TAKING PHOTOGRAPHS ‘IN PUBLIC’: WHAT’S LAWFUL AND WHAT’S NOT?

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Table Of Contents

Executive Summary........................................................................................................................................... 4

Introduction ..................................................................................................................................................... 7

Victorian and Commonwealth Law ................................................................................................................. 7

The law and the reality .................................................................................................................................... 7

Disclaimer ....................................................................................................................................................... 8

Part 1 – Some General Principles ................................................................................................................. 8

Human Rights .................................................................................................................................................. 9

Criminal liability ............................................................................................................................................... 9

Private legal rights/ Common law and non-criminal legislative liability ......................................................... 9

Overlap between criminal liability and private liability ................................................................................. 10

Part 2 - Taking Photographs in Public: Potential criminal offences ......................................................... 10

1. Trespass to Land – s9(1) (e)-(g) Summary Offences Act 1966 ................................................................. 10

2. Visually capturing genital or anal region – s41B Summary Offences Act 1966 ............................ 12

3. Behaving in an offensive or insulting manner – s17(1) Summary Offences Act 1966. 12

   The case law .............................................................................................................................................. 13

   Implications for Public Photography ....................................................................................................... 14

4. Producing child pornography – s67 Crimes Act .................................................................................. 15

5. Specific Legislation Controlling Specific Sites .................................................................................. 15

   Commonwealth Reserves ......................................................................................................................... 15
Victorian Parks, State Forests and other landmarks .................................................. 16

Defence Force Sites ........................................................................................................ 18

Local Council restrictions on Photography ............................................................... 19

Part 3 - Possessing and Distributing Photographs: Potential criminal offences .......... 19

1. Offensive, insulting, indecent behaviour ............................................................... 19

2. Distribution of image of genital or anal region – s 41C Summary Offences Act 1966 (exceptions – s41D) ................................................................. 20

3. Possession of child pornography and distribution – s70 Crimes Act 1958 ............ 20

4. Classification of material – Federal laws ............................................................... 20

Part 4 - Civil Liability for Taking Photographs in Public ............................................. 20

1. Trespass .................................................................................................................. 20

2. Nuisance and Privacy ............................................................................................ 21

3. Breach of Confidence ........................................................................................... 23

   Defence of public interest ...................................................................................... 24

4. Self-regulation of invasion of privacy ................................................................. 24

5. Contract rights ..................................................................................................... 24

Part 5 – Civil Liability for Possessing and Distributing Photographs ......................... 25

1. Misleading and deceptive conduct ...................................................................... 25

2. Copyright ............................................................................................................... 26

3. Breach of Confidence .......................................................................................... 28

4. Trespass ................................................................................................................. 28

5. Nuisance ............................................................................................................... 28

6. Contract ............................................................................................................... 28

Part 6 - Remedies ......................................................................................................... 29

1. Damages ................................................................................................................. 29

2. Injunctions .............................................................................................................. 29

3. Self-Help ............................................................................................................... 29

Part 7 - Hypothetical Scenarios ................................................................................... 30
Scenario 1: .................................................................................................................. 30
Scenario 1a) ............................................................................................................... 30
Scenario 1b) ............................................................................................................... 30
Scenario 1c) ............................................................................................................... 31
Scenario 1d) ............................................................................................................... 31
Scenario 1e) ............................................................................................................... 33
Scenario 1f) ............................................................................................................... 33
Scenario 1g) ............................................................................................................... 33
Scenario 1h) ............................................................................................................... 34
Scenario 2: ............................................................................................................... 34
Scenario 3: ............................................................................................................... 35
Scenario 3a) ............................................................................................................... 35
Scenario 3b) ............................................................................................................... 36

Part 8 - Selected Websites of Policies, Contracts, and Guidelines concerning Photography
................................................................................................................................. 36

1. Museums and Libraries:...................................................................................... 36
2. Public Transport:................................................................................................. 36
3. Sports Clubs and Associations:.......................................................................... 37
4. Laws and Regulations re photography in Commonwealth Reserves:............... 37
5. Other relevant legislation: .................................................................................. 38
6. Other:.................................................................................................................... 38
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Executive Summary

Digital technology nowadays enables anyone to capture, reproduce, and distribute images anywhere, anytime, at the push of a button. As a result, in recent times the conduct of photographers – both amateur and professional – has increasingly come under scrutiny, and was the subject of much controversy. At the heart of the public discussion remains the question: (When) is the taking of photographs ‘in public’ lawful? This manual outlines the complex array of legal limitations that photographers in Victoria should be aware of before pursuing another project. It does not constitute detailed legal advice.

Although broadly speaking, in Australia, you are entitled to do anything unless there is a law that prevents or restricts the activity in question, a variety of Commonwealth and Victorian legislation is in place which may restrict or prevent the capturing of images in public. Such limitations may also apply to the possession and/or distribution of photographs taken in public. Depending on who is entitled to object to the taking of photographs, legal limitations may arise from two different types of illegality, criminal and civil liability, which occasionally might overlap.

1. **Criminal liability** is imposed by common law and altered by legislation; relevant Victorian criminal offences are set out in the *Crimes Act 1958* and *Summary Offences Act 1966*. Criminal legislation is enforced by the State through criminal prosecution.

Potential criminal offences arising from the taking of photographs are:

- Trespass. Section 9(1)(e)-(g) *Summary Offences Act 1966* (Vic), where a photographer enters onto a private property without lawful excuse or permission of the lawful owner occupier or occupier, or remains on the property after the permission to enter has been redrawn. This also applies to places that are classified as a ‘public place’ but are privately owned;

- Visually capturing genital or anal region of another person. Section 41B *Summary Offences Act 1966* (Vic), where undertaken intentionally and in circumstances in which it would be reasonable for the other person that his or her relevant region could not be captured, e.g. “upskirting”;

- Behaving in an offensive or insulting manner. Section 17(1) *Summary Offences Act 1966* (Vic), which applies where a person in or near a public place or within view or hearing of any person or passing therein or thereon behaves in a riotous indecent offensive or insulting manner. This offence
may apply to the taking of a photograph as well as to the distribution of such a photograph if the manner and context in which the image is displayed is considered offensive or insulting;

- Producing child pornography. Section s67 Crimes Act 1958 (Vic), which includes the taking of a photograph that describes or depicts a person who is, or appears to be, a minor engaging in sexual activity, or in an indecent sexual manner;

- Violations of specific legislation that controls photography in specific sites, such as Commonwealth Reserves, Victorian State Parks, State Forests, Parks and other landmarks or local council areas. In particular, failure to obtain a required permit or to comply with the conditions of the permit will constitute an offence. Defence Sites are off-limits to any kind of photography.

Potential criminal offences relating specifically to the possession and distribution of photographs are

- Distribution of images that visually capture the genital or anal region of another person, s41C Summary Offences Act 1966 (Vic);

- Possession and distribution of child pornography, s70 Crimes Act 1958 (Vic);

- Violation of federal classification legislation such as the Classification (Publications, Films and Computer Games) Act 1995 (Cth).

2. Civil liability – the contravention of the civil rights of another person. Such rights may result from common law or contractual agreements. Usually only the person with the relevant legal rights may take private legal action, such as court action for remedies, including injunctions, specific actions or damages, or self-help.

Civil liability for taking photographs in public may arise out of the following:

- Trespass. The case law however is ambiguous in relation to instances where a person remains on private property pursuant to obtaining a contractual right to enter.

- Nuisance and privacy. In limited circumstances where a photographer captures images from outside a private property, this might constitute an unreasonable interference with a recognised right in the property. In particular repeated action that by virtue of repetition interferes with the enjoyment may be nuisance. A right of privacy per se however, does not yet exist in Australia;

- Breach of Confidence. The contravention of a legal obligation not to divulge confidential information where a reasonable person would realise that the information is of confidential nature and the person receiving the information is required to maintain that confidentiality. In relation to
photographs these could apply to images of a private activity if the image is considered as confidential information, but a possible defence could be the public interest in that information.

- Self-regulation of invasion of privacy, media organisations, for example the Australian Press Council, engage in self-imposed monitoring of invasions of privacy;
- Contractual rights, can impose conditions or restrictions on the taking of photographs.

Further civil liabilities may arise from the possession and distribution of photographs taken in public:

- Misleading or deceptive conduct, in particular unauthorised use of an image of another person in promotional activities that would suggest an endorsement of the advertised product by the person whose image is used. Such conduct would be in violation of s52(1) Trade Practices Act 1974 (Cth), and s9(1) Fair Trading Act 1999 (Vic);
- Copyright. In general the author of an image – i.e. the photographer – owns the copyright in it, thus being entitled to restrict its reproduction, publication or communication online. However, there are exceptions to this rule, and the distribution of an image by the photographer may infringe another person’s copyright;
- Breach of confidence. Just like the capturing of images depicting private activity that is considered confidential, the distribution of such images would be a breach of confidence;
- Trespass. Distribution of photographs that were taken during trespass can be prevented if the distributor was party to the trespass;
- Nuisance. Where the taking of a photograph constituted a nuisance the distribution of that image may also be nuisance;
- Contracts. Contractual agreements may impose restrictions on the distributions, e.g. agreements between model and photographer regarding the use of the images.

When civil liability for the taking of a photograph in public, or the distribution of such an image is considered, possible remedies include exemplary or punitive damages, an injunction, or self-help by the person whose civil rights are contravened.
**Introduction**

The legal issues surrounding the taking of photographs in public and distribution of those photographs are, regrettably, complex. The basic starting point is that, in Australia, you are entitled to do anything unless there is a law that prevents or restricts the activity in question. In turn, this means that there may be a variety of different laws that prevent or restrict the taking and/or distribution of photographs.

Before discussing the detail of the relevant legal principles, Part 1 of this Manual discusses some general legal concepts that need to be understood. Those who already understand such principles can skip this part. Alternatively, if those general concepts are just a little esoteric, you may wish to go directly to the second and subsequent parts of the Manual.

Part 2 of the Manual deals with the potential criminal liability for taking photographs in public. Part 3 deals with the potential criminal liability for possessing and distributing such photographs. Part 4 deals with the potential civil liability for taking photographs in public and Part 5 deals with the potential civil liability for possessing and distributing such photographs.

Finally, Part 6 of the Manual discusses a number of different scenarios relating to the taking and distribution of photographs. The discussion of these specific scenarios is intended to provide some further insight into the application of the legal rules and principles discussed in Parts 1-5.

**Victorian and Commonwealth Law**

The legal commentary is based on Victorian and Commonwealth law. The law in other jurisdictions may be different although some of the general principles are applicable to all Australian jurisdictions.

**The law and the reality**

It is one thing to know your legal rights and obligations. It is an almost entirely separate matter to enforce those rights and to have those obligations enforced against you. In many instances, the breach of the rights or the contravention of obligations may be relatively trivial. In those circumstances, it is unlikely, but by no means impossible, that legal action will ensue through the courts. The more important issue in the immediacy of any situation will be the ability of either party to engage in self-help, corrective or preventive measures that can be lawfully undertaken by a private citizen without a court order or authority. For example, a land owner, after asking you to leave his or her property, may use reasonable
force to remove you from that property if you refuse to leave voluntarily. Equally, if a photographer is on public land and not taking photographs in a manner that contravenes any criminal law or the private rights of another person, the photographer is entitled to take those photographs. However, the enforcement of those rights via self-help depends on an ability to do so.

If the photographer is confronted by an angry mob bearing weapons and demanding that he or she desist, the photographer will derive small comfort from being in the right and insisting on taking the photographs and greater comfort from doing as the mob demands. Discretion is the better part of valour. Knowledge of the legal position may be of assistance in explaining the situation to another party but it provides no guarantee of protection from assault, abuse or other action that makes it impossible or unpleasant to exercise a legal right.

Disclaimer

While this Manual attempts to provide accurate information in relation to the legality of photography, it does not constitute legal advice. If it did, it would be accompanied by a bill for legal services. In addition, laws change as do the practices of those with legal rights to prevent photography such as occupiers of land who may or may not object to photography on their land.

You should acquire legal advice in relation to specific activity.

Part 1 – Some General Principles

One of the difficulties with saying that a particular activity is ‘illegal’ is that there are different types of illegality. The nature of the illegality will determine who is entitled to object to the photography. It will also determine the consequences of the activity in question. Basically, there is criminal liability and civil liability. The former arises when a crime is committed and the State will enforce the liability by a criminal prosecution. The latter involves contravening the civil (private) legal rights of another person and that person may take private legal action to enforce his or her rights. This action may take the form of court action for various types of remedies such as injunctions (a court order telling you not to take certain action), specific performance (a court order requiring you to perform a contractual obligation) and damages (a court order requiring you to pay money for the legal harm done to another) or it may take the form of self-help in which a person takes lawful action by themselves to enforce their rights.
As a general rule, our legal system operates on the basis that any activity is permitted unless there is a law that prohibits or restricts that activity. So the starting point is that photography is lawful unless there is a legal impediment to the taking, possession and/or distribution of the photographs in question. Unfortunately, there are quite a few such legal impediments to photography. The sources of these legal impediments are wide and varied. So there is little choice but to understand and know about all the different bases upon which there may be a legal objection to some particular activity by a photographer.

**Human Rights**
In addition to the ‘negative’ right to do whatever is not specifically prohibited, the Victorian Charter of Human Rights provides some very limited protection for photography under the right to freedom of expression which includes the freedom to ‘impart information and ideas of all kind, by way of art or in another medium.’ This freedom is subject to laws relating to respecting the rights and reputations of other people and the protection of national security, public order and morality. In any event, the right does not override legislation although legislation may be interpreted so as to be consistent with the right in circumstances where the legislation is ambiguous.

**Criminal liability**
In Victoria, criminal liability is imposed by the common law (judge made law), as altered by legislation from time to time. Legislation ‘trumps’ the common law and it can create new criminal offences, abolish old offences or alter the definitions of various offences and the defences to them.

Most of the criminal offences in Victoria are referred to in some way in the Crimes Act or the Summary Offences Act. It is these pieces of legislation that are most likely to apply to photographs taken in public and their subsequent distribution.

**Private legal rights/ Common law and non-criminal legislative liability**
Individuals may have legal rights that they can assert against other individuals. These rights are recognised by either the common law or relevant legislation that confers rights on particular individuals that they may then assert by way of legal action. The rights are private

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3. See ss1(2)b; 32(1) *Charter of Human Rights and Responsibilities Act 2006* (Vic): Statutory provisions must be interpreted in a way that is compatible with human rights so far as is possible to do so consistently with their purpose.
4. The *Crimes Act 1958* (Vic) and *Summary Offences Act 1966* (Vic).
rights in the sense that usually it is only the person with the relevant legal rights who can take action to enforce them.

Some examples may assist an understanding of the issues. If a photographer and another person enter into a legally binding contract about the taking and distribution of photographs, each party to the contract can enforce that contract. The contract is a private legal arrangement between the two parties and, subject to some technical exceptions, they are the only two parties that can enforce the contract. The nature of the enforcement is quite different from the enforcement of criminal liability. Instead of the State imposing a sanction such as imprisonment, a fine, an obligation to undertake community service or some other penalty, the party to the contract whose contractual rights have been broken may seek a personal remedy. The remedy may include seeking damages, an injunction or, more rarely, an order requiring the contract to be specifically enforced. In addition, the wronged party may be able to terminate the contract and thereby end its further obligations under the contract.

Another example of private legal rights that may impact on photographers is that the lawful occupier of land, such as the owner or a tenant, is able to impose conditions on anyone who wishes to enter or remain on their land. If the owner or occupier requires a person to leave, they are legally obliged to do so.

Overlap between criminal liability and private liability
The matter can become slightly more complicated by the fact that, in some circumstances, the one act may both incur some private liability and constitute a criminal offence. A number of criminal offences have been created to enable the State to also enforce private legal rights. For example, refusing to leave a person’s private property when asked by them to do so constitutes both a trespass against the private property rights of the land owner and a criminal offence of trespass. The consequence is that the same act can have both criminal and civil consequences.

Part 2 - Taking Photographs in Public: Potential criminal offences

1. Trespass to Land – s9(1) (e)-(g) Summary Offences Act 1966
This issue is relatively straightforward. You cannot go onto private property without either lawful excuse or the permission of the owner or the person who is the lawful occupier of the property, such as the tenant. Even if you have permission to enter the property, the permission might be withdrawn. It might be withdrawn because the owner or occupier objects to your photography. If you enter the property without permission or stay after the permission is withdrawn, you commit an offence under s9 of the Summary Offences Act.
One of the confusing aspects of this area of law to many people is the nature of a public place and a private place. The fact is that many places have both public and private aspects. They are public in that members of the public are permitted to enter but private in the sense that they are either privately owned or occupied by an individual or a company. An obvious example is a shopping centre. The centre is a public place in that, as a general rule, members of the public are obviously welcome to enter the centre. At the same time, it is a privately owned property and the owner occupier or occupier is perfectly entitled to refuse entry to any or all people at any time and to require any or all people to leave at any time.

The upshot is that the owner occupier of the centre, or those acting on their behalf, can tell you that you cannot take photographs in their centre. They can require you to leave if you insist on doing so. They can also place conditions on your original entry into their centre such as prohibiting you from taking photographs by placing a prominent sign up to that effect.

It is also possible to be guilty of trespassing in a public place by not leaving such a place after being told to do so by the owner occupier or a person authorized by or on behalf of the owner or occupier. The Summary Offences Act speaks of two different types of public place, namely, a public place and a Scheduled public place.5

Again, the dichotomy in use of the terms ‘public’ and ‘private’ is potentially confusing. Many of the places defined in the legislation as public places6 are, in fact, privately owned or occupied. For example, licensed premises and churches and church halls where services are being conducted are included in the definition of a public place as too are race courses and cricket and football grounds and any railway station or platform.7

A Scheduled public place is more easily defined8 and it is easier to prove an offence of trespass in such a place because, by their nature, they are places where one would expect that only a small percentage of the public would have good cause to go. The Summary Offences Act has a Schedule to it which defines a Scheduled public place. Such places include schools, residential areas for those with disabilities, mental health institutions and public cemeteries. For the purposes of the Summary Offences Act, Scheduled public places are treated the same as private places.

The end result is this. If the place is a private place, you can be prevented from entering for the purpose of taking photographs. Even if you are allowed to enter, you may be required to leave at any time. The same applies to Scheduled public places. If the place is a public place, as defined in the Summary Offences Act, you may still be required to leave the place in question. The real issue will be who has the power to request you to leave and that is usually the occupier, the person or organisation in charge of the area in question, or someone authorised by them. For example, a local council may give control over a beach to a surf life saving association for a day or part of a day, thus entitling the association to exclude people from the area for that period of time.

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5 See s9 subs (d)-(g) Summary Offences Act 1966 (Vic).
6 See definitions in s3 ‘public place’ Summary Offences Act 1966 (Vic).
7 Ibid.
8 See Schedule 1 Summary Offences Act 1966 (Vic).
2. Visually capturing genital or anal region – s41B Summary Offences Act 1966

It is an offence to intentionally visually capture another person’s genital or anal region in circumstances in which it would be reasonable for that other person to expect that his or her genital or anal region could not be visually captured.\(^9\) The offence relates to bare genital or anal regions or those covered by underwear.\(^10\)

The offence is intended to prevent activities such as photographing people in public dressing rooms in states of undress. It was introduced as part of the Summary Offences Amendment (Upskirting) Act 2007, and particularly designed to outlaw the practice of ‘upskirting’,\(^11\) i.e. the covert taking of photographs underneath clothing.

3. Behaving in an offensive or insulting manner – s17(1) Summary Offences Act 1966

An offence that has regularly been relied upon to prohibit photography in public is that of behaving in an offensive manner. ‘Any person who in or near a public place or within the view or hearing of any person being or passing therein or thereon behaves in a riotous indecent offensive or insulting manner’ is guilty an offence under s17(1) of the Summary Offences Act 1966 (Vic). An equivalent provision in New South Wales has been used to either prosecute or for police to confront people taking pictures on beaches such as Coogee and Bondi.\(^12\)

What constitutes behaving in an offensive manner is difficult to define. As the offence is a relatively minor one and the penalties are also relatively minor, there have not been many appeal decisions relating to the offence although the provision is used extensively in the Magistrates Courts of each State.\(^13\)

There has been one decision by the High Court of Australia (the highest court in Australia) on the meaning of insulting behaviour and a Victorian Supreme Court decision that applies the

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\(^9\) See s41(B) Summary Offences Act 1966 (Vic).
\(^10\) See s40 Summary Offences Act 1966 (Vic).
\(^13\) See eg Crime and Justice Statistics Queensland 1998-9 at www.oesr.qld.gov.au/products/publications/crime-justice-stats-qld/. In 1998-9, 823 people were charged with abusive or obscene or insulting language and 824 people were charged with indecent or offensive behaviour.
decision. Most of the cases relating to this offence involve insulting, offensive or obscene language rather than other behaviour such as taking photographs in public places. In addition, the behaviour is often directed at police officers whereas photography in public is rarely so directed. Consequently, we need to attempt to predict the application of the relevant principles to photography in public.

**The case law**

The High Court decision of Coleman v Power\(^{14}\) was a contentious case. It involved the distribution of pamphlets in a public place in Townsville, the local mall. The pamphlets accused named police officers of various forms of misconduct, including corruption. Coleman was charged with an offence which prohibited ‘using insulting words to any person’.

The seven judges of the High Court wrote six different judgments relating to the offence in question. Much of the case turned upon Constitutional law issues relating to the validity of the legislation and whether it unduly impinged on a Constitutional right recognised in earlier High Court decisions to engage in political communication.

The majority of judges found that because of that Constitutional right, the defendant had not committed the offence of using insulting words to any person. However, there was also considerable disagreement between the judges as to what constituted insulting words in the context of the legislation in question. Three judges took a very restrictive view of the meaning of the words (Kirby, Gummow and Hayne JJ). Those judges took the view that the offence only arose if the effect of the words was likely to provoke violence.\(^{15}\) Three judges took a wide view (McHugh, Callinan and Heydon JJ) with it being sufficient that they were used in a public place and were calculated to hurt the feelings of a person and did affect the feelings of that person.\(^{16}\) The effect was that the swinging vote on the issue was that of the Chief Justice Gleeson who took an approach somewhere between the restrictive interpretation and the wide interpretation.

He made the following observations:

> 12. Concepts of what is disorderly, or indecent, or offensive, vary with time and place, and may be affected by the circumstances in which the relevant conduct occurs. The same is true of insulting behaviour or speech. In the context of legislation imposing criminal sanctions for breaches of public order, which potentially impairs freedom of speech and expression, it would be wrong to attribute to Parliament an intention that any words or conduct that could wound a person’s feelings should involve a criminal offence. At the same time, to return to an example given earlier, a group of thugs who, in a public place, threaten, abuse or insult a weak and vulnerable person may be unlikely to provoke any retaliation, but their conduct, nevertheless, may be of a kind that Parliament intended to prohibit.

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\(^{14}\) Patrick John Coleman v Brendan Jason Power & Ors [2004] HCA 39; 220 CLR 1; 209 ALR 182; 78 ALJR 1166 (1 September 2004).

\(^{15}\) Ibid. at par 200 (Gummow and Hayne JJ); par 256 (Kirby J).

\(^{16}\) Ibid. at par 64 (McHugh J); par 302 (Callinan J); par 323 (Heydon J).
13. There is a similar problem in applying the concept of offensive behaviour, which often arises in relation to conduct undertaken in the exercise of political expression and action. In Ball v McIntyre[14], Kerr J considered the conduct of a student who demonstrated against the Vietnam War by hanging a placard on a statue in Canberra. He decided that the behaviour was not offensive within the meaning of the Police Offences Ordinance 1930-1961 (ACT) even though some people may be offended by it. He said[15]:

"The word 'offensive' in [the Ordinance] is to be found with the words 'threatening, abusive and insulting', all words which, in relation to behaviour, carry with them the idea of behaviour likely to arouse significant emotional reaction."

He said that what was involved had to be behaviour that would produce, in the reasonable person, an emotional reaction (such as anger, resentment, disgust or outrage) beyond a reaction that was no more than the consequence of a difference of opinion on a political issue.17

The views of the Chief Justice in Coleman v Power were considered by Harper J in the Victorian Supreme Court decision of Ferguson v Walkley.18 He concluded that the definition of insulting behaviour adopted by the Chief Justice was ‘whether the impugned behaviour is so deeply or seriously insulting, and therefore so far contrary to contemporary standards of public good order, as to warrant the interference of the criminal law’.19

Implications for Public Photography
So what does all of the above mean as to when taking photographs in public will constitute behaving in an offensive manner? A few points can be made:

1. Someone will have to be offended or the police will have to form the view that they or others have been offended.
2. Even if particular individuals are offended, this does not mean that the behaviour is offensive. The test is whether a ‘reasonable person’ would be offended and even then the degree of offence must be so great that the conduct is to be considered contrary to contemporary public standards to such a degree as to warrant the interference of the criminal law.
3. The totality of the behaviour will have to be considered. So the issue will turn on what photos were taken of whom and in what circumstances. For example, a panoramic shot taken on a beach that takes in a number of sunbathers is less likely to be offensive than one involving a photographer walking up very close to a beach goer and zooming in on their left buttock, even if it is covered by a swimming costume. Other factors that might be relevant would be the course and duration of conduct, such as walking down a crowded beach and taking close up photos of every single person or every person who falls into a particular category, the manner in

17 Ibid. at paras 12-13 (Gleeson CJ).
19 Ibid. at par 42.
which the photographer engages with people, including anything they say and the
tone of voice in which it is said. Alternatively, surreptitiously photographing people
via devices such as mobile phones may add to the offensive nature of the conduct,
once known to those photographed. The purpose or apparent purpose of the
photography may also be relevant. Surreptitiously taking photographs of particular
categories of people may be offensive. For example, taking photographs of young
women who are scantily clad or taking photographs of young children may be
considered offensive, depending on the circumstances in which those photographs
are taken

4. The test of ‘offensive’ is somewhat vague. If the behaviour is contrary to
contemporary standards of public good order, it is offensive, but contemporary
standards change from time to time. The more action is taken to prevent
photography in a public place and that action is accepted, the more likely it is that
the photography will be regarded as offensive behaviour on the grounds that it is
now accepted that photography should be restricted.

On a day to day basis, the issue will be driven by the opinions of those who are taking action. These may include police, life savers who, although having no particular powers, may report the matter to police and individual citizens who object to particular activity and who report it to the police. It is common practice on Australian beaches for photographers to be told that they cannot take pictures on the beach, particularly if the photography is clearly directed at particular individuals. However, in at least one instance where a person was charged with surreptitiously taking photographs of topless women with his mobile phone, the charges were subsequently dropped.20

4. Producing child pornography – s67 Crimes Act
The Crimes Act makes it an offence to make or produce child pornography.21 Child
pornography includes a photograph that describes or depicts a person who is or appears to
be a minor engaging in sexual activity or depicted in an indecent sexual manner or context.22

5. Specific Legislation Controlling Specific Sites
Photography in specific geographic places may be regulated by specific legislation governing those places.

Commonwealth Reserves
For example, the Commonwealth government controls some forms of photography on
Commonwealth reserves such as Uluru National Park and Kakadu via legislation designed to
protect the environment, namely the Environment Protection and Biodiversity Conservation

20 In April 2005, two university students were charged with offensive behaviour after they were caught
using their mobile phone cameras to take photographs of topless beachgoers at Coogee beach, but
charges were formally dismissed, see “Charges dropped against camera phone duo” in the Sydney
dropped-against-camera-phone-duo/2005/04/05/1112489474842.html.
21 See s68 Crimes Act 1958 (Vic).
22 See definition in s67A Crimes Act 1958 (Vic).
Act 1999 (Cth). The regulations made pursuant to that legislation permit the restriction of photography and filming. In practice, commercial photography or filming requires a permit and, in the absence of such a permit, the photography is illegal. The permit imposes various conditions on the commercial photographer. Failure to obtain a permit may result in forfeiture of all images and devices used to capture the images.

The form for and conditions of the permit can be obtained from [https://govforms.business.gov.au/SearchFormsBy.aspx?txtSearch=Photographers&txtSearchType=occupation&SearchMode=1](https://govforms.business.gov.au/SearchFormsBy.aspx?txtSearch=Photographers&txtSearchType=occupation&SearchMode=1)

### Victorian Parks, State Forests and other landmarks

Similar to Commonwealth reserves, some forms of photography in Victoria’s National Parks and State Forests may be subject to restrictions and require a permit from the relevant managing body.

For example, all areas reserved under the *National Parks Act 1975* (Vic) are managed by Parks Victoria. These include National Parks, State Parks, and Wilderness Parks and Zones, such as the Grampians National Park, Port Campbell National Park, Mornington Peninsula National Park, and Wilson Promontory National Park, Marine Park and Marine Reserve. In addition to these, Parks Victoria also manages a large number of metropolitan parks, including Albert Park, St Kilda Pier and the Yarra Bend Park. Parks Victoria does not ban photography. However, it has developed guidelines for filming and photography which are the foundation on which Parks Victoria manages photography in its Parks. Professional photography requires a permit subject to a number of conditions. Individual amateur photographers taking photographs for personal interest do not need a permit. Photography for news and current affairs purposes as well as small scale editorial photography for books,

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23 Section 354(1) sub (f) *Environment Protection and Biodiversity Conservation Act 1999* (Cth) penalises actions for commercial purposes in a Commonwealth reserve, unless the actions are in accordance with the management plan in operation for the relevant reserve. This section applies to commercial photography.

24 Under reg 12.24 subregs (1) and (3) *Environment Protection and Biodiversity Conservation Regulations 2000*, the capturing of images in or of a Commonwealth reserve is subject to the prohibition or restriction of its Director. Reg 12.38 *Environment Protection and Biodiversity Conservation Regulations 2000* also penalises the use of a captured image of a Commonwealth reserve to derive commercial gain, including an image that was not captured for commercial purposes.

25 Under policy 6.13.1 of the *Kakadu National Park Management Plan 2007-2014*, commercial photography in the Park may be carried out in accordance with a permit issued by its Director. For the Uluru Commonwealth reserve, see policy 6.6.1 *Uluru-Kata Tjuta National Park Management Plan 2010-2020*.

26 For a complete list, see Schedules 2 to 4 *National Parks Act 1975* (Vic).


28 There is no mention of filming or photography in the *National Parks Act 1975* (Vic), nor in the associated *National Parks (Park) Regulations 2003*.

29 For example, policy 8.1.3 of the *Port Campbell National Park and Bay of Islands Coastal Park Management Plan* expressly formulates the aim to continue to permit commercial photography in accordance with Parks Victoria guidelines; Parks Victoria’s “Guidelines for Filming and Photography” are available at [http://www.parkweb.vic.gov.au/resources/16_0700.pdf](http://www.parkweb.vic.gov.au/resources/16_0700.pdf).

magazines and newspapers can be undertaken without a permit, too.\textsuperscript{31} Wedding photography is also exempt given that a permit and booking had been issued for the actual wedding event. Where photographs are taken in an area that has cultural and spiritual significance for indigenous people, an additional permit has to be sought from the relevant indigenous community.

It should be noted that even though the taking of photographs as such may not be subject to a permit, the photographer’s conduct may nevertheless constitute an illegal activity. Such cases may include instances where a photographer enters a park which has been temporarily closed in the event of a natural disaster or the threat of a natural disaster,\textsuperscript{32} or instances where the photographer interferes with the fauna and/or flora.\textsuperscript{33} An example for the latter would be a photographer who tries to attract animals by feeding them prior to taking pictures of them.\textsuperscript{34}

Photographers interested in small-scale landscape photography can also apply for an annual landscaping photography licence.


In Victoria’s State Forests, which are managed by the Department of Sustainability and Environment, certain limitations apply to commercial photography, too. In ‘forest parks’ and ‘forest reserves’ the taking of photographs for profit constitutes an offence, unless the photographer has obtained a permit from the Department of Sustainability and Environment.\textsuperscript{35} ‘Forest parks’ are the Otway Forest Park and the Cobobooee Forest Park.\textsuperscript{36} ‘Forest reserves’ are the Delatite Arm Reserve, Murrindindi Scenic Reserve, Sylvia Falls Scenic Reserve, Steavenson Falls Scenic Reserve, You Yangs Regional Park, Thomson River Forest Reserve and Tarago River Forest Reserve.\textsuperscript{37}

The Royal Botanical Gardens in Melbourne and Cranbourne are managed by the Royal Botanical Gardens Board. Again, it is an offence to take any photograph in the Royal Botanical Gardens for commercial purposes without a written authority by the Board.\textsuperscript{38}


\begin{itemize}
\item\textsuperscript{31} ‘small scale’ being defined as a maximum of one photographer and one assistant with low level equipment – whichever fits in one backpack, or a tripod – no props or talent.
\item\textsuperscript{32} See reg 8 subreg (3) National Parks (Park) Regulations 2003.
\item\textsuperscript{33} See reg 9 National Parks (Park) Regulations 2003.
\item\textsuperscript{34} For a quick overview see Parks Victoria’s “Guidelines for Filming and Photography”, available at http://www.parkweb.vic.gov.au/resources/16_0700.pdf.
\item\textsuperscript{35} See reg 23 subreg (2) in conjunction with reg 23 subreg (6) Forests (Recreation) Regulations 2010.
\item\textsuperscript{36} see Part 7 of Schedule 5 of the Crown Land (Reserves) Act 1978 (Vic) which is referenced in the definition of ‘forest parks’ in reg 5 Forests (Recreation) Regulations 2010.
\item\textsuperscript{37} See definitions in reg 5 Forests (Recreation) Regulations 2010.
\item\textsuperscript{38} See reg 20 subreg (b) Royal Botanical Garden Regulations 2004.
\end{itemize}
Restrictions on commercial photography may also apply to other landmarks, such as the Shrine of Remembrance and Federation Square.

Section 5(1) of the *Shrine of Remembrance Act 1978 (Vic)* makes it an offence to manufacture, print, publish or sell photographs relating to the Shrine of Remembrance, and the authorisation of any such act without the written authority of its managing body, the Shrine Trustees. Section 5(2) subsection (a) of said Act however exempts the manufacturing, printing or publishing of any photograph unless the offender knows that it is going to be used for the purpose of advertising, or sold. In other words, non-commercial photography, does not constitute an offence, even if undertaken without written permission. The same applies to photography for use in newspapers, and in properly bound books unless they’re solely or principally relating to the Shrine.  


Federation Square in Melbourne is an example of a privately owned ‘public space’ as discussed above in relation to trespass. It is owned and operated by Fed Square Pty Ltd, and all commercial photography on the premises requires a permit.

### Defence Force Sites

Photographing an Australian Defence Installation without lawful authority to do so is an offence under section 82(1) of the *Defence Act 1903 (Cth)*. The photographs and apparatus used to capture the photographs are forfeited.

Section 82(1) of the *Defence Act 1903 (Cth)* provides that if

(a) a person makes a sketch, drawing, photograph, picture or painting of any defence installation in Australia or of any part of one; and
(b) the person has no lawful authority to do so; then:
(c) the person is guilty of an offence; and
(d) all sketches, drawings, photographs, pictures, and paintings, and all tools and all materials or apparatus for sketching, drawing, photographing or painting found in his or her possession are forfeited and may be destroyed, sold, or otherwise disposed of, as the Governor-General directs.

Seizure may take place without a warrant.

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39 See s5(2) sub (b) *Shrine of Remembrance Act 1978 (Vic).*
40 See s5(2) sub (c) *Shrine of Remembrance Act 1978 (Vic).*
41 The permit is required to ensure that Federation Square’s safety requirements are fulfilled by the photographer, see [http://fedsquare.com/index.cfm?pageID=43](http://fedsquare.com/index.cfm?pageID=43)
Local Council restrictions on Photography

Many local councils nowadays have policies in place which impose restrictions on photography. These are mainly aimed at commercial photography and usually require that a permit be obtained subject to several conditions, such as the acquisition of sufficient public liability insurance, and payment of fees.\(^{42}\) Such policies are made in accordance with local government law.\(^{43}\) Failure to obtain such permit, or failure to comply with any conditions of the permit will result in an offence.\(^{44}\) Local councils have authority to pass such local laws under section 111(1) Local Government Act 1989 (Vic), which empowers local councils to “make local laws for or with respect to any act, matter or thing in respect of which the Council has a function or power”. The main rationale behind such regulations is to be able to manage the impact that certain activities have on the general safety or use and enjoyment of the local council land by the general public,\(^{45}\) which is in accordance with local councils’ functions of providing and maintaining community infrastructure within their district.\(^{46}\) It should be noted that even though local laws might only contain a reference to ‘filming’, policies and terms and guidelines generally extend to ‘commercial stills photography’.

Part 3 - Possessing and Distributing Photographs: Potential criminal offences

1. Offensive, insulting, indecent behaviour

While the taking of particular photographs may or may not constitute offensive, insulting or indecent behaviour, the manner and context in which they are displayed may be offensive, insulting or indecent. For example, it may be okay to take photographs of young lifesavers engaged in activities such as rowing boats and paddling surf craft. It may be yet another matter to display those photographs on a website together with commentary about the sexual attractiveness of those young lifesavers. In that situation, it is, again, the totality of the behaviour that needs to be considered. It is not the photographs per se that are offensive or indecent, it is the photographs as displayed in the particular context.

On the other hand, the display or distribution of those same photographs in a context that is not demeaning or carrying sexual overtones is extremely unlikely to constitute an offence. A


\(^{44}\) see clause 14.1 Melbourne City Council Activities Local Law 2009, and clause 7 subclauses (2) and (3)(b) Port Phillip City Council Community Amenity Local Law No. 3 (July 2005).

\(^{45}\) See for example the objectives set out in clause 1.2 Melbourne City Council Activities Local Law 2009; also see clause 2 Port Philip City Council Community Amenity Local Law No. 3 (July 2005).

\(^{46}\) See s3E Local Government Act 1989 (Vic).
website designed to record the details of the surfing carnival and including a few action shots simply will not be contrary to the law. The same would apply to all sorts of photographs.

2. Distribution of image of genital or anal region – s 41C Summary Offences Act 1966 (exceptions – s41D)
The legality of creating these sorts of images is discussed above. It is illegal to distribute them.

3. Possession of child pornography and distribution – s70 Crimes Act 1958
The legality of creating such material is discussed above. It is illegal to possess or to distribute such material.

Photographic material that is published may need to be classified according to the Classification (Publications, Films and Computer Games) Act 1995 (Cth). Photographs taken in public by the vast majority of photographers are unlikely to be affected by this legislation

Part 4 - Civil Liability for Taking Photographs in Public

1. Trespass
The lawful occupier of land is entitled to prevent you from entering the land. Even if you have lawfully entered the land, they may require you to leave for any reason whatsoever. If you do not leave, the occupier may take reasonable steps to physically evict you. The occupier could also sue you for any damages arising from your trespass to your property and you may have also committed an offence. In other words, if the occupier of the land objects to your photography, you should desist.

The occupier might be an occupier for a relatively limited period of time but they have an entitlement to exclusive use of that land for that period of time. For example, a life saving organisation might be given exclusive use of a beach by a local council for the duration of a surf carnival. During that time, the life saving organisation is the occupier and can exercise the powers of an occupier about entry to the beach and remaining on the beach.

There may be an exception to this proposition but it is unlikely to apply to most photography. The exception is that some case law suggests that if a person has a contractual right to be on the land that they may remain there pursuant to that contractual right. The
case law is ambiguous on the point with some case authority suggesting that, even then, the occupier of the land can insist on the person’s departure.\textsuperscript{47} It will be rare that the photographer will have such a contractual right that has been granted by the occupier of the land.

## 2. Nuisance and Privacy

In addition to trespass, there is a slight possibility that someone can object to a photographer taking photographs from outside private property of people or activity on that private property. As a general rule, such photography cannot be prevented.

However, it may be possible in very, very limited circumstances for someone with an interest in land to object to photographs taken of them on that land. There is a legal action for what is called nuisance – an unlawful interference with the use and enjoyment of land.\textsuperscript{48}

The plaintiff in such an action must have an interest in the land in question such as being the owner or a tenant. The interference with the use and enjoyment of land must be unreasonable and it must interfere with a recognised right associated with the property. This latter requirement means that photography is unlikely to constitute a nuisance in many instances. Overlooking a property is not normally regarded as a legal nuisance. For example, in a well known High Court decision,\textsuperscript{49} the High Court declined to prevent the defendant from building a tower so as to overlook a race course and provide a broadcast of the horse races run on the course.

The real difficulty with using nuisance to prevent a photographer photographing people on land is in defining the property right that is interfered with as a consequence of the alleged nuisance. The action usually deals with matters such as excess noise, dust or light.

The common law does not yet recognise a right of privacy per se although a number of cases have discussed the possibility. For example, some High Court judges raised the possibility of a right of privacy in ABC v Lenah Game Meats Pty Ltd.\textsuperscript{50} In fact, four of seven judges suggested that such a tort (civil wrong) may be recognised in Australian law but for various reasons decided that, even if it did exist, it did not apply in the circumstances then before

\textsuperscript{47}In Cowell v The Rosehill Racecourse Co Ltd [1937] 56 CLR 605 (22 April 1937) it was held by the High Court of Australia that a licensor can use reasonable force to evict a licensee from his premises after the initial license to enter the premises has been revoked, and the licensee refuses to leave, even though the revocation was in breach of the contractual licence. In Forbes v New South Wales Trotting Club [1979] 143 CLR 242 (21 June 1979) at p. 274 however, Murphy J hinted that in his opinion, the decision in Cowell was wrong.

\textsuperscript{48}Victoria Park Racing & Recreation Grounds Co Ltd v Taylor [1937] 58 CLR 479 (26 August 1937) at p. 492/493 per Latham CJ.

\textsuperscript{49}Victoria Park Racing & Recreation Grounds Co Ltd v Taylor [1937] 58 CLR 479 (26 August 1937).

\textsuperscript{50}Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 63; (2002) 208 CLR 199 (15 November 2001).
the High Court.\textsuperscript{51} One decision of the Queensland District Court has since held that an action for invasion of privacy exists in Australia\textsuperscript{52} but other decisions have held otherwise.\textsuperscript{53}

The Australian Law Reform Commission and, more recently, the Victorian Law Reform Commission have both recommended the introduction of a legislative right of privacy. The precise scope of such a right would not be known until such legislation was passed. It may be unlikely to severely restrict the taking of photographs of people in a public place but may restrict the taking of photographs from a public place of private activities being conducted on private land.

Consequently, the general rule is that what one can see, one can photograph. However, repeated actions that if, by virtue of that repetition, interfere with enjoyment of land may be actionable. For example, a New South Wales Supreme Court judge gave an interlocutory injunction against a next door neighbour who set up light and motion activated video equipment that video-taped his neighbours when they went into their garden.\textsuperscript{54}

Similarly, an English court has said that constant aerial surveillance of a house from the air accompanied by the photographing of activities in and around the house may constitute a nuisance.\textsuperscript{55}

In summary, an action of nuisance could only be used to prevent photography of activity on private land in limited circumstances and the following points are worthy of note:

1. The plaintiff must have a recognised interest in the property in question.
2. The photography must constitute an unreasonable interference with a recognised property right.
3. Privacy is not yet recognised as a right associated with property.
4. Some case law suggests that a right of privacy for individuals may be recognised in the future but the majority of case law says otherwise. The situation may change.
5. Constant, repeated video or photographic surveillance of a person’s activities on their property may constitute an unreasonable interference with a person’s right to quiet enjoyment of their property. A one off photo session is highly unlikely to constitute such a nuisance.

\textsuperscript{51}Ibid. at paras 35, 39, 41-43, 52, 55 per Gleeson CJ; paras 126, 130, 132 per Gummow and Hayne JJ; paras 189-191 per Kirby J.

\textsuperscript{52}Grosse v Purvis [2003] QDC 151 (16 June 2003) at para 442-447 per Skoien DCJ.

\textsuperscript{53}see e.g. the Federal Court decision in Kalaba v Commonwealth of Australia [2004] FCA 763 (8 June 2004) at para 6 per Heerey J; the Victorian Supreme Court decision in Giller v Procopets [2004] VSC at para 187 et seq. per Gillard J.

\textsuperscript{54}Raciti v Hughes [1995] 7 BPR 14, 837.

\textsuperscript{55}Bernstein of Leigh (Baron) v Skyviews & General Ltd [1978] 1 QB 479 (10 February 1977) at p. 489 para G. The court held, though, that the taking of only one photograph from an aircraft flying over a property in compliance with the relevant aviation legislation did not constitute a nuisance (Ibid. at paras E-F).
3. Breach of Confidence

Photography may involve a contravention of a legal obligation not to divulge confidential information. The basic legal principle is that if a person receives information in circumstances where a reasonable person would realise that the information is of a confidential nature and provided on that basis, the person receiving the information is required to maintain that confidentiality.

Some judges in some cases have been prepared to say that a video or a photograph constitute confidential information if they record private activities that any reasonable person would regard as being intended to remain private. For example, in one New South Wales case Donnelly v Amalgamated Television Services Pty Ltd, the judge decided that a video recording of the plaintiff in his underpants in his bedroom that was taken by police while executing a search warrant was private information that should not be revealed. In the Australian High Court decision of ABC v Lenah Games Meats Pty Ltd, Chief Justice Gleeson held such film would have the necessary quality of privacy to warrant the application of the law of breach of confidence.

This cause of action will have some, but very limited, application to photography. The activity photographed must be private and the images captured regarded as constituting confidential information. For example, in Douglas v Hello Ltd, the English Court of Appeal held that the photographs of a celebrity wedding attended by 250 people where photography was closely controlled were confidential information.

Whether or not photographs will have the necessary quality of confidentiality will therefore depend on a number of factors. These include the nature of the information captured, the circumstances in which they were captured and the steps taken or usually taken by the owner of the confidential information to prevent such information becoming publicly available. All of these factors are relevant to determining whether a reasonable person in the position of the person acquiring the information (the photographer) would appreciate that they were acquiring the information subject to an obligation of confidentiality. A recent example from the mass media relates to the distribution of a photograph of Lara Bingle in the shower at her home. Various factors suggest that the information in the photograph is confidential, including the circumstances of the photograph and body language suggesting a lack of consent to the photograph.

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57 Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 63; (2002) 208 CLR 199 (15 November 2001) at para 53 et seq., per Gleeson CJ.
59 Ibid., at paras 10-11: Invitations to the wedding reception included “a politely worded statement which made it clear that no photographs were to be taken”; professional photographers were hired; security staff were at the hotel venue well before the scheduled date, and on the day before the wedding, all 350 guests received entry cards “with a view to ensuring, by means of a coded marking on each card, that, so far as possible, no unauthorised person got in”.
60 Ibid., at paras 100-102.
Defence of public interest
The action for breach of confidence is subject to a public interest defence. If revealing the subject matter is in the public interest, the obligation of confidence is not applicable.\(^{61}\) Photographing public figures engaged in illegal activity may well be such an exception.

4. Self-regulation of invasion of privacy
While a right of privacy does not yet exist under Australian law, various media organisations engage in self-regulation of excessive invasions of privacy. The Australian Press Council is an organisation established by the Australian press to monitor and control such invasions of privacy. For example, one decision related to the photograph of a politician in conversation with his wife in their back yard. The politician had been the subject of claims of extra-marital relationships. The Press Council found that taking and publishing the photograph of the married couple in that context was an unnecessary invasion of their privacy.\(^{62}\)

5. Contract rights
A contract is a legally enforceable agreement between two or more people. The nature of a contract is that each person to the contract promises to do something or to refrain from doing something, usually for the benefit of the other parties to the contract. An agreement is not necessarily a contract. There needs to be the give and take referred to in the previous sentence. This is described via the technical term of ‘consideration’.\(^{63}\) In addition, the parties must intend that the agreement be legally enforceable.

Provided the contract is not one to do something that is illegal, the contract could involve payment for taking photographs and it could impose conditions of almost any sort on photography. For example, the Australia Council for the Arts has ‘Protocols for working with children in art’ and compliance with the protocols is a condition of receiving grant money from the Council.\(^{64}\)

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\(^{61}\) See e.g. Fn 31 at 34-35 per Gleeson CJ with reference to an English decision. In \textit{Allied Mills Industries Pty Ltd v Trade Practices Commission (No.1)} [1981] FCA 11; (1981) 55 FLR 125 (18 February 1981) at para 105, Sheppard J held that “the public interest in the disclosure (to the appropriate authority or perhaps the press) of iniquity will always outweigh the public interest in the preservation of private and confidential information.”; also see \textit{The Commonwealth of Australia v John Fairfax & Sons Ltd} [1980] HCA 44; (1980) 147 CLR 39 at para. 50 per Mason J: “It has been accepted that the so-called common law defence of public interest applies to disclosure of confidential information”.


\(^{63}\) A “quid pro quo”, see \textit{Australian Woollen Mills Pty Ltd v The Commonwealth} [1954] 92 CLR 424 at p. 456 et seq.; also see Carlill v Carbolic Smoke Ball Company [1893] 1 QB 256 at 264 per Lindley LJ; 271 per Bowen LJ; 272 per Smith LJ.

Part 5 – Civil Liability for Possessing and Distributing Photographs

1. Misleading and deceptive conduct

In Australia, there is, as yet, no right per se to privacy and no right of publicity ie. a right to control the publicity surrounding the use of one’s image. Consequently, the distribution of a person’s photograph will generally be permissible. Newspapers regularly place the photographs of people, whether they are well known or not, on their pages without having to seek the consent of those people or to pay them.

The context in which the photograph is used may alter that position. In particular, if the photograph is being used as part of the promotion or sale of good or services, the use of a particular person’s image may misleadingly suggest that the person is associated with or in some way supports those goods or services. Commonwealth and Victorian legislation both prohibit engaging in conduct that is misleading and deceptive or which is likely to mislead or deceive.65

Using the image of a well known person in an advertisement is likely to convey the misleading impression that they have been paid for their participation in the advertisement

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65See s52(1) Trade Practices Act 1974 (Cth): “A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”; also see s9(1) Fair Trading Act 1999 (Vic): “A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”.
or they otherwise endorse the products in question.\textsuperscript{66} The context in which the image is used is everything and the wording surrounding the photograph would be critical. For example, there may be an advertisement consisting of a photograph of a well known sportsperson using the advertiser’s sporting equipment. The sportsperson may have taped over the trade marks on the equipment because she did not have a sponsorship agreement with the advertiser. The wording of the advertisement explains why the trade marks are taped over and which equipment is actually being used. The clear message conveyed is that the sportsperson is not being paid to endorse the goods or for the advertisement but that she actually does think the equipment is good.

The situation is slightly more complex when the person in question has no reputation of note. The photograph may not suggest that the person has endorsed the products because, in the absence of a reputation, the average viewer would not be concerned about whether or not the person has endorsed the products. That person’s opinion would be irrelevant to the viewer because they are a ‘nobody’ (only in terms of their public profile!) and the context in which they are portrayed would suggest that they are simply being used as a prop for the goods or services in question.

From a practical point of view, the difficulty is that the person photographed may not have a reputation at all when they are photographed but have a substantial reputation at the time that the photograph is distributed. For example, an old photograph of Jennifer Hawkins, the former Miss Universe, may have been taken at a time when she was unknown to the public. Its use now in a commercial context where the photograph is used to promote goods or services would almost certainly be misleading and deceptive because of the reputation that she has established since the photograph was taken. For this reason, it is in the interests of the photographer to gain a written consent to future use of the photographs from a photography model at the time of the photography.

2. Copyright

Photographs are included in the definition of artistic works for the purposes of the Copyright Act 1968 (Cth). The owners of the copyright in the photographs have a bundle of legal rights that they can exercise. In particular, they can prevent others from reproducing the photograph, publishing the photographs or communicating the photographs to the public.\textsuperscript{67} ‘Reproducing’ a photograph includes copying a photograph. Communicating to the public in this context means making available on-line or otherwise electronically transmitting the photographs.

\textsuperscript{66} s53 sub (c) \textit{Trade Practices Act 1974} (Cth), and s12 sub (e) \textit{Fair Trading Act 1999} (Vic) both list the representation that “goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have” as a ‘false or misleading representation’.

\textsuperscript{67} With photographs being artistic works, s35(2) \textit{Copyright Act 1968} (Cth) states that the author of an artistic work is the owner of any copyright in the work. In relation to artistic works, s31(1) sub (b) \textit{Copyright Act 1968} (Cth) defines copyright as the exclusive right to reproduce, publish or communicate to the public the work.
The copyright in a photograph lasts for 70 years after the death of the author of the photograph. 68 The author of a photograph is the person who takes the photograph.69

While it is critical to determine who took the photograph and was therefore the author of the photograph, an even more critical issue is the issue of who owns the copyright. The starting point is that the owner of the copyright is the person taking the photograph.70 This rule is then subject to some exceptions. If the photograph is taken during the course of employment, the employer owns the copyright although there are slight qualifications to this proposition for employees of newspapers and other publications.71

If the photograph is taken pursuant to an agreement to take the photograph for private purposes such as for a wedding, the copyright is owned by the person who pays for the photographs to be taken but that proposition is subject to a further exception. The person who paid for the photographs may not use them, without the permission of the photographer, for a purpose other than that for which they were originally made.72 That mouthful is best explained by an example. If I pay you to take photographs of my wedding, the implicit or explicit agreement is that I will make copies for myself, my family and my friends. You cannot stop me from doing so as I own the copyright. However, if I’m famous or become famous, I can’t allow New Idea or some other publication to copy (reproduce) the photographs and display them in the magazine without your permission.

What is clear is that the subject of the photograph does not have copyright in the photograph simply as a consequence of being the subject of the photograph. Anyone who claims that they have such rights simply on that basis alone is incorrect.

One further point about subsistence of copyright may be relevant. A building is an artistic work within the meaning of the Australian copyright legislation.73 Technically, a photograph of a building would be a reproduction of it and would therefore contravene copyright. The legislation specifically exempts photographs of buildings from infringement.74 All of the above rules relating to copyright can be subject to a contract that dictates who is to own the copyright. Copyright can be assigned to another party by any writing that is signed by or on behalf of the owner of the copyright.75

68 See s33(2) Copyright Act 1968 (Cth).
69 See definition in s10 Copyright Act 1968 (Cth): “author, in relation to a photograph, means the person who took the photograph.”
70 See Fn 42 and 44.
71 S35(4) subs (a) - (d) Copyright Act 1968 (Cth) state that where an artistic work is made by the author under the terms of his or her employment by the proprietor of a newspaper, magazine or similar periodical and is so made for the purpose of inclusion in a newspaper, magazine or similar periodical, the proprietor owns the copyright. However, the author owns the limited copyright in relation to reproduction of the work for inclusion in a book, and reproduction of the work in a hardcopy facsimile of the newspaper, magazine or periodical.
72 See s196(1) and (3) Copyright Act 1968 (Cth) where is stated that copyright is personal property and is transmissible by assignment (s196(1)), and that an assignment of copyright does not have effect unless it is in writing signed by the assignor (s196(3)).
3. Breach of Confidence
If photographs are taken in circumstances where an obligation of confidence is imposed (see discussion above), the distribution of the photographs will constitute a breach of that obligation. The person owed the obligation of confidence may well be able to obtain an injunction preventing the distribution if it is threatened but has not yet occurred. Alternatively, they may be able to recover damages if the photographs are distributed in breach of the obligation. 76.

4. Trespass
The distribution of photographs taken during a trespass to property may be prevented by an injunction or damages may be given for the effects of the trespass. 77 One potential difficulty will be that the person distributing the photographs must have been a party to the trespass. Once a third party lawfully acquires the photographs, it may be difficult to prevent them from further distributing or exhibiting the photographs. 78

5. Nuisance
If the taking of photographs constitutes a private nuisance, it may be possible to prevent their distribution by obtaining an injunction. See the discussion of injunctions below. As the circumstances in which taking photographs will constitute a nuisance are very rare, there is little case law on the point.

6. Contract
A contract may regulate the possession and distribution of photographs. For example, a contract between a photographer and the model for the photographs may specify what the photographer can and cannot do with the photographs.

76 (ABC v Lenah Game Meats Pty Ltd 2001 HCA 63).
77 Lincoln Hunt Australia Pty Ltd v Willesee (1986) 4 NSWLR 457
78 ABC v Lenah Game Meats Pty Ltd (2001) HCA 63 at para 50.
Part 6 - Remedies

When civil liability for taking and distribution of photos is considered, a very real issue is the nature of any remedy that a person objecting to the taking or distribution may be likely to obtain and the cost of obtaining that remedy.

1. Damages
Damages are awards for money for breaching legal obligations. The test for deciding how much damages are to be awarded will vary according to the nature of the cause of action ie. the nature of the legal obligation that has been breached. If the damages are likely to be small, they may not justify the bringing of the legal action in question.

Damages may include exemplary or punitive damages in some circumstances. These are damages that are awarded because the defendant’s conduct in defying the plaintiff’s rights are so outrageous that damages should be given to punish the defendant for its conduct. These damages are over and above the damages payable to the plaintiff for the loss or harm suffered by it as a consequence of the illegal activity.

2. Injunctions
An injunction is a court order requiring a party to refrain from taking certain action or, in rare circumstances, requiring them to take some form of positive action. In this context, it may be possible for a person objecting to the distribution of photographs to obtain an injunction preventing that distribution. As with any remedy, the plaintiff would have to demonstrate that some legal obligation had been breached by the person threatening to distribute the photographs. Again, the cost of such proceedings may be greater than the benefit of obtaining such an order.

As a general rule, an injunction will not be given if damages are sufficient to address the breach of the relevant legal obligation. In addition, the point may already have been reached where it is pointless to grant an injunction. For example, if photographs have already been widely distributed, there is little point granting an injunction on the grounds of a breach of confidence because the confidentiality of the photographs has already been destroyed. Damages would be provided instead.

3. Self-Help
A private citizen may engage in self-help - corrective or preventive measures that can be lawfully undertaken by a private citizen without a court order or authority. An example is a

79 Lincoln Hunt Australia Pty Ltd v Willesee (1986) 4 NSWLR 457.
land occupier’s right to physically evict a trespasser by using reasonable force to do so.80 The occupier does not have a right to seize, damage or destroy personal property such as a camera.

**Part 7 - Hypothetical Scenarios**

**Scenario 1:**
Aspiring photographer Penny is currently working on an ongoing arts project which highlights all the different facets of urban life in the metropolitan area of M. She hopes to find interesting subjects in the heart of the CBD, at a large public area called the “Square” located directly opposite a busy train station.

**Scenario 1a)**
Penny takes pictures of passers-by at the “Square”, and in the vicinity of the main entrance to the station without asking anyone’s permission. She uses her professional digital SLR in an open manner, and focuses mainly on trying to capture larger groups of people rushing past her, or crossing the busy streets, rather than on single persons.

- The location Penny has chosen is a public space. Neither the “Square” nor the streets and pedestrian paths in vicinity of the train station are privately owned. Thus, she does not need permission to take photographs there.

- Given the nature of the activity that Penny is trying to portray, and the fact that she is not actively trying to single out particular subjects, nor in any way acting surreptitiously, her conduct would most likely not be offensive to a reasonable person and certainly not sufficiently offensive to justify the intervention of the criminal law.

**Scenario 1b)**
Penny then decides to take a series of photographs in the museum around the corner, because she thinks she would find a perfect contrast to the hectic scenes she just captured. She chooses to photograph groups of visitors, ambling in between paintings and sculptures on the ground level of the museum. Again, she uses a professional camera and takes the pictures openly, from a distance, but does not ask her subjects for permission.

- The museum is open to the public and Penny can take photographs subject to the museum’s rules about such activity. It can place conditions on entry that may restrict or prohibit photography. Since Penny has not yet been advised of such restrictions or asked to leave, she is at liberty to take the photographs in question.

80 See **Cowell v The Rosehill Racecourse Co Ltd** [1937] 56 CLR 605.
- Her conduct would hardly constitute offensive behaviour. She does not try to surreptitiously capture her photographs, yet at the same time operates discretely enough not to spoil the museum experience for the patrons. In addition, she only relies on her camera without the use of further equipment, for example flash light or a tripod. Such equipment might interfere with the other visitors’ enjoyment of the museum by impairing their view of the exhibits on display or by blocking their way.\footnote{For example, at the National Gallery of Victoria, the use of a hand-held camera is allowed. However, flash photography or the use of tripods will not be tolerated unless the gallery has granted express permission, see the Photography and Filming Guidelines available at http://www.ngv.vic.gov.au/about-us/reports-policies-and-plans/policies/photography-and-filming-guidelines-for-personal-use}

**Scenario 1c)**

Penny now decides to take several close-up shots of one particular visitor, following him around as he moves from one painting to another. He eventually objects to being photographed, despite Penny’s attempts to explain her art project to him. Penny is then approached by security staff who ask her to either cease photography, or leave the premises. Penny however, remains in the museum and continues to take photographs on the first floor. Penny then is escorted off the premises by security staff.

- Although in a public place, Penny, is now trespassing. Her conduct is no longer tolerated by the operator of the museum. section 9(1) sub (d) *Summary Offences Act 1966* (Vic) applies because she “neglects or refuses to leave after being warned to do so”; Penny had been asked to desist or leave the premises by security on behalf of the owner, thus had been ‘warned’. Her being escorted off the premises in this case constitutes reasonable force.

- The question now arises, whether Penny’s conduct qualifies as offensive behaviour. In applying the ‘reasonable person test’ mentioned above, we have to ask whether a reasonable person in the place of the particular visitor would feel offended by Penny’s behaviour. It is likely to be perceived as being ‘rude’ that Penny did not ask the visitor for permission, following him around would possibly also be found as ‘annoying’. But on the other hand, the particular activity depicted in Penny’s photographs seems rather harmless. It is hard to imagine someone would deem it ‘indecent’ or ‘insulting’. Thus, Penny’s conduct would more likely not qualify as offensive behaviour.

**Scenario 1d)**

After being ejected from the museum, Penny decides to pursue her project at the nearby shopping centre. As she takes photographs in the centre, she is approached by security guards and again required to leave the premises where she is taking photographs. She decides to take the train to a nearby beach and, while taking photos of commuters on the platform, is again told to desist.

- Unlike the traditional market square, which used to be governed by the relevant public authority, shopping centres are privately owned and operated. Generally, the
same applies to railway stations. For example, in Melbourne the current railway operator is Metro. Hence, it is at the operator’s discretion whether to allow photography on their premises.

- Whereas in some shopping centres a strict ban on all photography may apply, others may be more lenient, for instance when customers take photographs of their own children at a playing area on the premises. Some shopping centres may require photographers to apply for a permit in advance. It should be noted that relevant photography policies are not always displayed on the premises, but might also exist in unwritten form as directions to security staff. In the above scenario, Penny had to comply with the request of the security guards at the shopping centre.

- Similar to shopping centres, railway operators generally have policies relating to photography on the platforms of their stations. These policies mainly seem to address security concerns and aim at ensuring ‘railway enthusiasts’ with cameras won’t interfere with the flow of passengers and trains, and won’t endanger themselves while taking photographs. Nevertheless, it is at the respective operator’s discretion to allow or disallow photography on the platforms, and Penny would be in no position to insist on taking photographs. Such behaviour would again constitute trespass if she refused to leave when asked to do so.

- With regard to Melbourne’s metropolitan train system in particular, photography is not allowed on the platforms of the underground City Loop stations Parliament, Flagstaff and Melbourne Central. The system’s former operator, Connex once explained this approach as necessary to comply with obligations under anti-terrorism legislation. In fact, by order of the Governor in Council, transport was declared an ‘essential service’ in accordance with section 28(1) of the Terrorism (Community Protection) Act 2003 (Vic), and Connex declared an operator thereof. As a consequence of said order, Connex had to establish a risk management plan with the objective, amongst others, to prevent a terrorist act and to mitigate the effects of a terrorist act in relation to the essential service of transport. Whether or not the ban on photography may be necessary to help preventing terrorist attacks, it was at the discretion of Connex – and subsequently Metro – to introduce such policy in stations operated by them.

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82 Eg, though unwritten, and not advertised on their websites, Chadstone and Highpoint shopping centres have such strict policies in place.
83 Melbourne Central follows such a policy, application forms can be obtained through centre management.
84 Flash photography, for instance is not allowed on Metro operated platforms, and you are to remain behind the yellow safety lines, see items 7 and 8 of Metro’s Policy & Guidelines – Amateur and Rail Enthusiast photography, available at http://www.metrotrains.com.au/About-us/Photography.html. For similar guideline in NSW see RailCorp guideline for hobbyists and secondary students at http://www.railcorp.info/commercial/filming/hobbyists. Both operators require permission to photograph be asked in advance.
87 see s29(1) and s30 subs (a) and (b) Terrorism (Community Protection) Act 2003 (Vic).
Scenario 1e)
Penny now proceeds onto the beach, wandering in between beachgoers. She takes pictures of beachgoers engaging in a game of Frisbee, and a couple of photographs of a group playing in the surf.

- Theses pictures merely depict scenes of recreational sporting activity. Taking these photographs is unlikely to cause offence.

Scenario 1f)
Penny then takes a couple of close-up shots of individual beachgoers sunbathing on the beach. Her close-ups include photographs of a few topless female beachgoers. She also takes a couple of photographs of children in their bathers playing in the sand near the water, which attracts the attention of their parents. One of the local SLSA members on duty then approaches Penny and demands that she hands over her camera. Penny refuses, but the SLSA member nevertheless attempts to confiscate his camera.

- Again, Penny’s conduct may have constituted offensive behaviour, and the reasonable person test needs to be applied

- On the one hand, the question is whether nowadays photographing topless beachgoers is likely to be perceived as ‘indecent’ by a reasonable person. This would certainly be the case if the photograph had been taken for sexual gratification. Clearly, this was not Penny’s intention. nor did she act surreptitiously. However, this perception might change in the near future.

- Regarding Penny’s photographs of the children at the beach, there may always be concerns regarding possible instances of child pornography. A photograph of children playing on the beach, though, is unlikely to be seen as depicting the children in a sexual manner or context. Also general concern in the community about sexual predators could be a factor, but in this scenario would most likely not suffice to conclude that Penny’s conduct was offensive.

- The attempted confiscation of Penny’s camera by SLSA member is unjustified: There is no authority for the SLSA to confiscate cameras on the beach.

Scenario 1g)
After the events at the beach, Penny accompanies her daughter to her daughter’s soccer game. At the game, Penny starts taking photographs of the players who are all about 10

88 In “Unauthorised Photographs on the Internet And Ancilliary Issues” Discussion Paper of the Standing Committee of Attorneys- General (August 2005) p.19 paras 82-83 it is suggested to use legislation similar to Victoria’s offensive behaviour offence to deal with surreptitious photographs of topless beachgoers.


years old. Some club officials ask her to stop. They remind her that she is a member of the soccer club and that the club’s rules prevent photography of junior players without written permission of the club. The club also owns the ground.

- Since Penny is a member of the club, she may be bound by the club’s policies as a matter of contract law. However, questionable is the wide scope of the club’s rules on photography. Penny may have to abide by the rules and cease photographing the junior players.

- In this particular scenario, leaving the ground, and taking photographs from outside the premises effectively would also be in violation of the club’s rules. Leaving the premises doesn’t turn Penny into a non-member of the club.

- Even if Penny wasn’t a member, with the club being the owner occupier of the playing ground, club’s officials would have the right to remove her from the premises on the grounds of trespass if she was to continue taking photographs on the ground.

**Scenario 1h)**

After the game, Penny and her daughter catch the train home. As the train passes a military training camp, Penny sticks her head out the window and takes a few quick snaps of that establishment.

- As discussed above, this conduct constitutes an offence. Section 82(1) of the *Defence Act 1903* (Cth)

- Consequently, Penny could be fined up to $200 or even face imprisonment of up to 6 months, and her camera could be seized and destroyed without a warrant.

**Scenario 1(i)** Finally Penny goes home and takes a few photographs from her upstairs balcony of her neighbours having a BBQ. When they notice what she is doing, they object and she stops taking photos and makes an apology.

- As has been established, there is no defined right to privacy in Australia

- Continuous and repeated photography of her neighbours from her balcony though might qualify as a nuisance, ie a unreasonable interference with the enjoyment of a recognised right in her neighbours’ property. The conduct to date is unlikely to fit into that category.

**Scenario 2:**

Back home, Penny spends the rest of the day retouching the photographs she took earlier. She then uploads her photographs onto a photo gallery in her internet blog under the
heading “Contrasts- reflections on urban life”. The photo gallery also features a short ‘introduction’ in which Penny highlights and explains the rationale behind her project.

The parents of the children depicted in some of Penny’s beach and soccer photographs come across Penny’s website and demand that she takes the photographs off her website. They are of the opinion that the depiction of their children is inappropriate. Her neighbours also complain of the depiction of them.

- The context in which the photographs are displayed is essential in determining its legal implications. In Penny’s case, in no manner whatsoever is the presentation of her photographs demeaning or carrying sexual overtones. No offensive, indecent or insulting behaviour could be argued here.

- With regard to the pictures taken at the soccer match however, keeping those on her website might affect Penny’s - and ultimately her daughter’s - membership at the club. Because she initially took the pictures in breach of the club’s rules, the club might investigate and take disciplinary measures, which in the worst case could lead to Penny’s expulsion from the club.

- Although Penny’s neighbours complain about their depiction on the website, there is no obligation for Penny to remove those photographs. With the photographs not having been taken in unlawful circumstances, any legal action against Penny would not succeed.

**Scenario 3:**

**Scenario 3a)**
Penny’s less artistically inclined flatmate Bruce stumbles across some of Penny’s photographs on a USB drive they both share. He goes through them and posts a couple of the photographs of the topless beachgoers on his ‘Facebook page’ in conjunction with raunchy comments on certain physical attributes of the subjects in the pictures.

- This conduct is wrong on a number of levels. Firstly, in terms of Bruce’s dealings with Penny, he has infringed Penny’s copyright in the photographs. Penny, as the author of the photographs, has copyright in them. Bruce is not entitled to reproduce them as he has done by uploading them onto his Facebook page. The same action constitutes communicating the photographs to the public by making them accessible on-line. This is also a breach of copyright. In theory, Penny could sue Bruce, obtain an injunction requiring the pages be removed and seek damages. In practice, the value of the copyright may not justify such steps. A notice can be given to Facebook alleging a breach of copyright and requesting the removal of the allegedly infringing material. [http://www.facebook.com/legal/copyright.php?notify=1](http://www.facebook.com/legal/copyright.php?notify=1)

- The use of the photographs in this context (the posting of the photographs together with the commentary) is also likely to be offensive conduct.
Scenario 3b)
Encouraged by the positive response to his latest posting, Bruce decides to top it off with another post. This time he chooses one of the pictures Penny took in the museum. It shows a young woman gazing at a sculpture depicting a nude male mythical figure. He adds a caption that very bluntly alludes to the woman’s apparent interest in the sculpture’s private parts.

- The situation here is the same as for the previous scenario.
- The context of the distribution makes it offensive, indecent, and insulting.
- Given that Bruce is communicating material in a way that is potentially damaging to another person’s reputation, his conduct might even constitute an act of defamation, which could lead to civil action against him for damages.
- Again, the unauthorised upload of Penny’s photograph constitutes a copyright infringement

Part 8 - Selected Websites of Policies, Contracts, and Guidelines concerning Photography

1. Museums and Libraries:


2. Public Transport:


RailCorp (NSW) guidelines for hobbyists and secondary students available at http://www.railcorp.info/commercial/filming/hobbyists

RailCorp (NSW) guidelines for other filmmakers and photographers available at http://www.railcorp.info/commercial/filming/other

3. Sports Clubs and Associations:


4. Laws and Regulations re photography in Commonwealth Reserves:


5. Other relevant legislation:

Defence Act 1903 (Cth) available at

Summary Offences Act 1966 (Vic) available at

Crimes Act 1958 (Vic) available at

Local Government Act 1989 (Vic) available at

6. Other:

Australia Council for the Arts ‘Protocols for working with children in art’ available at

Facebook DMCA Notice of Infringement Online Application Form available at
http://www.facebook.com/legal/copyright.php?notify=1
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