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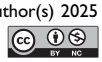

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NDAs: Legally unenforceable or just unethical? A contract law perspective

Renata Grossi
Faculty of Law, University of Technology Sydney, Australia

Abstract
Evidence suggests that non-disclosure agreements ('NDAs') are widely used. Instead of their intended use of protecting trade secrets and commercially sensitive information, they were exposed during #MeToo as tools to hide sexual harassment and assault. Evidence suggests they remain pervasive and pernicious, and require more scrutiny. As contracts, how legally enforceable are they? The article will attempt to answer this question by applying some well-known contract principles to the real-life NDA between Zelda Perkins and Harvey Weinstein/Miramax, widely reported in the media. This analysis will cast some doubts around their enforceability and at the same time suggest a broader social role for contract law.

Keywords
Contract law, sexual harassment, #MeToo, employment law, dispute resolution

A non-disclosure agreement ('NDA'), also known as a confidentiality agreement, is a promise to remain silent and not disclose specific information in return for various types of consideration, typically a sum of money. NDAs can arise as the result of settling a dispute, but they can also be pre-emptive, with employees being asked to sign them before taking on employment, and even, as is often the case in the entertainment industry, before attending an interview/audition.[1] Their presence is not always obvious; they can be disguised in compulsory mediation and arbitration clauses,[2] or as non-disparaging clauses.[3] Before they were spectacularly exposed by #MeToo, they were mostly associated with the protection of sensitive trade information, trade secrets, inventions and intellectual property. They also occasionally played a role in state secrets[4] and the protection of privacy.[5]

More recently, NDAs have become pervasive. Some estimates suggest that in the United States (US), over one third of the workforce is now subject to an NDA,[6] and that 55 per cent of workers are subject to mandatory employment arbitration clauses[7] which are likely to embed within them confidentiality clauses.[8] We can assume that these figures somewhat reflect a similar situation in Australia.[9] This means that NDAs impact the lives of workers 'at every pay grade and every industry'.[10]

[1]See David Arditi, '*The Voice*: Non-Disclosure Agreements and the Hidden Political Economy of Reality TV' (2020) 18(2) *Popular Communication* 138.
[2]Emily Otte, 'Toxic Secrecy: Non-Disclosure Agreements and #MeToo' (2021) 69(3) *Kansas Law Review* 545. See discussion of mandatory arbitrary clauses as quasi-NDAs at 552–4.
[3]'Meta Puts Stop on Promotion of Tell-All Book by Former Employee', *The Guardian* (online, 14 March 2025) https://www.theguardian.com/technology/2025/mar/13/meta-careless-people-book-former-employee.
[4]Generally, governments use state secret legislation but in the Spycatcher cases of the 1980s, it also relied on breach of confidence.
[5]*Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457. Supermodel Naomi Campbell's privacy was breached when an employee revealed to the media that she was attending Narcotics Anonymous.
[6]Josh Bornstein, *Working for the Brand: How Corporations are Destroying Free Speech* (Scribe, 2024) 50.
[7]Alexander JS Colvin, *The Growing Use of Mandatory Arbitration* (Report, Economic Policy Institute, 27 September 2017) https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/.
[8]Christopher R Drahozal, 'Confidentiality in Consumer and Employment Arbitration' (2015) 7 *Arbitration Law Review* 28, 30.
[9]This is suggested by Bornstein (n 6).
[10]Orly Lobel, 'NDAs are Out of Control. Here's What Needs to Change', *Harvard Business Review* (online, 31 January 2018) https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change.

Corresponding author:
Dr Renata Grossi, Faculty of Law, University of Technology Sydney, PO Box 123, Broadway, NSW 2007, Australia.
Email: renata.grossi@uts.edu.au

A recent quick search on the internet throws up a telling picture, illustrated by some of the most prominent examples. During his 2024 election campaign, Donald Trump asked Stormy Daniels to sign yet another NDA to prevent her from discussing their past sexual relationship.[11] Meta is using a non-disparagement clause in an employment contract to prevent former employee, Sarah Wynn-Williams, from promoting her book detailing her experiences of working for the company.[12] The Australian Federal Police is using an NDA to prevent New South Wales (NSW) police officers from revealing that a widely reported 'caravan terrorist plot' was in fact a hoax, knowingly exploited for political leverage.[13] The consumer rights organisation Choice reveals that car companies are asking consumers to sign NDAs before fixing faults with their newly purchased cars.[14] But nothing is as shocking as their misuse, revealed by the #MeToo campaign,[15] as tools by which sexual predators avoid scrutiny by silencing their victims.[16] Their use has veered away quite drastically from protecting commercially sensitive information, trade secrets and inventions. What was once an 'obscure legal instrument' has become a tool at the 'centre of public conversation'.[17] The examples reported above suggest they are widely used for political purposes, to protect corporate economic interests, to suppress employees' rights in the workplace and at law generally, and to hide illegal and immoral behaviour. Many jurisdictions around the world have responded with law reform that limits their use.[18] In Australia, several reports and recommendations have been made but no legislative changes have occurred.[19] In this article I want to suggest that, regardless of any legislative avenues we may pursue, it is worth testing whether the common law of contract, with the help of equity, may also be a tool in the ways we preserve the legitimacy of NDAs while also preventing their misuse.

The misuse of NDAs during #MeToo

By their very nature, it is difficult to get details of the terms of the NDAs that people sign. One of the very few available in the public domain was the NDA that Zelda Perkins and Rowena Chiu signed with the US film and television production and distribution company Miramax, to settle a sexual harassment dispute involving Harvey Weinstein.

Zelda Perkins was one of Weinstein's assistants in London in the mid-1990s.[20] When Weinstein came to town, Perkins described going to his hotel room to wake him up and he would expose himself and try to pull her into bed with him. When working together, he would often be naked in the shower, or sitting at a desk semi-naked. She told *The Guardian* that '[e]very time he'd leave to go back to America, the relief for having survived was huge'. She felt powerless to do anything about it and would get through it with 'a mixture of humour and aggression'. In the late 1990s on a trip to the Venice Film Festival, Weinstein attempted to sexually assault her fellow assistant, Rowena Chiu. At this point, Perkins and Chiu decided to take some action. They reported the incident to the company Miramax. They were told to get some good lawyers and to negotiate a settlement. The negotiations themselves were 'long and intimidating'. Perkins and Chiu were not allowed pen or paper, were not allowed to go to the bathroom unaccompanied and were not allowed to speak to anyone but their lawyers.

They tried to negotiate a settlement that would prevent other employees from working in a similar situation, which they realised was 'normalised' 'extreme sexual harassment'. They demanded that Weinstein have therapy, that the company create robust HR systems to deal with complaints

[11]Graham Kates, Katrina Kaufmann and Jacob Rosen, 'Trump Sought New NDA from Stormy Daniels This Year, Documents Show', *CBS News* (online, 18 October 2024) https://www.cbsnews.com/news/trump-stormy-daniels-nda/. See also the Trump organisation's extensive use of reputational NDAs discussed in Mark Fenster, 'How Reputational Nondisclosure Agreements Fail (or, In Praise of Breach)' (2023) 107(2) *Marquette Law Review* 325, 353.

[12]'Meta Puts Stop on Promotion of Tell-All Book by Former Employee' (n 3).

[13]Jordyn Beazley, 'NSW Police Officer Signed NDA with AFP over Sydney Caravan "Fake Terrorism" Plot', *The Guardian* (online, 7 April 2025) https://www.theguardian.com/australia-news/2025/apr/07/sydney-dural-caravan-fake-terrorism-plot-nsw-police-officer-signed-nda-with-afp-ntwnfb.

[14]Andy Kollmorgen, 'Why Non-Disclosure Agreements Fly in the Face of Consumer Law', *Choice* (30 November 2023) https://www.choice.com.au/shopping/consumer-rights-and-advice/your-rights/articles/non-disclosure-agreements.

[15]NDA misuse along similar lines has also been documented among the church to hide the abuse of children by the church. It is also reported as a widely used technique to hide medical malpractice. See Seán McGuire, 'Practicing Truth, in Silence: Reflecting on the Use of Non-Disclosure Agreements in North American Ecclesial Contexts' (2024) 17(1) *Practical Theology* 27.

[16]See Jodi Kantor and Megan Twohey, 'Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades', *New York Times* (online, 5 October 2017) https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html; Ronan Farrow, 'Harvey Weinstein's Secret Settlements', *The New Yorker* (online, 21 November 2017) https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements.

[17]Jodi Kantor and Megan Twohey, *She Said: Breaking the Sexual Harassment Story that Helped Ignite a Movement* (Bloomsbury, 2019) 183 ('*She Said*').

[18]Post #MeToo, many countries have passed reforms concerning NDAs. In the US, there has been a variety of approaches, from banning them (New Jersey) to giving victims the right to withhold their names (California). In New York, they were made valid only if they were used at the request of the sexual survivor in the case. This follows the Irish model where they are banned unless they are the expressed wish and preference of the victim employee and, even then, they are subject to conditions.

[19]See Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020. For a discussion, see Madeleine Causbrook, 'The Road to Reform: Lessons from International Jurisdictions for Legislative Regulation of Non-Disclosure Agreements in Workplace Sexual Harassment Matters in Australia' (2023) 36(1) *Australian Journal of Labour Law* 30. In Victoria, a commitment has been made to introduce legislation to restrict the uses of NDAs in workplace sexual harassment cases.

[20]Unless otherwise stated, the facts recounted here are from two articles, the first an interview with Zelda Perkins by Emine Saner, 'Zelda Perkins: "There Will Always be Men like Weinstein. All I Can Do is Try to Change the System that Enables Them"', *The Guardian* (online, 23 December 2020) https://www.theguardian.com/world/2020/dec/23/zelda-perkins-there-will-always-be-men-like-weinstein-all-i-can-do-is-try-to-change-the-system-that-enables-them. Second is an opinion piece by Zelda Perkins, 'An NDA from Harvey Weinstein Cost Me my Career – At Last, Banning Them Feels Within Reach', *The Guardian* (online, 15 December 2022) https://www.theguardian.com/commentisfree/2022/dec/15/nda-harvey-weinstein-confidentiality-clause-abuse.

of sexual harassment, and that he should be fired if he sexually harassed another employee. Knowing what we know now about how events unfolded, it is unlikely that any of these terms were ever seriously implemented, if at all.

Perkins and Chiu were each paid £125,000 for their silence, which was stipulated to be total and in perpetuity. They were forbidden from talking about the events that led to the settlement with Miramax to family, friends and medical practitioners, including therapists. They could not disclose to their accountant where the £125,000 had come from.[21] If any future civil or criminal cases arose, they were instructed to use their 'best endeavours' to limit what they said. They were not allowed to speak to the media and, if any stories were reported, they were required to help conceal them.[22] They were not allowed to have a copy of the agreement. Perkins would read it in her lawyer's office and then write down what she remembered when she left.[23]

It was not till 2017, some 20 years later, and after the *New York Times* published the story detailing decades of allegations of sexual abuse, that Zelda Perkins' and Rowena Chiu's stories came to light.[24] Before the stories broke, Perkins could not talk about or explain what had happened to her. At job interviews, she described not being able to answer questions on why she had left what to many was considered a dream job. The lack of explanation left her open to insinuations of having had 'an affair with the boss'. She had considered studying law, but the experience led to her losing faith in the legal system. She said: 'While he collected Oscars, I endured job interviews where men openly questioned me about my "relationship" with Weinstein, but I was gagged from telling the truth'. Eventually, she moved overseas and switched to a career working with horses.

Zelda Perkins has since become an activist in Britain to lobby against the use of NDAs. She argues that there is 'nothing ethical about a legal agreement that hides bullying, racism or any form of assault and works purely to protect powerful wrongdoers'. Her view of NDAs is that they serve to protect the perpetrator, enabling them to continue their behaviour while their victims are silenced, losing their jobs as well as their ability to prevent others from enduring the same experiences.

Largely as a result of these revelations, NDAs have been described in the scholarship as 'gagging clauses',[25] 'hushing contracts',[26] or 'psychological prisons'[27] that create 'toxic secrecy',[28] and 'epistemic injustice'.[29] Notwithstanding that they have a legitimate use, it has become difficult to find anything good to say about them since the revelations during #MeToo of their misuse.[30]

Are NDAs legally enforceable?

The internet describes NDAs as legally binding contracts that allow an innocent party to seek damages for losses suffered.[31] But how legally enforceable are NDAs?[32] Many people who sign them take them very seriously – in Zelda Perkins' case to the point of abandoning a career and moving overseas instead of breaking her silence. What would have happened if Zelda Perkins had spoken publicly against the terms of her NDA? What would a court in Australia have done using common law contract principles? There is a lack of litigation around NDAs. In his book *Working for the Brand: How Corporations are Destroying Free Speech*,[33] Josh Bornstein, a leading employment lawyer in Australia, explains that most employees do not challenge NDAs because of fear, ignorance and the high cost of 'lawyering up'.[34] This lack of litigation thus leaves unanswered serious questions around their enforceability. How would existing laws stand up against an NDA such as one described in this article? For the sake of advancing this discussion, below I will apply some existing Australian contract law principles to the case of Zelda Perkins and raise some questions around the enforceability of the NDA she signed with Harvey Weinstein and Miramax.[35]

[21]Kantor and Twohey, *She Said* (n 17) 66.
[22]Ibid.
[23]Ibid.
[24]See Kantor and Twohey (n 16); Farrow (n 16).
[25]Victoria Pagan, '21st Century Bridling: Non-Disclosure Agreements in Cases of Organizational Misconduct' (2022) 76(11) *Human Relations* 1827 ('21st Century Bridling'); Victoria Pagan, 'The Murder of Knowledge and Ghosts that Remain: Non-Disclosure Agreements and their Effects' (2021) 27(4) *Culture and Organization* 302 ('The Murder of Knowledge and Ghosts that Remain').
[26]David A Hoffman and Erik Lampmann, 'Hushing Contracts' (2019) 97 *Washington University Law Review* 165.
[27]Bernadette Baum, 'Workplace Sexual Harassment in the "MeToo" Era: The Unforeseen Consequences of Confidential Settlement Agreements' (2019) 31(1) *Journal of Business and Behavioral Sciences* 4, 7.
[28]Otte (n 2).
[29]Pagan, '21st Century Bridling' (n 25); Pagan, 'The Murder of Knowledge and Ghosts that Remain' (n 25).
[30]There are some arguments in their favour, largely concerned with maintaining the privacy of the victims and being quick and cheaper than going to court to resolve disputes. See Karen O'Connell quoted in Jenna Price, 'Why Silence on Sexual Harassment will Hurt Company Bottom Lines', *The Sydney Morning Herald* (online, 10 April 2021) https://www.smh.com.au/national/why-silence-on-sexual-harassment-will-hurt-company-bottom-lines-20210409-p57ht1.html; Nico Bernardi, 'Silence can be Golden: The Benefits that Confidentiality Clauses can Bring Survivors Seeking Settlement' (2021) 33(1) *Canadian Journal of Women and the Law* 1. See also Regina Featherstone and Sharmilla Bargon, *Let's Talk About Confidentiality: NDA Use in Sexual Harassment Settlements since the Respect@Work Report* (Report, The University of Sydney Law School, 6 March 2024) 42–5 https://www.sydney.edu.au/law/our-research/research-projects/lets-talk-about-confidentiality.html.
[31]See, eg, Andrew Lord, 'A Guide to Non-Disclosure Agreements', *Lord Commercial Lawyers* (Web Page, 12 December 2024) https://www.lordlaw.com.au/a-guide-to-non-disclosure-agreements/.
[32]Featherstone and Bargon (n 30) raise this question in their report at 45–7. Others listed in this article do similarly – see, eg, Villain (n 40), Causbrook (n 19), Otte (n 2) and Fenster (n 11).
[33]Bornstein (n 6).
[34]Ibid 52.
[35]I am not discussing Rowena Chiu because, while it appears her NDA was identical to Zelda Perkins', she has not been as public.

Vitiating consent

Perhaps the most obvious question that emerges from the discussion above goes to how the contract (NDA) was formed and to the robustness of the parties' consent to it. Contract law is overall not interested in questions of substantive justice – the content of a contract. However, contract's ethical core comes from the claim that parties have freely consented to the contract.[36] While the freedom to contract has been significantly critiqued,[37] contract is understood as 'quintessentially voluntary'.[38] Moreover, although the context of contract is the capitalist market of self-interested and unequal parties, contract law doctrine will draw a line at faulty consent. For example, it will set a contract aside for duress – understood as illegitimate pressure by one party to induce entry or to modify a contract.[39] Further, in conjunction with equity law, contract common law will also vitiate consent that is the result of a relationship of influence between the parties (undue influence) or where one of the parties has a particular disadvantage (unconscionability) which results in a disadvantageous contract. While these doctrines invite a holistic approach, there are some factors that raise them as possibilities. Villain says there are some 'red flags',[40] such as when there is a large disparity between the parties, when an agreement contains terms that overwhelmingly favour the stronger party, or when an inadequate consideration is exchanged for the promise.[41]

These 'red flags' certainly appear when we consider the NDA between Zelda Perkins and Miramax. First, we can say that there was a great difference in the power between the parties. Miramax was and is a large film and television production and distribution company. In the 1990s, it was at the peak of its success. It boasts 700 titles, which have earned a total of 278 Academy Award nominations and 68 Oscars.[42] Zelda Perkins was a personal assistant working in their London office. From the information we have, on the face of it there is a big disparity between these parties in the organisational structure. Second, the terms of the NDA can certainly be described as harsh and one-sided. There is little justification for imposing a condition that she could not discuss the situation with a medical professional, nor disclose where the money had come from to her accountant in perpetuity. Third, in terms of the adequacy of the payment received, it is hard to say whether the payment of £125,000 that Perkins received for her silence is a fair reflection of what she lost as a result of her career changes.

But perhaps the most telling thing in this case is the way, described above, that the NDA was negotiated which Perkins said left her feeling like there was little choice but to sign the document. She said:

> Pretty quickly, we were told there was nothing we could do other than agree some form of settlement with him. It was a huge, horrible realisation that ultimately it was about who had the power. It would just be two silly girls' word against Harvey Weinstein. And that realisation was really upsetting.[43]

A feeling that parties did not have a choice is key to a finding of a lack of consent. It is what the courts have focussed on in the caselaw,[44] and this is what would make the NDA vulnerable to non-enforceability in Australian law.[45]

Implied duty of good faith and fidelity

As stated, NDAs emanate from a legitimate requirement in an employment relationship for an employee to keep the employer's confidence. This may be expressly stated from the contract of employment, or it may be implied. Every contract of employment imposes upon the employee an implied duty of good faith and fidelity.[46] Eminent employment law academic Joellen Riley Munton says that this duty includes a prohibition on appropriating inventions and property, making use of an employer's confidential information, soliciting an employer's customers, and accepting bribes and commissions. In relation to speech, the duty extends to a prohibition on making unauthorised comments on the employer's business.[47]

To determine how far this duty extends, the courts will consider the nature of the information, how closely

[36]See the classical book by PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979).
[37]See Walter Olsen, 'Tortification of Contract Law: Displacing Consent and Agreement' (1992) 77 *Cornell Law Review* 1043; Richard Craswell, 'Contract Law, Default Rules, and the Philosophy of Promising' (1989) 88(3) *Michigan Law Review* 489.
[38]Aditi Bagchi, 'Voluntary Obligation and Contract' (2019) 20(2) *Theoretical Inquiries in Law* 433, 435.
[39]See *Thorne v Kennedy* [2017] HCA 49. Duress is both a common law and an equitable doctrine that can be applied.
[40]Hélène Villain, 'Non-Disclosure Agreements: When Contracts Serve Sexual Violence and How to Deal with Them' (2024) 37(6) *International Journal for the Semiotics of Law/Revue internationale de Sémiotique juridique* 1799, 1805.
[41]Ibid. This needs to be read in light of the more general rule that courts do not by themselves consider adequacy of consideration as relevant to the legality of a contract. See *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189.
[42]See Nigel M Smith, 'Iconic Film Studio Miramax Sells to Doha-Based beIN Media Group', *The Guardian* (online, 3 March 2016) https://www.theguardian.com/film/2016/mar/02/bein-media-group-miramax-film-studio-acquisition.
[43]Saner (n 20).
[44]For example, in *Thorne v Kennedy* (n 39), speaking specifically on the relationship between undue influence and unconscionability, the High Court said: 'Ms Thorne was subject to undue influence – powerless, with what she saw as no choice but to enter the agreements – point inevitably to the conclusion that she was subject to a special disadvantage in her entry into the agreements' at [64] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).
[45]On this point, it is interesting to note that a recent report into the uses of NDAs in the settlement of sexual harassment cases in Australia has revealed that many victim survivors are not being advised by their lawyers, as they should be, that NDAs are optional. According to the report, victim survivors are not being given the advice that they can negotiate 'carve outs' from NDAs. It appears that they are simply not being given a choice about signing them. See Featherstone and Bargon (n 30) 83.
[46]This duty shares a similar normative grounding with fiduciary duties that equity places on certain professional roles such as doctors, lawyers, trustees and others. It is a one-sided duty. In England, there is a more balanced approach through the duty of mutual trust and confidence.
[47]Joellen Riley Munton, *Labour Law: An Introduction to the Law of Work* (Oxford University Press, 2021) 79.

it was guarded, whether it was considered truly confidential and if it could have been sourced in another way.[48] This analysis would consider the overall justifications for these duties, which, according to Tanya Aplin et al, are mostly about: the desire to incentivise the creation of information; the desire to prevent unnecessary expenditure of resources, and the desire to prevent unjust enrichment and unethical behaviour more generally.[49]

But there are limits to what the employee is bound to keep secret. In English law there is a public defence of just cause or excuse for the Equitable action for breach of confidence which would be relevant for a defence against a breach of the implied term of good faith and fidelity. A good statement of this defence was given by Lord Denning MR, in *Initial Services Ltd v Putterill*,[50] as extending to information that alludes to 'crimes, frauds and misdeeds', committed or in contemplation, whose disclosure can be justified in the public interest. Lord Denning emphatically stated that

> no private obligation can dispense with that universal one which lies on every member of society to discover every design which may be formed contrary to the laws of the society, to destroy the public welfare.[51]

Applying this to the Zelda Perkins case, would she have breached her duty of faith and fidelity to her employer if she had disclosed her experiences of working with Harvey Weinstein against her NDA?

First, it is important to remember the rationale for the duty. As shown above, the duty's rationale is to incentivise research and the creation of new inventions, and to protect the financial interest of those who have invested in the creation of new knowledge. A paradigmatic case would be akin to *University of Western Australia v Gray*,[52] when the University of Western Australia tried to claim ownership of medical discoveries made by one of their employees, Professor Gray, to prevent him from commercialising and financially gaining from them. Perkins' NDA with Miramax could not be further removed from this context and this rationale for the legal justification for the implied term. Even if the information that the NDA was hiding were to be considered commercially sensitive, and for the protection of the company, an argument for disclosure for the public interest would be substantial.

Against public policy

Another contract law question is whether some of the NDAs described in this article would be considered unenforceable because they are against public policy. In *A v Hayden*,[53] the High Court affirmed the court's right to refuse enforcement of any contract that goes against public policy. This is an area of contract law where judges can look at contracts beyond the economic interests of the two parties, to the broader impact of contracts in society. Public policy jurisprudence enables courts to infuse public values into a contract, to consider third party rights and to reduce the potential for social harms. Public policy jurisprudence is one place where we can find the collective voice of contract law.[54]

There is a nervousness around the court's use of the public policy doctrine and with good reason. In *A v Hayden*, the Court described contracts against public policy as contracts that are 'injurious to communal interests'.[55] Courts are always engaging with communal interests, but to do so as overtly as this area of law invites is not an easy task. Community values are neither homogenous nor static and the exercise is always politically fraught. Among other things, it plays into the common trope of undemocratic and activist courts usurping the role of parliament. This might help to explain, in some part, why this area of contract law has not been used to its full potential.

Nick Seddon and Rick Bigwood[56] claim the following as heads of public policy grounds that may render a contract unenforceable in Australia. These are contracts that involve unlawful conduct or purpose; those that promote sexual immorality; those that are prejudicial to the status of marriage; those that defraud revenue; those that prejudice the impartiality of public officials; those that fetter the exercise of executive power or statutory power; those prejudicial to national or international security or to the administration of justice; those that seek to oust the jurisdiction of the courts; and those that unreasonably restrict trade.[57] Andrew Robertson and Jeannie Paterson add two other types: contracts that impose servitude, and contracts that infringe the laws of a foreign country.[58]

[48]Ibid.
[49]Tanya Aplin et al, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd ed, 2012) 77–88.
[50][1968] 1 QB 396.
[51]Ibid 405. For a discussion on the development of this defence in English law see Kaaren Koomen, 'Breach of Confidence and the Public Interest Defence: Is it In the Public Interest? A Review of The English Public Interest Defence and the Options for Australia' (1994) 10 *QUT Law Journal* 56. The precise nature of this defence in Australia is not known. For different approaches see Kirby P in the NSW Court of Appeal in the *Australian Spycatcher decision*; *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 75 ALR 3 and Powell J in the *Westpac Banking Corporation v John Fairfax Group* (1991) 19 IPR 513.
[52][2009] FCAFC 116.
[53](1984) 156 CLR 532 ('*A v Hayden*').
[54]Objectivity and the reasonable person standard is another source. See Renata Grossi, 'Can Contract Law be Good? When the reasonable person goes to market' in Luca Siliquini-Cinelli and Joshua Neoh (eds), *Research Handbook on Epistemologies of Law* (Edward Elgar, 2025).
[55]*A v Hayden* (n 53) 557, 571.
[56]Nick Seddon and Rick Bigwood, *Cheshire and Fifoot Law of Contract* (LexisNexis, 11th Australian ed, 2017).
[57]Ibid 1007.
[58]Andrew Robertson and Jeannie Paterson, *Principles of Contract Law* (Law Book Company, 6th ed, 2020) 869–70.

Most of these are straightforward. Illegal contracts include both common law and legislative illegality, and contracts which may not in themselves be illegal but may lead to illegal activity.[59] Contracts that seek to defraud revenue and limit the executive and the courts are fairly strictly applied, as are contracts that defraud revenue to the state. Contracts that are prejudicial to marriage and those that involve sexual immorality require a modern reading of both marriage and sexual morality.[60] Overall, this area of contract law requires that the court weigh 'the gravity of the anti-social act and the extent to which it will be encouraged by enforcing the right sought to be asserted against the social harm which will be caused if the rights are not enforced'.[61]

What makes public policy even more applicable to NDAs is that the courts can determine new heads of public policy to move with the times and reflect contemporary society. As Jordan CJ said in *Re Morris (dec'd)*:

> From generation to generation ideas change as to what is necessary or injurious, so that 'public policy is a variable thing. … New heads of public policy come into being, and old heads undergo modification.[62]

Applying this area of law to the Zelda Perkins case, does her NDA with Miramax go against community standards and thus breach public policy?

While, as already stated, measuring community standards is not a precise science, I would suggest that the community would overwhelmingly support the elimination of sexual harassment and support holding accountable those found to be guilty of it. It is also safe to argue that keeping Weinstein's sexual harassment behaviour secret increased social harm. Following the signing of the NDA with Perkins, Weinstein continued to sexually harass women for two decades. He is currently serving a 23-year jail term for rape. His Wikipedia page claims that over 80 women have made charges against him for sexual harassment or rape. While it is difficult to say with certainty whether exposing him in the mid-90s would have hindered his behaviour and saved some women from harm, it is at the very least possible that it could have done so.

Moving away from this general discussion and drilling down and applying the existing heads of public policy breaches, we can say that this NDA may have breached policy on grounds of unlawful purpose, going against sexual morality and on the administration of justice.

The behaviour which the NDA sought to cover up may have been criminal (sexual assault), may have been against anti-discrimination laws, may have been against numerous occupational health and safety laws, and may have been contrary to numerous workplace agreements and codes of behaviour. It would not be hard to put together a long list of the illegality of sexual harassment. This would suggest that it would not be hard to argue that Perkins' NDA was against public policy because it was made for unlawful purposes. In relation to whether it goes against the sexual morality of our times, there is little modern case law to help us with a discussion here, but this enquiry would focus on consent to the acts and not any outdated view of the morality of sex outside of marriage. It would focus on modern standards of women's equality and rights to be treated professionally in the workplace. It would focus on modern ideas that reject men's right to sexual entitlement and abuse of their power over women.

In relation to interfering with the administration of justice, Perkins' NDA looks like it directly interferes with the administration of justice by directing Perkins to avoid giving evidence in any future civil and criminal prosecutions that may emerge. However, courts have not found confidentiality clauses that prevent an employee from disclosing information to a solicitor for a civil matter to be against public policy.[63] Seddon and Bigwood suggest that a duty of confidentiality will not be easily displaced in a civil matter unless there is also a public interest exception at play.[64]

There is also room to argue for the recognition of another head of public policy, one that makes unenforceable any contract that enables discrimination against any member of our society. There is enough evidence to suggest that in contemporary Australia, we do not support the sexual exploitation and discrimination against any member of our society, and that therefore such a public policy consideration of our contracts would be welcomed.

Conclusion

Elizabeth Anderson has argued that we need to stop viewing the problem of workplace governance as one of freedom to contract and instead see it as a problem of government.[65] This is a broader and a more long-term project that I support, but in the meantime some resistance and possible redress may come from within contract law itself. Contract law is often overlooked as a way to redress injustices in society. This is unsurprising given contract law's posture of neutrality on questions of content and questions of justice. Courts have been very weak in using contract law to develop a jurisprudence that would reflect community standards of justice. It has relegated that role to other areas of the law or to parliament, and when confronted with injustices it has hidden behind the ideal of freedom to contract.[66] But contract law has within its doctrinal infrastructure the ability to champion different norms.

Applying a contractual lens to the misuses of NDAs in our workplaces and beyond presents an interesting

[59]See an example of this in *McCarthy Bros v The Dairy Farmers' Co-operative Milk Company Ltd* (1945) 45 SR (NSW) 266.
[60]Seddon and Bigwood (n 56) 1004–34.
[61]*Hardy v Motor Insurer Bureau* [1964] 2 QB 745, 751.
[62]*Re Morris* (1943) 43 SR (NSW) 352, 355.
[63]See *AG Australia Holdings Ltd v Burton* [2002] NSWC 170.
[64]*Richards v Kadain* [2005] NSWCA 328; Seddon and Bigwood (n 56) 1018.
[65]Elizabeth Anderson, *Private Government: How Employers Rule our Lives (and Why We Don't Talk about It)* (Princeton University Press, 2017) 131.
[66]Roger Cotterrell, 'The Development of Capitalism and the Formalisation of Contract Law' in Bob Fryer et al (eds), *Law, State and Society* (Routledge, 1981) 173.

case in point. NDAs are contractual documents and when we consider the features of consent needed to properly form a contract in common law and in equity, when we consider the terms that are in the employment relationship, and when we apply – with more energy than ever before – the rules of public policy that contracts must reflect community standards, then contract law can play a real role in correcting the pervasive and pernicious use of NDAs in contemporary society.

Expanding contract law in the fight against NDAs not only rights a wrong, it also inches contract law closer to the bigger goals that I suggest it is capable of playing – to be a force in reaching fair and just agreements.

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ORCID iD

Renata Grossi https://orcid.org/0000-0002-2011-9848

Renata Grossi is a Senior Lecturer in the Faculty of Law at the University of Technology Sydney.