 'one of the most important juridical devices for controlling the flow of information.'[2] Such actions can be used in addition to contractual rights,[3] as well as in situations where the plaintiff has no legal rights.[4] Indeed, Deane J (as he then was), delivering the opinion of the

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1 R P Meagher, W M C Gummow & J R F Lehane, *Equity Doctrines & Remedies*, (3rd ed, Butterworths, Sydney, 1992), para [4101].

2 J Pizer, "The Public Interest Exception to the Breach of Confidence Action: Are the Lights About to Change?" (1994) 20 *Mon ULR* 67.

3 That is, in equity's auxiliary jurisdiction. See eg *Vokes Ltd v Heather* (1945) 62 RPC 138 at 141; *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402; *Brian D Collins (Engineers) Ltd v Charles Roberts & Co Ltd* [1965] RPC 429; *Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd* [1979] VR 167 at 190.

4 That is, in the exclusive jurisdiction of equity. See Meagher, Gummow & Lehane (n1), para [4104]. For example, folklore did not qualify as literary material so as to be protected under copyright law, although it was protected as confidential information: *Foster v Mountford* (1977) 14 ALR 71. Similarly, a new strain of nectarine could not be protected under then existing patent law, nevertheless its developer was protected under the law of confidence: *Franklin v Giddins*[1978] Qd R 72.

High Court in *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)*[5] accepted that there existed a general equitable jurisdiction to grant relief against actual or threatened abuse of confidential information, not involving any tort or breach of contract or some wider fiduciary duty.[6] The importance of this jurisdiction is further accentuated by the fact that Australian law knows no tort of unfair competition or trading.7 It is little wonder then that confidential information actions have become firmly established and continue to 'remain fashionable.'[8]

The confidential information doctrine serves to promote 'trust, candour and good faith in those relationships that constitute the fabric of society.'[9] However, protecting information that is received in confidence may 'stifle' society's interests 'by preventing the disclosure of matters of serious public concern.'[10] With the increasing use of 'breach of confidence' actions and liberal interpretations of what can be protected under the guise of confidentiality, it is hardly surprising that limitations have been imposed upon such actions. One often-used limitation involves the argument that disclosure, or publication, of confidential material is justified as being in the public interest.[11] What would otherwise be confidential, and hence, protected information will be disclosed if it would benefit the public to have knowledge of that information. By 'public interest' is meant something 'more than that which catches one's curiosity or

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5 (1984) 156 CLR 414.

6 *Ibid* at 438; cf the view taken by Jeffries J in the New Zealand case of *McKaskell v Benseman* [1989] 3 NZLR 75 at 88 where his Honour described breach of confidence as 'an established tort'. See also Pizer, *supra* n. 2 at 67; cf S Rickertson, "Public Interest and Breach of Confidence" (1979) 12 *MULR* 176, 177. The action emerged in the nineteenth century as the result of three cases, *Abermethy v Hutchinson* (1824-5) 3 LJ Ch 209; *Prince Albert v Strange* (1849) 1 Mac & G 25 (41 ER 1171); *Morison v Moat* (1851) 9 Hare 241 (68 ER 492). A modern statement of equity's original jurisdiction to handle confidential information actions comes from the judgment of Lord Greene MR in the case of *Saltman Engineering Co Ltd v Campbell* (1948) 65 RPC 203 at 216, where the Master of the Rolls made it clear that even if a contract existed between the parties, the defendant may still be liable as an equitable obligation of confidence was capable of arising independently of contract. See also *Lord Ashburton v Pape* [1913] 2 Ch 469 at 475; *Seager v Copydex* [1967] 2 All ER 415; *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47; *Stephens v Avery* [1988] 2 All ER 477 at 482.

7 *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414. Meagher, Gummow & Lehane, *supra* n. 1 at para [4101].

8 Meagher, Gummow & Lehane, *supra* n. 1 at para [4101]. Writing in 1984, Finn noted that actions for breach of confidence had become one of the law's then recent fashions: Finn P D, 'Confidentiality and the "Public Interest"' (1984) 58 *ALJ* 497.

9 Pizer, *supra* n. 2 at 67. See also Koomen K "Breach of Confidence and the Public Interest Defence: Is it in the Public Interest," [1994] *QUTLJ* 56.

10 Pizer, *supra* n. 2 at 67.

11 G E Dal Pont, D R C Chalmers & J K Maxton, *Equity and Trusts: Commentary and Materials*, (Law Book Co, Sydney, 1997), p 129. In *A-G v Guardian Newspapers Ltd* [1990] AC 109 at 221, Lord Goff stated: "... although the basis of the law's protection of confidence is that there is a public interest that confidences should be protected by the law, nevertheless the public interest may be *outweighed* by some other countervailing public interest which favours disclosure" [emphasis added]. Koomen, *supra* n. 9 at 56.

merely raises the interest of the gossip.'[12] Kirby P agrees with that definition of 'the public interest' saying:

> . . . [T]he public interest [should not be construed] in the sense of something which catches the interest of the public out of curiosity or amusement or astonishment, but in the sense of something which is of serious concern and benefit to the public.[13]

The origin of this defence can be traced to the judgment of Wood V-C in *Gartside v Outram*,[14] in the principle that 'there is no confidence as to the disclosure of iniquity'.15 Beyond this statement, however, the boundaries of the defence have been difficult to draw, and, despite its frequent use, the law regarding the public interest defence can hardly be regarded as settled.[16] The 'inherent dynamism' of what may be in the public interest makes it impossible to reduce the concept to a fixed formula.[17]

It should be mentioned at the outset that this debate is not concerned with the *existence* of a public interest defence per se. This paper will examine the nature and scope of the defence of public interest as it exists in Australian law.[18] It will be apparent that the courts have struggled with attempts to further define the concept of 'iniquity'[19] in the search for 'a criterion which will serve to distinguish between information which should, and that which should not, be disclosed in the public interest.'[20] In *Westpac Banking Corporation v John Fairfax & Sons*,[21] Powell J considered that the 'iniquity rule' had been:

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12 *Attorney-General (UK) v Wellington Newspapers Ltd* [1988] 1 NZLR 129 at 178 per McMullin J. Koomen, *supra* n. 9 at 74.

13 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSLWR 86 at 162-3. His Honour relied upon a statement to the same effect by Megarry V-C in *British Steel Corp v Granada Television Ltd* [1981] 1 All ER 417 at 436. See also *Beloff v Pressdram Ltd* [1973] 1 All ER 241 at 260 per Ungoed-Thomas J; *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 230 per Lord Hailsham.

14 (1856) 26 LJ Ch 113. For an earlier history of the defence see Ricketson, *supra* n. 6 at 181-6.

15 *Ibid* at 114. See also M Richardson & J Stuckey-Clarke, 'Breach of Confidence', in P Parkinson, (ed), *Principles of Equity*, (Law Book Co, Sydney, 1996), para [1247]; Koomen, *supra* n.9 at 57-8.

16 Richardson & Stuckey-Clarke, *supra* n. 15 at 463; M Evans, *Outline of Equity and Trusts*, (3rd ed, Butterworths, Sydney, 1996), para [8.21], cf para [8.22]; Pizer, *supra* n.2 at 69; Koomen, *supra* n. 9 at 72.

17 Pizer, *supra* n. 2 at 70.

18 While this paper will primarily be considering Australian law, it is necessary to also examine the leading English decisions which in many cases have formed the basis for Australian decisions.

19 See *Initial Services Ltd v Putterill* [1968] 1 QB 396 at 410, where Salmon LJ stated: '... what is the sort of iniquity that comes within that doctrine [in *Gartside v Outram*] is certainly not easy to define.'

20 Dal Pont *et al*, *supra* n. 11 at p 130.

21 (1991) 19 IPR 513.

> . . . subsumed in a more general rule, namely, that publication of otherwise confidential material might be permitted in cases in which there is shown to have been some impropriety which is of such a nature that it ought, *in the public interest*, be exposed.[22]

Despite Powell J's view, it appears that judicial views as to the scope of the public interest defence in Australia continue to be divided.[23] One reason for this division is that different considerations come into play in cases involving government information as against those cases involving personal or private information. This distinction is examined below.[24]

From the numerous decisions involving the defence, it appears that judges have approached the defence from two different viewpoints.[25] Some judges have preferred a broad view of the defence, based upon freedom of the press.[26] Mason J, for example, regarded the defence as making legitimate the publication of confidential information 'so as to protect the community from destruction, damage or harm.'[27] Alternatively, other judges have taken a somewhat narrower view of the public interest defence and more strictly applied the 'iniquity' principle from *Gartside v Outram*.[28] Such an approach involves an application of the maxim that 'he who comes to equity must do so with clean hands.'[29] A plaintiff seeking to prevent information containing iniquitous matters from being disclosed will not come to the court with clean hands. Equity, therefore, will not protect that information. An alternate application of this narrow approach is that argument that iniquitous matters of public interest lack the necessary *quality* of confidence to attract the protection of equity.[30] This means that the information

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22 *Ibid* at 525.

23 Richardson & Stuckey-Clarke n15, para [1248]; G E Dal Pont & D R C Chalmers, *Equity and Trusts in Australia and New Zealand*, (Law Book Co, Sydney, 1996), p 101.

24 See Pt D §4.

25 Cf Koomen, *supra* n. 9 at 72-80 who approaches the defence from three viewpoints. This tripartite division is examined below. *Supra* n. 31-3.

26 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39; *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86. Much reliance for this view is placed upon decisions of the House of Lords and the English Court of Appeal, namely *Initial Services Ltd v Putterill* [1968] 1 QB 396; *Fraser v Evans* [1969] 1QB 349; *Malone v Metropolitan Police Commissioner* [1979] 1 Ch 344. Koomen treats this as the public interest defence in her article: *supra* n. 9 at 72-4.

27 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 57.

28 See *Weld Blundell v Stephens* [1919] 1 KB 520 at 533-4; *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434; *Smith Kline & French Laboraties (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73.

29 Evans, *supra* n. 16 at para [1.24]. For an explanation of the types of conduct which debars relief see *Official Trustee in Bankruptcy v Tooheys Ltd* (1993) 29 NSWLR 641 at 650 per Gleeson CJ.

30 Meagher *et al*, *supra* n. 1 at para [4123] citing *Attorney-General v Observer Ltd* [1990] 1 AC 109 at 159-60 and *Stephens v Avery* [1988] 2 All ER 477 at 482. Koomen divides the narrow view adopted in this article into the narrow iniquity rule and the broad iniquity rule: Koomen, *supra* n. 9 at 72. See below notes 32-33 and the accompanying

is not *confidential* in the first place.

Koomen has postulated that there are three approaches to the public interest defence: a '*balancing* rule', a 'narrow iniquity rule' and a 'broad iniquity rule.'[31] The learned author uses the 'narrow iniquity rule' to describe the approach whereby information lacks the necessary quality of confidence if it concerns iniquity.[32] The 'broad iniquity rule' combines elements of the narrow iniquity rule and the balancing approach. This approach is explained as follows:

> This rule only applies to cases where an iniquity is involved, but the existence of an iniquity will not *automatically* justify disclosure. If an iniquity is involved the court must then balance the competing public interests to determine whether disclosure is justified.[33]

It will be shown that whenever an iniquity is involved, a 'balancing of competing interests' approach will always result in disclosure. Ultimately, this approach is no different from the broad view of the public interest defence.

The distinction between the broad 'freedom of the press' view, and the narrow 'unclean hands' view, is best illustrated by an example. In *Woodward v Hutchins*,[34] the plaintiffs were pop singers including Tom Jones, Englebert Humperdinck and Gilbert O'Sullivan. In order that they were portrayed to the public in the best possible light the singers employed, through their management company, the defendant public relations officer whose task it was to project a favourable image of their public and private lives. Shortly after the defendent left their employment he wrote a series of articles for a daily newspaper. These articles gave an account of a number of discrediting incidents that had not previously been disclosed in the public domain.[35] The plaintiffs brought actions for libel and breach of confidence.

The English Court of Appeal refused an injunction and allowed the publication of the articles. Lord Denning MR's approach, representing the judgment of the court, illustrates the public interest defence at its widest:

> If a group of this kind seek publicity which is to their advantage, it seems to me that they cannot complain if a servant or employee of their afterwards discloses the truth about them. If the image which they fostered was not a true image, it is in the public interest that it should be corrected. ... As there should be 'truth in advertising', so there should be truth in publicity.[36]

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text.

31 Koomen, *supra* n. 9 at 74.

32 *Id.*

33 *Ibid*, 76.

34 [1977] 2 All ER 751.

35 Lord Denning MR gives a detailed account of these articles at [1977] 2 All ER 751 at 753.

36 [1977] 2 All ER 751 at 754. As authority his Lordship cites *Initial Services Ltd v Putterill* [1968] 1 QB 396, *Fraser v Evans* [1969] 1 QB 349 and *D v National Society for the Prevention of Cruelty to Children* [1976] 3 WLR 124.

However, had the court applied a public interest defence of a more narrow scope, namely by reference to the unclean hands maxim, it is submitted that the result would have been quite different. The plaintiffs, though actively seeking to portray a favourable public image, had not come to the court with unclean hands. The mere fact that the singers had sought to portray wholesome (even if untrue) images of themselves to the public was not an iniquitous matter of which the public should have been made aware. Any public interest in the matter would arise merely out of curiosity or amusement.[37] Therefore, upon a narrow application of the public interest defence disclosure would not have been justified as being in the public interest. The Court of Appeal however, regarded 'truth in publicity' as being more fundamental than the protection of the private lives of the singers.[38]

The above illustration reveals how potentially dangerous the division of approaches to the public interest is. Without a sufficiently delineated scope, the public interest defence will remain uncertain, inconsistent, and ultimately unjust in application. This paper will argue that it is more in conformity with equitable doctrine to adopt the narrow approach to the public interest defence. By adopting a framework which focuses on the *nature* of the information, and whether it would be against good conscience and morality to allow disclosure, courts will be able to apply the public interest defence in the future with greater certainty and without resort to their own social and political values. In order to properly understand the debate it is necessary to undertake, in turn, analysis of both the broad and narrow views to the defence.

THE BROAD VIEW OF THE PUBLIC INTEREST DEFENCE

COURTS FAVOURING THE BROAD VIEW

Throughout the 1960s and 1970s, English courts, led by Lord Denning MR, extended the public interest defence beyond matters involving misconduct to matters of such a nature that it was in the public interest that they be disclosed.[39] In *Initial Services Ltd v Putterill*,[40] a sales manager of the plaintiff launderers, upon his resignation, took with him documents that contained information about the company's affairs. He gave these documents to reporters of a newspaper, which published articles alleging 'a liaison system between a group of firms ...

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37 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 162-3; *Attorney-General (UK) v Wellington Newspapers Ltd* [1988] 1 NZLR 129 at 178. See the definitions of 'public interest' *supra* n. 12-13 and the accompanying text.

38 See generally M Richardson, "Breach of Confidence, Surreptitiously or Accidentally Obtained Information and Privacy: Theory Versus Law" (1994) 19 *MULR* 673, 684-90; Finn n8, 500-3.

39 *Initial Services Ltd v Putterill* [1968] 1 QB 396; *Fraser v Evans* [1969] 1 QB 349 at 362; *Hubbard v Vosper* [1972] 2 QB 84; *Malone v Metropolitan Police Commissioner* [1979] Ch 344 at 362; *Attorney-General v Observer Ltd* [1990] 1 AC 109 at 268-9, 282-3. See also Richardson & Stuckey-Clarke n15, para [1247]; Koomen, *supra* n. 9 at 57-72.

40 [1968] 1 QB 396.

whereby they were keeping up prices.'[41] When issued with a writ alleging breach of confidence, the defendant ex-employee sought to rely on the defence of public interest.

The Court of Appeal held that there was an implied obligation of servants that they will not disclose information received in confidence. However, this obligation was subject to exceptions, and the Court applied the *Gartside v Outram*[42] principle that 'iniquity' was discernable in the plaintiff's conduct; namely that the public were being misled.[43] Lord Denning MR stated that the principle should extend to 'crimes, frauds and misdeeds, both those actually committed as well as those in contemplation',[44] provided that the disclosure is in the public interest.[45] Salmon LJ acknowledged the difficulty in defining iniquity, however, his Lordship also felt that customers not being informed of such a trade practice was iniquitous.[46]

Just over one year later, Lord Denning MR was given the opportunity to further elaborate his views of circumstances in which iniquity allowed a confidence to be broken in Fraser v Evans.[47] In that case, a report made by a public relations consultant to the Greek Government was surreptitiously obtained, and came into the hands of a national newspaper.[48] The consultant plaintiff sought to restrain its publication by relying on defamation, copyright and breach of confidence. The Court of Appeal rejected these arguments and discharged an interlocutory injunction obtained against the newspaper. Most importantly however, the Master of the Rolls made comments that were to shape the broad view of the public interest defence. His Lordship did not regard 'iniquity' as expressing a principle.[49] Rather, it was regarded merely as 'an instance of just cause or excuse for breaking confidence.'[50] Lord Denning continued:

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41 *Ibid* at 404.

42 (1856) 26 LJ Ch 113.

43 This was the case because the agreement to keep up prices was not registered as it should have been under s 6 of the *Restrictive Trade Practices Act* 1956 (UK).

44 [1968] 1 QB 396 at 405.

45 As to the problem of what *extent* disclosure is justified in the public interest, see below notes 160 *et seq* and the accompanying text. It is suggested the requirements such as present harm and disclosure to the relevant authorities better deal with the extent of justified disclosure: see below note 184 *et seq* and accompanying text.

46 [1968] 1 QB 396 at 410.

47 [1969] 1 QB 349.

48 On the issue of information which is surreptitiously or accidentally obtained, see generally Richardson n38, 690-7.

49 Kirby P made a similar statement in *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 171.

50 [1969] 1 QB 349 at 362. See also *Lion Laboratories Ltd v Evans* [1984] 2 All ER 417 at 422-3 per Griffiths LJ, cf 431 per O'Connor LJ. This formulation was criticised in G Jones "Restitution of Benefits Obtained in Breach of Another's Confidence" (1970) 86 *LQR* 463, 472, where the learned author remarked that "'just cause' is as unruly a horse as public policy."

> There are some things which are of such public concern that the newspapers, the Press, and indeed, everyone is entitled to make known the truth and to make fair comment on it. This is an integral part of the right of free speech and expression. It must not be whittled away.[51]

Sir Robert Megarry V-C applied Lord Denning's approach from *Fraser v Evans* in *Malone v Metropolitan Police Commissioner*.[52] The Vice Chancellor explained that there may be cases where there is no misconduct or misdeed, yet there is a just cause or excuse for disclosing the information.[53]

Lord Denning continued shaping the broad approach to the defence in *Hubbard v Vosper*.[54] In that case, the Court of Appeal held that the 'closed doors' of the Church of Scientology 'should be opened for all to see.'[55] The Master of the Rolls was of the opinion that the courts will never restrain a defendant who publishes in breach of confidence, if the defendant has a reasonable defence of public interest: 'The reason is because the defendant, if he is right, is entitled to publish it: and the law will not intervene to suppress freedom of speech except when it is abused.'[56]

The 'spring tide'[57] of the broad view arrived with the decision of *Woodward v Hutchins*.[58] The Court of Appeal therein allowed disclosure of the unsavoury lifestyles of certain pop stars. Lord Denning MR held that it was permissible to publish the truth about the lives of pop stars, even if obtained in breach of confidence, as the stars had presented a favourable image of themselves to the public so that audiences would come to hear them and support them.[59] In his dissenting judgment in *Schering Chemicals Ltd v Falkman Ltd*,[60] Lord Denning

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51 [1969] 1 QB 349 at 363. In a similar vein, consider the comments of Lord Salmon in *British Steel Corporation v Granada Television* [1981] 1 All ER 417 at 467: '... a free press is one of the pillars of freedom in this and indeed in any other democratic country.'

52 [1979] 1 Ch 344 at 362. See also *Lion Laboratories Ltd v Evans* [1984] 2 All ER 417 at 432-3 per O'Connor LJ.

53 As an illustration his Honour offers a case 'where confidential information may relate to some apprehension of an impending chemical or other disaster, arising without misconduct, of which the authorities are not aware, but which ought in the public interest to be disclosed to them': [1979] 1 Ch 344 at 362.

54 [1972] 2 QB 84. Megaw and Stephenson LJJ agreeing with the Master of the Rolls in separate judgments.

55 *Ibid* at 96.

56 *Ibid* at 97.

57 *Castrol Australia Pty Ltd v Emtech Associates Pty Ltd* (1980) 33 ALR 31 at 56. Meagher *et al*, *supra* n. 1 at para [4123]; Koomen, *supra* n. 9 at 61.

58 [1977] 2 All ER 751. *Supra* n. 34-38 and accompanying text.

59 [1977] 2 All ER 751 at 754. See also *Lennon v News Group Ltd* [1978] FSR 573, where the Court of Appeal found no breach of confidence where John Lennon's marriage secrets were disclosed. However, their Honours did so on the basis that so much had already been written about the marriage that it was 'all in the public domain': at 754 per Lord Denning MR, 755 per Bridge LJ. See also Richardson n38, 685.

60 [1981] 2 All ER 321.

MR maintained this view, noting that freedom of the press should not be restricted unless there was a 'pressing social need' for such restraint.[61]

AUSTRALIAN SUPPORT FOR THE BROAD VIEW

By relying upon the English decisions outlined above, some Australian judges have applied a broadly-based 'freedom of the press' approach to the public interest defence. In *Allied Mills Industries Pty Ltd v Trade Practices Commission*,[62] Sheppard J, relying upon English authority, stated that 'the public interest in disclosure ... of iniquity will always outweigh the public interest in the preservation of private and confidential information'.[63] Similarly, in *Attorney-General (UK) v Heinemann Publishers*,[64] Kirby P, relying on the dissenting opinion of Lord Denning MR in *Schering Chemicals Ltd v Falkman Ltd*,[65] stated that 'freedom of the press' to impart information of general interest or concern, and the right of the public to receive it, was of fundamental importance to Australian society.[66] Therefore, his Honour concluded that the public interest in the matters raised in the 'Spycatcher' book outweighed any equitable obligation of confidence operating on the author.[67]

In *A v Hayden*,[68] the High Court held that an express contractual stipulation of confidentiality would not be enforced if contrary to the course of justice and public policy. At the direction of the Commonwealth, the plaintiff secret service agents participated in a training exercise during which it was alleged that criminal offences occurred. The Victorian Government sought to obtain their names in order to conduct a criminal investigation. The plaintiffs, by relying on a confidentiality clause in their service contracts, sought to restrain the Commonwealth from providing their names. The High Court[69] refused to grant

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61 *Ibid* at 334. Interestingly, the Master of the Rolls did not elaborate on when such a need existed.

62 (1981) 34 ALR 105.

63 *Ibid* at 141, relying upon *British Steel Corp v Granada Television Ltd* [1981] 2 All ER 417 and *Initial Services Ltd v Putterill* [1968] 1 QB 396. Sheppard J's statement was criticised as being too broad by Gibbs CJ in *A v Hayden* (1984) 156 CLR 532 at 544. However, it is submitted that the statement is of relevance regardless its ignorance of the scope of the defence: Richardson & Stuckey-Clarke n. 15 at 466. For a similarly broad statement see *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 171 per Kirby P.

64 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86.

65 [1981] 2 All ER 321 at 334. See further note 61 and the accompanying text.

66 (1987) 10 NSWLR 86 at 169. Earlier at 167, his Honour cited with approval Salmon LJ's comments in *Initial Services Ltd v Putterill* [1968] 1 QB 396 at 408, and Lord Denning's statements *Fraser v Evans* [1969] 1 QB 349 at 362, and *Hubbard v Vosper* [1972] 2 QB 84 at 96-7.

67 Richardson & Stuckey-Clarke (n15), para [1248]. See also *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39.

68 (1984) 156 CLR 532.

69 Per Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ.

an injunction. Gibbs CJ examined the obligation of confidence that the Commonwealth owed to the plaintiffs. His Honour noted that if certain parties breached the law, the presence of a promise to maintain confidentiality should not hinder disclosure of their identity to the authorities.[70] Further, the Chief Justice held that the public interest did not, 'in every case, require the disclosure that a criminal offence, however trivial, has been committed.'[71]

The torrent unleashed by *Woodward v Hutchins* has since receded[72] and both in Australia and England the broad view of the defence now extends only to publication of serious matters and those which are of some consequence to the public.[73] Indeed, Kirby P recognised that the trend in England had cast doubt on the extent, or at least the operation of, the public interest defence.[74]

THE TEST UNDER THE BROAD APPROACH

How then do the Courts determine if the freedom of the press is to prevail over, or outweigh, any obligations of confidence? In *D v National Society for the Prevention of Cruelty to Children*,[75] Lord Denning in the Court of Appeal felt that the matter was 'all a question of competing interests.'[76] Although in the minority in the Court of Appeal, his Lordship's opinion was confirmed by the majority of the House of Lords.[77] Elaborating on this statement in *Attorney-General v Guardian Newspapers (No 2)*,[78] Lord Griffiths considered the matter to involve 'balancing the public interest in upholding the right of confidence which is based on the moral principles of loyalty and fair dealing, against some other public interest that will be served by the publication of the confidential material.'[79]

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70 *Ibid* at 547; cf at 563 per Murphy J. However in the present case, Gibbs CJ felt that there was no basis for believing that any offences had been committed.

71 (1986) 156 CLR 532 at 545-6. See also at 574 per Wilson and Dawson JJ. See also Koomen n9, 78.

72 Evans n16, para [8.21].

73 See eg *Castrol Australia Pty Ltd v Emtech Associates Pty Ltd* (1980) 33 ALR 31 at 56; *A v Hayden* (1984) 156 CLR 532 at 546; *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 8 NSWLR 341 at 382; *British Steel Corp v Granada Television Ltd* [1981] 2 All ER 417 at 455; *Schering Chemicals Ltd v Falkman Ltd* [1981] 2 All ER 321 at 337-8, 347 (contra at 334 per Lord Denning MR); *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408 at 413; *Lion Laboraties Ltd v Evans* [1984] 2 All ER 417 at 422-3; *X v Y* [1988] 2 All ER 648 at 660-1; *W v Egdell* [1990] 1 All ER 835 at 848. These cases are dealt with in Pt C.

74 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 168.

75 [1978] AC 171.

76 *Ibid* at 190. See also *Woodward v Hutchins* [1977] 2 All ER 751 at 754.

77 [1978] AC 171 at 218 per Lord Diplock, 230 per Lord Halisham, 241 per Lord Simon. See also *Science Research Council v Nasse* [1980] AC 1028 at 1065, 1072, 1074, 1080 and 1088.

78 [1990] 1 AC 109.

79 *Ibid* at 269. See also *British Steel Corp v Granada Television Ltd* [1981] 1 All ER 417 at

Similarly, those Australian courts that have adopted the broad view appear to approach the matter by reference to balancing competing interests. In *Commonwealth v John Fairfax & Sons Ltd*,[80] a case involving confidential government information,[81] Mason J said:

> There will be cases in which the conflicting considerations will finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality.[82]

His Honour felt that the degree of embarrassment to Australia's foreign relations which would flow from publication of a book entitled *Documents on Australian Defence and Foreign Policy* 1968-1975 was not sufficient to justify an injunction for protection of confidential information contained therein.[83] His Honour placed much reliance on the fact that disclosure of government information enabled the public to discuss, review and criticise government action.[84]

THE NARROW VIEW OF THE PUBLIC INTEREST DEFENCE

JUSTICE GUMMOW'S VIEW

The most vocal proponent of the narrow approach to the public interest defence has been Justice Gummow. His Honour had the opportunity to express his opinion in two Federal Court cases, namely *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)*[85] and *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health*.[86]

In *Corrs Pavey Whiting & Byrne*, a firm of solicitors acting for the patentee of an Australian patent for Naproxen, a pharmaceutical drug, made an application under the *Freedom of Information Act* 1982 (Cth) for documents concerning the importation of Naproxen by the second respondent[87] in alleged infringement of the patent. The Collector of Customs declined to supply the documents on the ground that as they were supplied in confidence, they were exempt from

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480 per Lord Fraser (cf at 449 per Watkins LJ in the Court of Appeal); *Lion Laboraties Ltd v Evans* [1984] 2 All ER 417 at 422-3 per Stephenson LJ; *X v Y* [1988] 2 All ER 648 at 660 per Rose J; *W v Egdell* [1990] 1 All ER 835 at 852-3 per Bingham LJ.

80 (1980) 147 CLR 39.

81 Government information which is allegedly confidential stands in a different position from private information. See below Pt D §4.

82 (1980) 147 CLR 39 at 52. See also *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 170-1 per Kirby P.

83 An interim injunction was in fact granted however as the Commonwealth had made out a *prima facie* breach of copyright.

84 (1980) 147 CLR 39 at 52. See further note 205 and the accompanying text.

85 (1987) 14 FCR 434.

86 (1990) 22 FCR 73. See also Richardson & Stuckey-Clarke n15, para [1248].

87 Alphapharm, a pharmaceutical company.

disclosure.[88] In the Full Federal Court, Sweeney and Jenkinson JJ dismissed an appeal from the Administrative Appeals Tribunal by the solicitors, holding that disclosure of the documents would constitute a breach of confidence within the meaning of the Act.[89] Gummow J dissented and held that the term 'breach of confidence' in the Act was used in its technical sense so that a document would be exempt only if its disclosure would be actionable under general law.[90] To come to this conclusion it was necessary for Gummow J to determine whether disclosure of the documents would be an actionable breach of confidence.

His Honour was faced with submissions by the appellant that there existed a public interest defence to allow disclosure of confidential information. Among the cases relied upon as authority for this proposition were *Fraser v Evans*, *Hubbard v Vosper* and *Woodward v Hutchins*. Gummow J regarded the public interest defence as developed by the English Court of Appeal as 'picturesque but somewhat imprecise.'[91] His Honour then undertook a detailed examination of *Gartside v Outram* and the statement that 'there is no confidence in iniquity.'[92]

Gummow J concluded that the case provided insufficient basis for a public interest defence as formulated in the English cases.[93] Rather, that authority should be restricted to the principal that the courts are unlikely to imply an obligation upon a servant to keep secret details of his master's bad faith to his customers.[94] In the alternative, and more importantly for present purposes, Gummow J was of the view that where there was no reliance on contract, and reliance was placed upon equity solely, the principal was no wider:

> . . . than one that information will lack the necessary attribute of confidence if the subject-matter is the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance, and the confidence is relied upon to prevent disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed.[95]

Therefore, rather than using the public interest as a means for permitting disclosure of confidential information, this approach uses iniquity to defeat a breach of confidence action at the first stage: namely, that the information must

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88 Pursuant to s 45(1) *Freedom of Information Act* 1982 (Cth).

89 It was therefore unnecessary for their Honours to decide whether the disclosure would be actionable under the general law and hence whether there existed any public interest defence to such disclosure.

90 (1987) 14 FCR 434 at 458-9.

91 *Ibid* at 451.

92 *Ibid* at 452-6. In this examination his Honour was hindered by differing reports of the case: (1856) 26 LJ Ch 113; 5 WR (NS) 39; 28 LT (OS) 120. See also Meagher et al n1, para [4123].

93 (1987) 14 FCR 434 at 454.

94 *Ibid* at 455.

95 *Ibid* at 456.

possess 'the necessary quality of confidence'.[96] According to Gummow J, where the information exposes an iniquity which is of such public importance, it is incapable of meeting the confidentiality criterion.[97]

In the result, the Administrative Appeals Tribunal had erred because it had not considered whether the documents would not be protected in equity, as it contained information of a civil wrong of public importance and, in the alternative, there would be a defence of unclean hands where the subject matter was non-disclosure of information showing a real likelihood of patent infringement.[98]

The reason for Gummow J's reluctance to accept a defence of public interest is apparent from his Honour's decision in the *Smith Kline & French* case.[99] In that case, Gummow J stated that the public interest defence ". . . is not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an ad hoc basis as to whether, on the facts overall, it is better to respect or to override the obligation of confidence."[100]

In that case, a trade competitor wished to import and market a product substantially similar to the applicants' chemical compound which was protected by patent. The importation of such a substance was controlled by the *Customs (Prohibited Imports) Regulations* 1956 (Cth) and the power to relax the Regulations was reposed in the respondent Secretary. The applicants lodged certain information with the respondent in order to obtain marketing approval for a new product which contained the compound. It was claimed that a portion of this information was confidential and provided for the sole purpose of enabling the respondent to consider and decide the marketing application. Further, it was contended that the information was not to be disclosed without the applicants' consent. Gummow J held that the applicants failed to establish that the information was received by the respondent in such circumstances as to import an obligation of confidence.[101]

According to his Honour, rather than deciding whether confidence should be overridden by balancing the competing demands according to social or political opinion, equitable principles were better developed by 'reference to what conscionable behaviour demands of the defendant'.[102] On the facts, Gummow

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96 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47 per Megarry J. The classic statement of the nature of a confidential information action is that of Lord Greene MR in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 215: "If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, he will be guilty of an infringement of the plaintiff's rights."

97 Dal Pont et al n11, p 131.

98 (1987) 14 FCR 434 at 458-9.

99 (1990) 22 FCR 73.

100 *Ibid* at 111.

101 *Ibid* at 110. The matter was not addressed on appeal: (1990) 99 ALR 679 (Full Fed Ct); (1991) 65 ALJR 360 (HCA).

102 *Ibid* at 110.

J applied a narrow duty of conscionable conduct upon the respondent who wished to disclose the information. It was difficult, in his Honour's view, to see on what footing equity should intervene to bind the respondent's conscience where the respondent neither knew nor ought to have known of the alleged limited purpose of the disclosure.

OTHER AUSTRALIAN AUTHORITY SUPPORTING THE NARROW VIEW

Justice Gummow is not alone in his views. Earlier, in *Castrol Australia Pty Ltd v Emtech Associates Pty Ltd*,[103] Rath J felt that if 'there is to be a defence labelled public interest, some such confinement of its vague boundaries . . . is essential.'[104] In order to determine whether proposed advertisements satisfied Pt V of the *Trade Practices Act* 1974 (Cth), the plaintiff provided certain documents to the Trade Practices Commission. The Commission later attempted to prosecute Castrol for breaches of the Act. Castrol sought to restrain the use of the information it had given to the Commission in this way on the ground that it was supplied voluntarily for a limited purpose. The Commission argued unsuccessfully, that such use was justified in the public interest.

During the course of his judgment Rath J criticised Lord Denning MR's formulation of the public interest defence in *Woodward v Hutchins*,[105] stating that never before had the obligation of confidence been weighed against the public interest in the truth being told.[106] His Honour opined that the courts were required to consider more precise and weighty matters than the public interest in the truth being told. At most, the public interest defence, in Rath J's opinion, extended to disclosure of actual or threatened breaches of security of the law or misdeeds of similar gravity relating to such things as public health.[107]

In *David Syme & Co Ltd v General Motors-Holden's Ltd*,[108] Hutley AP considered that the balancing between maintaining confidentiality and the right of the public to know and the right of the press to assist the public to know had no basis. Rather, where a right to confidentiality was destroyed by iniquity, the very right to confidentiality itself was lost.[109] In other words, the information could no longer be considered confidential.

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103 (1981) 33 ALR 31. This case is consistent with the views of Gummow J, see *Corrs Pavey Whiting & Byrne v Collector of Customs* (1987) 14 FCR 434 at 451, and *Smith Kline & French v Community Services* (1990) 22 FCR 73 at 111.

104 (1981) 33 ALR 31 at 55.

105 [1977] 2 All ER 751.

106 (1981) 33 ALR 31 at 56.

107 *Id*, approving the judgment of Ungoed-Thomas J in *Beloff v Pressdam Ltd* [1973] 1 All ER 241 at 260, quoted below at note 113.

108 [1984] 2 NSWLR 294. See also S Ricketson n6, 198-9.

109 [1984] 2 NSWLR 294 at 305-6. This is consistent with Gummow J's approach in *Smith Kline & French v Community Services* (1990) 22 FCR 73 at 111.

ENGLISH SUPPORT FOR THE NARROW VIEW

Similar support for a narrow view of the iniquity rule has been expressed by the English courts.[110] In *Hubbard v Vosper*,[111] Megaw LJ said that the Church of Scientology had been protecting their secrets by 'deplorable means'. He concluded therefore that the Church was seeking to protect iniquitous material and therefore did not come to the court with clean hands. In *Beloff v Pressdam Ltd*,[112] Ungoed-Thomas J expressed his understanding of the limits of the public interest defence as follows:

> The defence of public interest clearly covers and, in the authorities does not extend beyond, disclosure . . . of matters carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other deeds of similar gravity.[113]

His Honour went on to state that such public interest, 'does not extend beyond misdeeds of a serious nature and importance to the country.'[114] More recent authority has suggested that matters which may be considered as part of the public interest defence are better considered when the nature and content of any confidential obligation is formulated.[115]

The 'brakes were most clearly put'[116] on the public interest defence in England by the Court of Appeal in *Schering Chemicals Ltd v Falkman Ltd*.[117] Where an ex-employee of a reputable drug manufacturing company sought to make available information he obtained in the course of his employment to a television company for a documentary allegedly made in the public interest. The documentary contained information about a drug produced by the company

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110 Indeed, in some cases it has appeared that the English courts have been 'trying to reverse' the development of the public interest defence: Koomen n9, 63, using *British Steel Corp v Granada* [1981] 1 All ER 417 as an example.

111 [1972] 2 QB 84. See notes 54-56 and the accompanying text above.

112 [1973] 1 All ER 241.

113 *Ibid* at 260. This passage was viewed by Rath J as 'an acceptable statement of the law' in *Castrol Australia Pty Ltd v Emtech Associates Pty Ltd* (1980) 33 ALR 31 at 55.

114 [1973] 1 All ER 241 at 260; cf *Distillers Co. (Biochemicals) Ltd v Times Newspapers Ltd* [1975] 1 QB 613 at 622-3, where Talbot J suggested that where information fell outside the categories mentioned by Ungoed-Thomas J it was 'then necessary to ask whether the defendants had shown that there is a competing public interest which justified disclosure.' Failure to fit the information into one of the categories was not fatal to the defence. See further Koomen n9, 61.

115 Meagher, Gummow & Lehane n1, para [4123]. See also *Stephens v Avery* [1988] 2 All ER 477 at 482; *Attorney-General v Observer Ltd* [1990] 1 AC 109 at 159-60.

116 *Attorney-General (UK) v Heineman Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 168 per Kirby P.

117 [1981 2 All ER 321. See also the note by A M Tettenborn, "Breach of Confidence, Publicity and the Public Interest" (1982) 98 *LQR* 5.

which had serious side effects. The company had since withdrawn the drug from sale and had suffered detriment as a result. The defendant alleged that the documentary was justified in the public interest and that the information contained therein was already in the public domain. The Court of Appeal[118] nevertheless held that this amounted to a breach of confidence and granted an injunction restraining the broadcast of the documentary. Shaw LJ forcefully stated "The law of England is indeed, as Blackstone declared, a law of liberty; but the freedoms it recognises do not include a licence for the mercenary betrayal of business confidences."[119]

Therefore, even though the relevant facts and opinions could have been found in the public domain, that was no justification to 'extend the knowledge or to revive the collection of matters' which were detrimental or prejudicial to the plaintiff's interests.[120] To justify disclosure, the subject matter of the documentary must have been 'something which is inimical to the public interest or threatens individual safety.'[121] Here no such consideration existed as the drug had been withdrawn from the market, and no individual stood in need of protection from it. It was not enough to defeat the obligation of confidence to argue that disclosure "would be a good thing to do."[122] Similarly, Templeman LJ recognised the significance that to deny an injunction would enable a trusted adviser to make money out of his dealing in confidential information.[123] Lord Denning MR delivered a strong dissenting judgment in which his Lordship firmly adhered to the broad view of the public interest defence.[124]

APPLICATION OF THE NARROW VIEW

The argument that 'there is no confidence in iniquity' can be used at two stages in actions for breach of confidence. Firstly, it can destroy the very nature of confidentiality about the information so that any action brought for breach of confidence fails at the outset. Secondly, the defence of 'unclean hands'[125] can be relied upon to justify disclosure of iniquities.

In *Smith Kline & French*, Gummow J considered that ". . . it is not a question of whether there is some "public interest" defence to the alleged breach of obligation . . . but rather one of the content of any such obligation in its

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118 Shaw and Templeman LJJ, Lord Denning MR dissenting.

119 [1981] 2 All ER 321 at 338.

120 *Id.*

121 *Ibid* at 337.

122 Tettenborn n117, 7.

123 [1981] 2 All ER 321 at 347.

124 *Ibid* at 334. See above notes 54-56 and accompanying text. As already noted, in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 169 Kirby P preferred the approach of Lord Denning. See further notes 64-66 and the accompanying text.

125 Rather than the broad 'freedom of the press' public interest defence.

inception."[126]

On this view, information which exposes iniquity, will never possess the quality of confidence which a court will protect. Preference for this approach was also expressed by Scott J in *Attorney-General v Guardian Newspapers Ltd (No 2)*.[127] In that case his Honour expressed the view that a prior question before any consideration of the iniquity defence was whether the defendant had a relationship with the plaintiff that justified the imposition on the defendant a duty not to disclose confidential information. This question could not be answered in general terms, rather any obligation must be found by reference to the specific information received and what was subsequently done with that information.

However, equity will not protect information already in the public domain,[128] nor will it protect trivial information.[129] From this basis, it was no exaggeration for Justice Gummow to opine that information as to crimes, wrongs and misdeeds lacked "the necessary quality of confidence."[130]

Alternatively, if a relationship of confidence does arise, and there is a duty upon the defendant not to disclose information so received, then it is a defence to any breach of that confidence to say that the plaintiff does not come to equity with clean hands.[131] In most cases the conduct relied upon to establish 'unclean hands' will be conduct which has adversely affected the defendant personally, however, the defence is not so confined and extends to cases where the plaintiff's misconduct has operated to the prejudice of third parties, including the public generally.[132]

An example of where either application of the narrow view could have been used to justify disclosure is *W v Egdell*.[133] In this case Dr Egdell, a psychiatrist, was instructed by the plaintiff's solicitors to undertake an examination of the plaintiff, a homicidal lunatic, who had several years previously murdered five people. The aim of this examination was to aid an application for his release. Upon conducting the examination, Dr Egdell strongly opposed the plaintiff's

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126 (1990) 22 FCR 73 at 110.

127 [1990] 1 AC 109 at 159-60. See also his Honour's earlier comments *In re A Company* [1989] 1 Ch 477 at 483.

128 See eg *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 8 NSWLR 341 at 368.

129 See, for example, *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 48.

130 (1987) 14 FCR 434 at 456, using Lord Greene MR's requirement from *Saltman Engineering Co Ltd v Campbell Engingeering Co Ltd* (1948) 65 RPC 203 at 215. See also Koomen n9, 85.

131 Meagher, Gummow & Lehane (n1), para [4123]. An example given therein is *Cartside v Outram* (1856) 26 LJ Ch 113, where the plaintiff wool brokers unsuccessfully sought to restrain the defendant, their former sales clerk, from communicating information pertaining to their fraudulent methods of business. See also *Weld Blundell v Stephens* [1919] 1 KB 520 at 533-4.

132 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 456-7.

133 [1990] 1 All ER 835.

discharge. He provided a copy of his report to the Tribunal. The plaintiff claimed breach of confidence by Dr Egdell and sought an injunction restraining the recipients from using or disclosing the report. Though Bingham LJ spoke in terms of overriding the interests of maintaining confidence, the matter was ultimately decided by reference to the relationship between the parties and the nature of the information.[134] The learned Lord Justice stated that only a fully informed responsible authority should make decisions about the release from hospital of a mentally ill man who had committed multiple killings.[135] His Honour continued:

> A consultant psychiatrist who becomes aware, even in the course of a confidential relationship, of information which leads him ... to fear that such decisions may be made on the basis of inadequate information and with a *real risk of consequent danger to the public* is entitled to take such steps as are reasonable in all the circumstances to communicate the grounds of his concern to the responsible authorities.[136] [emphasis added]

Similarly, Sir Stephen Brown P stated that the suppression of Dr Egdell's report would deprive the authorities of 'vital information' directly relevant to questions of public safety.[137] It can be seen that their Honours considered the report of such importance that it could not be confidential information. This was more than a mere public interest in the truth being told, there was a real and appreciable risk of future public harm if an incorrect decision was made by the authorities as to the release of the plaintiff. Additionally, by seeking to restrain the use of the report, the plaintiff had not come to the Court with clean hands.[138] The plaintiff was attempting to deny the authorities from making a fully informed decision on his mental stability. Therefore, unclean hands would preclude him from obtaining the intervention of equity to restrain disclosure of the report.

It should be noted that in *Corrs Pavey Whiting & Byrne*, Gummow J relied on the quality of the information and the unclean hands doctrine as arguments in the alternative.[139]

A COMPARISON OF THE TWO APPROACHES

In *Stephens v Avery*,[140] Sir Nicholas Brown-Wilkinson VC, as he then was, stated

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[134] Meagher et al n1, para [4123], state that a 'balancing process' was employed, drawing on concepts from the law of discovery and contempt, contract, fiduciary duty and undue influence, as well as the confidential information doctrine.

[135] [1990] 1 All ER 835 at 852.

[136] *Ibid* at 852-3.

[137] *Ibid* at 846.

[138] It is to be noted however that this particular basis was not argued before the Court. It is submitted that this argument could have been represented, and is merely used as an illustration of when both the clean hands doctrine and information lacking quality of confidence approaches could be used.

[139] *Supra* n. 87-98.

[140] [1988] 2 All ER 477 at 482.

that the basis of equitable intervention to protect confidentiality was that it would be unconscionable for a person who had received information on the basis that it was confidential to subsequently reveal that information. Some four years earlier, Deane J recognised the duty of confidence as 'an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained.'[141] It is apparent therefore, that conscionability, the basis of the abuse of confidence doctrine, is of fundamental importance in a comparison of the two views.

THE PROBLEM WITH BALANCING COMPETING INTERESTS

The rule that there is no confidence in iniquity, focuses on the content of the information for which the court's protection is sought. The basis of this rule lies in the clean hands doctrine.[142] Therefore, rather than undertaking a balancing of the interests in disclosure with those of maintaining confidentiality, it is submitted that the clean hands doctrine better achieves a result in line with standards of conscionability.

As already noted, Gummow J felt that balancing, and then overriding, interests according to social or political opinion amounted to 'an ad hoc' determination of justifying breaches of confidence.[143] Indeed, it has been suggested that after thirty years of the public interest defence in the English courts, 'serious doubts can be raised regarding whether the interests of the public have in fact been served by the defence.'[144] Perhaps the most striking example of 'judicial idiosyncrasy' however is the contrast that stands between the *Spycatcher* decisions in the House of Lords[145] and the Australian courts.[146] The dissenting judgment of Kirby P stands in direct contrast with that of the House of Lords even though both applied the same broad balancing test.[147] The courts' inability to agree on the scope of the defence has, unfortunately, resulted in the failure of the courts to protect the public interest.[148]

The balancing of interests involves not merely the standard consideration of enforcing confidentiality, but also the public interest in disclosing the otherwise confidential information. It is then for the court to strike the appropriate balance.[149] In *Westpac Banking Corporation v John Fairfax & Sons*,[150] Powell J,

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141 (1984) 156 CLR 414 at 438. See also *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 281 per Lord Goff, and Finn n8, 502.

142 Finn n. 8, 506.

143 *Smith Kline & French* (1990) 22 FCR 73 at 111. See also *British Steel Corp v Granada Television Ltd* [1981] 1 All ER 417 at 449 per Watkins LJ.

144 Koomen n9, 84.

145 *Attorney-General v Guardian Newspapers* [1990] 1 AC109.

146 *Attorney-General v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 (NSWCA); (1988) 78 ALJR 449 (HCA).

147 Koomen n. 9, 67.

148 *Ibid* at 84.

149 Finn n. 8, 507. The difficulty however is that the public interest found to have been

whilst expressing a preference for the broad approach,[151] stated that the balancing test could rarely be 'satisfactorily carried out at an interlocutory stage of proceedings, and on less than complete information.'[152]

Definitional problems exist when determining exactly what comes within the 'public interest' in disclosure. At one time, the public interest in knowing the truth was sufficient,[153] however more serious and weighty matters are now required.[154] It would appear that this view of the defence 'invites the judiciary to merely apply their own social and political values in determining how the public interest is best served in a particular case.'[155]

It has been stated that an attractive feature of the balancing test is that it forces examination of 'why confidentiality should be protected.'[156] This examination also occurs under the iniquity approach. It is therefore, suggested that resolving the issue by reference to the balancing of interests is not beneficial to the protection of the public interest. This is particularly so when the courts employ more stringent and precise tools,[157] which is more consistent with the basis of the confidential information doctrine, to utilise. In *Science Research Council v Nasse*,[158] Lord Wilberforce lends credence to this view by stating that "this is a more complex process than merely using the scales."[159]

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satisfied by reaching one conclusion may also justify reaching the opposite conclusion: Koomen n9, 81. See also *Smith Kline & French* (1990) 22 FCR 73 at 110.

150 (1991) 19 IPR 513.

151 See notes 22 and the accompanying text above.

152 (1991) 19 IPR 513 at 525. One of the issues in that case involved whether the public interest justified the disclosure of letters written to the plaintiff by the plaintiff's solicitors to the media. The letters included suggestions of negligence and mismanagement by a subsidiary of the plaintiff which had allegedly resulted in borrowers incurring substantial losses. Powell J expressed a preference for the broad view of the public interest defence however refused to apply the balancing test at the interlocutory stage. Therefore, it was unclear whether, *on balance*, the public interest would have justified disclosure. See also Koomen n9, 79-80.

153 See *Woodward v Hutchins* [1977] 2 All ER 751 at 754.

154 *Castrol Australia Pty Ltd v Emtech Associates Pty Ltd* (1980) 33 ALR 31 at 56. It has been suggested that the public interest can be divided into the following, non-exhaustive, categories: (1) the prevention of harm; (2) the improvement of the administration of justice; and (3) the realisation of the democratic ideal: Pizer n2, 70-8.

155 Koomen n. 9, 82; contra Dal Pont & Chalmers n. 23, 104.

156 Pizer n2, 87.

157 Namely, the two approaches to the application of the narrow view: (1) the information which exposes an iniquity lacks the requisite quality of confidence, and (2) the unclean hands defence.

158 [1980] AC 1028.

159 *Ibid* at 1069; cf *X v Y* [1988] 2 All ER 648 at 660. The uncertainty of the broad approach is further illustrated by the number of cases which have been reversed on appeal: *Malone v Metropolitan Police Commissioner* [1979] 1Ch 344 at 57-8. For more examples see Koomen n9, 81.

Another source of ambiguity is that confidentiality is maintained 'except *to the extent* that the public interest is served by disclosure'.[160] This raises a significant problem: does the public interest destroy totally any obligation of confidence, or does it merely override confidentiality to such an extent that the public interest justifies?[161]

It is more consistent to determine what is required of the defendant in terms of conscionable behaviour. This is to be done by reference to the relationship between the parties, having regard to the specific information that is possessed, to ascertain whether a duty not to disclose the information is imposed.[162] If it would be unconscionable for the defendant to disclose the information, then the courts will restrain such disclosure by way of injunction.[163] Alternatively, if disclosure has already occurred, then the Court will indemnify the plaintiff by way of compensation,[164] by awarding equitable damages,[165] by ordering account,[166] or – in extreme cases – by imposing a constructive trust.[167]

In *Hubbard v Vosper*,[168] Megaw LJ felt that the 'deplorable means' employed by the plaintiffs meant that they did not come to equity with clean hands. It is submitted that the Lord Justice was using conscionable standards as a yardstick

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160 Finn n8, 506 (emphasis added). Authority for this proposition can be found in Initial *Services Ltd v Putterill* [1968] 1 QB 396 at 405; *Fraser v Evans* [1969] 1 QB 349 at 362-3; *Woodward v Hutchins* [1977] 2 All ER 751 at 754; *Malone v Metropolitan Police Commissioner* [1977] Ch 344 at 377; *Hellewell v Chief Constable* [1995] 1 WLR 804 at 810-1.

161 Finn, n. 8 at 506. This, in turn, raises additional problems as Finn points out, namely, should disclosure only be made to one who has a proper interest to receive the information? This argument is similar to the rule that disclosure be made to the proper authorities. There is extensive English authority on this point: *Initial Services Ltd v Putterill* [1968] 1 QB 396 at 405; *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408; *Lion Laboraties Ltd v Evans* [1984] 2 All ER 417; *In re A Company* [1989] 1 Ch 477; [1990] 1 AC 109 at 213 *et seq*.

162 This is the approach, cited above, from *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 159-60 per Scott J. The matter is put in much the same way in Finn, n. 8 at 503: 'In identifying the interest served by the confidentiality in a particular type of relationship it becomes possible to arrive at some view as to the scope and operation of the duty in individual cases.'

163 *Duchess of Argyll v Duke of Argyll* [1967] Ch 302.

164 *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718.

165 *Talbot v General Television Corp Pty Ltd* [1980] VR 224; *Dowson & Mason Ltd v Potter* [1986] 1 WLR 1419; *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299.

166 *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1964] 1 WLR 96.

167 *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14. See also *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 125 where Deane J suggested that this remedy could be used whenever 'a person could not in good conscience retain for himself a benefit ... which he has appropriated to himself in breach of his ... equitable obligations to another.' See also Richardson & Stuckey-Clarke n15, paras [1255-6].

168 [1972] 2 QB 84 at 100-1.

for examining the conduct of the defendant. The defendant was acting conscionably in seeking to reveal the deplorable and dangerous practices in which the plaintiffs were engaged. Similarly, in *Schering Chemicals Ltd v Falkman Ltd*,[169] Templeman LJ was influenced by the fact that broadcasting the documentary would result in an adviser making money out of his dealings in confidential information.[170] It was unconscionable for him to act in this way and therefore disclosure was prohibited.

PRACTICAL PROBLEMS WITH APPLYING A NARROWLY DEFINED DEFENCE

It could be argued that applying a criterion based upon conscionability is just as uncertain as balancing competing interests. It is recognised that conscionability is inherently vague[171] and furthermore depends on the court's conceptions of justice.[172] In *British Steel Corp v Granada Television Ltd*,[173] Templeman LJ recognised the difficulty of applying the narrow view of the public interest defence in practice when he said:

> ... [D]iscussions between members of the staff of BSC about difficult decisions or management problems are *truly confidential*, and it was unfair for Granada to publish many of the extracts ... If information is *truly confidential* it does not cease to be confidential merely because it relates to matters of public interest. In the present case, the BSC documents and the contents of those documents which were quoted by Granada were *truly confidential* albeit that they related to matters of public concern.[174] [Emphasis added.]

This passage illustrates a situation in which the information did not lack the requisite nature of confidence; it was *truly confidential*. This brings the present discussion to an interesting point: 'why is confidentiality perceived to be an

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169 [1981] 2 All ER 321.

170 *Ibid* at 347.

171 Parkinson states that decisions of appellate courts in respect of unconscionable dealings have been often made with bare majorities, and not without protest and the 'differences between judges have reflected ideological differences about the limits of equitable intervention to modify strict legal rights': P Parkinson, "The Conscience of Equity", in P Parkinson (n15), para [203]. Cited therein as examples are *Commonwealth Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 481 per Dawson J (dissenting); *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 at 583 per Kirby P; *Foran v Wight* (1989) 168 CLR 385 at 389 per Mason CJ (dissenting); and *Commonwealth v Verwayen* (1990) 170 CLR 394.

172 Dal Pont & Chalmers n23, 103-4.

173 [1981] 1 All ER 417.

174 *Ibid* at 447. This passage was cited by Kirby P in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 168, who stated that the 'distinction between information "truly" confidential and information which is "merely confidential in the ordinary sense" is one not easy to draw.' It is, of course, important to remember the Kirby P is one of the proponents of the broad view of the defence. See also *British Steel Corp v Granada Television Ltd* [1981] 1 All ER 417 at 460 per Lord Wilberforce, 480 per Lord Fraser; *X v Y* [1988] 2 All ER 648 at 660-1 per Rose J.

integral element in some relationships and not in others?'[175] Of course, without a relationship of confidence so that any information received has been so received in confidential circumstances,[176] no action for a breach of confidence could be maintained. Finn recognises a number of factors that may create an obligation of confidence, including the maintenance of privacy, the promotion of information flow, and effective utilisation of professional services.[177] Additionally Finn notes the prevention of possible information abuse or of abuse of a position of dominance. This, it is submitted, is a reference to unconscionability.[178] For example, allowing the broadcast of the documentary in *Schering Chemicals Ltd v Falkman Ltd*[179] would have amounted to the former adviser abusing information he had received in confidence for monetary gain.

It is apparent that the defence of unclean hands plays an important role in relationships which may *truly* be regarded as those imposing obligations of confidence. Even if the information is confidential, publication of that information will be allowed if the plaintiff has not come to equity with clean hands, or good conscience. This imports the requirement of conscionable conduct into the matter, and ensures that the revelation of information only occurs if the defendant's conduct has been in accordance with good conscience. Similarly, where the conduct of the plaintiff is unconscionable or deplorable,[180] then such a plaintiff has unclean hands and disclosure is permissible.

As already mentioned,[181] it has been suggested that the concept of conscionability provides 'no greater safeguard against judicial idiosyncrasy than the criterion of public interest.'[182] Not only must the three elements of a breach of confidence be proved, but the court must also ascertain whether the defendant has acted without regard to conscience to prevent disclosure. It is submitted however, that when the narrow test is coupled with other limits which operate to prevent disclosure, the rationale of the doctrine of confidential information is better served. [183]

OTHER LIMITS WHICH ARE IMPOSED TO RESTRAIN DISCLOSURE

Despite the standards requirements of a breach of confidence action,[184] the

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175 Finn, *supra* n. 8 at 502.

176 The second element in a breach of confidence action: *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47.

177 Finn, *supra* n. 8 at 502. See also Pizer, *supra* n. 2 at 78-9.

178 It is to be remembered that Finn was writing in 1984 without the aid of cases such as *Moorgate* and *Stephens v Avery* which established the basis of confidentiality doctrine in conscionability.

179 [1981] 2 All ER 321.

180 See eg *Hubbard v Vosper* [1972] 2 QB 84.

181 *Supra* n. 171-174.

182 Dal Pont & Chalmers, *supra* n. 23 at 108.

183 *Supra* n. 140-141.

184 They being (a) confidential information, (b) imparted in confidential circumstances, and

courts have sought to impose additional limitations or restrictions upon disclosure where it is permitted. Two matters are relevant in this regard. Firstly, the courts have sought to permit disclosure so long as it is to the relevant authority.[185] Additionally, the courts will not restrain publication so long as there is no threat of future harm to the public.[186]

DISCLOSURE TO THE RELEVANT AUTHORITIES

In *Francome v Mirror Group Newspapers Ltd*,[187] Sir John Donaldson MR accepted that the media is an essential foundation of democracy, yet qualified this general statement by noting its peculiar vulnerability of confusing the public interests with the media's own interest. In that case, the public interest would have been served by passing on the information[188] to the relevant authorities, yet the defendant sought to publish the information in its national newspaper. The public interest was not served by this disclosure and, as the Master of the Rolls remarked, 'any wider publication could only serve the interests of the Daily Mirror.'[189] In *Corrs Pavey Whiting & Byrne*, Gummow J stated that disclosure to parties which had a 'real and direct interest' was permissible.[190] This illustrates that even if the defendant is able to justify the disclosure of confidential information, the courts will still intervene to ensure that any obligation of confidence is only broken *to the extent*[191] that conscience requires.

It is possible however, that the requirement of disclosure to the relevant authorities can also be used if the broad balancing view of the public interest defence is preferred. This is the effect of a statement by Lord Griffiths in *Attorney-General v Guardian Newspapers*[192] where his Lordship applied the broad view of the defence. He stated:

> Even *if the balance comes down* in favour of publication, it does not follow that publication should be to the world through the media. In certain circumstances the public interest may be better served by a limited form of publication perhaps to the police or to some other authority who can

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(c) unauthorised use of that information: see *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 213 and *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47-8. See also Richardson & Stuckey-Clarke n15, paras [1215-32].

185 See eg *Initial Services Ltd v Putterill* [1968] 1 QB 396 at 405-6; *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408 at 413-4, 416; *W v Egdell* [1990] 1 All ER 835 at 852-3.

186 See eg *Schering Chemicals Ltd v Falkman Ltd* [1981] 2 All ER 321.

187 [1984] 2 All ER 408.

188 In this case, illegally taped telephone conversations which revealed that a successful jockey had engaged in repeated breaches of certain Jockey Club regulations and had possibly committed criminal offences.

189 [1984] 2 All ER 408 at 413.

190 (1987) 14 FCR 434 at 458.

191 Finn, *supra* n. 8 at 506.

192 [1990] 1 AC 109.

follow up a suspicion...[193]

This restrain may therefore be employed as a limitation should a broad approach to the public interest defence be adopted.

NO THREAT OF FUTURE HARM

One reason underlying the decision in *Schering Chemicals Ltd v Falkman Ltd*[194] was that there was no threat of future harm to the plaintiffs if the obligation was broken. The drug which was at the centre of the case had been removed from the market and the defendants were without legitimate justification for breaching their obligations.[195] Lord Justice Shaw thought there was 'no occasion to beat the drum again.'[196]

PLACING THESE REQUIREMENTS WITHIN THE OVERALL APPROACH

Because of these two requirements for the disclosure of confidential information, it is submitted that a public interest defence with a limited scope better embraces the justification for limitations on the confidential information action.[197] Any information which exposes a grave iniquity, such as a crime, fraud, or serious misdeed will, on Gummow J's approach, lack the requisite confidentiality to give rise to a relationship of confidence. Alternatively, if the information is truly confidential, then by reference to the doctrine of unclean hands, relief will be denied to any plaintiff seeking to enforce an obligation of confidence. Further, even if a plaintiff is entitled to relief, the courts will ensure that the harm which disclosure would guard against is still present and that any such disclosure is to the relevant authorities only.

The limited approach ensures that the interests of privacy are not compromised (and importantly not compromised for trivial reasons).[198] A public interest defence which is narrow in scope also has the effect of shifting the court's focus – correctly it is submitted – onto the conduct of the plaintiff and defendant. Rather than determining whether the public has a right a know,[199] the relationship between the parties, the nature of the information, and the circumstances under which it was communicated become critical.[200]

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193 *Ibid* at 213.

194 *Supra* n. 117.

195 *Ibid* at 338.

196 *Id.*

197 Finn reaches a similar conclusion but specifically in relation to the balancing test: Finn, *supra* n. 8 at 507, Pizer, *supra* n. 2 at 73.

198 As was the case in *Woodward v Hutchins* [1977] 2 All ER 751. *Supra* n. 34-38.

199 As Lord Denning MR thought they did in 'truth in publicity' in *Woodward v Hutchins* [1977] 2 All ER 751.

200 It is worthy noting that such requirements form the basis of the confidential information doctrine. Such factors are ascertained by considering whether the information discloses an iniquity and whether the plaintiffs come to the court with clean hands.

CONFIDENTIAL GOVERNMENT INFORMATION

Any examination of the public interest defence must include an examination of the public interest which is inherent in the disclosure or retention of government information.[201] The government's own confidential information is treated somewhat differently from the confidential information of private individuals.[202] It appears that, in order for the Crown to restrain disclosure of government secrets, to not only show that the information is confidential, but also that it is in the public interest that it should not be published.[203] In *Commonwealth v John Fairfax & Sons Ltd*,[204] Mason J stated "... the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected."[205]

It can be seen then that government information stands in quite a different position from information of a private organisation or person. The equitable obligation of confidence has been fashioned for the personal, private and proprietary interests of the citizen.[206] Indeed, it has been recognised that governments are required to act in the public interest.[207] This consideration led McHugh JA in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd*,[208] to conclude that public, and not private, interest was the criterion by which equity determined whether to protect alleged confidential information of a government.[209]

In *Commonwealth v John Fairfax & Sons Ltd*,[210] Mason J stated:

> It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise Government action.[211]

As already noted,[212] Mason J declined to grant an injunction for breach of

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201 Dal Pont *et al*, n. 11 at p 137.

202 Evans, *supra* n. 16 at para [8.21].

203 *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 283 per Lord Goff relying on *Attorney-General v Jonathon Cape Ltd* [1976] QB 752 at 770 per Lord Widgery CJ, and *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 51-3 per Mason J.

204 (1980) 147 CLR 39.

205 *Ibid* at 52.

206 *Ibid* at 51-2.

207 *Id.* See also *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 191 per McHugh JA.

208 *Supra* n. 64.

209 *Ibid* at 191.

210 (1980) 147 CLR 39.

211 *Ibid* at 52.

212 *Supra* n. 80-84.

confidence although publication was likely to embarrass the Australian Government.[213] In order to restrain disclosure something 'inimical' to the public interest must be affected, such as national security, relations with foreign countries or the prejudicing of ordinary government business.[214]

This principle also extends to public authorities such as hospitals, as evidenced by the decision of *X v Y*.[215] In that case an employee of the plaintiff health authority supplied a newspaper reporter with information which identified two doctors carrying on general practice as being infected with the AIDS virus. The defendant newspaper sought to publish an article identifying the doctors, and the plaintiff sought an injunction restraining the publication. This was based on the fact that if the information were permitted to be disclosed, the authority's ability to carry out its public functions would suffer. Rose J held that this constituted a sufficiently serious detriment to restrain publication.[216]

CONCLUSION

It is predictable that since much of ordinary life occurs in full public glare, it will be increasingly more difficult to distinguish public knowledge from confidential information.[217] It is also recognised that the equitable duty of confidence is 'not absolute.'[218] In *Lion Laboratories v Evans*,[219] Griffiths LJ, as he then was, stated that 'the defence of public interest is now well established in actions for breach of confidence'.[220] Evans regards the public interest defence as settled in Australia.[221] However, as settled as the *existence* of the defence may be, it is also readily apparent that much uncertainty exists concerning its scope. Furthermore, this uncertainty is prejudicial to 'legitimate commercial, professional and other relationships which depend on trust and confidence to function effectively.'[222]

Indeed, it may be said that the application of a broad view of the public interest defence achieves nothing more than a system whereby 'judicial idiosyncrasy' determines on 'an ad hoc basis' disclosure which is, and which is not, justified as being in the public interest.[223] It is submitted that 'little need' exists for the

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213 (1980) 147 CLR 39 at 54. His Honour did however grant interlocutory injunctions for breach of copyright.

214 *Ibid* at 52.

215 *Supra* n. 79.

216 *Ibid* at 660-1.

217 Jones, *supra* n. 48, 472.

218 Pizer, *supra* n. 2, 108.

219 [1985] 2 All ER 417.

220 *Ibid* at 432. See *Corrs Pavey Whiting & Byrne* (1987) 14 FCR 434 at 451.

221 Evans, *supra* n. 16 at para [8.22]; cf Dal Pont & Chalmers, *supra* n. 23 at p 101.

222 Koomen, *supra* n. 9 at 84.

223 See *Corrs Pavey Whiting & Byrne* (1987) 14 FCR 434 and *Smith Kline & French* (1990) 22 FCR 73. Cf Dal Pont & Chalmers, *supra* n. 23 at p 103-4, who take a different approach, stating that confidential information principles should focus on the lack of

requirement of truth in publicity and any broad scope of the public interest defence.[224] The public interest that there is in knowing is adequately accommodated within a narrowly defined public interest defence.

In accordance with this view then, it is better to determine whether to allow disclosure by reference to iniquity and clean hands. Such analysis, it is submitted, is more in tune with the underlying conscionable basis of confidentiality doctrine and equitable principles in general.[225]

It is recognised that government information stands in a special position and therefore must be looked at 'through different spectacles.'[226] It may indeed be appropriate that a broad balancing approach to the public interest defence is best suited to government information. This appears to be the direction in which the authorities are heading;[227] yet, it must also be realised that private or personal information cannot be dealt with in this way.

In relation to private or personal information, it is more consistent with equitable doctrine, to apply an 'iniquity' principle rather than a broad 'freedom of the press' test. Indeed, in *British Steel Corp v Granada Television Ltd*,[228] Lord Wilberforce spoke in terms of iniquity and misconduct rather than in terms of a broader underlying public interest.[229] Additionally, with the limits which the law seeks to place on the any justified disclosure, a wider scope of a public interest defence cannot operate so as to achieve a more conscionable result than the narrow application of the iniquity rule. When iniquity and conscionable behaviour are combined with the other limitations upon any allowed disclosure,[230] this forms a sufficient concession to the public's right to know.[231] Such an approach establishes a more solid doctrinal basis for allowing an equitable obligation of confidence – should one be found to exist – to be broken. Moreover, the narrow approach will not promote a defence that is without precise definition and 'subject to vastly different and subjective

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public knowledge. However, as pointed out above, confidential information doctrine should more correctly focus on the relationship between the parties as giving rise to a right to prevent disclosure: see *Attorney-General v Guardian Newspapers (No 2)* [1990] 2 AC 109 at 281 per Lord Goff; and Finn, *supra* n.8 at 502.

224 Finn, *supra* n.8 at 507.

225 Cf Dal Pont & Chalmers, *supra* n.23 at p 108, who suggest that such an approach results in 'overriding' the basis of the defence.

226 *Commonwealth v John Fairfax & Sons* (1980) 147 CLR 39 at 51. Finn regarded the issue of confidential government information as concerned with the consequences which would flow from the revelation of the information: Finn, *supra* n. 8 at 508.

227 See eg *Commonwealth v John Fairfax & Sons* (1980) 147 CLR 39; *A v Hayden* (1984) 156 CLR 532; and the 'Spycatcher' cases.

228 [1981] 1 All ER 417.

229 *Ibid* at 455. See also *Science Research Council v Nasse* [1980] AC 1028 at 1067 per Lord Wilberforce.

230 That is, the restrictions that the harm must be present and not past, and that disclosure must only be made to the proper authorities.

231 Finn, *supra* n. 8 at 508.

interpretations.'[232] Any wider approach becomes unnecessarily invasive of privacy and an instrument of inconsistent, and unjust, application.

[232] Koomen, *supra* n. 9 at 88.