Unconscionable conduct:

Specific instances and the Court’s response

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Monash University Law Chambers

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DOES COMPLIANCE WITH AN INDUSTRY CODE REDUCE THE LIKELIHOOD OF UNCONSCIONABLE CONDUCT?

Abstract

Industry codes are an increasingly common feature of Australian business. With a focus on equitable principles, this paper will consider the impact of compliance with them on claims of unconscionable conduct. Can full compliance with a code practically negate claims of unconscionability? Does proven non-compliance with key terms of an industry code strengthen a claim of unconscionable conduct and, if so, how?

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INTRODUCTION

1. Before reading a paper with equity as a fundamental theme, it may seem that the first thing to do is get in a DeLorean DMC-12, gently pull down the door, set the clock to 1873, and accelerate to 88 miles per hour.1

2. But that would be unwise, for reasons other than the risk of unravelling the very fabric of the space time continuum and destroying the entire universe. More so than almost any other jurisdiction affected by the Judicature Acts, Australian jurisprudence has maintained a resistance to fusion of equitable and common law concepts.2

3. It is certainly not within the scope of this paper to tread the well-trodden path of a ‘fusion fallacy’ academic debate. However, an understanding of the relative importance of equitable doctrine in Australian law is instructive when considering equitable principles directly or, as is far more likely in modern Australian law, statutory rights of action that wholly or partly embody those principles.

4. Unconscionable conduct provisions in Australian legislation, by and large, exemplify this.

5. This paper will focus on how properly prepared industry codes seek to meet claims of unconscionable conduct in sections 20 and 21 of the Australian Consumer Law (Victoria) (ACL)3 and equivalent sections in ss12CA and 12CB of the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act).4

6. I will do this by referring to equitable principles. While reference is made to several industry codes in this paper, a focus is the Australian Bankers’ Association’s Code of Banking Practice 2013. A short list of other voluntary industry codes applicable to financial services is set out in Annexure A.

7. The paper:

a. first, describes key principles of unconscionable conduct in equity (and therefore section 20 of the ACL / section 12CA ASIC Act) as well as under section 21 of the ACL / section 12CB ASIC Act; and

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1 It is common practice in papers like these to commence with a learned, analogically apposite quote from antiquity or, if being more radically modern, an enlightenment era philosophical or judicial pronouncement. Alas, an allusion to a 1985 movie will have to do here.
3 Schedule 2 of the Competition and Consumer Act 2010 (Cth) is incorporated into the law of various States and Territories by enabling legislation – see for example, Australian Consumer Law and Fair Trading Act 2012 (Vic).
4 Extracts of these sections are provided at the end of the paper. The interplay between them is confusing, to say the least. Allsop CJ recently said, in Paciocco v Australia and New Zealand Banking Group Limited [2015] FCAFC 50 (Paciocco) at [249] ‘The application of these provisions admits, however, of some further comment, for different reasons. The interlocking and overlapping provisions are not a model of the simplicity that ought prevail in statutory provisions concerned with commerce, and with consumer protection.’
b. secondly, discusses how industry codes and unconscionable conduct claims interact, with reference to equitable principles.

UNCONSCIONABLE CONDUCT

Unconscionable conduct in equity and section 20 ACL / section 12CA ASIC Act - scope

8. Unconscionable conduct in equity engages principles concerned with the setting aside of transactions where unconscientious advantage has been taken by one party of the disabling condition or circumstances of the other. Unconscionability is a narrow principle and not just a code for unfairness, or a vehicle to impose individual judicial views of justice.

9. There are two elements to unconscionable conduct in equity, each of which must be found by the Court:

   a. a disabling condition or circumstance affecting a party (Special Disadvantage); and
   b. the taking of unconscientious or unfair advantage by the unaffected party (Taking Advantage).

10. Unconscionable conduct:

    a. is not a distinct cause of action, akin to an equitable tort, where a plaintiff simply points to conduct which appears "unconscionable" given its natural or ordinary meaning; and
    b. does not cover the field of equitable interest and concern.

11. For present purposes, equitable unconscionable conduct covers all that is proscribed by section 20 ACL / section 12CA ASIC Act. That is, to find a breach of those statutory

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5 Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd (2003) 214 CLR 51 (Berbatis), 77 (Gummow and Hayne JJ).
6 Attorney-General (NSW) v World Best Holdings Ltd (2005) 63 NSWLR 557 (Spiegelman CJ).
8 Tanwar Enterprises Pty Ltd v Cauchi [2003] 217 CLR 315 (Tanwar), 325 (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).
provisions, one simply meets the equitable tests (assuming of course relevant ‘in trade and commerce’ requirements are satisfied). This is not completely settled.\(^9\)

12. While it is abundantly clear that equitable precepts apply to section 20 ACL / section 12CA ASIC Act, it is equally clear that equity has a part to play in analysing unconscionable conduct as it is modified by statute, such as in sections 21 ACL and 12CB ASIC Act.\(^{10}\)

Unconscionable conduct in equity and section 20 ACL / section 12CA ASIC Act - Content

Special Disadvantage

13. Equity intervenes in cases of unconscionable conduct not necessarily because a party has been deprived of an independent judgment and voluntary will, but because that party has been unable to make a worthwhile judgment (ability to make ‘seriously affected’ – Mason J in Amadio\(^{11}\)) as to what was in the best interests of that party.\(^{12}\)

14. A Special Disadvantage can be analysed by reference to:

a. *Constitutional disadvantage* – this is the standard category stemming from any inherent infirmity or weakness or deficiency of a party, and typified by the following description of Fullagar J in *Blomley v Ryan*:\(^{13}\) ‘poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary’ - that points to special disadvantage espoused by the general principle; or

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9 In *Berbatis* the exact scope of s51AA TPA (ie s20 ACL) was unnecessary to decide, despite Kirby J’s vigorous views in dissent as to the scope of that section.

10 If there was ever doubt about this, see Allsop CJ’s detailed discussion of equity, unconscionable conduct and sections 12CA and 12CB of the ASIC Act in *Paciocco* including, at [283] “By the incorporation of the unwritten law into the ASIC Act, Parliament can be taken to have adopted, for the operation of the Act and arising out of its text, the values and norms that inform the living Equity in that doctrine. Section 12CB(4)(a) makes it plain that the operation of s 12CB is not limited by the unwritten law referred to in s 12CA. That is not to say, however, that the values and norms that underpin the equitable principle recognised within s 12CA do not have a part to play in the ascription of meaning to, and operation of, s 12CB, notwithstanding s 12CA(2).”


13 (1956) 99 CLR 362 at 405.
b.  *Situational disadvantage* - arising out of the legal and commercial circumstances in which the parties found themselves or deriving from particular features of a relationship between actors in the transaction.\(^{14}\)

The ‘constitutional disadvantage’ and, particularly, ‘situational disadvantage’ nomenclature was used by French J (as he then was) at trial in *Berbatis* when considering Special Disadvantage. Each term was referred to by members of the High Court in that case with neither approval nor disapproval. While the High Court did warn that over sub-categorisation of tests distracts from the ruling principle,\(^{15}\) thinking of Special Disadvantage via these sub-categories is practically useful.

15. The Special Disadvantage must be:

a.  *‘special’ in that it must ‘seriously affect the ability of the innocent party to make a judgment as to his own best interests’*. Importantly, a mere difference in bargaining power and taking advantage of a superior bargaining position, particularly in contractual relationships, is of itself insufficient.\(^{16}\) This sits well with equity’s traditional reticence to interfere in contractual relationships merely because circumstances render the bargain more favourable for one side;\(^{17}\) and

b.  *one that exists ‘in dealing with the other party’ and that puts the person at a disadvantage in dealing with that other party*. That is, if the special disadvantage is not related to dealing with the other party, then it is insufficient.\(^{18}\)

**Taking Advantage**

16. This is the unconscientious exploitation of another’s inability, or diminished ability, to conserve his or her own interests.\(^{19}\)

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\(^{15}\) See for example, *Berbatis* (2003) 214 CLR 51, 63 (Gleeson CJ) and, similarly but regarding use of ‘moral obloquy’ as a synonym for ‘unconscionable’, Allsop CJ in *Paciocco* [2015] FCAFC 50 at para [262].


\(^{18}\) *Kakavas* (2013) 250 CLR 392 at 406-407 specifically approving the observations of Mandie JA in the Victorian Court of Appeal.

\(^{19}\) *Berbatis* (2003) 214 CLR 51, 64 (Gleeson CJ).
17. It requires the stronger party to have actual knowledge or be wilfully ignorant of the Special Disadvantage and it is necessary, at the very least in arm’s length commercial transactions, to prove a ‘predatory state of mind’ by the stronger party akin to victimisation or exploitation; neither constructive knowledge nor heedlessness to the best interests of the weaker party is sufficient to engage equitable intervention. ²⁰

18. Taking Advantage is perhaps best illustrated by what it is not. It is not:

   a. the mere taking advantage of a better bargaining position – eg in *Berbatis*, a landlord extracting a tenant’s release from a monetary claim as a prerequisite of renewing that tenant’s lease, when it knew lease renewal was needed for sale of the tenant’s business; or
   b. established merely by a party’s loss, even loss amounting to hardship, or by unfairness in the terms of the impugned transaction or its performance; ²¹ or
   c. established by an inability to get one’s own way. ²²

19. Instead, Taking Advantage requires a Court of equity to look to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a Special Disadvantage in circumstances where it is not consistent with equity or good conscience that he should do so. That is, is it fair, just and reasonable for the stronger party to retain the benefit of the impugned transaction? ²³

What is “equity’s conscience”? ²⁴

20. Equity’s conscience in this context is not a judge’s personal whim, or a call to societal values of fairness in general. This conscience is a juridical construct that is crafted in every case based on the facts and circumstances of the dispute, but necessarily fashioned, particularly in matters of commerce, by relevant laws and the commercial norms and requirements that properly apply.

²¹ Ibid, 401.
21. Kakavas makes clear that, for the purposes of equity’s conscience, there must be distinction between morals based on personal moral philosophy, where unfairness may offend, and morality or conscience as a Court of equity sees it – where lawful conduct, even harsh lawful conduct, is less likely to offend that conscience.\textsuperscript{24}

22. As Allsop CJ states at length in Paciocco,\textsuperscript{25} a Court determines an ‘evaluative standard’ using legal and commercial context in order to judge, based on all relevant circumstances, whether a loss has resulted from conduct that is unconscientious as against that standard.

23. So, in:

\textbf{a. Australian Competition and Consumer Commission v Lux Distributors Pty Ltd,}\textsuperscript{26} the existence of State direct selling legislation addressing fairness had direct bearing (as legal context) on whether certain conduct of vacuum sellers was unconscionable; and

\textbf{b. Kakavas,} it was highly relevant to consideration of equity or good conscience that Crown Casino and Kakavas were in a commercial relationship whose very purpose was to inflict loss on one another.\textsuperscript{27}

24. Industry codes are matters of commercial, and where they are mandatory by regulation, legal context in this regard.

\textbf{Unconscionable conduct under section 21 ACL / section 12CB ASIC Act – additional matters}

25. As previously noted, despite section 21 ACL / section 12CB encompassing a wider notion of unconscionable conduct than the unwritten law,\textsuperscript{28} equitable principles are still highly relevant to analysis of conduct by suppliers or acquirers of good or services.

\textsuperscript{24} Kakavas (2013) 250 CLR 392, 403.
\textsuperscript{25} Paciocco, paras [259-306].
\textsuperscript{26} [2013] FCAFC 90; [2013] ATPR 42-447.
\textsuperscript{27} Kakavas (2013) 250 CLR 392, 403.
\textsuperscript{28} See for example section 21(4)(a) ACL and section 12CB(2)(a) ASIC Act, as well as the specific note of this in connection with equivalent TPA sections by Sundberg J in Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd (2000) 104 FCR 253 (Simply No Knead), 265-267.
26. ‘Unconscionable conduct’ in those provisions contemplates more than inequity arising from ‘special disadvantage’ and more readily extends – provided conduct also rises to a level of being contrary to conscience - to matters that are ‘unreasonable, harsh, unfair, oppressive, or wanting in good faith’.  

27. Notably:

a. the categories of possible unconscionable conduct are not closed and the ACL and ASIC Act set out matters to which, without limitation, the Court may have regard in considering relevant conduct, including (ACL: s22(1)):

   (g) the requirements of any applicable industry code;

   (h) the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code;

   (i) the extent to which the supplier unreasonably failed to disclose to the customer:

      (i) any intended conduct of the supplier that might affect the interests of the customer; and

      (ii) any risks to the customer arising from the supplier’s intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer); and

b. an accumulation of events, acts or circumstances can amount to unconscionable conduct;  

   and

b. some form of ‘moral obloquy’ is required, over and above simple unfairness alone, which is irreconcilable to what is just or reasonable.  

28. The requirement to find ‘moral obloquy’ - not mentioned in the legislation and obliquely criticised recently by Allsop CJ in Paciocco in any event – is equivalent to asking if ‘equity’s conscience’ is offended by the conduct.  An over focus on ‘unfairness’ or ‘harshness’ as

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29 Russell V Miller, Miller’s Australian Competition and Consumer Law Annotated (2015) [1.S2.21.15].  See also Simply No Knead and Sundberg J’s use of this terminology in underlying analysis of matters such as failure to negotiate, exclusion of franchisees from advertising, competing with franchisees and refusal to provide disclosure material.


31 Tonto Home Loans Australia Pty Ltd v Tavares [2011] NSWCA 389.

32 Paciocco [2015] FCAFC 50, para [263].
grounds for unconscionability under section 21 ACL / section 12CB ASIC Act is probably misguided though, even if those things are apparent in taking the Court through matters it may have statutorily regard to.33

INDUSTRY CODES AND UNCONSCIONABLE CONDUCT

What industry codes are and what they address generally

29. Codes of conduct seek to establish appropriate, industry-wide standards of conduct for dealings between members of an industry and their customers.

30. The form industry codes take is varied. They may be:

a. completely voluntary statements of principle only;34

b. voluntary codes incorporated by reference into contracts made by industry members with customers;35 or

c. industry codes under Part IVB of the CCA 2010, prescribed by regulation, being either:

i. voluntary codes, regulated by the ACCC in whole or in part, applying only when voluntarily adhered to by industry participants;36 or

ii. mandatory codes applying to all participants in a given industry.37

31. The Australian Competition and Consumer Commission (ACCC) is an enthusiastic believer in industry codes. It regulates 5 mandatory codes of conduct: the Franchising Code, Horticulture Code, Oilcode, Wheat Port Code and Unit Pricing Code. It also has regulatory duties under the Food and Grocery Code of Conduct as a prescribed voluntary industry code.38

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33 See the Victorian Court of Appeal’s discussion of unfairness, with reference to other appellate judgments, in Director of Consumer Affairs Victoria v Scully & Anor [2013] VSCA 292.
34 Included in this category are those codes which are expressed in their terms to be contractual only as between a member of a professional / industry association and the association itself, rather than the industry member and the end consumer.
35 For example the Code of Banking Practice 2013 or the ePayments Code.
36 For example the Food and Grocery Code of Conduct.
37 For example the Franchising Code of Conduct.
38 See Part IVB (Industry Codes) of the CCA 2010. For an example of regulations setting out a mandatory code, see Competition and Consumer (Industry Codes—Franchising) Regulation 2014 (Cth).
32. Over and above this, the ACCC promotes voluntary codes of conduct more generally as having the following benefits:39

   a. greater transparency of the industry to which signatories to the code belong;
   b. greater stakeholder or investor confidence in the industry/business;
   c. ensuring compliance with the CCA 2010 to significantly minimise breaches; and
   d. a competitive marketing advantage.

33. The Australian Securities and Investments Commission (ASIC) also has regulatory oversight of financial services sector codes of conduct that are formally submitted to it under ASIC Regulatory Guide 183 Approval of financial services sector codes of conduct (RG 183). None have been submitted as at the date of this paper, even though voluntary codes do exist in the sector (see Annexure A).

34. Industry codes, even prescribed ones, are not intended to exclude any other rights or remedies available in respect of the conduct of any person bound by them. A person can still act unconscionably and face action notwithstanding a code being both in place and complied with.40

35. As noted above, unconscionable conduct causes of action in general equity and under the ACL / ASIC Act try to protect, in a non-prescriptive fashion, underlying norms and values of society and commerce.

36. An industry code speaks to norms of conduct within a particular industry. In so doing, compliance with a properly prepared industry code, over and above being a matter which a Court may have regard to for section 21 ACL / section 12CB ASIC Act proceedings,41 assists a party to credibly claim fair, reasonable, disclosed conduct inconsistent with it Taking Advantage.

39 ACCC, Guidelines for developing effective voluntary industry codes of conduct, 2011 pg 4.
40 For statements to this effect, see the explanatory statements to prescribed industry codes, for example, pg 4 of the Food and Grocery Code of Conduct Explanatory Statement available at http://www.comlaw.gov.au/Details/F2015L00242/Download. Industry codes themselves will also often state this – see clause 5 (Retention of your rights) of the Code of Banking Practice 2013.
41 Sections 22(1)(g) and (h) and 22(2)(g) and (h) of the ACL; sections 12CC(1)(g) and (h) and 12CC(2)(g) and (h) ASIC Act.
37. That claim, while powerful, is just a claim. The relevant industry code and actions in compliance with or in breach of it need to be placed in the context of each element of the cause of action.

Industry codes and the elements of unconscionable conduct in equity / section 20 ACL / section 12CA ASIC Act

Special Disadvantage

38. It should always be remembered that unconscionable conduct in general equity requires both a Special Disadvantage and Taking Advantage of it (as those terms are defined in paragraph 9 of this paper). Obviously, there is no blanket prohibition on dealings with a person under a Special Disadvantage.

39. Identifying a Special Disadvantage can be difficult. A counterparty may not disclose it, or indeed it may only first become operative during the course of a continuing acquisition or supply of goods or services.

40. The requirement in equity that a person have actual knowledge or be wilfully ignorant of both Special Disadvantage and its impact on the relevant dealing provides protection when dealing with someone under a Special Disadvantage. If an unaffected party does not know about a Special Disadvantage, it cannot knowingly take advantage of it. For a claim under section 21 ACL / section 12CB ASIC Act that does not rely on unconscionable conduct under the ‘unwritten law’ (ie equity) however, it is less clear that constructive knowledge is insufficient. In any event, a ‘head in the sand’ approach would not be prudent.

41. A properly prepared industry code will have provisions:

a. that seek to identify whether a person has a constitutional disadvantage that may affect their ability to conserve their own best interests, by:

   i. making expressly clear what additional assistance or modification to services is available to persons with a disability or inherent infirmity or weakness (encouraging self-identification),\(^{42}\) and/or

\(^{42}\) See, for example, clause 7 (Customers with special needs) of the Code of Banking Practice 2013.
ii. outlining disclosure and/or pre-contractual procedures that allow collection of customer / counterparty information in a form sufficient to identify disadvantage; and

b. that apply to identify situational disadvantage. Often this will be implicit simply by the existence and application of a code in the first place (ie Code of Banking Practice 2013). In other cases, particularly where the relevant dealing is between members of an industry rather than customers per se, clear information sharing or disclosure provisions can assist.

Taking Advantage

42. A Court of equity may intervene to prevent a stronger party attempting to enforce, or retain the benefit of, a dealing with a person under a Special Disadvantage in circumstances where it is not consistent with equity or good conscience that he should do so. That is, where the stronger party has unfairly and knowingly exploited an inability of a person to conserve his/her/its best interests.

43. A properly prepared industry code will have provisions that address the possibility of ‘Taking Advantage’ of a Special Disadvantage by:

   a. requiring evidence of, or at the very least recommending (allowing written waiver by the customer/counterparty), independent legal, business and/or financial advice to the customer / counterparty; 43
   b. requiring disclosure of information (often in plain English or with a separate plain English / other language disclosure information being available), distinctly ahead of the acquisition;
   c. catering for modified procedures for persons under a clear special disadvantage or experiencing hardship;44
   d. catering for specific, detailed procedures for certain types of transactions where vulnerability is more common; 45 and

43 See Clause 31.4 of the Code of Banking Practice 2013 in relation to entry into guarantees and, separately, Clause 10(2) of the Franchising Code of Conduct in relation to legal, business and accounting advice.
44 Clause 16 (Account Suitability) and Clause 28 (If you are experiencing financial difficulties with your credit facility) of the Code of Banking Practice 2013.
45 See clauses 31.5 and 31.6 of the Code of Banking Practice 2013 in relation to pre-signing and signing procedures for applicable guarantees.
e. creating a complaints mechanism – ideally wholly or partly independent.\footnote{See Part F – Resolution of Disputes, Monitoring and Sanctions of the Code of Banking Practice 2013.}

44. A good industry code attempts to cater for the possibility of a Special Disadvantage or other vulnerability, and then the taking of steps to ensure a person is fully informed and dealt with in accordance with clear, disclosed procedures accepted within an industry. In those circumstances, it is a far more difficult task to find that a stronger party is acting sufficiently unconscionably to require equitable, or statutory, intervention.

Faced with an industry code in an unconscionable conduct claim, what do you do?

45. A Court considering any claim with a basis in equity will look at the whole course of conduct between parties (not just a particular impugned transaction), with precise examination of the facts and the relationship between parties, to determine what best reflects the real justice of the case before it.\footnote{Jenyn v Public Curator (Q.) (1953) 90 CLR 113 (Dixon CJ, McTiernan and Kitto JJ) and discussion of it in both Kakavas (2013) 250 CLR 392, 426 and Paciocco [2015] FCAFC 50 at para [271].}

46. An industry code may be a very important aspect of that relationship and the characterisation of conduct within it. Due to the need to consider all facts and circumstances however, unconscionable conduct would not be found merely because an industry code breach has occurred. A breach is unlikely to be determinative of itself save in egregious circumstances.

47. There is no reason why, in appropriate circumstances, a breach (or multiple breaches) of an industry code cannot be pleaded as grounds for, or at least in support of, an unconscionable conduct claim.\footnote{For a recent example see National Australia Bank Ltd v Rice [2015] VSC 10 (Rice), paras [162-165; 170; 296].} Any such breach needs to be connected to one or more individual components of the cause of action.

48. To be able do this, it is necessary to:

a. identify all of the acts and/or omissions that together are alleged to be unconscionable conduct;
b. characterise the ‘affected party’ (ie is he/she/it affected by a Special Disadvantage or other vulnerability?);

c. identify how the affected party was affected by the alleged unconscionable conduct (did the conduct engage the Special Disadvantage or vulnerability?);

d. identify whether an industry code applies generally to the parties and specifically to the allegedly unconscionable conduct;

e. consider the appropriate ‘evaluative standard’ of conduct that ought to apply to the party against whom unconscionable conduct is alleged, considering the industry code and other legal requirements applying to that person; and

f. analyse the impact that departure (or compliance) with an industry code has on elements of unconscionable conduct in equity and then, considering the ‘evaluative standard, more broadly (including the factors a Court may have regard to under s22 ACL or section 12CC ASIC Act).

49. When considering the industry code itself, it is worthwhile to consider the following:

a. Does an industry code apply to the relationship or the transaction the subject of the unconscionable conduct claim?

   i. This is not always clear, despite the presence of an “Application” section in most codes. Notably, many codes do not cover every dealing within an industry. Some disapply particular provisions within the code for certain transactions, even if the code otherwise applies to the end customer.

b. Does the industry code speak to the relevant Special Disadvantage or a procedure for finding out more information about the customer?

   i. An industry code is necessarily general in nature, so it may not be specific.

c. Is the alleged unconscionable conduct of the industry participant encouraged /required/prohibited by the industry code? Is there a breach of the code?
i. It is necessary to place the conduct of the industry participant in the context of the code.

d. *Does the industry participant have procedures in place that support and document its implementation of the industry code? If so, what are they?*

e. *Have those procedures been followed and what evidence is there that they have been?*

i. This should not be assumed, even if the industry participant’s internal documentation suggests procedures have been followed. For high volume industries in particular – eg financial services generally – internal processes can encourage a ‘tick the box’ mentality and documentation may not reflect reality.\(^4\)

### CONCLUSION

50. The general principles of equity are not ships drifting rudderless on the ocean. Legal and commercial context guide those principles to produce appropriate justice in any given commercial case in which they are invoked.

51. Where unconscionable conduct is alleged, even under statute, equitable principles remain centrally relevant.

52. In particular, industry codes can play an important part in setting the legal and commercial standard, or conscience, against which actual conduct is analysed. A knowledge of what those codes are, how they apply and how they impact conscience is important in any unconscionable conduct case.

53. While compliance with an industry code can reduce the likelihood of a finding of unconscionable conduct, it is not indemnification against such a finding. Similarly, conduct in breach of an industry code does not mandate an unconscionable conduct finding.

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\(^4\) See *Rice* generally in respect of the breach of an earlier version of the Code of Banking Practice and references to the documentation produced by the bank’s employee.
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### Legislation

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<td>Code of Banking Practice</td>
<td>To signatory banks and their dealings with individuals and small business customers. Voluntary (contractual) - intended to be incorporated into contracts.</td>
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<td>Customer Owned Banking Code Of Practice</td>
<td>To signatory customer owned banks, building societies and credit unions and their dealings with individuals and small business customers. Voluntary (contractual) - intended to be incorporated into contracts.</td>
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<td>ePayments Code</td>
<td>Banks, credit unions, building societies and other providers of electronic payment facilities who subscribe (list of subscribers available from ASIC). Voluntary (contractual) - as a condition of subscribing, entities warrant that the code is included in account / facility holder contracts.</td>
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<tr>
<td>General Insurance Code of Practice</td>
<td>To members of the Insurance Council of Australia, any other general insurers, and other entities approved by the ICA, who adopt it in their dealings with consumers (some exclusions) Voluntary (principle) – expressly operates as contract only between member of ICA / relevant entity and ICA itself.</td>
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<td>Voluntary (principle) – expressly operates as contract only between member of NIBA and NIBA itself.</td>
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Annexure B - EXCERPT OF LEGISLATION (as at 28 May 2015)

*Australian Consumer Law (Victoria)*

20  **Unconscionable conduct within the meaning of the unwritten law**

(1) A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(2) This section does not apply to conduct that is prohibited by section 21.

21  **Unconscionable conduct in connection with goods or services**

(1) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a person (other than a listed public company); or

(b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

(...)

(4) It is the intention of the Parliament that:

(a) this section is not limited by the unwritten law relating to unconscionable conduct; and

(...)

22  **Matters the court may have regard to for the purposes of section 21**

(1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the *supplier*) has contravened section 21 in connection with the supply or possible supply of goods or services to a person (the *customer*), the court may have regard to:

(...)

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code; and

(...)

[sub-section 2 is in equivalent terms, in respect of an acquisition]
12CA Unconscionable conduct within the meaning of the unwritten law of the States and Territories

(1) A person must not, in trade or commerce, engage in conduct in relation to financial services if the conduct is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.

(2) This section does not apply to conduct that is prohibited by section 12CB.

12CB Unconscionable conduct in connection with financial services

(1) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of financial services to a person (other than a listed public company); or

(b) the acquisition or possible acquisition of financial services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

(...)

(4) It is the intention of the Parliament that:

(a) this section is not limited by the unwritten law of the States and Territories relating to unconscionable conduct; and

(...)
Lynton practises in commercial and civil litigation, with particular expertise in banking and finance, corporations and insolvency matters.

He accepts briefs to advise or appear in matters relating to banking, contract, corporations, equity, insolvency and trade practices law, as well as actions in disciplinary and related tribunals.

Prior to joining the bar, Lynton was a solicitor and Senior Associate in the banking group at King & Wood Mallesons for over 8 years. He has in-depth knowledge and experience in a wide array of major financing transactions across a variety of sectors, including infrastructure, energy & resources and financial services.

Lynton also has experience in military law matters and was a Captain in the Australian Army Reserve.

Lynton is reading with Stephen Moloney.
BREACH OF CONFIDENCE AS A REMEDY FOR INVASIONS OF PRIVACY


Abstract

The increasing use of social media, including Facebook, has created new ways for an individual’s privacy to be invaded. In the absence of a tort of privacy in Australia the Courts have used the equitable action of breach of confidence to fashion a remedy for invasions of privacy. This paper discusses the action for breach of confidence and the available remedies within Australia in the current digital context with a focus on actions in relation to privacy.

Susan Gatford, Barrister, Owen Dixon Chambers
susangatford@vicbar.com.au
1. Introduction

The action for breach of confidence is an equitable action of long standing. It is available in a multitude of situations and is flexible both in application and in remedy.

The tort of privacy, on the other hand, has struggled to develop in Australia since the High Court’s decision in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1. Since 2001 there has also been much discussion about a legislative response, but no statutory tort of privacy has been created.

In the meantime breach of confidence has continued to be applied and expanded to new situations, including those brought about by the invasions of privacy made possible by the development of online social and business connectedness generally and of services such as Facebook in particular. This paper discusses the action for breach of confidence and the available remedies within Australia in the current digital context with a focus on actions in relation to privacy.

2. The history of the action – Saltman, Argyll, Seager and Coco

Although analogous obligations can find their way into relationships through express or implied contractual terms the action for breach of confidence is independent of contract. This independence, together with the development of the action in the 1950’s and 1960’s, is shown in the four most cited cases of that era.

*Saltman Engineering v Campbell Engineering* (1948) 65 RPC 203; [1963] 3 All ER 413

Saltman had developed drawings for tooling to be used in the manufacture of leather punches. It asked another company, Monarch, to arrange for the manufacture of tooling and leather punches on its behalf. Monarch gave the drawings to a third company, Campbell Engineering and asked it to make the tooling and punches. Campbell Engineering subsequently modified the tools and made punches which it sold on its own account.

Saltman and Monarch sued. The causes of action at trial were breach of copyright, breach of contract, breach of confidence and conversion. Campbell Engineering denied the existence of the contract, saying that there had never been a concluded agreement. The contract (including the alleged implied term that the drawings were
provided under an obligation of confidence) was not proved at trial and the case was dismissed.

The appeal dealt solely with the issue of breach of confidence, which the trial judge had not considered as a separate cause of action. Saltman was successful, with Lord Greene MR saying

> Even if Mr Ransom did not make a contract with the defendants, it does not alter the fact that the confidential drawings handed to the defendants for the purpose of executing the orders placed with them were the property of the Saltmans, and the defendants knew that ... The defendants knew that those drawings had been placed into their possession for a limited purpose, namely the purpose only of making certain tools in accordance with them, the tools being required for the purpose of manufacturing leather punches.

> Without going further into the matter it seems to me that the existence of a confidential obligation in relation to these drawings, as between Saltmans and the defendants, is abundantly proved...

The relief, granted by agreement, was “delivery up of the drawings and an enquiry into what damages had been suffered by Saltman by reason of the Campbell Engineering’s breaches of confidence in retaining for their own use and using for the construction of leather punches to be sold by the defendants on their own account the said drawings and any tools in the making whereof any drawings were used or reproduced to any substantial extent, and in selling such leather punches”.

**Duchess of Argyll v Duke of Argyll (1964) [1967] Ch 302 [1965] 1 All ER 611; [1965] 2 WLR 790**

The Duchess of Argyll was the Duke’s third wife. Both the Duke and the Duchess had been unfaithful. The Duke sought a divorce. The Duchess cross-petitioned alleging that the Duke was having an affair with her step-mother. The step-mother sued for libel and was awarded £25,000. The Duchess then sought an injunction against publication of newspaper articles by the Duke on the basis that confidence between spouses during marriage should be protected by the Court. She succeeded. Ungoed-Thomas J was critical of both parties’ behaviour but nevertheless decided the case on the sanctity of the marriage relationship, noting that
The breaches of confidence of which the Plaintiff now complains appear to be of confidences in the early years of the marriage...When these confidences were made, the relationship [between the parties was]...the normal confidence of trust between husband and wife...[Adultery] makes the confidential relationship of marriage impossible. However, what it does is to undermine confidence for the future and not betray the confidences of the past.

He then attacked the Duke’s marital record and his proposed publications, saying

The confidential nature of the relationship is of its very essence and so obviously and necessarily implicit in it that there is no need for it to be expressed. To express it is superfluous; it is clear to the least intelligent.

Having considered earlier legal authority he then said

These cases, in my view, indicate (1) that a contract or obligation of confidence need not be expressed but can be implied; (2) that a breach of confidence or trust or faith can arise independently of any right of property or contract other, of course, that any contract which the imparting of the confidence in the relevant circumstances may itself create; (3) that the Court in the exercise of its equitable jurisdiction will restrain a breach of confidence independently of any right of law.


Pre-contractual negotiations between the parties over the marketing of Mr Seager’s carpet grip broke down. Subsequently Copydex incorporated Mr Seager’s idea for a carpet grip into one of its products. The Court found that Copydex had been given the design of the grip in circumstances in which it came under an obligation of confidence. Damages were assessed at the market value of the information as between a willing buyer and a willing seller. The Court held that following the damages payment property in the confidential information would vest in Copydex and that Copydex would have the right to make use of the information as its own.

**Coco v AN Clark (Engineers) Ltd** (1968) 1A IPR 587

Mr Coco designed a moped engine. He asked Clark to assist in the manufacture of mopeds using his design. A joint venture was proposed. During discussions, Mr Coco
revealed to Clark the details of the design of his engine. Negotiations broke off between the parties. Sometime later Clark produced a moped the design of which closely resembled Mr Coco’s design. Mr Coco sought an interlocutory injunction to restrain Coco from misusing information communicated to it in confidence solely for the purposes of the joint venture. Clark denied that the information had been communicated in confidence or that it had been used in its moped engine.

Mr Coco failed. He did not establish that his engine had original qualities that gave information about it the necessary quality of confidence or that any similarities that existed between the two engines were achieved by the use of the information that he had communicated.

Despite this unsatisfactory result the case remains the most cited source of the essential elements of the action for breach of confidence, namely

- the existence of information of a confidential nature;
- that the information is communicated or obtained in circumstances importing an obligation of confidence; and
- the information is used in an unauthorised way.

3. The elements of the action

The information must be confidential

The information the subject of the action must, in the words used in Saltman, “have the necessary quality of confidence about it”. In other words, it must be private, not common knowledge. In a commercial context the value of the information, including the fact that it was produced using considerable effort, is relevant. As Lord Greene MR said in Saltman:-

"It is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker on materials which may be available for the use of anybody; but what is confidential is that fact that the maker of the document has used his brain and that produced a result which can only be produced by somebody who goes through the same process."
In other words, secrecy is a relative concept. It is possible for information to be disclosed or known to numerous other persons but still be confidential. For example in *Foster v Mountford* (1977) 14 ALR 1, secret aboriginal tribal customs, known to many senior members of a tribe, were disclosed to a non-aboriginal who subsequently sought to publish details of them in a book. He was restrained from doing so.

In a business context many employees and some customers may know confidential information. In such circumstances the criteria drawn by Gowans J from American trade secrets law and set out in *Ansell Rubber v Allied Rubber Industries* [1967] VR 167 at 193 may be useful namely (1) the extent to which the information is known outside of his (i.e. the plaintiff’s) business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

The obligation of confidence

The information also has to be communicated or obtained in circumstances which place the recipient under an obligation to keep it confidential. This obligation can arise by an express statement or agreement to this effect when the information is disclosed. It can also arise by implication from some relationship between the parties, such as the (former) marriage relationship in *Argyll*.

The test, derived from Coco, is whether a reasonable person in the position of the recipient would have recognised that the information was given in confidence.

In a commercial context the extreme end of expressly imposed obligations (such as an agreed permanent restriction on disclosure) may fall foul of the common law doctrine of restraint of trade, such as in *Maggbury v Hafele Australia* (2001) 210 CLR 181. This may not be the case, however, in a privacy context, where there are no “trading” considerations.

Unauthorised use

Both the nature of the information and the circumstances of its communication are relevant to determining whether the disclosure complained of is unauthorised. For
inherently private information of a personal nature any kind of disclosure may be unauthorised. For commercial information it may be that the information was disclosed for a particular purpose (for example to decide whether to proceed with a particular business venture) but not for other purposes. As is usually the case, it will depend on all of the circumstances. Equity looks at substance, not form, and will determine as a matter of fact whether any disclosure is warranted, and whether the complained of disclosure is within the scope of the permission granted.

4. Remedies

The principal remedies in equity are:-

- Declaration;
- Injunction;
- Account of profits;
- Delivery up; and
- Equitable compensation, that is, compensation aimed at restoring the plaintiff to the position he would have been in if the breach had not occurred.

**Damages in equity**

Damages is not a traditional equitable remedy. In order to remove the uncertainty of the availability of damages in equity Lord Cairns’ Act was passed in 1858. Section 2 of that Act provided:-

> In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct.

So, for example, in Saltman the Court explicitly ordered damages under Lord Cairns’ Act in substitution for an injunction. However, the jurisdictional basis of Lord Cairns’ Act damages may on occasion have been over-reached. Take, for example, Seager v Copydex Ltd above, where damages akin to a purchase price for the information
were ordered, together with an order than once the damages were paid the recipient was the owner of the information. It is unclear what equitable remedy such an award would be in substitution for.

Finally, when considering available remedies it is important to remember that where an obligation of confidence is found to be an implied term of an existing contract then contractual damages are also available.

5. Privacy law in Australia

The Privacy Act 1988 (Clth) regulates how personal information is handled by government agencies and some private sector organisations. The equivalent (newer) Victorian legislation is the Privacy and Data Protection Act 2014 (Vic). But neither creates a relevant cause of action prohibiting invasions of privacy in Australia. Most recently, the final report of the Australian Law Reform Commission inquiry into serious invasions of privacy in the digital era was tabled in Parliament on 3 September 2014 (Serious Invasions of Privacy in the Digital Era, Australian Law Reform Commission Report 123, 3 September 2014). The report sets out in detail the proposed structure of a tort of privacy. Such a tort does not appear, however, to be part of any current legislative agenda.

6. Privacy focused breach of confidence cases in the new millennium – Hitchcock, Lenah, Procopets and Wilson

Australian Courts have been similarly reticent in developing a general tort of invasion of privacy. They have instead focused on the expansion of the action for breach of confidence.

Hitchcock v TCN Channel 9 [2000] NSWSC 198

In Hitchcock Austin J granted a limited ex parte injunction to prevent Channel 9 from broadcasting a television interview with a Ms Page. The interview concerned Ms Hitchcock and her child and their relationship with a third party, Mr Richard Pratt. Ms Page was the child’s “nanny” though this classification of her role was disputed.

At issue in a legal sense was the construction of a confidentiality provision in a deed of settlement of court proceedings. The relevant clause was interpreted and found to prohibit some but not all of the threatened “private” disclosure. Austin J was reluctant to impose separate (additional) obligations of confidence in the circumstances.
He noted at [58]

For a time it was arguable that the equitable doctrine of breach of confidence was confined, or ought to be confined, to disclosure of trade secrets and other information of a proprietary kind. But in Duchess of Argyll v Duke of Argyll [1967] 1 Ch 302 Ungoed-Thomas J held that an obligation of confidence can arise independently of any right of property, and equity has jurisdiction to preserve a matrimonial confidence by injunction. That case was accepted and interpreted widely in dicta by Mason J in The Commonwealth of Australia v John Fairfax & Sons Ltd (1980) 147 CLR 39. When dealing with a contention that equity protects information which is not public property and public knowledge, and that no relevant distinction is to be drawn between the government and a private person, his Honour observed that ‘a citizen is entitled to the protection by injunction of the secrets of his or her private life, as well as trade secrets’, and he cited the Argyll case as support for that proposition. Later English cases have confirmed that the equitable doctrine is available to protect non-proprietary domestic confidences: see Stephens v Avery [1988] 1 Ch 449, 455; Woodward v Hutchins [1977] 1WLR 760.

Despite this statement he ultimately confined the protection he was prepared to grant to Ms Hitchcock to those confidences that in his view fell within the scope of the deed in evidence before him. Ms Hitchcock appealed ([2000] NSWCA 82). At the commencement of proceedings before the Court of Appeal Chanel 9 offered an undertaking in the same terms as the injunction which Ms Hitchcock had sought before Austin J. The only issue before the Court of Appeal was the question of costs. Despite this the Court of Appeal suggested that they might have reached a different result on the breach of confidence claim. Heydon J with whom Speigelman CJ and Mason P agreed, said at [19]

It is not necessary to reach a final view on the reasoning of the primary judge, whose reasons for judgment in their clarity and analytical skill command respect in view of the circumstances under which they were prepared. It is not necessary to deal at all with his Honour’s opinions on the deed. As to his Honour’s opinions on the equitable obligation of confidence, to the extent necessary for disposing of this question of costs I would respectfully differ from him and conclude that there are serious questions to be tried as to whether the
relationship between Ms Page and the plaintiff was such that material discovered by Ms Page in the course of that relationship is liable to be protected by the Supreme Court.

**Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 1991**

Lenah Game Meats Pty Ltd (Lenah) lawfully produced and exported brush tail possum meat. Someone broke into its premises and installed three video cameras without Lenah’s consent. The cameras recorded the operational processes involved in Lenah’s production of possum meat. Later, and unbeknownst to Lenah, the tapes in the video cameras were removed. These tapes were supplied to Animal Liberation Ltd, which in turn forwarded a video tape to the ABC. That video tape was of ten minutes’ duration and showed aspects of Lenah’s possum meat production, including the stunning and killing of brush tail possums. Although the ABC was aware, or became aware that the video was obtained by unlawful entry and surveillance, it was not a party to these activities. The ABC planned to televise the video nationally. Lenah sought an injunction to prevent them from doing so. It was unsuccessful at first instance, successful on appeal to the Tasmanian Court of Appeal, and unsuccessful in the High Court.

Lenah is perhaps most important for the High Court’s confirmation that even in equity you need a recognised cause of action before you can obtain relief from a Court.

Gleeson CJ at [30] recited the elements of the equitable remedy for breach of confidence, but noted that Lenah

“conceded that information about the nature of the processing is not confidential, and was not imparted in confidence. But, it is argued, all information obtained as the result of trespass ought to be treated in the same way as confidential information.”

At [55] he rejected that proposition as “too large”, and inapplicable unless the nature of the information obtained is such as to permit it to be regarded as confidential.

Similarly, Hayne and Gummow JJ (with whom Gaudron J agreed) said at [132]

… Lenah’s reliance upon an emergent tort of invasion of privacy is misplaced. Whatever development may take place in that field will be to the benefit of
natural, not artificial, persons. It may be that development is best achieved by looking across the range of already established legal and equitable wrongs.

This suggested that instead of a general tort of privacy the law of breach of confidence might be expanded to provide a remedy in situations of invasions of personal but not corporate privacy. Indeed, Callinan J (dissenting) was prepared to frame Lenah’s case in this way and to grant Lenah relief non this basis.

**Giller v Procopets (2008) 24 VR 1**

The Victorian Court or Appeal had an opportunity to develop the causes of action in equity a few years later as part of a de facto property dispute arising out of a messy relationship breakdown. The proceedings were complicated by the conduct of the parties, of whom the trial judge said

> In my view both the plaintiff and defendant are amoral; they lie, deceive, and mislead as a way of life. The oath means nothing to either of them. Each will lie if he or she thinks it will benefit him or her.

Part of the evidence that the trial judge accepted, however, was that Mr Procopets had recorded himself and Ms Giller on video tape engaged in sexual activity in the privacy of a bedroom. The taping was initially without and later with Ms Giller’s knowledge. When the relationship ended Mr Procopets distributed copies of the video tapes to members of Ms Giller’s family and to others, and made further unsuccessful attempts to similarly distribute the tapes.

The causes of action relied on in Giller were breach of confidence, intentional infliction of emotional distress and invasion of privacy. The different members of the Court of Appeal disagreed as to the existence and applicability of the torts of intentional infliction of emotional distress and invasion of privacy. Maxwell P made a finding as to the existence and commission of the tort of intentional infliction of emotional distress at [36], but both Ashley JA and Neave J declined to do so. Maxwell P noted at [129] that the generalised tort of invasion of privacy was not available in Australia. Ashley JA noted at [167]-[168]

> The existence of a generalised tort of unjustified invasion of privacy has not been recognised by any superior court of record in Australia. The development of such a tort would require resolution of substantial definitional problems. This,
of itself, might contraindicate such a development. It has been suggested that a better approach may be the “development and adoption of recognised forms of action to meet new situations and circumstances”.

In the present case, a claim founded in breach of confidence was, as I have concluded, available to the appellant. It conferred upon her an entitlement to equitable compensation. This case, like Lenah, is therefore one in which it is unnecessary to consider whether a generalised tort of invasion of privacy should be recognised. It is also an instance of the way in which the law has otherwise developed to address a particular situation. That may provide a good reason why, if a tort of invasion of privacy did come to be recognised, it would not extend to a case of the present kind.

Neave J at [452] referred to the Australian Law Reform Commission’s work and said

Because I have already concluded that Ms Giller has a right to compensation on other grounds, it is unnecessary to say more about whether a tort of invasion of privacy should be recognised by Australian law.

But all agreed that the claim for breach of confidence was both open and established on the facts (Maxwell P at [1], Ashley JA at [41] and [131] and Neave J at [394] and following). Further, the Court in Giller found that a plaintiff in such an action may recover

- equitable compensation for the emotional distress caused by the release of the confidential information; and
- aggravated damages.

These remedies, it was said, were available under the Victorian version of Lord Cairns’ Act, section 38 of the Supreme Court Act 1986 (Vic), which provides

**Damages in addition to or in place of other remedies**

If the Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance

Writing in the Australian Bar Review in 2013 Barbara McDonald (MacDonald, Barbara (2013) 36 ABR 241, A statutory action for breach of privacy: Would it make a (beneficial) difference?) suggested that if Giller became widely applicable and
accepted in Australia then it would effectively fill the first and arguably most important
hole in common law protection of privacy, namely the need to protect the
unauthorized disclosure of private information. Whilst the stated justification for the
broad ambit of the remedies in Giller has since been criticized (see Meagher
Gummow and Lehane’s Equity Doctrines & Remedies, 5th edition (2015) at [24-085])
the availability of the cause of action has not been.

Giller has also recently been applied by the Supreme Court of Western Australia, and
in circumstances which

- “update” its applicability to the current world of social media;
- confirm that damages for emotional distress are available based on general
equitable principles, and not simply because of the unusually broad wording
of the Victorian Supreme Court Act set out above; and
- draw comparisons with the quantum of damages available in personal injuries
cases.

**Wilson v Ferguson [2015] WASC 15**

Ms Wilson and Mr Ferguson lived together in a house in suburban Perth. They both
worked as “fly-in fly-out” workers at the Cloud Break mine site in the Pilbara, working
eight days on and six days off. They used text messaging as a regular means of private
communication. During the course of their relationship they sent each other
photographs of a sexual nature depicting themselves naked or partly naked. Ms
Wilson had also taken sexually explicit videos of herself but had not shown them to
anyone or sent them to Mr Ferguson, but he saw them on her phone and emailed
them to himself. He told her that he had done so. She was upset and asked him to
make sure that nobody else saw them. He agreed.

Subsequently their relationship deteriorated. They argued. Several times during such
arguments Mr Ferguson threatened to post photos of the plaintiff on Facebook and
YouTube, but he did not carry out this threat until 5 August 2013. On that day Ms Wilson
was at Cloud Break and Mr Ferguson was in Perth. They had an argument, by text
message. She sent him a text saying that she had found out he was cheating on her
and that she wanted nothing further to do with him. He responded by uploading 16
photos and two videos of her onto his Facebook page with the comment “Happy to
help all ya boys at home..enjoy!!”. Mr Ferguson had about 300 Facebook friends. Later
that day Ms Wilson began to get calls from friends asking if she had seen what Mr Ferguson had posted on his Facebook page. She had not, as she did not have a Facebook account. She used a friend’s Facebook account to access and print the posts. The same day Mr Ferguson sent her a text message which read

“Fkn photos will be out for everyone to see when I get back you slappa. Cant wait to watch u fold as a human being. Piece if shit u r”

Ms Wilson sent texts back begging him to take the posts down, which he did about 7pm that night. She flew back to Perth the next day, removed her belongings from the house they shared and moved into her parent’s house. She was so upset that she was unable to return to work until 30 October 2013. As a result she lost wages of $13,404. Her evidence was that she was absolutely horrified, disgusted, embarrassed and upset when she saw the posts and felt particularly humiliated, distressed and anxious because they worked at the same site and had many mutual friends and colleagues. At the trial in late 2014 she said that she continued to feel humiliation and anxiety as a result of Mr Ferguson’s publication of the photographs and videos.

In the absence of a statutory or common law remedy for breach of privacy the equitable cause of action for breach of confidence was used to fashion a remedy for Ms Wilson. At [51] the Court relied on Argyll as authority for the proposition that the intimate nature of a personal relationship between two people may give rise to a relationship of trust and confidence such that, without express statement to that effect, private and personal information passing between those people may in certain circumstances be imbued with an equitable obligation of confidence.

At [79]-[81] it applied Giller, updating it for what it described as “the current pervasiveness in Australia society of the internet, social media platforms utilising the internet and portable devices which interface with the internet and those platforms” and, how, on the evidence before it, they are now being used. Specifically the Court said

The not uncommon contemporary practice of couples privately engaging in intimate communications, often involving sexual images, by electronic means, the damaging distress and embarrassment which the broader dissemination of those communications would ordinarily cause and the ease and speed with
which that dissemination can be achieved should inform the way in which equity responds to a breach of the obligation of confidence.

Compensation was awarded to the plaintiff

- for her lost wages; and
- for her “significant embarrassment, anxiety and distress as a result of the dissemination of intimate images of her in her workplace and among her social group, aggravated by the fact that the release of the images was an act of retribution by the defendant, and intended to cause harm to the plaintiff” (at [85]).

Her lost wages were determined at $13,404. The amount of the second head of damage was fixed at $35,000, taking into account that the plaintiff had not sustained psychiatric injury. The Court also said that any award should not be disproportionate to the amounts commonly awarded for pain, suffering and loss of amenity in personal injury cases. *Wilson* confirms the availability of a remedy for gross invasions of privacy in Australia and of compensation, without the need to prove any psychiatric injury, for the emotional distress caused as a result.

7. Conclusion

The Courts have generally been sympathetic to individuals who have come before them seeking redress for invasions of their privacy. Without expressly filling the gap left by legislative inaction and creating a tort of privacy *per se*, judges have been prepared to extend the breach of confidence remedy to fashion a remedy. It is impossible to say whether such developments lend support to the creation of a statutory tort of privacy or whether the legislature will instead consider that such a response by them is unnecessary in light of decisions like *Giller* and *Wilson*. Either way, if you meet a person aggrieved by what they consider to be an invasion of privacy pause to consider the applicability of an action for breach of confidence before dismissing the law as being unable to assist.
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