



**New South Wales
Law Reform Commission**

**Consultation
paper**

20

**Access to digital assets
upon death or incapacity**

August 2018
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Make a submission

We seek your responses to this consultation paper. To tell us your views you can send your submission by:

Email: nsw-lrc@justice.nsw.gov.au

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It would assist us if you could provide an electronic version of your submission.

If you have questions about the process please email or call 02 8346 1284.

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The Law Reform Commission is an independent statutory body that provides advice to the NSW Government on law reform in response to terms of reference given to us by the Attorney General. We undertake research, consult broadly, and report to the Attorney General with recommendations.

For more information about us, and our processes, see our website:
www.lawreform.justice.nsw.gov.au

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Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967*, the NSW Law Reform Commission is asked to review and report on:

- (1) Laws that affect access to a NSW person's digital assets after they die or become incapacitated.
- (2) Whether NSW should enact legislation about who may access a person's digital assets after they die or become incapacitated and in what circumstances.
- (3) What should be included in any such legislation.

In particular, the Commission is to consider:

- (a) Relevant laws including those relating to intellectual property, privacy, contract, crime, estate administration, wills, succession and assisted decision-making.
- (b) Policies and terms of service agreements of social media companies and other digital service providers.
- (c) Relevant jurisdictional issues, including the application of NSW laws, Commonwealth laws and the laws of other jurisdictions.
- (d) Appropriate privacy protections for the electronic communications after a person dies or becomes incapacitated.
- (e) The Uniform Law Conference of Canada's Uniform Access to Digital Assets by Fiduciaries Act (2016) and the American Uniform Law Commission's Revised Uniform Fiduciary Access to Digital Assets Act (2015).
- (f) Any other matters the NSW Law Reform Commission considers relevant.

[Received 26 March 2018]

Questions

- (1) When a person dies what should it be possible for third parties to do in relation to the person's digital assets? In particular:
 - (a) Who should be able to access those assets?
 - (b) What assets should they be able to access?
 - (c) For what purposes should they be able to access them?
 - (d) What documentation should be needed to authorise a person to access those assets?
 - (e) What restrictions should there be on that access?
- (2) When a person otherwise becomes incapable of managing their digital assets what should it be possible for third parties to do in relation to those assets? In particular:
 - (a) Who should be able to access those assets?
 - (b) What assets should they be able to access?
 - (c) For what purposes should they be able to access them?
 - (d) What documentation should be needed to authorise a person to access those assets?
 - (e) What restrictions should there be on that access?
- (3) Should NSW enact a law that specifically provides for third party access to a person's digital assets upon death or incapacity? Why or why not?
- (4) If NSW were to legislate to provide specifically for third party access to a person's digital assets upon death or incapacity:
 - (a) How should the law define "digital assets"?
 - (b) How can the law appropriately balance privacy considerations with access rights?
 - (c) How can the law best overcome conflicting provisions in service agreements?
 - (d) How can the law best overcome provisions in service agreements that apply the law of some other jurisdiction?
 - (e) What else should the law provide for?
- (5) What alternative approaches might be desirable to deal with the issue of third party access to digital assets upon death or incapacity?
- (6) What amendments could be made to existing NSW laws to ensure appropriate third party access to digital assets upon death or incapacity?

1. Introduction

In brief

We describe the scope of our review and our intended approach, and outline the contents of this consultation paper.

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This review

- 1.1 In summary, the Attorney General has asked us to review and report on:
- the laws that affect who can access a person's digital assets after they die or become incapacitated, and in what circumstances
 - whether NSW needs new laws in this area, and
 - what should be included in any such laws.

Our approach

- 1.2 To help us identify relevant issues and concerns, we invited preliminary submissions on our terms of reference. We received 15 preliminary submissions (listed in Appendix A). These submissions have helped inform this paper.
- 1.3 After we receive responses to the questions in this paper, we will conduct targeted consultations before producing a final report. We will also post online surveys that you can complete instead of making a formal submission.
- 1.4 Our approach may change depending on the information we learn during this review.
- 1.5 All of the documents we publish as part of this review will be on our website: www.lawreform.justice.nsw.gov.au.
- 1.6 Follow us on Facebook www.facebook.com/NSWLawReform or Twitter @NSWLawReform for further information and updates.

This consultation paper

- 1.7 The purpose of this consultation paper is to:
- outline how we intend to conduct the review
 - describe the current laws affecting access to digital assets in NSW

- describe practices being used to overcome the legal impediments to access
- consider recent innovative changes to the law in other jurisdictions, and
- seek your views about what, if anything, needs to change.

1.8 The remaining chapters of this consultation paper are arranged as follows:

- **Chapter 2: Background and context.** We introduce the concept of “digital assets”. We discuss the reasons why it might be necessary to access a person’s digital assets upon their death or incapacity, and the difficulties that relatives, friends and representatives can face. We describe the rise of litigation and some of the privacy considerations in this area of law, and the non-legislative arrangements that facilitate third party access to digital assets.
- **Chapter 3: Laws affecting third party access to digital assets.** We provide an overview of the laws affecting access to digital assets in NSW. There is no law in Australia that directly deals with accessing or transferring digital assets upon a person’s death or incapacity. However, there are several existing laws that are relevant, and which have competing considerations.
- **Chapter 4: Developments in other jurisdictions.** We consider recently enacted laws in other jurisdictions that specifically address the question of who can access a person’s digital assets after death or incapacity and in what circumstances.
- **Chapter 5: Proposals for reform.** We discuss the case for legislative reform to enable some categories of people to access another person’s digital assets upon death or incapacity. We consider whether NSW or the Commonwealth should implement reform, and discuss the limited application of NSW legislation in a digital context. Finally, we propose a possible law reform approach and invite submissions on specific questions.

2. Background and context

In brief

We introduce the concept of “digital assets”. There are a number of reasons why it might be necessary to access a person’s digital assets upon their death or incapacity, and relatives, friends and representatives can face difficulties in seeking and obtaining access. This area of the law has seen the rise of litigation and concerns about privacy. Sometimes non-legislative arrangements are used to facilitate third party access to digital assets.

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- 2.1 The nature of property and our methods of communication have changed significantly in recent years. Most people now have at least some items and communications stored digitally, either on a tangible electronic device (such as a laptop or phone) or on a third party’s server. This might include, for example, emails, online bank accounts, social media profiles and photographs. In this paper, we refer to such items and communications as “digital assets”.
- 2.2 There are practical and legal problems in managing the digital assets of people who have died.¹ Similar problems arise if someone can no longer manage their digital assets because of, for example, a brain injury, dementia or a serious illness. Users of digital assets may not consider the fate of these assets when they can no longer manage them, and often do not expressly provide for their disposition in the event of death or incapacity.² Even when they do, their instructions may conflict with the terms of service agreements that users enter into when they set up online accounts. Some service providers have explicit policies on what will happen to a person’s account when they die, but many do not. Even when these policies are included in a service agreement, users may not be fully aware of their effect,³ and may fail to make provision for accessing these assets or applying the policies.
- 2.3 Access to a person’s digital assets upon their death or incapacity is increasingly important. Personal representatives such as executors, administrators, attorneys under a power of attorney and trustees may need access to digital assets to deal effectively with a person’s financial or personal affairs. Friends and relatives may

1. P Stokes, *Preliminary Submission PD14*, 2.

2. B Reid, “Legal Life After Death: Publicity, Physical, and Digital Assets” (2017) 8 *Southern Journal of Business and Ethics* 108, 118.

3. B Reid, “Legal Life After Death: Publicity, Physical, and Digital Assets” (2017) 8 *Southern Journal of Business and Ethics* 108, 118.

also want access to these assets for sentimental reasons. Arguably, the current law in NSW does not effectively address these issues.

What do we mean by digital assets?

- 2.4 The concept of “digital assets” has no standard legal definition. In order to keep this discussion broad, at least at this early stage of our review, we have adopted a broad definition. When we talk about a “digital asset” in this consultation paper, we mean any item of text or media that has been formatted into a binary source and over which a person has some form of rights. This might include, for example:
- **personal assets** such as email and email accounts, text messages, blogs, websites, social media profiles and accounts, digital music collections, eBook collections, digital photographs and video sharing accounts (such as YouTube)
 - **financial assets** such as online bank accounts, online purchasing accounts (such as Amazon and PayPal), and cryptocurrency⁴
 - **business assets** such as online store accounts (such as EBay, Pandora and Spotify), customer orders, addresses and payment information
 - **intellectual property rights** that attach to assets such as domain names and images and writing stored on a computer
 - **loyalty program benefits** such as frequent flyer points
 - **sports gambling accounts**, and
 - **online gaming accounts**, characters and virtual property.

The importance of access

- 2.5 There are many reasons why access to digital assets upon death or incapacity is important. These include:
- **Financial value.** A person may have significant funds in a bank, PayPal, eBay or Bitcoin account, which their personal representative must collect and distribute to the person’s beneficiaries.⁵ Personal blogs and social media accounts can generate income, and many online games create rewards that can be traded for money. A person may have a valuable copyright interest in a literary work that only exists online. A representative will need access to these assets to administer a person’s estate.
 - **Sentimental value.** Photos, emails, and instant messages may have sentimental value to a person’s friends and family. Social media profiles increasingly play an important social role as a site of interaction and

4. A cryptocurrency is a digital currency that relies on complex encryption techniques and operates independently of principal banks: England and Wales Law Commission, *Making a will*, Consultation Paper 231 (2017) 238 footnote 2.

5. B Carey, “Logging off for life” (2013) 51(3) *Law Society Journal* 36, 37.

commemoration when social media users die.⁶ If access to these assets is barred, the emotional impact can be significant.⁷ The development of “interactive personality constructs” is another emerging issue.⁸ These are artificial-intelligence driven systems designed to continue to interact online with surviving family and friends in the same way the deceased interacted when they were alive.⁹ Family and friends of the deceased user will necessarily have a stake in the use and control of such technologies.

- **Loss of “paper trails”.** Banks and other institutions are increasingly issuing statements and bills to customers via email or other online accounts.¹⁰ Small business owners sometimes manage their orders and invoices through their personal email accounts.¹¹ Therefore, personal representatives may need access to these accounts to identify the extent of a person’s assets and liabilities.
- **Protecting privacy and confidentiality.** Online accounts may contain significant amounts of personal information that other people should be restricted or prevented from seeing.¹² Therefore, personal representatives may need to be able to close these accounts or delete certain content.
- **Reducing the risk of identity fraud.** When an individual cannot continue to monitor their online accounts because of incapacity or death, it becomes easier for others to hack their accounts and impersonate the account holder.¹³ Therefore, representatives and families may need to be able to monitor and protect a person’s account; for example, by terminating the account, or changing passwords when suspicious activity is detected.¹⁴

Impediments to access

- 2.6 Despite the many legitimate reasons for seeking access to a person’s digital assets after their death or incapacity, family members and representatives can encounter significant practical difficulties.

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6. P Stokes, *Preliminary Submission PDI4*, 3; In June 2018 Facebook had 2.2 billion monthly active users: Facebook Newsroom, “Stats”, <newsroom.fb.com/company-info/> (retrieved 10 July 2018).
 7. C Peoples and M Hetherington, “The Cloud Afterlife: Managing your Digital Legacy” (Paper presented at IEEE International Symposium on Technology in Society, Malahide, 2015) 1; J Lamm and others, “The Digital Death Conundrum” (2014) 68 *University of Miami Law Review* 385, 390-391.
 8. A Buben, “Technology of the Dead: Objects of Loving Remembrance or Replaceable Resources?” (2015) 44(1) *Philosophical Papers* 15.
 9. P Stokes, *Preliminary Submission PDI4*, 4.
 10. NSW Trustee and Guardian, *Digital Assets Webinar* (27 October 2015)12:01.
 11. K A Whaley, “Digital Life After Death: The Next Level of Estate Planning and Estate Litigation” (Paper presented at the Six-Minute Estates Lawyer 2013, Law Society of Upper Canada, 24 April 2013) 6.
 12. L McCarthy, “Digital Assets and Intestacy” (2015) 21 *Boston University Journal of Science and Technology Law* 399, 401; Society of Trust and Estate Practitioners, Digital Assets Working Group, *Digital Assets: A Guide for Professionals* (2017) 1.
 13. S Brown Walsh, N Cahn and C L Kunz, “Digital assets and fiduciaries” in J A Rothchild (ed) *Research Handbook on Electronic Commerce Law* (Edward Elgar, 2016) 94; NSW Council for Civil Liberties, *Preliminary Submission PDI8*, 4.
 14. See N R Cahn and G W Beyer, “When You Pass on, Don’t Leave the Passwords Behind: Planning for Digital Assets” (2012) 26 *Probate and Property* 40, 41.

- 2.7 One major impediment is that few users of digital assets consider the fate of these assets upon their death or incapacity. In a national survey administered by Charles Sturt University and the University of Adelaide, 82% of participants reported that they had digital assets of some kind. Of those that had digital assets, 71% were unaware of what would happen to those assets upon death or incapacity.¹⁵
- 2.8 These findings are similar to those of an online survey undertaken by the NSW Trustee and Guardian. This survey found that nine out of ten Australians have a social media account, but 83% have not discussed with their friends or relatives what they want to happen to their accounts after death.¹⁶ Additionally, only 3% of Australians who have a will had specifically decided what to do with their social media accounts in the event of death.¹⁷ As a result, third parties will not necessarily have permission to access another person's digital assets, even if it is likely the person would have wanted them to.
- 2.9 Other impediments to access can include:
- **Passwords and encryption.** Most online accounts are password-protected, and the passwords can only be reset with access to the account holder's email account.¹⁸ Additionally, accessing data stored on a computer or other device may not be possible if it is password-protected.
 - **Service agreements.** Even if the personal representative or family member has the person's password to their online account, the service provider's agreement may prohibit access by anyone except the original user. Some service agreements specifically prohibit transferring the contents of a person's account after their death.
 - **Laws prohibiting access.** Commonwealth and NSW criminal laws prohibit unauthorised access to restricted data held in a computer. Even if a person were "authorised" to manage the assets, this may not protect them from liability.¹⁹
 - **Laws prohibiting content sharing.** The US *Stored Communications Act* ("SCA"),²⁰ prohibits public providers of electronic communication services or remote computing services from "knowingly divulging to any person or entity the contents of a communication which is carried or maintained on that service".²¹ Service providers are therefore cautious about disclosing information when the SCA applies, and reluctant to risk civil liability for disclosing private information.²²
- 2.10 Carers NSW has heard from many carers about the difficulties they have experienced accessing important documents, recovering passwords and administering accounts and assets in the event of the person's death or

15. A Steen and others, *Estate Planning in Australia* (Charles Sturt University, 2017) 18-19.

16. NSW Trustee and Guardian, *Digital Assets Webinar* (27 October 2015) 07:50.

17. NSW Trustee and Guardian, *Digital Assets Webinar* (27 October 2015) 09:43.

18. S Brown Walsh, N Cahn and C L Kunz, "Digital assets and fiduciaries" in J A Rothchild (ed) *Research Handbook on Electronic Commerce Law* (Edward Elgar, 2016) 95.

19. See [3.60]-[3.67].

20. 18 US Code §2701-2712.

21. 18 US Code §2702.

22. STEP Australia, *Preliminary Submission PDI6*, 7.

incapacity.²³ Surmounting these obstacles can be emotionally and financially costly, especially if litigation occurs.

The rise of litigation

- 2.11 In light of the difficulties that family members and representatives can face in accessing digital assets, there is an emerging trend of legal action being taken against service providers in order to gain access.²⁴ In the earliest case about access to digital assets, the parents of a US soldier who died in 2004 sued Yahoo! which denied them access to his email account. The parents sought access for largely sentimental reasons, as email was their son's primary method of communication during his deployment. Ultimately, the court ordered Yahoo! to provide copies of the emails but the parents were not granted access to the account itself.²⁵ Since then, Yahoo! has revised its terms of service to state that a person's accounts are not property of their estate.²⁶
- 2.12 In another US case, a woman initiated legal proceedings after Facebook changed the password to her deceased son's account and prevented her from accessing it.²⁷ The woman had unsuccessfully made an access request to Facebook, but later worked out the password from information provided by her son's friends. Within two hours of her accessing the account, the site's administrators changed the password.²⁸ After lengthy legal proceedings, Facebook granted her 10 months of access before the account was taken down.
- 2.13 In 2012, the executors of a deceased British woman's estate brought proceedings in California to access records from her Facebook account, which they believed contained critical evidence of her state of mind at the time of her death.²⁹ The court in California granted Facebook's motion to quash the subpoena, and refused to address whether Facebook could voluntarily disclose the content.
- 2.14 More recently, a US couple sought access to their son's Facebook and Gmail accounts to try to understand why he took his own life. Even after they obtained a court order stating that they had a legal right to access their son's digital assets as his heirs, Facebook refused to disclose the son's personal account information.³⁰
- 2.15 In July 2018, the Federal Court of Justice in Germany ruled that German people have the right to access the social media accounts of their deceased relatives. The decision came after the parents of a 15 year old girl tried to access her Facebook profile, including posts and private messages, to determine whether her death was

23. Carers NSW Australia, *Preliminary Submission PDI13*, 7.

24. B Carey, "Logging off for life" (2013) 51(3) *Law Society Journal* 36.

25. See *In re Ellsworth*, No 2005-296,651-DE (Oakland Co. Michigan Probate Court 2005).

26. G A Fowler, "Life and Death Online: Who Controls a Digital Legacy?" *Wall Street Journal* (New York) 5 January 2013, 3.

27. See Associated Press, "Mother fights for access to her deceased son's Facebook account" (1 March 2013) *CBC* <www.cbc.ca/news/technology/mother-fights-for-access-to-her-deceased-son-s-facebook-account-1.1327683> (retrieved 22 March 2018).

28. See "Facebook May Become Part of Your Digital Estate" (15 March 2012) *CNBC* <www.cnn.com/id/46750736> (retrieved 23 March 2018).

29. *In re Facebook, Inc*, 923 F.Supp.2d 1204 (N.D.Cal. 2012) 1205.

30. K Masterman and A Sivarajah, "Estate Planning For a Client's Digital Assets" (26 July 2017) *Advisor.CA* <www.advisor.ca/tax/estate-planning/estate-planning-for-clients-digital-assets-238786> (retrieved 17 April 2018).

an accident or suicide. The Court decided that social media accounts can be inherited in the same way that documents such as diaries and letters can.³¹

- 2.16 It appears that Australian courts have not yet dealt with such issues.

Privacy considerations

- 2.17 Significant amounts of personal information are transmitted over the internet and stored on electronic devices³² and the disclosure of this information can harm legitimate interests.³³ Protecting the privacy of users' information is the main stated reason behind most access limitations.³⁴ For instance, Microsoft has stated that:

The right to privacy and the security of our customers' data is a fundamental concern to Microsoft. Our users expect Microsoft to keep their information private and secure even in the event of death or incapacitation. Our primary responsibility is to honor this expectation.³⁵

- 2.18 Privacy in the digital realm is an increasing concern for the public and for legislators, especially in the wake of incidents like the Cambridge Analytica major data breach. In this incident, a data analytics firm harvested millions of Facebook profiles and used them to build a software program to predict voting intentions and influence votes in the UK and US.³⁶
- 2.19 Permitting third party access to a deceased or incapacitated person's digital assets may raise genuine privacy concerns. For this reason, any law designed to make access to digital assets easier for third parties will need to strike an appropriate balance between the interests of those seeking access and the privacy interests of account holders.

Facilitating third party access to digital assets

- 2.20 People have been finding practical methods to address the barriers that third parties face in accessing another person's digital assets upon death or incapacity. These methods overcome some, but not all, of the barriers posed by service agreements and applicable laws.

31. A Bradbury, "A turning point in digital immortality (10 August 2018) *SPEAR'S* <www.spearswms.com/digital-immortality-a-turning-point/> (retrieved 29 August 2018); J Steger, "German court rules Facebook content is inheritable, just like a diary" (July 13 2018) *Handelsblatt Global* <global.handelsblatt.com/companies/german-court-heirs-facebook-account-digital-assets-death-9449771> (retrieved 20 August 2018).

32. Australia, House of Representatives, Standing Committee on Communications, *Hackers, Fraudsters and Botnets: Tackling the Problem of Cyber Crime* (2010) [9.1].

33. NSW Privacy Commissioner, *Preliminary Submission PDI9*, 2.

34. C Bellamy and others, *Death and the Internet: Consumer issues for planning and managing digital legacies* (Australian Communications Consumer Action Network, Sydney, 2013) 4.

35. Microsoft, "Q: My family member died recently/is in a coma, what do I need to access their Microsoft account?" (2018) <answers.microsoft.com/en-us/outlook_com/forum/oaccount-omyinfo/my-family-member-died-recently-is-in-coma-what-do/308cedce-5444-4185-82e8-0623ecc1d3d6> (retrieved 4 April 2018).

36. C Cadwalladr and E Graham-Harrison, "Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach" *The Guardian* (Australia ed) (18 March 2018) <www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election> (retrieved 22 August 2018).

Digital registers and digital trust assets

- 2.21 Digital registers are an emerging approach to managing access to digital assets upon death.³⁷ A digital register is an inventory of a person’s digital assets, including those stored in online accounts and on devices in which they record their account numbers, usernames, and directions about what they want done with their digital assets. They may also appoint a “digital executor” to manage these assets. The digital executor need not be the same person appointed to manage their other assets.³⁸
- 2.22 The Australian Communications Consumer Action Network and the NSW Trustee and Guardian advocate this approach, although they caution against directly listing usernames, passwords and answers to security questions in a person’s will. Instead, they suggest including such details in a letter to the person’s executor.³⁹
- 2.23 However, making an inventory of accounts and usernames to facilitate access to these accounts by others does not necessarily mean that the person passes on the legal right to use the account and the information contained within it.⁴⁰ In fact, sharing access information may contravene the terms of service agreements.⁴¹ Therefore, a service provider, upon being made aware of a person’s death or incapacity, may still deny access to the nominated party or even change the password to the person’s account.
- 2.24 In Australia, some service providers such as iiNet, Optus, and Telstra permit legal personal representatives to access someone else’s account, provided they have permission from the account owner and can verify their identity.⁴²
- 2.25 Trusts can also be used to facilitate access to a person’s digital assets. Digital assets in the form of licences can be transferred to a trust, and in the event of the person’s death or incapacity, the trustee has authority to manage the assets and transfer them to beneficiaries in accordance with instructions.⁴³ However, it is unclear whether digital asset trusts are a valid method of distributing digital assets where service agreements prevent transferability.⁴⁴

Digital legacy services

- 2.26 Another approach to managing access to digital assets upon death or incapacity is to use “digital legacy services”. Websites such as SecureSafe and Password Box

37. C Bellamy and others, *Death and the Internet: Consumer issues for managing and managing digital legacies* (Australian Communications Consumer Action Network, Sydney, 2013) 4; E Carroll, “Helping Clients Reach Their Great Digital Beyond” (2011) 150 (9) *Trusts and Estates* 1, 4.

38. J Lamm and others, “The Digital Death Conundrum” (2014) 68 *University of Miami Law Review* 385, 407.

39. See Australian Communications Consumer Action Network, *Preliminary Submission PDI10*, 9; NSW Trustee and Guardian, *Digital Assets Webinar* (27 October 2015) 22:06.

40. J Connor, *Digital Life After Death: The Issue of Planning for a Person’s Digital Assets After Death*, Texas Tech Law School Research Paper No 2011-02 (2011) 6.

41. Australian Communications Consumer Action Network, *Preliminary Submission PDI10*, 6. See also Society of Trust and Estate Practitioners, Digital Assets Working Group, *Digital Assets: A Guide for Professionals* (2017) 2.

42. Australian Communications Consumer Action Network, *Preliminary Submission PDI10*, 6.

43. J M Mentreck, “Estate Planning in a Digital World” (2009) 19 *Ohio Probate Law Journal* 195.

44. N M Banta, “Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death” (2014) 83 *Fordham Law Review* 799, 806.

enable users to store passwords and instructions that allow nominated individuals to access their digital assets and carry out their wishes.⁴⁵ Australian sites include Your Digital File, which enables users to create a “Data Legacy” and give nominated people access to certain files in case of a “trigger event”, and eClosure, which helps people find and close online accounts, as well as search Australian financial institutions for missing funds, superannuation and shares.⁴⁶

- 2.27 However, these management sites have a tendency to develop and disappear quickly, so there is no guarantee that they will continue to exist.⁴⁷ And like digital registers, using digital legacy services may violate the terms of service agreements, meaning that a nominated person still may be denied access.⁴⁸

Digital archives

- 2.28 A person may facilitate access to their digital assets upon their death or incapacity by creating and maintaining a personal digital archive.⁴⁹ Service providers such as Facebook and Twitter allow users to download a record of their personal data,⁵⁰ and users may then store the files on external storage devices.
- 2.29 This practice relies on individual users taking responsibility for preserving their digital assets.⁵¹ In reality, few people methodically download and store their content in a format that is accessible to others upon their death or incapacity.⁵² Storage methods can change as technology evolves, and if a storage device becomes unusable, content may be lost.⁵³

45. C Bellamy and others, “Life beyond the timeline: creating and curating a digital legacy” (Paper presented at Nexus, Confluence, and Difference: Community Archives meets Community Informatics, CIRN Conference, Prato, 28-30 October 2013).

46. E van der Nagel and others, *Death and the Internet: Consumer issues for planning and managing digital legacies* (University of Melbourne, 2nd ed, 2017) 13.

47. D M Lenz, “Is the Cloud Finally Lifting? Planning for Digital Assets” (2017) *ALI CLE Estate Planning Course Materials Journal* 35, 38.

48. G W Beyer, “Web Meets the Will: Estate Planning for Digital Assets” (2015) 42(3) *Digital Assets* 28,.

49. E van der Nagel and others, *Death and the Internet: Consumer issues for planning and managing digital legacies* (University of Melbourne, 2nd ed, 2017) 11.

50. Facebook, “Downloading Your Info” (2018) <www.facebook.com/help/131112897028467/> (retrieved 3 April 2018); Twitter, Inc, “How to download your Twitter archive” (2018) <support.twitter.com/articles/20170160> (retrieved 3 April 2018).

51. E van der Nagel and others, *Death and the Internet: Consumer issues for planning and managing digital legacies* (University of Melbourne, 2nd ed, 2017) 13.

52. E van der Nagel and others, *Death and the Internet: Consumer issues for planning and managing digital legacies* (University of Melbourne, 2nd ed, 2017) 3.

53. NSW Trustee and Guardian, *Digital Assets Webinar* (27 October 2015) 29:53.

3. Laws affecting third party access to digital assets

In brief

There is no law in Australia that directly deals with accessing or transferring digital assets upon a person's death or incapacity. However, there are some laws that affect access to digital assets in NSW. These include laws relating to wills, administration of deceased estates, assisted decision-making, contract, crime and privacy.

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- 3.1 There is no law in NSW that directly deals with accessing or transferring a person's digital assets upon death or incapacity. However, a number of existing laws affect such access. In this Chapter, we describe these laws and examine the potential difficulties with them as they are currently framed.
- 3.2 While some laws might be said to favour access, others work against it. For instance, estate administration and assisted decision-making laws arguably require access to another person's digital assets upon death or incapacity, while contract and criminal laws may prohibit access.¹
- 3.3 One difficulty with many of these laws is that they were drafted before the widespread use of digital assets. As a result, their effect in relation to digital assets is unclear.

1. D M Lenz, "Is the Cloud Lifting? Planning for Digital Assets" (2017) *ALI CLE Estate Planning Course Materials Journal* 35, 40.

- 3.4 Another difficulty is that some of the laws that prevent access to the digital assets of NSW residents are not NSW laws. An example is the US *Stored Communications Act* (“SCA”)² which prohibits some providers of electronic services from divulging the contents of a communication carried or maintained on their service.³ Many companies that provide such services, for example, Facebook and Google, are subject to this law. We cannot recommend changes to laws outside NSW, although in some cases we may be able to make recommendations that affect the impact of such laws in NSW.

The law of wills

- 3.5 Under the *Succession Act 2006* (NSW) (“*Succession Act*”), a person may give away property to which they are entitled at the time of their death through a will.⁴ They can also specify how their property is to be controlled.⁵
- 3.6 At common law, a person may give property to another, in contemplation of death. Property given in this way cannot be given to someone else through a will. The gift is conditional upon the donor’s death and the donor may revoke it at any time before death. This is traditionally referred to as a *donatio mortis causa*. It is an open question whether digital assets can be given in this way, for example, by giving the recipient an account’s log-in and password.⁶
- 3.7 On one view, people should be able to give away their digital assets in the same way they can give away other forms of property⁷ — particularly where the digital asset has monetary value. They may also wish to give access to a representative to manage or terminate their email and social media accounts upon their death.⁸

Difficulties in the context of digital assets

- 3.8 There are at least three difficulties with the intersection of the law of wills and digital assets.
- 3.9 First, it is unclear whether digital assets are considered “property” for the purposes of the *Succession Act*. The Act does not clearly define “property”. It simply states that it “includes any valuable benefit”.⁹ In the *Interpretation Act 1987* (NSW), “property” means “any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description, including money, and includes things in action”.¹⁰

2. 18 US Code §2701-2712.

3. 18 US Code §2702.

4. *Succession Act 2006* (NSW) s 4.

5. A Swan, “Personal ownership versus control” in *Australian Estate Planning* (CCH Intelliconnect, 2017) [6-100].

6. See, eg, N Roberts, “Donationes Mortis Causa in a Dematerialised World” (2013) 77 *The Conveyancer and Property Lawyer* 113, 123-125.

7. A Yardi, *Preliminary Submission PDI2*, 1; A Corvy, *Preliminary Submission PDI1*, 1.

8. H Conway and S Grattan, “The ‘New’ New Property: Dealing with Digital Assets on Death” in H Conway and R Hickey (ed) *Modern Studies in Property Law* (Hart, 2017) vol 9, 104; Society of Trust and Estate Practitioners, Digital Assets Special Interest Group, *Digital Assets: Practitioner’s Guide England and Wales* (2017); A Yardi, *Preliminary Submission PDI2*, 1.

9. *Succession Act 2006* (NSW) s 3 definition of “property”.

10. *Interpretation Act 1987* (NSW) s 21.

- 3.10 There are a number of reasons why a digital asset may not fall within this definition. One example is if a third party holds the digital asset and a service agreement restricts the user's property rights, such as the right to transfer it to someone else. QANTAS frequent flyer points fall into this category. Membership of a QANTAS Frequent Flyer program is terminated automatically following the death of a member. QANTAS points accrued will be cancelled and cannot be redeemed or transferred following the member's death.¹¹
- 3.11 Applicable service agreements can restrict access to digital assets in other ways as well. We discuss the issue of service agreements more broadly below.¹²
- 3.12 Because it is unclear whether digital assets are "property" under the *Succession Act*
- it can be difficult for people to know which digital assets they can give away by will and which ones they cannot,¹³ and
 - a provision in a will relating to the disposition of a digital asset may be ineffective.¹⁴
- 3.13 A second difficulty is that the plethora of individual policies and service agreements that can apply to assets has created a "labyrinth of parallel succession regimes, containing a completely different set of rules for each service that can only be found and (hopefully) understood by reading through the many pages of 'fine-print' terms and conditions".¹⁵
- 3.14 A third difficulty relates to whether instructions in a valid will take precedence over other forms of instructions. For example, a person may have given instructions about what should be done with their Facebook page using Facebook's Legacy Contact tool.¹⁶ If a person has made a will that gives instructions about what to do with their Facebook page, but the person has given conflicting instructions through the Legacy Contact Tool, it is unclear which instructions would prevail.

Possible law reform approaches

- 3.15 Ways to resolve these issues might include:
- Amending the definition of "property" in the *Succession Act* or otherwise clarifying in legislation what type of digital assets a person should be able to give away or give access to by will.
 - Specifying in legislation what succession laws should apply when there is a connection to NSW.

11. QANTAS, Frequent Flyer "Terms and Conditions", (24 July 2018) cl 8.3 <www.qantas.com/au/en/frequent-flyer/discover-and-join/terms-and-conditions.html> (retrieved 23 August 2018).

12. [3.26]-[3.59].

13. England and Wales Law Commission, *Making a will*, Consultation Paper 231 (2017) [14.14].

14. L Edwards and E Harbinja, "What Happens to My Facebook Profile When I Die?": Legal Issues Around Transmission of Digital Assets on Death" in C Maciel and V C Periera (ed) *Digital Legacy and Interaction: Post-Mortem Issues* (Springer, 2013) 126.

15. STEP Australia, *Preliminary Submission PDI6*, 11.

16. For a description of what Facebook's Legacy Contact Tool is, see [3.34]-[3.39].

- Clarifying in legislation what status instructions in a will have compared with other conflicting directives that a person has made.

Administration of deceased estates

- 3.16 In NSW, the administration of a deceased person's assets is subject to the *Probate and Administration Act 1898* (NSW) ("*Probate and Administration Act*"). Upon the grant of probate of the will or letters of administration, the deceased person's estate vests in their legal personal representative.¹⁷ This entitles the legal personal representative to administer the estate.
- 3.17 When applying for a grant of probate or administration, the applicant must disclose the assets and liabilities of the deceased.¹⁸ Legal personal representatives also have statutory obligations to verify and file an inventory of the deceased's estate¹⁹ and pay the deceased's debts.²⁰
- 3.18 Legal personal representatives also have fiduciary duties to the beneficiaries of deceased estates, such as the duty to maximise the value of the estate, to prevent waste,²¹ and to exercise the care, skill and diligence of a prudent person.²² Beneficiaries have a right to due administration of the estate.²³
- 3.19 If a legal personal representative is barred from accessing some of the relevant assets, they may be unable to satisfy their statutory responsibilities and equitable obligations.

Difficulties in the context of digital assets

- 3.20 The *Probate and Administration Act* does not specifically address the question of access to a deceased person's digital assets.²⁴ If other laws prevent access, and a legal personal representative has to get a court order for access to a person's digital assets, the costs of litigation can add significantly to the expense and time of estate administration.²⁵

Possible law reform approaches

- 3.21 Possible ways to resolve these issues include enacting NSW provisions that allow a legal personal representative to access the digital assets of a deceased person to administer their estate properly.²⁶ This could include, for example, rights of access, control and copying (within the extent permitted by copyright laws) depending on

17. *Probate and Administration Act 1898* (NSW) s 44.

18. *Probate and Administration Act 1898* (NSW) s 81A.

19. *Probate and Administration Act 1898* (NSW) s 85.

20. *Probate and Administration Act 1898* (NSW) s 46.

21. *Bird v Bird* [2013] NSWCA 262.

22. *Trustee Act 1925* (NSW) s 14A.

23. *Kennon v Spry* [2008] HCA 56, 238 CLR 366.

24. Society of Trust and Estate Practitioners, Digital Assets Special Interest Group, *Digital Assets: Practitioner's Guide Australia* (2017) 1.

25. M Borden, "Covering Your Digital Assets: Why the Stored Communications Act Stands in the Way of Digital Inheritance" (2014) 75 *Ohio State Law Journal* 405, 424.

26. University of Newcastle Legal Centre, *Preliminary submission PD15*, 2.

the deceased person's explicit wishes and intentions.²⁷ Such provisions would need to ensure that instruments and/or laws that would otherwise restrict access do not apply (for example, service agreements,²⁸ criminal law²⁹ and privacy law).³⁰

Assisted decision-making laws

- 3.22 The *Powers of Attorney Act 2003* (NSW) ("*Powers of Attorney Act*") and the *Guardianship Act 1987* (NSW) ("*Guardianship Act*") permit the appointment of "attorneys" and "financial managers" to manage a person's property and financial affairs (their estate) when they do not have the decision-making ability to do so themselves.
- 3.23 In order to perform certain functions relating to the person's property and financial affairs, an attorney or financial manager may need to access, for example:
- digital assets of financial value, and
 - the person's email and cloud accounts to find bank statements and other financial information about their assets.

Difficulties in the context of digital assets

- 3.24 Guardianship and powers of attorney laws do not specifically address the question of access to a deceased person's digital assets. If other laws prevent access, an attorney or financial manager may be unable to perform their role effectively.

Possible law reform approaches

- 3.25 Ways to resolve these issues might include enacting NSW provisions that allow attorneys and financial managers to access the digital assets of a person to manage their estate. Such provisions would need to ensure that instruments and/or laws that would otherwise restrict access do not apply (for example, service agreements,³¹ criminal law³² and privacy law).³³

Contract law: service agreements that restrict access

- 3.26 When a person signs up for an online account or service, they must agree to the provider's terms of service.³⁴ These are contracts that govern the rights and

27. Law Society of NSW, *Preliminary Submission PDI14*, 1.

28. [3.26]-[3.59].

29. [3.60]-[3.67].

30. [3.68]-[3.70].

31. [3.26]-[3.59].

32. [3.60]-[3.67].

33. [3.68]-[3.70].

34. G W Beyer, "Web Meets the Will: Estate Planning for Digital Assets" (2015) 42(3) *Digital Assets* 28, 31.

responsibilities of the user and the service provider, including in relation to using or transferring digital assets.³⁵

- 3.27 The kinds of rights that users have in relation to their digital assets will depend on the type of asset and the terms of the service agreement. For instance:
- A gaming account might give a person the right to “play” a particular avatar in the game, as well as an individual licence to use the game software.
 - Access to documents stored on an online server may or may not include the right to edit or download those documents, and/or share them with other users.³⁶
 - When a person purchases movies, music and eBooks online, an agreement will typically state that they acquire a non-transferable licence to use this content during their lifetime, rather than full ownership.³⁷ This means that, for example, they may be prevented from bequeathing these purchases to beneficiaries when they die.
- 3.28 As well as limiting more traditional property rights, the terms of a service agreement may limit the intellectual property rights that a person would otherwise hold. For example, copyright, which is the exclusive right to reproduce, publish, communicate or adapt a particular work or subject matter,³⁸ usually continues to be protected after the creator’s death.³⁹ However, the terms of service agreements often interfere with the intellectual property rights of users and their successors.⁴⁰
- 3.29 For instance, Google’s service agreement states that when users upload, submit, store, send or receive content through Google services, Google acquires “a worldwide license to use, host, store, reproduce, modify, create derivative works ... communicate, publish, publicly perform, publicly display and distribute such content”.⁴¹ This license continues even if the user stops using Google services.
- 3.30 Many service agreements provide that the contract is between the user and the service provider, that the user’s account is non-transferable, and that the user is prohibited from sharing access information. Therefore, service providers may be unwilling or unable to allow anybody else to access a person’s account, even if authority has been granted through a will or power of attorney.⁴²

35. England and Wales Law Commission, *Making a will*, Consultation Paper 231 (2017) [14.16].

36. L Bennett Moses, P Vines, J Gray and S Logan, *Preliminary Submission PDI11*, 2.

37. H Antoine, “Digital Legacies: Who Owns Your Online Life After Death?” (2016) 33(4) *The Computer and Internet Lawyer* 15; G W Beyer, “Web Meets the Will: Estate Planning for Digital Assets” (2015) 42(3) *Digital Assets* 28, 31-33; ACCAN *Preliminary Submission PDI10*, 8.

38. See *Copyright Act 1968* (Cth) s 31, s 85.

39. D McCallig, “Private But Eventually Public: Why Copyright in Unpublished Works Matters in the Digital Age” (2013) 10(1) *SCRIPTed* 39, 42.

40. Australian Communications Consumer Action Network, *Preliminary Submission PDI10*, 5; A George, *Preliminary Submission PDI15*, 5.

41. Google, “Google Terms of Service” (25 October 2017) <polices.google.com/terms> (retrieved 6 April 2018).

42. R Genders and A Steen, “Financial and Estate Planning in the Age of Digital Assets: A Challenge for Advisors and Administrators” (2017) 3(1) *Financial Planning Research Journal* 75, 76.

A variety of provider approaches to third party access

- 3.31 Some service providers have policies about what will happen to a user's account upon death, but these policies vary.
- 3.32 Australian banks have slight variations in their policies and procedures but the process is generally the same for all of them. When a bank is notified of an account holder's death:
- All their accounts are frozen.
 - Funds cannot leave the account but money coming into the account will still be accepted.
 - Money may be expended from an account for funeral expenses or as otherwise permitted by the bank policy/agreement.
 - The bank reviews its dealings with the deceased, then pays out all funds from any accounts to the deceased's estate through their representative, and closes those accounts.
- 3.33 The policy of different social media service providers is less consistent. One preliminary submission observes:

Whether a deceased user's social media profile is deleted, left unaltered, or placed into a 'memorialised' state ... is entirely a function of service provider policy and how bereaved families interact with these.⁴³

The policies of Facebook, Google, Yahoo! and Twitter illustrate this.

Facebook

- 3.34 Facebook users can authorise Facebook to deal with their account in two ways in the event of their death:
- appoint a legacy contact to look after their "memorialised" account, or
 - choose to have their account permanently deleted from Facebook.
- 3.35 If a user does not choose to have their account permanently deleted, it will be memorialised if Facebook becomes aware of the user's death.
- 3.36 The process of "memorialising" a user's Facebook account involves Facebook making some key changes to it. For example:
- the word "remembering" is shown next to the user's name on their profile
 - the legacy contact, if one is nominated, is allowed to update the profile and respond to new friend requests.
- 3.37 Depending on the privacy settings of the account, friends can continue to share memories on the user's timeline. Content the user shared (for example, photos and posts) stays on Facebook and is visible to the audience it was shared with.

43. P Stokes, *Preliminary Submission PDI4*, 3.

- 3.38 While the legacy contact can update the profile and respond to friend requests, they cannot log into the account, remove existing friends or read the user's messages. However, a user may give their legacy contact permission to download an archive of the photos, posts and profile information they shared on Facebook.⁴⁴
- 3.39 If the account holder did not nominate a legacy contact, an immediately family member or executor can request that the account be deleted or memorialised.⁴⁵ Memorialised accounts that do not have a legacy contact cannot be changed.

Google

- 3.40 Google's Inactive Account Manager Policy allows users to nominate trusted contacts to receive data if the user has been inactive for a certain period of time.⁴⁶ The trusted contacts may be entitled to download data the user left them, or may simply be notified of the inactivity. If a user does not set up an Inactive Account Manager, Google may permit family members or executors to obtain certain data from the account or close the account. However, this process is discretionary and Google does not promise that requests will be granted.⁴⁷

Yahoo! and Twitter

- 3.41 On the death of a Twitter user, a person authorised to act on behalf of the person's estate, or an immediate family member, can ask for the account to be deleted.⁴⁸ Twitter will not provide account access to anyone, irrespective of their relationship to the deceased.
- 3.42 Yahoo! accounts are non-transferable, and any rights to them terminate upon the account holder's death.⁴⁹

Enforceability of service agreements

- 3.43 One complication is that a service agreement that purports to prevent access to a person's digital assets may not be enforceable.
- 3.44 Typically, a user will enter into a service agreement through a website or online service without necessarily accessing or reading the terms and conditions governing the agreement.⁵⁰ This is unsurprising, as service agreements are often lengthy and contain complex legal language. Many agreements also allow the

44. See Facebook, Inc, "What is a legacy contact and what can they do?" <www.facebook.com/help/1568013990080948> (retrieved 6 June 2018).

45. See Facebook, "Special request for a medically incapacitated or deceased person's account" (2018) <www.facebook.com/help/contact/228813257197480> (retrieved 6 April 2018).

46. See Google, "About Inactive Account Manager" (2018) <support.google.com/accounts/answer/3036546?hl=en> (retrieved 6 June 2018).

47. E Harbinja, "Post-mortem Privacy 2.0: Theory, law and technology" (2017) 31(1) *International Review of Law, Computers and Technology* 26, 35-37.

48. Twitter, Inc, "How to contact Twitter about a deceased family member's account" (2018) <help.twitter.com/en/rules-and-policies/contact-twitter-about-a-deceased-family-members-account> (retrieved 6 April 2018).

49. See Oath, "Oath Terms of Service" (August 2018) <policies.yahoo.com/us/en/yahoo/terms/utos/> (retrieved 23 August 2018).

50. P Mallam, S Dawson and J Moriarty, *Media and Internet Law and Practice* (Thomson Reuters, 2017) [25.224].

service provider to alter the terms unilaterally and at any time.⁵¹ Therefore, issues can arise as to whether, in accordance with contract law:

- the user was given reasonable notice of the terms which would apply to the agreement⁵²
- the user was given sufficient notice of unusual or onerous terms, such as terms that limit the service provider's liability or prevent a user from transferring their account, and
- particular terms are unfair or unjust.⁵³

Issues of contract formation

3.45 Online service providers generally employ one of two types of service agreement: "browsewrap" and "clickwrap" agreements:

- A **clickwrap agreement** presents the user with the terms of the agreement before they access the service or website. The user is required to click a button or a checkbox to indicate assent.
- A **browsewrap agreement** operates on the assumption that any additional "browsing" beyond the homepage of the website amounts to accepting the terms located elsewhere on the website.⁵⁴

3.46 There are arguments about whether the terms of clickwrap agreements are incorporated by signature or by notice. If they are incorporated by signature,⁵⁵ the terms would bind the user even if they have not read them.⁵⁶ If they are incorporated by notice, the service provider must have taken reasonable steps to bring the terms to the user's attention at or before the time the contract was formed.⁵⁷

3.47 In a Federal Court of Australia case, Justice Rares upheld the enforceability of a clickwrap agreement and stated that "[b]y clicking on the relevant buttons and, by the computer bringing up all terms needed to purchase ... the whole transaction was in writing, signed and agreed by the parties".⁵⁸ In a Victorian Civil and Administrative Tribunal matter, the Member held that the terms of a clickwrap agreement were validly incorporated by notice "even though ... there was no underlining that might have prompted [the user] to click on a link in order to read

51. See, eg, Microsoft, "Microsoft Services Agreement" (1 May 2018) <www.microsoft.com/en-au/servicesagreement/upcoming.aspx> (retrieved 23 August 2018).

52. See *Parker v South Eastern Railway Co* (1877) 2 CPD 416.

53. P Mallam, S Dawson and J Moriarty, *Media and Internet Law and Practice* (Thomson Reuters, 2017) [25.224].

54. K Manwaring, "Enforceability of Clickwrap and Browsewrap Terms in Australia: Lessons from the US and the UK" (2011) 5(1) *Studies in Ethics, Law and Technology* 1; W Hartzog, "The New Price to Play: Are Passive Online Media Users Bound by Terms of Use?" (2010) 15 *Communications Law and Policy* 405, 406.

55. Clicking a checkbox may amount to a valid signature under the *Electronic Transactions Act 1999* (Cth) s 10.

56. *L'Estrange v F Graucob Ltd* [1934] 2 KB 394.

57. D Clapperton and S Coronos, "Unfair terms in 'clickwrap' and other electronic contracts" (2007) 35 *Australian Business Law Review* 152, 157.

58. *eBay International AG v Creative Festival Entertainment Pty Limited* [2006] FCA 1768, 170 FCR 450 [49].

them”. Instead, the Member observed that terms were available online for the user “to read in some other fashion, had he sought them”.⁵⁹

3.48 Browsewrap agreements pose greater concerns in terms of enforceability. Using the website is said to constitute acceptance of the agreement, but the user must access the website in order to read the terms, or even become aware of them.⁶⁰ Ordinarily, the small print at the bottom of the homepage will contain a hyperlink to a separate “Terms and Conditions” page alongside other links to pages such as the website’s privacy policy. Arguments can be made about whether this constitutes incorporation by notice or incorporation by reference. In either case, however, it can be argued that the website operators have not done all they could reasonably do to bring the terms of the browsewrap to the attention of the user. On this basis, the terms would not bind the user.⁶¹

3.49 An issue that affects both types of service agreements is the common law doctrine of “special notice”, which applies to a particularly onerous contract term.⁶² Such a term must be brought clearly to the attention of the party against whom it is to be enforced, by being “printed in red with a red hand pointing to it – or something equally startling”.⁶³ Therefore, highly restrictive terms located in the small print of an agreement or accessible only via a hyperlink may not satisfy this requirement and could be unenforceable.

Unfair or unjust contract terms

3.50 It is not clear whether the terms of service agreements that restrict accessing or transferring a person’s digital assets would be enforceable under contract or consumer law. They could be considered unfair under the Australian Consumer Law (“ACL”) or unjust under the *Contracts Review Act 1980* (NSW) (“*Contracts Review Act*”).

3.51 Under the ACL, a term of a standard form consumer contract is void if the term is unfair.⁶⁴ A term is unfair if:

- (a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
- (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.⁶⁵

59. *Goldstein v Jumbo Corporation Ltd* (Civil Claims) [2006] VCAT 2472 [26].

60. D Clapperton and S Corones, “Unfair terms in ‘clickwrap’ and other electronic contracts” (2007) 35 *Australian Business Law Review* 152, 157.

61. D Clapperton and S Corones, “Unfair terms in ‘clickwrap’ and other electronic contracts” (2007) 35 *Australian Business Law Review* 152, 157.

62. This obligation has been accepted in an online context: see *Evagora v eBay Australia and New Zealand Pty Ltd* [2001] VCAT 49 [15]-[16] which dealt with a misleading and deceptive conduct claim.

63. *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, 170. See also *eBay International AG v Creative Festival Entertainment Pty Ltd* [2006] FCA 1768, 170 FCR 450 [52].

64. *Competition and Consumer Act 2010* (Cth) sch 2, Australian Consumer Law s 23(1).

65. *Competition and Consumer Act 2010* (Cth) sch 2, Australian Consumer Law s 24(1).

- 3.52 Examples of unfair terms include terms that enable one party (but not another party) to terminate or vary the contract, and terms that penalise one party (but not another party) for a breach of the contract.⁶⁶
- 3.53 In determining whether a term is unfair, the court must also take into account the extent to which the term is transparent, and consider the contract as a whole.⁶⁷ A term is transparent if it is expressed in reasonably plain language, legible, presented clearly, and readily available.⁶⁸ However, some terms of service agreements may not be sufficiently “transparent”. Service agreements often run to several thousand words and use complex legal terminology and may incorporate the terms of other documents by reference. The documents incorporated by reference may in turn incorporate other documents by reference, creating a branching “tree” of agreements to which the user notionally assents.⁶⁹
- 3.54 In determining whether a contract is a standard form contract, a court must take into account:
- (a) whether one of the parties has all or most of the bargaining power
 - (b) whether the contract was prepared by one party before any discussion between the parties
 - (c) whether one party was, in effect, required either to accept or reject the terms in the form presented
 - (d) whether one party was given an opportunity to negotiate the terms
 - (e) whether the terms take into account the specific characteristics of one party.⁷⁰
- 3.55 Many service agreements could be classified as standard form consumer contracts, for example, by not giving users an opportunity to discuss or negotiate terms. Agreements often provide that the service provider can unilaterally change the terms of the agreement in anyway way, at any time, without notice to the user, or with “notice” in a manner that is unlikely to come to the attention of the user (for example, by updating the terms on a website page).⁷¹
- 3.56 A term in a service agreement could also be “unjust” under the *Contracts Review Act 1980* (NSW). “Unjust” includes “unconscionable, harsh or oppressive”.⁷² Where all or part of a contract is found to be unjust, the court has a range of options to avoid an unjust result, including refusing to enforce some or all of the contract.⁷³
- 3.57 In determining whether an agreement or a term is unjust, the Court must have regard to the public interest and to all the circumstances of the case, including the

66. *Competition and Consumer Act 2010* (Cth) sch 2, Australian Consumer Law s 25(b), s 25(c), s 25(d).

67. *Competition and Consumer Act 2010* (Cth) sch 2, Australian Consumer Law s 24(2).

68. *Competition and Consumer Act 2010* (Cth) sch 2, Australian Consumer Law s 24(3).

69. D Clapperton and S Corones, “Unfair terms in ‘clickwrap’ and other electronic contracts” (2007) 35 *Australian Business Law Review* 152, 158.

70. *Competition and Consumer Act 2010* (Cth) sch 2, Australian Consumer Law s 27.

71. D Clapperton and S Corones, “Unfair terms in ‘clickwrap’ and other electronic contracts” (2007) 35 *Australian Business Law Review* 152, 158.

72. *Contracts Review Act 1980* (NSW) s 4 definition of “unjust”.

73. *Contracts Review Act 1980* (NSW) s 7.

consequences of compliance or non-compliance with the contract's provisions.⁷⁴ Additionally, the court must have regard to a non-exclusive list of factors, including:

- any inequality in bargaining power between the parties
- whether the contract's terms were the subject of negotiation
- whether it was reasonably practicable to negotiate to alter or reject any of the provisions
- whether the provisions impose conditions which are not reasonably necessary to protect the legitimate interests of the parties, and
- the physical form of the contract and the intelligibility of its language.⁷⁵

3.58 As with factors set out in the ACL, many of these factors would be relevant to service agreements.

Possible law reform approaches

3.59 One way to resolve these issues might be to prevent the operation of terms of service agreements that restrict third party access in limited circumstances. One of these circumstances might be when the user has died or is incapacitated, and access is required to deal with their assets under another law. If the law is clear that access is allowed in certain limited cases, parties will not need to engage in expensive litigation to settle the question of whether a service agreement is enforceable.

Criminal law

3.60 Under the *Criminal Code* (Cth) and the *Crimes Act 1900* (NSW), it is an offence for a person to cause any unauthorised access to, or modification of, restricted data held in a computer, knowing that the access or modification is unauthorised.⁷⁶ Therefore, a person who accesses another's computer upon death or incapacity, and knows that they do not have clear authorisation to do so, could be at risk of prosecution. Potential criminal liability may therefore discourage fiduciaries from accessing digital assets held on a computer.⁷⁷

3.61 The scope of the offences is wide. They do not require an intention to commit or facilitate the commission of another offence.⁷⁸ There is also no defence of "lawful excuse", unlike the previous version of the offence.⁷⁹

3.62 The concepts of "access", "computer" and "restricted data" are also extremely broad. "Computer" is not defined in the NSW or Commonwealth offences, meaning

74. *Contracts Review Act 1980* (NSW) s 9(1).

75. *Contracts Review Act 1980* (NSW) s 9(2).

76. See *Criminal Code* (Cth) s 478.1; *Crimes Act 1900* (NSW) s 308H. The maximum penalty is 2 years' imprisonment.

77. A B Lopez, "Posthumous Privacy, Decedent Intent, and Post-Mortem Access to Digital Assets" (2016) 24(1) *George Mason Law Review* 183, 187.

78. J Clough, *Principles of Cybercrime* (Cambridge University Press, 2012) 48.

79. *Crimes Act 1900* (NSW) s 309(1) which has been repealed, previously expressed the offence by reference to a lack of "lawful excuse" in the person accessing the computer system.

that they could apply to accessing restricted data on any computer at all. For both offences, “restricted data” means any data that are subject to an access control system, such as a password.⁸⁰ Therefore, any files stored on a device that has a login password would be considered “restricted data”.⁸¹

3.63 “Access to data held in a computer” is defined to mean:

- (a) the display of the data by the computer or any other output of the data from the computer; or
- (b) the copying or moving of the data to any other place in the computer or to a data storage device; or
- (c) in the case of a program – the execution of the program.⁸²

3.64 In this definition, “access” is tantamount to “use” of the data, as any contact with the data that causes the computer to respond will amount to access.⁸³

3.65 The scope of the offences is limited by the requirement that the access be “unauthorised”. “Unauthorised access” simply means that the person is not “entitled” to access the relevant data,⁸⁴ rather than the computer itself.⁸⁵ Therefore, a general entitlement to a person’s computer under a will or a power of attorney arrangement may not be sufficient to authorise access to data held on the computer. Moreover, if a person is violating a service provider’s agreement by accessing the data, they may be “unauthorised” for the purposes of the offence.⁸⁶

3.66 Another issue is that even if someone has made provision in a will or power of attorney for another person to access their digital assets, it may not be clear what sort of authority they intended to confer. If the permission is expressly or impliedly limited to access for a particular purpose, then access for another purpose will be unauthorised.⁸⁷

Possible law reform approaches

3.67 Ways to resolve these issues might include:

- introducing a defence in limited circumstances, for example, when access is required to deal with a person’s digital assets under another law,⁸⁸ or
- drafting a law specifically about third party access to digital assets to ensure that in limited circumstances the relevant criminal offences do not apply, for

80. *Criminal Code* (Cth) s 478.1(3); *Crimes Act 1900* (NSW) s 308B.

81. J Clough, *Principles of Cybercrime* (Cambridge University Press, 2012) 96.

82. *Criminal Code* (Cth) s 476.1(1); *Crimes Act 1900* (NSW) s 308.

83. J Clough, *Principles of Cybercrime* (Cambridge University Press, 2012) 60.

84. *Criminal Code* (Cth) s 476.2(1); *Crimes Act 1900* (NSW) s 308B(1).

85. J Clough, *Principles of Cybercrime* (Cambridge University Press, 2012) 72.

86. S Brown Walsh, N Cahn and C L Kunz, “Digital assets and fiduciaries” in J A Rothchild (ed) *Research handbook on electronic commerce law* (Edward Elgar, 2016) 100. See also NSW Council of Civil Liberties, *Preliminary Submission PD18*, 6.

87. See, eg, *DPP (Vic) v Murdoch* (1993) 1 VR 406; *Gilmour v DPP (Cth)* (1995) 43 NSWLR 243; *Morgan v Commissioner of Police* [2010] NSWIRComm 67; *Salter v DPP (NSW)* [2011] NSWCA 190.

88. Confidential, *Preliminary Submission PD17*.

example, by addressing the question of what constitutes “unauthorised access”.

Privacy law

- 3.68 The legislative framework for privacy protection in Australia has a limited impact on access to digital assets. There is no right to privacy enshrined in the Australian Constitution, and legislation at the Commonwealth and state levels does not provide an enforceable right to privacy.⁸⁹ The privacy laws that do exist regulate the handling of personal information by public sector agencies,⁹⁰ not individuals or corporations, and tend not to extend protection to deceased people.⁹¹
- 3.69 The US *Stored Communications Act* (“SCA”), discussed above,⁹² which prohibits providers of certain electronic services from divulging the contents of a communication carried or maintained on their service, potentially has more of an impact for many NSW residents than any Australian laws. This is particularly the case for users of web-based email and social media.

Possible law reform approaches

- 3.70 Ways to address the operation of US privacy laws affecting NSW residents might include enacting NSW provisions that require service providers to give third parties access in limited circumstances, for example, when access is required to deal with a user’s assets under another law.

89. G Goggin and others, *Digital Rights in Australia* (University of Sydney, 2017) 17.

90. See, eg, *Privacy and Personal Information Protection Act 1998* (NSW).

91. See *Privacy Act 1988* (Cth); *Information Privacy Act 2014* (ACT); *Privacy and Data Protection Act 2014* (Vic); *Information Privacy Act 2009* (Qld); but see *Personal Information and Protection Act 2004* (Tas); *Information Act* (NT).

92. [2.9], [3.4].

4. Developments in other jurisdictions

In brief

Some other jurisdictions and bodies have recently enacted or proposed laws that specifically address the question of who can access a person's digital assets after their death or incapacity and in what circumstances. These include the United States, Canada, the European Union, and the Council of Europe.

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- 4.1 While the growth of digital assets has outpaced state and Commonwealth legislation in Australia, other jurisdictions have been quicker to respond. In Canada and the US, uniform law committees have proposed model legislation to facilitate a fiduciary's access to digital assets while still upholding the privacy of users and the interests of service providers. Some preliminary submissions support such laws for NSW.

United States

- 4.2 In 2014, the Uniform Law Commission in the US adopted the *Uniform Fiduciary Access to Digital Assets Act* ("UFADAA"). The intention of the UFADAA was to spell out the rights of fiduciaries with respect to users' digital assets.
- 4.3 In part, the UFADAA was needed because all 50 states in the US have criminal laws that prohibit unauthorised access to digital assets. Additionally, the federal *Stored Communications Act* ("SCA") prevents service providers from disclosing the content of users' electronic communications.¹
- 4.4 A revised version was adopted in 2016 following concerns raised by internet service providers and civil liberties groups over privacy.²
- 4.5 Most US states have enacted the *Revised Uniform Fiduciary Access to Digital Assets Act* ("RUFADAA").³ Under RUFADAA, a fiduciary's access to the deceased or incapacitated person's electronic communications is restricted unless the person

1. 18 US Code §2701-2712.

2. F L Woodman, "Fiduciary Access to Digital Assets: A Review of the Uniform Law Conference of Canada's Proposed Uniform Act and Comparable American Model Legislation" (2017) 15 *Canadian Journal of Law and Technology* 193.

3. See National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* <[www.uniformlaws.org/LegislativeFactSheet.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20\(2015\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015))> (retrieved 6 April 2018).

expressly consented to such access in a will, trust agreement, power of attorney or other legal record.⁴

- 4.6 The RUFADAA definition of digital assets only includes electronic records in which the individual has a property right or interest. Where an individual's instructions address the ability of third parties to access their digital assets, these instructions are prioritised over service access agreements. An instruction provided through an online tool, such as Facebook's Legal Contact tool, will override a contrary direction in an estate plan.⁵
- 4.7 If there are no explicit instructions, the terms of the service agreement will be followed. If the service agreement does not address fiduciary access, then the default rules of the RUFADAA will apply. Under these rules, fiduciaries can only access a catalogue of the person's electronic communications and not their content.⁶ A "catalogue" is essentially "log-type" information, such as the email addresses of the sender and the recipient, and the date and time that the communication was sent.⁷
- 4.8 The RUFADAA covers the following types of fiduciaries:
- personal representatives of deceased estates
 - appointed guardians
 - attorneys acting under a power of attorney, and
 - trustees.⁸

The RUFADAA does not cover family members and friends who are not fiduciaries.⁹

Canada

- 4.9 In 2016, the Uniform Law Conference of Canada adopted the *Uniform Access to Digital Assets by Fiduciaries Act* ("UADAF") that draws on the 2014 UFADAA. Before this, only Alberta had legislated to address directly some of the issues

4. M D Walker, "The New Uniform Digital Assets Law: Estate Planning and Administration in the Information Age" (2017) 52 *Real Property, Trust and Estate Law Journal* 51, 59.

5. National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* §4(a).

6. See National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* §7, §9, §11, §13, §14.

7. See National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* §2(4) and Comment to §2.

8. National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* §2(14).

9. National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* Prefatory Note.

regarding access to digital assets.¹⁰ It does not appear that any other Canadian province has enacted the UADFA.¹¹

- 4.10 The UADFA defines a “digital asset” more broadly than the US law. Essentially, fiduciaries have access to all relevant electronic communications and online accounts that provide evidence of ownership or similar rights. “Digital asset” is defined as “a record that is created, recorded, transmitted or stored in digital or other intangible form by electronic magnetic or optical means or by any other similar means”.¹² The definition refers to any type of electronically stored information, such as information stored on a computer and other digital devices, content uploaded onto websites, and rights in digital property such as domain names and material created online.¹³
- 4.11 Unlike the US model law, the UADFA does not distinguish between a catalogue of an account holder’s electronic communications and the content of these communications. Therefore, a fiduciary who has a default right to access a digital asset of an account holder “is deemed to have the consent of the account holder for the custodian to divulge the content of the digital asset to the fiduciary”.¹⁴ This default position can only be changed by the terms of a power of attorney, trust, will or a grant of administration, a court order, or instructions in an agreement separate to the general service agreement.¹⁵ If there is more than one such instruction, the “last-in-time” instrument or order takes precedence.¹⁶
- 4.12 A term in a service agreement that limits fiduciary access to digital assets contrary to the UADFA is void, unless the account holder assents to it in a separate, affirmative act.¹⁷
- 4.13 According to the drafters of the UADFA, Canadian privacy laws do not prevent fiduciary access under the Act because the fiduciary is obliged to obtain the information in order to fulfil their duties.¹⁸ Additionally, for the purposes of Canadian criminal laws dealing with the unauthorised use of a computer or computer service a fiduciary is an “authorised user of the property”.¹⁹

10. *Estate Administration Act 2014* (Alberta) s 1(g) definition of “personal representative” only applies to personal representatives of deceased people.

11. See F L Woodman, “Fiduciary Access to Digital Assets: A Review of the Uniform Law Conference of Canada’s Proposed Uniform Act and Comparable American Model Legislation” (2017) 15 *Canadian Journal of Law and Technology* 193, 194.

12. Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) s 1 definition of “digital asset”.

13. See Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) comment to s 1.

14. Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) s 3(1), s 5(1)(b).

15. Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) s 3(2).

16. Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) s 3(4). See also comment to s 3.

17. Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) s 5(2)(a).

18. Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) comment to s 5.

19. Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) s 5(3)(b); *Criminal Code 1985* (Canada) s 142.1.

European Union

- 4.14 The European Union (“EU”) adopted the General Data Protection Regulation (“GDPR”) in 2016. It became binding upon all member states on 25 May 2018. The GDPR primarily aims to give control to individuals within the EU over their personal data, and to simplify the regulatory environment for international businesses.²⁰
- 4.15 An important provision of the GDPR is the right to be forgotten (as it is commonly known).²¹ This allows individuals to ask search engines to remove links with their personal information. However, it is unclear whether people can request information to be deleted for someone who has died or does not have capacity.²²
- 4.16 Under the “opting-in” provisions of the GDPR, users must give informed consent before service providers can share their personal data with marketers and others.²³ Violations of the GDPR attract significant penalties: 4% of global turnover or €20 million, whichever is higher.
- 4.17 The GDPR excludes the data of deceased people from protection, but allows member states to recognise post-mortem privacy.²⁴ Some states have already done so. For instance, in France, under the *Digital Republic Act* of 2016 people can register with a certified third party or the service provider general or specific directives for the preservation, deletion and disclosure of their personal data after death.²⁵

Council of Europe

- 4.18 In May 2018, the Council of Europe adopted an amending Protocol, known as Convention 108, which updates the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (“Convention”).
- 4.19 The Convention is the first binding international instrument which seeks to protect individuals from the abuses that can result from the collection and processing of personal data. It also seeks to regulate the cross-border flow of personal data. As at July 2018, 54 countries are parties to the treaty. Australia is an observer country, which means that it can participate in the Council of Europe’s activities, but cannot vote or propose resolutions.

20. STEP Australia, *Preliminary Submission PDI6*, 15.

21. *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ L 119/43, art 17.

22. E van der Nagel and others, *Death and the Internet: Consumer issues for planning and managing digital legacies*, 2nd edition (University of Melbourne, 2017) 28.

23. See *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ L 119/43, art 7, art 21.

24. *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ L 119/43, recital 27.

25. Loi n 2016-1321 du 7 octobre 2016 [Law No 2016-1321 of 7 October 2016, Digital Republic Act] (France) art 63(II). E Harbinja, *Preliminary Submission PDI12*, 5.

- 4.20 The Convention sets out several basic principles for data protection. For example, Article 5 provides that personal data that is “automatically processed” must be “obtained and processed fairly and lawfully”, “stored for specified and legitimate purposes and not used in a way incompatible with those purposes”, and “adequate, relevant and not excessive in relation to the purposes for which they are stored”. Additionally, Article 7 provides that “Appropriate security measures shall be taken for the protection of personal data stored in automated data files against accidental or unauthorised destruction or accidental loss as well as against unauthorised access, alteration or dissemination”.

Preliminary submissions on these developments

- 4.21 A number of the preliminary submissions we received reference the approaches outlined above. One is interested in the idea of the GDPR’s “right to be forgotten”.²⁶
- 4.22 The University of Newcastle Legal Centre suggests that the definitions of “digital assets” used in USA and Canadian legislation have limitations. It recommends that a definition of digital assets should include illustrative examples and exclusions.²⁷
- 4.23 The Law Society of NSW considers the definition used in the US legislation to be “the most comprehensive and suitable” definition currently used but says that any definition should cover “any electronic records in which [the relevant person has] a right or interest”.²⁸
- 4.24 Another submission prefers the Canadian definition, but thinks its use of the term “record” is inappropriate.²⁹
- 4.25 The Law Society of NSW submits that including the US model’s classification of four types of fiduciaries would be appropriate, but suggests adding a fifth type – the executor or next of kin for small estates. In such cases, probate should not be required for small estates to enable a named executor or next of kin to access the digital assets.³⁰
- 4.26 Overall, the Society of Trust and Estate Practitioners (“STEP”) prefers the Canadian model to the US one, citing in particular the fact that the Canadian model:
- makes a fiduciary’s right of access subject to the terms of the instrument appointing the fiduciary, rather than the terms of a service agreement, and
 - has a “last-in-time” priority system, ensuring a person’s most recent instruction concerning the right to access a digital asset takes priority.³¹

26. STEP Australia, *Preliminary Submission PDI6*, 4, 15, 16.

27. University of Newcastle Legal Centre, *Preliminary Submission PDI5*, 2.

28. Law Society of NSW, *Preliminary Submission PDI14*, 2.

29. E Harbinja, *Preliminary Submission PDI12*, 1.

30. Law Society of NSW, *Preliminary Submission PDI14*, 5.

31. STEP, *Preliminary Submission PDI6*, 13.

5. Approaches to reform

In brief

We discuss the case for legislative reform to enable certain categories of people to access another person’s digital assets upon death or incapacity. We consider whether this should be NSW or Commonwealth reform, and discuss the limited application of NSW legislation in a digital context. Finally, we list some possible reforms and invite submissions on specific questions.

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The case for law reform

- 5.1 Our preliminary view is that there are substantial policy grounds for legislative reform to govern when third parties can access a person’s digital assets upon death or incapacity.
- 5.2 The increasing accumulation, value and significance of digital assets, and the current legal uncertainties, are all reasons why specific legislation may be needed.
- 5.3 We should aspire to a clear and effective legal framework about third party access to digital assets that will address the current problems and strike an appropriate balance between competing considerations.

State or Commonwealth provisions?

- 5.4 Given the global nature of digital assets, and the regular movement of Australians within the country, it makes sense for Australian states and territories to have the same laws about third party access to digital assets. A number of preliminary submissions support this approach.¹
- 5.5 We agree that this is preferable, and believe that it can be achieved in a number of ways. One way is for the Commonwealth to enact provisions that apply across

1. M Dignam, *PDI03*, 1; STEP, *Preliminary Submission PDI6*, 4.

Australia. Another way is for one state or territory to enact model provisions that can be adopted in elsewhere.

The limitations of law reform – the problem of applicability

- 5.6 It is important to note that due to the global nature of digital assets, NSW laws may not apply in certain cases,² even if the digital assets in question are those of a NSW resident. Legislation should be drafted to ensure that its application is as broad as possible. We set out some of the key considerations below.

The proper law

- 5.7 The “proper law” means the law that applies in situations where a conflict of laws occurs. It determines the jurisdiction or system of law under which a case should be heard. Due to the intangible and global nature of digital assets, it is sometimes difficult to determine what the “proper law” is.
- 5.8 The proper law of digital assets that are not regulated by a service agreement, such as photos and videos stored on a computer, is generally the law of the place where the deceased or incapacitated person lives or lived. However, if a digital asset is regulated by a service agreement, such as an online account, or the content stored within it, the situation is less clear.
- 5.9 Often service providers will identify in their service agreement what law they want applied. For instance, Facebook’s service agreement provides that “the laws of the State of California” apply to all users except German users.³
- 5.10 The freedom of parties to choose which law governs a contract is not absolute. The chosen law will not be applied if the legislation of the forum (the place hearing the dispute) overrides either the express choice of the law or its effect.⁴ For example, in Australia, the consumer protections in the Australian Consumer Law provide that, if the proper law of the contract would be the law of any part of Australia but for a term in the contract that provides otherwise, the provisions of the ACL apply despite that term.⁵
- 5.11 Where there is no express choice of law in a contract, the court will imply a choice of governing law from particular terms and the surrounding circumstances.⁶ Where there is no express choice and one cannot be implied, the contract will be governed by the law of the jurisdiction with the “closest and most real connection” to the contract.⁷ Ordinarily, this depends on factors such as the place of contracting, the subject matter of the contract, the place of performance and the nationality or domicile of the parties.⁸ In the digital context, relevant factors may therefore include:

2. A Davidson, *The Law of Electronic Commerce* (Cambridge University Press, 2012) 183.
3. Facebook, “Terms of Service” (19 April 2018) <www.facebook.com/terms.php> (retrieved 4 June 2018).
4. R Mortensen, R Garnett and M Keyes, *Private International Law in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 423.
5. *Competition and Consumer Act 2010* (Cth) sch 2, Australian Consumer Law s 67(a).
6. *Akai Pty Ltd v People’s Insurance Co Ltd* (1996) 188 CLR 418.
7. *Bonython v Commonwealth* [1951] AC 201, 219.
8. *Re United Railways of the Havana and Regla Warehouses Ltd* [1960] Ch 52, 91.

- the location of the service provider’s headquarters
- the location of the service provider’s servers
- the location of the account holder, and
- the location of the communications equipment transmitting information between the provider and the user of the account.⁹

Possible law reform approaches

- 5.12 To ensure that any NSW legislation about third party access to digital assets has as broad an application as possible, it might be that the legislation should specify that NSW law is the proper law in all cases where the user is a NSW resident, and despite conflicting “proper law” clauses in service agreements.

The proper forum

- 5.13 Where there is a dispute about accessing or transferring a digital asset, the question of whether a particular court can hear the dispute is determined by choice of forum principles. If a dispute is brought before an Australian court, the main considerations affecting the court’s decision whether to stay (halt) the proceedings are:¹⁰

- whether there is an applicable mandatory law of the forum, which directs the Australian court to retain or decline jurisdiction¹¹
- whether the parties to the dispute have contractually agreed to litigate in a particular court, and
- whether the forum is “clearly inappropriate” (*forum non conveniens*) so that the court can decline to exercise jurisdiction when the proceedings are vexatious or oppressive, or an abuse of the court’s process.¹²

- 5.14 In deciding whether the Australian court is a clearly inappropriate forum, the court will consider whether there is any legitimate advantage to the plaintiff of litigating in the forum,¹³ such as the availability of a remedy under Australian legislation.¹⁴

Forum selection clauses

- 5.15 International contracts often include a clause that refers disputes to a particular court. For instance, Facebook’s service agreement provides that claims are to be

9. STEP Australia, *Preliminary Submission PDI6*, 10.

10. R Mortensen, R Garnett and M Keyes, *Private International Law in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 89.

11. See, eg, *Carriage of Goods by Sea Act 1991* (Cth) which provides for the exclusive jurisdiction of Australian courts in contracts for the international carriage of goods by sea, from any Australian port.

12. *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

13. *Oceanic Sun Line Special Shopping Co v Fay* (1988) 165 CLR 197, 251; *Voth v Manildra Flour Mills Pty Ltd* (1999) 171 CLR 538. 564-565; *Henry v Henry* (1996) 185 CLR 571, 587.

14. *Telesto Investments Ltd v UBS Ag* [2013] NSWSC 530 [170]-[171].

brought “exclusively in the US District Court for the Northern District of California or a state court located in San Mateo County”.¹⁵

- 5.16 If a plaintiff institutes an action in breach of an exclusive jurisdiction clause, and the defendant applies for a stay of proceedings, the court will generally grant a stay, unless the plaintiff demonstrates strong cause for not doing so.¹⁶ In exercising its discretion, the court should consider factors such as the location of evidence, whether the law of the foreign court applies, with what country the parties are connected, and whether the defendant genuinely desires a trial in the foreign country or is seeking a procedural advantage.¹⁷ However, when a clause is a non-exclusive forum selection clause (that is, it does not purport to grant to the courts of one country *exclusive* jurisdiction to hear a dispute), then the burden on the party seeking to sue elsewhere is not as high.¹⁸
- 5.17 It may be the case that a forum selection clause in a service agreement will not be upheld where a fiduciary or relative is seeking access to digital assets. In one case, a Massachusetts state court refused to uphold a forum selection clause in Yahoo!’s service agreement that nominated the courts of California.¹⁹ The court concluded that the administrators of the deceased user’s estate could not be bound by the service agreement because they were not parties to it.
- 5.18 A forum selection clause may be void for unfairness under the *Australian Consumer Law*. Terms that may be considered unfair include terms that limit, or have the effect of limiting, a right to sue.²⁰ A forum selection clause that requires users to bring legal proceedings in a foreign court may be unfair, as such proceedings may prove too costly for the size of the claims that most users would bring.²¹

Possible law reform approaches

- 5.19 If NSW legislates to permit fiduciary access to digital assets upon death or incapacity, the legislation may need to clarify the appropriate forum for the resolution of access or ownership disputes. One possible approach, where a fiduciary has brought the action, is to make any forum selection clause in a service agreement ineffective if it purports to deprive a NSW court of jurisdiction.

Data stored overseas

- 5.20 Another potential difficulty with any NSW legislation is whether it can be applied to reach data stored outside the jurisdiction by electronic communication service providers, such as email, or remote computing services, including cloud computing.

15. Facebook, “Terms of Service” (19 April 2018) <www.facebook.com/terms.php> (retrieved 4 June 2018).

16. *Akai Pty Ltd v People’s Insurance Co Ltd* (1996) 188 CLR 418.

17. See, eg, *The Eleftheria (Cargo Owners) v The Eleftheria* [1970] P 94, [1969] 2 WLR 1073, 2 All ER 64; *Reese Bros Plastics Ltd v Hamon-Sobelco Australia Pty Ltd* (1988) 5 BPR 11,106.

18. See, eg, *Contractors Ltd v MTE Control Gear Ltd* [1964] SASR 47; *Aldred v Australian Building Industries Pty Ltd* (1987) 89 FLR 68, 48 NTR 59 (NTSC); *Green v Australian Industrial Investment Ltd* (1989) 25 FCR 532.

19. *Ajemian v. Yahoo!, Inc.*, 83 Mass. App. Ct. 565, 572–573, 577, 987 N.E.2d 604 (2013).

20. *Competition and Consumer Act 2010* (Cth) sch 2, Australian Consumer Law s 25(1)(k).

21. K Manwaring, “Enforceability of Clickwrap and Browsewrap Terms in Australia: Lessons from the U.S. and the U.K.” (2011) 5(1) *Studies in Ethics, Law and Technology* 1, 13.

Possible law reform approaches

- 5.21 NSW legislation could make it clear that it applies to the data of NSW residents regardless of where it is stored. An example of such an approach, in the criminal investigation area, can be seen in the US *Clarifying Lawful Overseas Use of Data Act* (“CLOUD Act”)²² which was enacted in March 2018. The Act has extraterritorial effect so that the US government can now directly seek a warrant for data within the possession, custody or control of providers based in, or operating in, the US, irrespective of where the data are stored.

Suggestions for reform

- 5.22 Having considered the difficulties with the law in this area, we are of the view that, in the absence of Commonwealth action, a possible legislative approach could be to enact NSW provisions that explicitly allow a particular class of person to access a person’s digital assets upon death or incapacity, in limited circumstances.
- 5.23 Preliminary submissions have made some suggestions about what any such provisions could contain. For example, they could:
- be based on existing models in other jurisdictions, such as in the US or Canada
 - specify when NSW law is to be considered the proper law and a NSW court the relevant forum
 - define “digital assets”, for example, in a way that:
 - is “sufficiently broad to cover the types of assets currently in existence, but also flexible enough to encompass relevant classes or types of assets that may come into existence in the future”²³
 - incorporates examples and exclusions of what constitutes a digital asset,²⁴ and
 - distinguishes between financial and sentimental assets so that specific considerations and rules can apply separately to each class²⁵
 - determine:
 - which third parties should have access rights to what assets
 - who should have the authority to decide what happens to a person’s digital assets, and
 - what should happen if relevant parties disagree
 - clarify how the wishes of a person should be taken into account when deciding about their digital assets upon death or incapacity

22. 18 *US Code* §2523.

23. Law Society of NSW, *Preliminary Submission PDI14*, 2.

24. University of Newcastle Legal Centre, *Preliminary Submission PDI5*, 2; E Harbinja, *Preliminary Submission PDI12*, 1.

25. Law Society of NSW, *Preliminary Submission PDI14*, 2.

- exempt the operation of service agreements and privacy laws in defined circumstances
- impose obligations on service providers, such as Facebook, Instagram and Twitter, to ensure that, before accessing an account, users advise what they want to happen to their digital assets upon death or incapacity²⁶
- provide for the way in which relevant non-legislative tools (such as digital legacy services) should operate
- clarify the effect of existing laws that potentially create a barrier to access, such as succession and criminal laws
- set general or specific directives to preserve, delete or disclose a person's data upon death²⁷
- make it an offence to misuse a person's digital assets after death or incapacity²⁸
- freeze or suspend a person's digital assets after their death or incapacity to avoid misuse or identity theft.²⁹

Questions

- 5.24 Following are some questions to guide your response to the issues raised in this consultation paper. However, there may be issues that have not been raised or included to date. We welcome submissions on these questions and any other issues that you think are relevant to the review.

Questions

- (1) When a person dies what should it be possible for third parties to do in relation to the person's digital assets? In particular:
 - (a) Who should be able to access those assets?
 - (b) What assets should they be able to access?
 - (c) For what purposes should they be able to access them?
 - (d) What documentation should be needed to authorise a person to access those assets?
 - (e) What restrictions should there be on that access?
- (2) When a person otherwise becomes incapable of managing their digital assets what should it be possible for third parties to do in relation to those assets? In particular:
 - (a) Who should be able to access those assets?

26. University of Newcastle Legal Centre, *Preliminary Submission PDI5*, 3.

27. See, eg, Loi n 2016-1321 du 7 octobre 2016 [Law No 2016-1321 of 7 October 2016, Digital Republic Act] (France) art 63(II). See also M Dignam, *Preliminary Submission PDI3*, 1; P Stokes, *Preliminary Submission PDI4*, 4-5; STEP Australia, *Preliminary Submission PDI6*, 4.

28. A Yardi, *Preliminary Submission PDI2*, 1.

29. A Yardi, *Preliminary Submission PDI2*, 1.

- (b) What assets should they be able to access?
 - (c) For what purposes should they be able to access them?
 - (d) What documentation should be needed to authorise a person to access those assets?
 - (e) What restrictions should there be on that access?
- (3) Should NSW enact a law that specifically provides for third party access to a person's digital assets upon death or incapacity? Why or why not?
- (4) If NSW were to legislate to provide specifically for third party access to a person's digital assets upon death or incapacity:
- (a) How should the law define "digital assets"?
 - (b) How can the law appropriately balance privacy considerations with access rights?
 - (c) How can the law best overcome conflicting provisions in service agreements?
 - (d) How can the law best overcome provisions in service agreements that apply the law of some other jurisdiction?
 - (e) What else should the law provide for?
- (5) What alternative approaches might be desirable to deal with the issue of third party access to digital assets upon death or incapacity?
- (6) What amendments could be made to existing NSW laws to ensure appropriate third party access to digital assets upon death or incapacity?

Appendix A: Preliminary submissions

- PDI1** Alan Corven, 29 March 2018
- PDI2** Anay Yardi, 2 April 2018
- PDI3** Marcellus Dignam, 9 April 2018
- PDI4** Dr Patrick Stokes, 25 May 2018
- PDI5** University of Newcastle Legal Centre, 30 May 2018
- PDI6** Society of Trust and Estate Practitioners (STEP) Australia, 30 May 2018
- PDI7** Confidential, 31 May 2018
- PDI8** NSW Council for Civil Liberties, 1 June 2018
- PDI9** NSW Privacy Commissioner, 1 June 2018
- PDI10** Australian Communications Consumer Action Network, 1 June 2018
- PDI11** Associate Professor Lyria Bennett Moses, Professor Prue Vines,
Dr Janice Gray and Sarah Logan, 1 June 2018
- PDI12** Dr Edina Harbinja, 1 June 2018
- PDI13** Carers NSW, 14 June 2018
- PDI14** The Law Society of NSW, 19 June 2018
- PDI15** Dr Alexandra George, 24 June 2018



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