

## Confidential Information

Confidential Information – if no contract, equity. Contract may extend obligations beyond equitable requirements: <i>Maggbury v Hafele Australia</i> .	
Proposition	Application
General:	<p>Obligations of confidentiality have been recognised or imposed in relation to: <b>any</b> identifiable info that is secret/confidential.</p> <ul style="list-style-type: none"> <li>- Ideas which have not been developed or reduced to material form, such as a suggestion for a specific kind of television program: <i>Talbot v General Television Corp</i></li> <li>- An invention which, although not novel, has been kept relatively secret, such as a process for freeze drying mussels so as to produce a remedy for arthritis (<i>Aquaculture Crop v New Zealand Green Mussel Co</i>) or the source code of a computer program: <i>CA inc v ISI Pty Ltd</i></li> <li>- Other technical information, such as the details as to the design, construction and operation of a particular machine: <i>Ansell Rubber Co v Allied Rubber Industries</i>.</li> <li>- Confidential customer requirements: <i>Thomas Marshall v Guinle</i>.</li> </ul> <p>Trivial information may not be protected –must have some value: <i>Coulthard v SA</i>. May inform remedies: <i>Stephens v Avery</i>.</p> <p><i>Australian Broadcasting Corp v Lenah Game Meats</i>: Injunctive relief (preventing airing of footage of a slaughterhouse’s operations) could not be granted merely on the basis that the ABC’s conduct was in some sense unconscionable (breaking in to get the footage).</p> <ul style="list-style-type: none"> <li>- Nothing demonstrably confidential about the activities that were filmed, thus ruling out an action for breach of confidence, and the ABC had not been party to the illegal filming (activists).</li> </ul> <p>Lower courts prepared to recognise a tort of invasion of privacy, at least for individuals: <i>Doe v Australian Broadcasting Corporation</i>. Higher courts more reluctant: <i>Kalaha v Cth</i></p>
Identifying the Plaintiff:	
Owner of information:	<p>Absent express agreement to the contrary, employer has the right to sue for breach – with D being the employee who created the information. If A and B each have info, and employee of A threatens to leak info, A may sue but B may not.</p> <p>Where joint effort has produced the information and no agreement can be discerned on the matter, the position appears to be that each of the parties concerned will be able to enforce confidentiality against others to whom they make disclosures, but not against each other: <i>International Scientific Communications v Pattison</i>.</p>
Establishing Liability – Three Elements: <i>Coco</i> .	
Information must have the necessary quality of confidence about it.	<p>Degree of secrecy:</p> <ul style="list-style-type: none"> <li>- Test is always whether, in the particular circumstances, ‘relative secrecy’ can be identified (<i>Missingham v Shamin</i>) a matter simply not susceptible to precise formulation.</li> </ul>

Confidential Information

<p>Effect of loss of secrecy on obligations of confidence:</p> <p>Springboard Doctrine:</p>	<ul style="list-style-type: none"> <li>- P must attempt to specify with some care what is confidential – a global claim covering a wide range of information will be rejected, no matter how clear it is that some of the information is secret: <i>O'Brien v Komesaroff</i>.</li> <li>- <i>Ansell Rubber</i>: made it clear to employees that apparatus was confidential, and effective measures taken to ensure that it was clear that it was confidential.</li> <li>- So long as the information is not in the public domain, it may be the subject of an obligation of confidence: <i>Saltman Engineering v Cambell Engineering</i>.</li> <li>- <i>Franchi v Franchi</i>: Merely making the info accessible destroyed secrecy given the vigilance of the relevant public.</li> <li>- <i>EPP National Buying Group v Levy</i>: information put on a website, available on internet considered public domain.</li> <li>- <i>Mars v Teknowledge</i>: product put on market and reverse engineered – no longer secret.</li> <li>- <i>AFL v The Age</i>: Speculation, gossip, or even assertion from an anonymous source, incapable of being verified or held accountable – not in the public domain.</li> </ul> <p>So long as the information has been published by someone else AND so long as the confidant has not previously been using the information in an unauthorized manner, then (subject to springboard doctrine) there is no sense in placing a continuing disability on the confidant in relation to information which everyone else is free to use: <i>Peter Pan Manufacturing Corp v Corsets Silhouette</i>.</p> <p><i>Aquaculture v NZ Green Mussel</i>: Preventing people from getting to the market quicker than they otherwise would because of the information.</p> <ul style="list-style-type: none"> <li>- Communicated in confidence; third party communicated to press and info got out. Person who owed obligation wasn't responsible for disclosure but had advantage.</li> <li>- Temporary injunction.</li> </ul>
<p>Receipt of information in confidence:</p>	<p>Person must have some understanding at the time of receiving the relevant information that they are obtaining it for a limited purpose before they can be termed a confidant: <i>Smith Kline &amp; French Laboratories v Secretary, Department of Community Services and Health</i>. May be obvious in all the circumstances, industry practice, fiduciary relationship.</p> <ul style="list-style-type: none"> <li>- Pre-existing relationship, which is inherently confidential, whether in terms of personal intimacy or professional ethics, the requisite understanding may readily be inferred: <i>Argyll v Argyll</i>.</li> <li>- Commercially too – more so in joint ventures: <i>Coco v A N Clark</i>. Employment too.</li> <li>- Disclosure in the course of a casual conversation: obligation of confidence does not arise: <i>Abraham v Biggs</i>.</li> </ul> <p>Absence an inference of relationship conferring confidence – must consider the circumstances:</p>

Confidential Information

	<ul style="list-style-type: none"> <li>- If the communication has been solicited by the recipient and the information is obviously sensitive, it will be easy to infer confidentiality: <i>Johns v ASC</i></li> <li>- Where unsolicited, turns on the extent to which the recipient has been afforded an opportunity to accept or reject the confidence: <i>Fractionated Cane Technology v Ruiz-Avila</i>.             <ul style="list-style-type: none"> <li>- D had not been given the opportunity of rejecting the attempted disclosure or of refusing to conduct the trials. Confidence cannot be forced upon an unwilling recipient.</li> </ul> </li> <li>- Behavior: if unsolicited confidential details are sent by mail, it may be by the decision to read through them rather than return them instantly, may reasonably be supposed to have accepted an obligation of confidentiality.</li> </ul> <p>Acquisition without consent:</p> <ul style="list-style-type: none"> <li>- <i>Franklin v Giddins</i>: unlawful acquisition held to have infringed P's rights.</li> <li>- Information blurted out in public cannot be protected: <i>Coco</i></li> <li>- A person who utters confidential information must accept the risk of any unknown overhearing that is inherent in the circumstances of communication: <i>Malone v Commissioner of Police of the Metropolis (No 2)</i>. Risks inherent.</li> </ul>
<p>Unauthorised use or disclosure:</p> <p>Detriment:</p>	<p>Where the information has been disclosed for a limited purpose, the confidence crystallises around that limited purpose, so that use or disclosure for any other purpose will amount to a breach of confidence: <i>Telstra Corp v First Netcom</i>.</p> <p>Intention irrelevant: Liability attaches where the confidant negligently allows others to learn of the information (<i>Weld-Blundell v Stephens</i>) or discloses it by error (<i>Interfirm Comparison v Law Society of NSW</i>) or subconsciously plagiarizes the confider's secret idea: <i>Talbot v General Television Corp</i>).</p> <p>Requirement of detriment:</p> <ul style="list-style-type: none"> <li>- Established merely by the P's desire to avoid criticism or embarrassment (<i>Cth v John Fairfax &amp; Sons</i>) or the infliction of harm on another person: <i>AG v Guardian Newspapers</i>. Publication; without acknowledgement; lack of payment.</li> </ul>
<p>Third party liability:</p>	<p>Any person who receives information as a result of another's breach of confidence may be liable for using or disclosing it, or restrained from doing so, once they have actual or constructive notice of the breach: <i>Talbot v General Television Corp</i>.</p> <p>Mitigation:</p> <ul style="list-style-type: none"> <li>- <i>Wheatley v Bell</i>: no bona fide purchase for value.</li> <li>- A range of factors, of which innocence and change of position are merely the most compelling, may lead a court to treat such Ds somewhat more leniently than they would the original confidant: <i>Retractable Technologies v Occupational and Medical Innovations</i>.</li> </ul>

Confidential Information

Defences:	
Justified disclosure:	Liability avoided where there is just cause or excuse of disclosing the information in question: <i>Fraser v Evans</i> .
Iniquity Rule:	<p>There is no confidence as to the disclosure of iniquity: <i>Gartside v Outram</i>.</p> <ul style="list-style-type: none"> <li>- Iniquity includes any misconduct of such a nature that it ought in the public interest be disclosed: <i>Initial Services v Putterill</i>.</li> <li>- Public interest requirement may reject application to ‘trivial’ wrongs (<i>A v Hayden</i>) or to past misconduct whose repeat is not threatened and which lacks present relevance: <i>Distillers v Times Newspapers</i>.</li> <li>- <i>Cth v John Fairfax</i>: The principle makes legitimate the publication of confidential information or material in which copyright subsists so as to protect the community from destruction, damage or harm.</li> </ul>
Principal element:	<p>Disclosure:</p> <ul style="list-style-type: none"> <li>- Must be made to the proper authorities: <i>AG v Heinemann Publishers Australia</i>.</li> <li>- <i>Lion Laboratories</i>: given the government’s unbending public support for the faulty Intoximeter products, and the mounting disquiet about its reliability, it was acceptable for the confidants’ fears to be aired through the media.</li> <li>- A mere allegation is not sufficient to justify disclosure and the confidant must make out a prima facie case that the allegations have substance: <i>AG v Guardian Newspapers</i>.</li> </ul>
Public interest:	<p>Not accepted in Australia. <i>Lion Laboratories v Evans (UK)</i>: Public interest as people being wrongly convicted.</p> <ul style="list-style-type: none"> <li>- <i>Cth v Fairfax</i>: Mason J contemplated possibility of public interest.</li> <li>- Only to disclose to authorities: <i>Sullivan v Sclanders</i>. Documents stolen, faxed off, replaced – argued it was evidence of fraud. Only reporting to authorities is acceptable, not disclosure to the media.</li> </ul>
Remedies:	
Interlocutory relief:	<p>If P’s claim is to prevent publication, and pecuniary relief is inadequate, strong claim to this remedy otherwise trial would be pointless: <i>AG v Guardian Newspapers</i></p> <p>Particular factors which may bring the balance of convenience down against P include: the damage that might be suffered by a D who has already geared up to exploit the information (<i>Concept Television v ABC</i>), especially where P is not trading in the same market (<i>Coco v Clark</i>); the weakness of P’s case (<i>ANI Corp v Celtite Australia</i>).</p>
Final injunction:	So long as the underlying thrust of the doctrine of breach of confidence is to protect the confider’s interests rather than punish confidants, injunctive relief, should not be granted for Ds profitable use of the information even though the profits are not being made at Ps expense.

Confidential Information

	<p>Unclean hands will prevent injunctive relief. Must be some relationship between the impropriety and the relief being sought: <i>Talbot v General Television Corp</i></p> <ul style="list-style-type: none"> <li>- Where P uses deplorable means to protect the information: <i>Hubbard v Vosper</i></li> <li>- Refusing to respect Ds confidentiality in return.</li> </ul>
<p>Appropriateness of injunctions:</p>	<p>Where does the balance of convenience lie?          Would damages be an adequate remedy?          Has there been undue delay?          Has the information entered the public domain?</p>
<p>Ancillary Relief:</p>	<p>Destroy Ds property which has been independently created by D in order to exploit the information even though the wastefulness of such an exercise may well militate against such an order being granted: <i>Ormonoids Roofing &amp; Asphalts v Bitumenoids</i>.</p>
<p>Pecuniary:</p>	<p>Either account of profits or compensation (returned to prior position: <i>Talbot</i>) for any loss: <i>Optus Networks v Telstra Corp</i>.</p> <ul style="list-style-type: none"> <li>- Usually where info already out there as injunction not helpful anymore.</li> <li>- <i>Acquaculture v NZ Green Mussel</i>: exemplary damages are possible.</li> </ul>