

Taking Photographs In Public

Zooming In On The Legals



Where and when can you photograph freely in a public space in Australia? The answer isn't as straightforward as you might think so Melbourne-based copyright lawyer Sharon Givoni outlines the legal realities and some interesting case studies to help you decide.

Photo by Chris Scott. Copyright 2014.

Picture the following three scenarios. You are a wedding photographer and you organise a wedding shoot in a public park with a newlywed couple. You are taken by surprise on the actual day when you are approached by an official asking for a permit which you don't have.

Or, you are taking photos for commercial purposes, on what you think is public property when security guards approach you and ask you to leave, stating that what you are doing is against the Defence Act 1903 (Cth). You don't know what you have done wrong.

Or, you wish to take photos of pedestrians on the street – would this be allowed?

While it is widely assumed that any public place can be freely photographed and filmed, this is in fact far from true. If you wish to undertake filming or photography in a public place, you may need a permit from the appropriate authorities, particularly if you

are shooting professionally for commercial purposes. Landscape photographer Ken Duncan once commented, "We must be the only country in the world where you could get a criminal record for taking a picture of a rock".¹

The "rock" he is referring to is, of course, Uluru, a heritage site governed by an extensive list of rules, laws and guidelines. Ken Duncan has stated that these rules and restrictions have led to Uluru becoming known as "Ulu-rules" and Kakadu as "Kaka-don't".²

While Ken Duncan's quote above may seem to be on the extreme side, he is technically correct. Under the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) a person who captures an image in a restricted Commonwealth Reserve may be committing a criminal offence.

But Uluru is not the only Australian icon which has strict photography limitations. The legal landscape

(excuse the pun!) for Australian photographers consists of a myriad of legislation, regulations and conditions. Arts Freedom Australia (AFA), a now-defunct organisation that represented some of Australia's major photographic associations and freelance photographers in these matters, stated on its Facebook page that "... photography in Australia is under attack and photographers and other image makers are losing their rights to freedom of expression".³

Getting Permission

Many photographers feel aggrieved just at the thought of needing to obtain permission when taking photographs in public spaces. For example, Robert Walls, author of the photography blog *This Photographer's Life*⁴, expressed the view that asking photographers to apply for permission to take photographs is "...like asking musicians to apply in writing before they can play



This photo taken by Chris Scott in Melbourne does not show any facial recognition of the people and even if it did there are no laws against taking images of people if you are in a public place – just remember your manners. Copyright Chris Scott 2014.

experience of taking photographs of her sculptures in the gardens. While Phillippa did not encounter any specific issues, she stresses that she was always very careful to get permission before taking any photographs.

"Communication is crucial," she says, adding, "I always kept everyone in the loop, from the chief executive through to the horticulturalists."

CASE STUDY *Victoria Barracks (Government property)*

Issues can arise when taking photographs on government property. For example, it is illegal to take a photograph of any Australian Defence installation (including a building) as well as any area related to defence purposes. Disobeying these restrictions can lead to fines, confiscation and destruction of your equipment and photographs.

One such property – which is also a popular spot for wedding photographs – is the Victoria Barracks façade on St Kilda Road in Melbourne. For any wedding photography

or filming on this site, a permit needs to be obtained from the Department of Defence. Usually the wedding couple organise the permit, however a photography studio can obtain a permit on a client's behalf.⁶

Without approval of the documentation, it's actually illegal for wedding photography to take place on the site under the *Defence Act*. This goes to show just how easy it is to flout the law, even if you didn't mean to do the wrong thing.

Your permit is your 'ticket' in the door. Don't forget to bring it with you!

CASE STUDY *The Melbourne Shrine of Remembrance*

Another popular location for wedding photography is Melbourne's Shrine of Remembrance. Although the Shrine and its surrounding gardens have a special beauty, some photographers have been known to

"In Australia, the general rule is that you are permitted to take photographs of people in public places."

refuse to shoot wedding photographs out of respect for what the structure symbolises.

If photographs taken for a non-related purpose come to the attention of the Shrine Trustees then the photographer may be liable under *The Shrine of Remembrance Act 1978* (Victoria)⁸ or the Shrine Trustees could even apply to the courts to have the photographs destroyed or delivered to them.

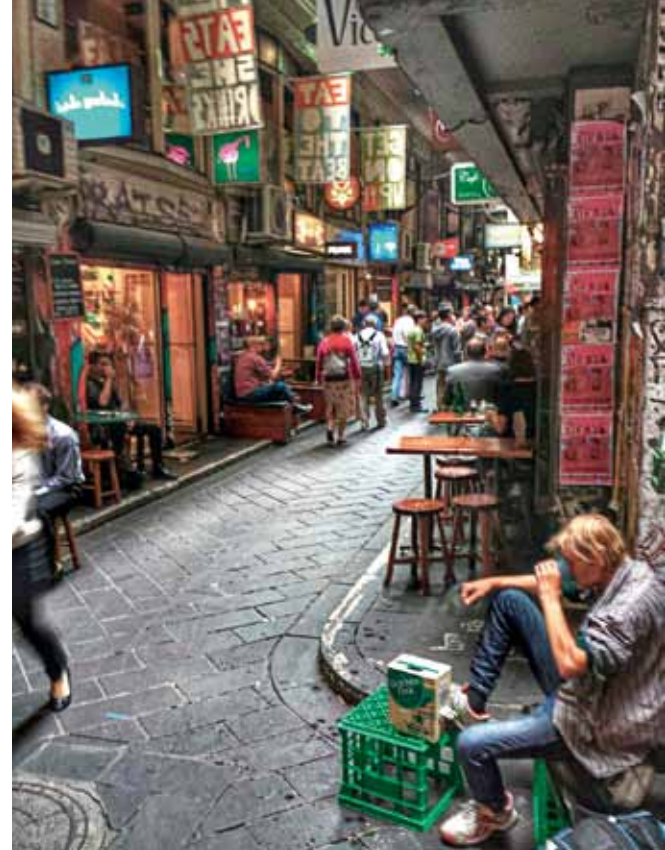
If you do decide to film there, you should be aware of the strict terms and conditions relating to professional photography in the Shrine. At the time of writing, commercial photography and filming for purposes unrelated to the Shrine was not permitted in the Shrine or on the Shrine Reserve.

Commercial Versus Non-Commercial Uses

Generally speaking, if your work is intended for commercial purposes, it is more likely that you will require a permit. The definition of 'commercial' may vary, but broadly speaking, when your photograph will be used in association with a product or service that will generally be considered a commercial use. Really, anything that involves some sort of money making purpose can amount to a commercial use.

The lines can become blurred if a photographer takes an image incidentally which is later used in a commercial context. However, the point is that when commercial photography becomes your financial livelihood,

RIGHT & BELOW: Photo by Chris Scott. Copyright 2014.



hood it is best not to take risks. You don't want to find yourself in a circumstance where you on-sell the image to someone else only to have to later retract it due to the absence of a permit.

As inconvenient as they may appear to be, the rules and regulations are generally in place for a num-

ber of reasons, including safety, privacy concerns and basic public order. Further, they ensure that not too many professional photographers are in the same place at the same time and set the standard for professional photographers (with rules relating to crew size, start and end times, permitted equipment and the like). In the case of general bans, the rules are in place to prevent photographs being taken surreptitiously and subsequently exposed on the internet.

Additionally, terrorism concerns have also led to restrictions of photography in popular public places.

Copyright Issues

It is important in this discussion to touch briefly on the issue of copyright. Basically, even if you have obtained permission to shoot in a specific location, you also need to be wary of not infringing copyright. Obtaining permission and infringing someone's copyright are very different matters when it comes to the law.

CASE STUDY *Images Involving Other Peoples' Public Works*

While sculptures, monuments and artwork are generally protected in their own right under copyright laws and therefore can't be reproduced without authorisation from the copyright owner, sections 65 and 66 of the *Copyright Act 1968* (Cth) generally permit people to take photographs of buildings, models of buildings, sculptures and works of 'artistic craftsmanship' so long as the work is "situated, otherwise than temporarily, in a public place, or in premises open to the public".

CASE STUDY *Graffiti And Street Art*

Graffiti is also a relevant consideration for Australian photographers, particularly in Melbourne which has been colloquially dubbed as the 'Stencil Graffiti Capital'. Note that if a work of street art takes up the whole frame of your photograph you may need permission from the artist to avoid overstepping their rights.

People In Public Places

While ordinary members of the public may come up and tell you that you have no right to snap their image, as the law stands (subject to exceptions such as being on private property including schools and gyms), this is not the case. In Australia, the general rule is that you are permitted to take photographs of

people in public places. This is because, despite what many people think, there is no right to privacy that protects a person's image from being taken. Existing privacy laws in Australia are more concerned with storage and management of personal information and tend to apply in a business context.

In any event, nothing can replace common courtesy. Photographers should tell people that they are about to shoot and allow them the opportunity to step out of the frame. Some photographers have what they call the 'knuckle rule' – basically, if the person looks aggressive and the photographer thinks that they may get punched in the face, it's not worth the hassle.

Having stated all this, you need to be wary that there are public places which restrict the taking of photographs as discussed above⁹. So you always need to check, particularly if you are a professional photographer. It is one thing to take a happy snap in a social context, but quite another if you are a professional photographer (especially if a tripod and/or elaborate camera equipment is in sight).

Photographing People For A Commercial Purpose

While the general rule is that taking photos of people in public places is permitted, if, however, you are taking photos for a commercial purpose, such as for an advertisement, it is best to obtain a model release from the people in the photos.

Sometimes for news articles when it is not always practical to get consent, they tend to blur out faces to avoid facial recognition as a courtesy and show of respect to peoples' privacy, but as far as the law goes this is not strictly a legal requirement (although there are exceptions for example if someone is protected under the witness protection laws which others who have given information to police about criminal activities).

Let's consider two examples.

CASE STUDY *Street Photography: A Right Or An Invasion?*

In 1999, New York-based photographer Philip-Lorca diCorcia set up his camera on a tripod in Times Square, attached strobe lights to scaffolding across the street and took an arbitrary series of pictures of strangers passing under his lights. While it was described by one person as intensely melodramatic and strangely

Case Studies From Around The World

- Since March 2014, photographers in Hungary are technically breaking the law if someone wanders into a shot and the photographer does not have permission.¹⁵
- In November 2013, a police officer in the United Kingdom threatened to arrest a photographer for taking photographs at the scene of a fatal crash in a public street.¹⁶
- In January 2007 in Miami, a photographer was forcefully arrested after a confrontation arose with security guards who stopped him from photographing on a platform at a train station. Following the incident a group was formed called 'Photography Is Not a Crime'¹⁷. The founder has been arrested multiple times since¹⁸ and has constantly challenged the charges.
- In December 2011, a 15-year-old student received an out-of-court settlement, an apology and an affirmation of journalists' right to report freely from the Commissioner of Police in London, after he was arrested for taking photos at the Armed Forces Day parade in June 2010.¹⁹
- In February 2009, as part of an anti-terrorism campaign, a law was passed in the UK prohibiting photographers from taking pictures of members of the police force. Photographers protested claiming that the law intrudes unfairly on photographers' legitimate right to work and freedom.²⁰

touching, not everyone was impressed and one of the unwitting subjects felt particularly violated. After seeing his picture being sold in a gallery, one subject sued the photographer and the gallery claiming that they had published the portrait without permission and were profiting from it financially.

The legal suit was dismissed by a New York State Supreme Court judge who said that the photographer's right to artistic expression trumped the subject's privacy rights.

At the time it was said in the media that, "The practice of street photography has a long tradition in the United States, with documentary and artistic strains, in big cities and small towns. Photographers usually must obtain permission to photograph on private property - including restaurants and hotel lobbies - but the freedom to photograph in public has long been taken for granted. And it has had a profound impact on the history of the medium. Without it, Lee Friedlander would not have roamed the streets of New York photograph-

ing strangers, and Walker Evans would never have produced his series of subway portraits in the 1940s¹⁰."

The above case is of interest as it shows the approach in the United States to these sorts of matters as well as how these issues tend to arise in practise. However, in Australia the result may have been different, but it can be compared to the case studies outlined next which emphasise the more commercial nature of the photographs rather than the artistic purpose.

CASE STUDY *SMILE, You're On Camera*

In 2013, Melbourne-based commercial and documentary photographers, Saville Coble and Joseph Feil, in collaboration with Blue Tree Studios, launched an initiative in the city of Melbourne, called *The Window Project, Five Seconds of Fame*.

Essentially, a giant camera was set up in a shop front at the corner of two busy streets in the city and passers-by were invited to pose in front of the window to have their photo taken. Out of the thousands of

photos taken, Blue Tree Studios randomly selected several of them, turned them into portraits and uploaded them to its Facebook page. The philosophy behind the Window Project was stated as being "...to take the photographic portrait and strip it bare. The portrait has been a photographic staple since the very earliest days of photography. It is a means of capturing the expression, mood and personality of the subject, as well as a commentary on the social styles and norms of the day. Yet most portraiture is constructed, environmental or created in it's approach. The Window Project seeks to take an element of all of these approaches and yet be none of them" (as stated on the Pozible Website, <http://www.pozible.com/project/24777>).

There was a banner that provided instructions to Stop, Click, Smile and Share, and indicated quite clearly that a photo would be taken every five seconds.

In that situation, members of the public gave their consent to participate in the project. However, if an image were to be later used for money-making purposes - for example, if it was superimposed on an advertisement or used on product packaging, it would be prudent to get explicit consent in the form of a model release from the people featured, especially where the people are identifiable.

CASE STUDY *Girl's Image Used Without Permission For Mobile Phone Campaign*

In 2007, a Texas family sued Virgin Mobile USA, when they became aware that an image of their 16-year-old daughter, posted on Flickr¹¹, had been used in an advertising campaign by Virgin Mobile, Australia. The



Photo by Chris Scott. Copyright 2014.

"Even if you have obtained permission to shoot in a specific location, you also need to be wary of not infringing copyright."

Reference Notes

1. Ken Duncan, Australian panoramic photographer and former Chairman of Arts Freedom Australia, as quoted by Australian Commercial and Media Photographers (ACMP).
2. Amy Marshall, 'Snappers want 'Ulu-rules' eased', ABC News, 26 August 2010, available at: www.abc.net.au.
3. Arts Freedom Australia, 'About', Facebook page, available at: www.facebook.com.
4. Robert Walls, 'This photographer's life', available at: robertwalls.wordpress.com/.
5. See Melbourne University Venue Hire Guide: <http://services.unimelb.edu.au/venuehire/general/weddings>.
6. Certain requirements must be met, such as documentation being signed by a Justice of the Peace and then approved by the Department of Defence.
7. Untamed Images Photography company website available at: www.untamedimages.com.au.
8. *The Shrine of Remembrance Act 1978* (Vic) s 5.
9. Bondi Beach is one such place and permits are required for all commercial filming and photography.
10. Battle Over 'Heads' Photo Goes to Court, by Danny Hakim, October 5, 2007, 4:39 pm, *The New York Times*, City Room, http://cityroom.blogs.nytimes.com/2007/10/05/battle-over-heads-photo-goes-to-court/?_php=true&_type=blogs&_r=0#.
11. A photo-sharing social media site, see <http://www.flickr.com>.
12. *Chang v Virgin Mobile USA, LLC*, 2009 WL 111570 (N.D.Tex. January 16, 2009).
13. *The Creative Commons Series*, June 25 2012, Create Legal website, available at: <http://www.create-legal.com/514/the-creative-commons-series-part-3-important-information-on-choosing-your-license>.
14. Susan Drucker, Gary Gumpert and Howard Cohen, 'Social Media' in *Regulating Convergence*, Susan Drucker and Gary Gumpert eds, 2010, Peter Lang Publishing, p. 96.
15. Daniel Nolan, 'Hungary law requires photographers to ask permission to take pictures', *The Guardian*, 15 March 2014 at

www.theguardian.com/world/2014/mar/14/hungary-law-photography-permission-take-pictures; Felix Esser, 'New Hungarian law requires photographers to ask permission before taking a picture', *Imaging Resource*, 17 March 2014 at <http://www.imaging-resource.com/news/2014/03/17/new-hungarian-law-requires-photographers-to-ask-permission-before-taking-a>.

16. Adam Withnall, 'Investigation launched after photographer secretly films police officer threatening to arrest him and make his day "living hell"', *The Independent*, 7 January 2014 at <http://www.independent.co.uk/news/uk/crime/investigation-launched-after-photographer-secretly-films-police-officer-threatening-to-arrest-him-and-make-his-day-living-hell-9044719.html>; Harriet Arkell, 'We'll nick you now and I will make your day a living hell, 'cause you'll be in that cell all day': Police officer swore and threatened to lock man up for photographing crash scene', *Daily Mail*, 7 January 2014 at <http://www.dailymail.co.uk/news/article-2535198/Well-nick-I-make-day-living-hell-cause-youll-be-in-that-cell-all-day-Police-officer-threatened-lock-man-make-life-living-hell-photographing-scene-accident.html#ixzz2wq2Bv600>.

17. Read more on the 'Photography is not a crime (PINAC)' website at <http://photographyisnotacrime.com/about>.

18. Michael Zhang, 'Photographer Forcefully Arrested After Shooting on Metrorail Platform', *PetaPixel*, 22 January 2013 at <http://petapixel.com/2013/01/22/photographer-forcefully-arrested-after-shooting-on-metrorail-platform>.

19. Met Commissioner compensates journalist arrested for taking photographs in public place and told to stop "running round acting silly, being stupid and gay", *Bindmans*, 9 December 2011 at <http://www.bindmans.com/news-and-events/news-article/met-commissioner-compensates-journalist-arrested-for-taking-photographs-in-public-place-and-told-to-stop-running-round-acting-silly-being-stupid-and-gay>; 'Metropolitan Police compensate parade-ban photographer', *BBC Online*, 12 December 2011 at <http://www.bbc.co.uk/news/uk-england-london-16131390>.

20. Photographers angry at terror law', *BBC Online*, 16 February 2009 at <http://news.bbc.co.uk/2/hi/uk/7892273.stm>; Jo Adetunji, 'Photographers fear they are target of new terror law', *The Guardian*, 12 February 2009 at <http://www.theguardian.com/media/2009/feb/12/photographers-anti-terror-laws>.

ads featuring the girl's face appeared on billboards, Websites, newspapers and the like¹². She was captured standing in front of a church, making a two-fingered 'peace' sign, and was superimposed with slogans that read, "Dump your pen friend" and "Free text Virgin to Virgin".

At the time of the incident, Flickr had a policy in place requiring users to select how they wanted their photos to be used.

The photographer who had uploaded the image had done so pursuant to a creative commons license which permitted anyone to use it for commercial purposes. The family argued that licence or no licence, the mobile phone company should have sought permission first. Not many would argue with that, yet Virgin Mobile got away with it purely on technical grounds.¹³

Ultimately, the Texas District Court dismissed the family's case, holding that Virgin Mobile had not

intended its Australian campaign to reach Texas in the first place. The company had only used the photograph in Australia where it was authorised to sell its products and services. Because there was a lack of connection between the use of the photo in Australia, and proceedings in Texas, the case was dismissed¹⁴. However, had the family resided in Australia, the result may have played out quite differently, as people may have assumed the girl's family had consented.


The message here is that if you are going to use someone's image commercially, get permission or risk facing negative publicity and, possibly, having to deal with the wrath of the law.

Wrap Up

The law relating to public spaces and photography is by no means black and white. However, on the plus side it's often not too difficult to find out what the rules are for a public space.

Sometimes the rules can be worded in a way which may seem unclear. In these situations, don't take risks. Contact the relevant authority in question to ensure that once onsite, you don't want to encounter embarrassing situations which could have been avoided.

If you're approached while taking photographs have your permit on hand, avoid arguments and know your rights.

The final lesson to be learned here is that in the context of taking photographs in public places, the opposite of the old adage holds true - it's better to ask for permission than to ask for forgiveness! 

The contents of this article are of a general nature only and must not be relied upon as a substitute for tailored legal advice.

Sharon Givoni is an intellectual property lawyer with many clients in the creative industry. She has run her own legal practice for some 20 years. She can be contacted via email (sharon@plegal.com.au) or by telephone on (03) 9527 1334 or 0410 557 907. To view her website go to www.sharongivoni.com.au.



Street art enthusiast, Chris Scott took this panorama featuring Banksy art freely in the streets of Melbourne. Copyright Chris Scott 2014.