

## STREET PHOTOGRAPHY - WHOSE SIDE OF THE LENS ARE YOU ON?

### - SYNOPSIS

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#### Introduction

This is a summary taken from my comprehensive presentation on street photography for amateur photographers.

The presentation asks the question 'Whose side of the lens are you on?' to emphasize conflicting views about street photography.

This summary should be supplemented with a thorough reading of the entire presentation and its supporting materials. The full text of the presentation is available from me.

#### Background

Amateur photographers in Australia should understand the law and ethics relating to street photography.

There is no one law making it unlawful for a photographer to make use of an image, which the subject did not authorize to be taken.

Good manners and etiquette are important features of street photography.

#### Objectives

To set out the historical legal position in Australia concerning street photography, and to consider how this position impacts on street photography.

#### Results

To identify what the legal and ethical positions are concerning street photography in Australia.

#### Issues

On 27 August 2020 Justice Patrick Keane of the High Court of Australia delivered the Michael Whincop memorial lecture. Justice Keane spoke of the development of privacy laws as being 'hit and miss' and said it 'would not be surprising were the High Court now to accept a tort of invasion of privacy' along US lines. The significance of this comment is profound from a street photography point of view.

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Before explaining why that is the case I return to my presentation. I opened by taking attendees back in time and back to the basics.

I began my presentation by asserting that a photographer, and most certainly a photographer out on the streets, should be aware of any risk in their pursuits from a jurisdictional point of view.

However, the simplest investigation revealed to me that there is a lack of certainty as to what street photography is.

In considering the genre today I said that street photography should simply visually document people in public and public property. When undertaking work in this genre the street photographer should consider what is right and what is wrong in undertaking street photography and focus on understanding the rights of the photographer while respecting those of the subject (or the owner of the subject).

#### THE GENERAL LEGAL POSITION AND THE ROLE OF THE HIGH COURT OF AUSTRALIA

I explained that no one law in Australia makes it unlawful for a photographer to make use of an image which the subject did not authorize to be taken.

We remain bound by the common law as explained below. Common law is judge-made law as opposed to law enacted by parliament, whether State or Commonwealth.

The 1937 High Court of Australia *Victoria Park Racing Case* remains authoritative today. The Chief Justice and Dixon and McTiernan JJ formed the majority to establish the binding authority of the case. They decided there is no property in a spectacle and no right to privacy. Rich and Evatt JJ in dissenting felt that it was time for the common law to entrench a new remedy which would have had the effect of defending the privacy of the person from serious and unwanted intrusion. The High Court was dealing with issues of tort. Tort is the law relating to wrongdoing. Tort allows for compensation to be paid by the wrongdoer.

For all intents and purposes street photography has been authorized by reason of the Victoria Park decision - there being no right to privacy.

The decision in *Victoria Park* was reaffirmed 64 years later by the High Court in *ABC v Lenah Game Meats* where the High Court in 2001 held that Australian law should still not recognize a tort of invasion of privacy. The High Court did, however, leave open the possibility of the development of a common law tort of invasion of privacy. That is why Justice Keane's comments are so profound. He was suggesting that the High Court may now be ready to create new common law recognizing the tort of invasion of privacy. Generally, it is not necessary for a photographer to obtain express consent of the subject or the owner of the subject but there are special considerations.

SPECIAL LEGAL CONSIDERATION must be given to children, trademarks, copyright, private property, lawful restrictions, and police.

Note: police cannot interfere with a street photographer's rights to take photographs, nor can the police insist on the deletion by a street photographer of their images without a court order.

#### OTHERWISE, WHEN (IF AT ALL) WILL THE LAW INTERVENE?

The law does not fail to provide ways that an image can be prevented from being used in an unauthorized manner. The law offers protection through:

Australian Consumer Law and fair trading, passing off and defamation laws.

#### PRIVACY – RECENT DEVELOPMENTS (IF ANY)

What is the current position regarding the right or otherwise to privacy? Are there relevant developments? Law reform seems imminent.



Significantly, the *Privacy Act 1988 (Cth)* deals with personal information but still it grants no general rights.

Meanwhile there remains no statutory definition of privacy in Australia.

#### CONSENT (OR OTHERWISE)

There is no doubt that a written contract between the street photographer and each subject, making certain the terms under which the photographer photographs each subject, should clarify all that is necessary including the right to commercialize any relevant image. However, the creation of such a document is unrealistic in most circumstances.

A good approach to similar issues has been adopted elsewhere with Codes of Practice.

The criminal law covers anti-voyeurism and anti-obscenity matters.

#### Conclusion and a broad perspective

Subject to the intervention to which I have referred, good manners and etiquette should govern the conduct of the street photographer in Australia.

I urge the reader to take the time to read and consider my complete presentation. It remains to be seen when, if ever, a tort of invasion of privacy will be established in Australia. The life of a street photographer would be impacted if the tort was established.

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