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Law Reform Commission
GPO Box 31
Sydney NSW 2001

Submission concerning digital assets upon death or incapacity

We wish to make this preliminary submission on the review into access to digital assets upon death or incapacity. We are researchers at UNSW Law associated with the Allens Hub for Technology Law and Innovation, the Private Law Research and Policy Group and Environmental Futures. The opinions expressed in this letter are our own.

Meaning of "digital assets"

One of the issues that the Commission will need to consider in the course of its project is the meaning of the term "digital assets". The background information currently defines digital assets as "a person's digital property and electronic communications". There are several points to make here:

1. Using a term such as "property" in the context of digitally stored information is not necessarily appropriate. Courts in Australia have concluded that, generally speaking, information cannot be an object of property rights.[1] While the High Court has left the door open to the possibility that "trade secrets" might be property,[2] this would be a narrow category in the context of individuals disposing of assets via will.

2. This does not necessarily mean that that the term "property" cannot be used in legislation, as it can be given a special legislative meaning different to the common law meaning. For example, in *Dixon v The Queen*, the Supreme Court of New Zealand held that digital files were "property" for the purposes of a statutory provision.[3] Further, property language is used in other statutes to describe relationships with digital information. However, it is potentially

[1] See, for example, *FCT v United Aircraft Corporation* (1944) 68 CLR 525, 534 ('[k]nowledge is valuable but is neither real nor personal property'); *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414, 441 [34] (Deane J) ('it had long been the common law that, in the absence of rights of patent, trade mark or copyright, information and knowledge *are* not the property of an individual'); *Brent v Commissioner of Taxation (Cth)* (1971) 125 CLR 418, 425–7 [8]-[10] (Gibbs J) (in particular '[n]either knowledge nor information is property in a strictly legal sense'); *Pancontinental Mining Limited v Commissioner of Stamp Duties (Qld)* [1989] 1 Qd R 310, 311 (de Jersey J) ('the ordinary meaning of the word does not encompass information').

[2] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, [118]. It also seems likely that trade secrets can be passed by will: see *Crowder v Hilton* [1902] SALR 83, where the Court seems to have assumed that the plaintiff's rights in secrets contained in a recipe book were inherited from his dead father.

[3] [2016] 1 NZLR 678

confusing to use “property” language that falls outside its standard legal meaning.

3. One reason why property terminology is problematic for digital assets is that, unlike physical chattels, their relationship with individuals can be more complex. Thus, while the law will only recognise one person’s possession of a thing (except in the case of co-ownership), digital files may be stored “in the cloud” where different individuals have access rights and/or control rights. This adds complexity to an attempt to link individuals and “digital assets” for the purposes of succession.

4. It is worth noting here that not all “digital assets” are the same. For example, the rules that ought to apply to the following may be vastly different:

    a. a person’s social media page (containing posts and photos/videos, private messages between “friends”, as well as the potential for continuing use as a profile[4] which may include permission to view other people’s content eg friends’ photos);

    b. a person’s collection of e-books (most of which will be licensed to the “owner” on contractual terms);

    c. a person’s gaming account (also contractual, such as a right to “play” a particular avatar in an online game combined with a licence to use particular software);

    d. a person’s access to documents stored in cloud – such access may or may not include the ability to edit or download those documents and may be shared among many individuals;

    e. a person’s access to documents stored on physical media, the right to possession of which passes on death.

    The different contexts, and different service contracts, ensure that the kinds of personal and proprietary rights that will exist in relation to diverse “digital assets” will differ. In fact, contract law (and the different contracts that are used) will have a larger role to play in assessing the nature of the rights than a single term such as “digital assets” suggests. While statutory reform can override contractual terms, the policy arguments for providing access and/or control of these to a person’s family or personal representative will vary. There may be a stronger argument for access to personal, sentimental “digital assets” than to commodities such as e-books. Privacy concerns will also vary significantly, including between a person’s “own” digital assets and those which contain personal information of third parties.

5. Because the underlying rights of the deceased will differ, the question of what rights come into play upon death will also vary. In some cases, a right to access may be all that is appropriate, while in other cases, it may be appropriate to

[4] For example, allowing people to continue to engage socially with the dead: see Carl Öhman & Luciano Floridi, ‘An ethical framework for the digital afterlife industry’ (2018) 2 *Nature Human Behaviour* 318-320.

have a right to obtain copies of files or a right to alter or delete files. However, the category of "digital asset" seems too broad to provide a single answer.

The case of water rights

The case of water rights in Australia reveals some of the complexities which may arise in relation to digital assets in a will.

Water rights are commonly rights of access rather than simple proprietary rights in the thing itself. In NSW, water entitlements provide the holder with a share or percentage of water in a variable consumptive pool. Meanwhile, water allocations give more specific content to entitlements by permitting calculations of the actual amount of water which the holder is entitled to access in a given 'water year'. These 'rights' are enshrined in legislation but in NSW they are not deemed to be property by the relevant legislation. In some other states, legislation has deemed them to be a species of personal property although it is widely understood that statutory property does not necessarily equate with common law property.

In NSW, water access licences (WALs) are recorded in a digital register. It is against this digital register that potential purchasers or mortgagees, for example, would need to check for caveats or other burdens on title. An executor of a will would also need to check this register if WALS were the subject of testamentary disposition.
While the digitalised Torrens register records rights in physicalised land, the digitalised WAL register records rights of access only---access being a subset of the plethora of rights commonly associated with the bundle of property rights that are seen as indicia of property. Are, or should these limited 'rights' be sufficient, without the help of statute, to be characterised as property?

Therefore, some of the questions that may need to be addressed include:

(a) Whether the digital WAL register is/should be the basis of a system of title by registration (resulting in 'digital property') or whether there should be a system for the digitalised registration of (already established) property? and

(b) Whether WALs should be conceived of as form of (digitalised or other) property at all? Are they best placed outside the proprietary frame (as licences or permissions as their name suggests)?

The very fact that WALs may be cancelled or surrendered for a variety of reasons reveals their potential for a lack of permanence: a degree of permanence being thought necessary to support a property characterisation. Nevertheless, in NSW, the Supreme Court has found, on one set of facts at least, that WALS constitute a form of property for the purposes of succession.

Whether WALs constitute digital property for the purposes of succession more generally is an issue that deserves attention.

Implications for succession

The next question which follows is the impact of the status of digital assets on the ability to pass those assets through the law of succession. The naïve testator may wish to pass a number of items to his or her successors that are not, strictly speaking, property. The biggest problem here is that testators may not understand that they do not own all of their digital material. For example, they may have downloaded music or have a right to stream music, but this may be subject to contractual limitations that prevent it from being transferable by will. This is exacerbated by the well-known phenomenon that people enter into electronic contracts without reading the terms of the contract, simply ticking the box. So testators may think they own property when in fact they merely have a contractual right which may well die with them. In most cases, what is given to the

downloader is a contractual non-transferable licence to use the content. This licence will generally die with the contractor whether or not that is mentioned in the contract.

This creates a need for education across the community so that people understand what they own or do not own. In particular, any changes in that arising from any new legislation will need to be subject to an education campaign. Some of this can be dealt with through legal advice, but it remains a significant issue for those who make their own wills.

Ability to access passwords – practical considerations

The ability to access passwords is a significant problem when the original holder of the password is dead. Although there are enterprises who set themselves up to hold passwords to prevent this problem, using such sites may breach the contractual provision against disclosing passwords and may involve risk (particularly where the same password is used across services). Also, as passwords change, the communication of a password requires a continuing process rather than one transaction. To make matters more complicated, the server from which a site is controlled may not be within the jurisdiction in which the testator or intestate died. What of bitcoin and similar currencies? They appear to be property, and bitcoin is able to be traded on the market, but problems of access remain.

Even providing passwords to a trusted friend or family member breaches the terms of service of most online service providers, especially social media platforms. Additionally, the trusted friend or family member and their relationship to the testator may not match that established in the will, potentially causing confusion. This is something that is within the testator's power to deal with in the will, but problems may still occur. Some companies, such as Dedsocial, and Everplans, offer an after-death service preserving online life, including social media platforms, but providing passwords to such services technically still breaches the terms of service of most major platforms,

Social media accounts offer a particular conundrum in terms of access after death. Social media accounts are not property, although many account holders may mistakenly consider them as such. Transfer of access, if not ownership, is facilitated by the major platforms, which seek to manage the problem of passwords being shared in contravention of their own terms of service by providing other ways for users to have their accounts managed after death.

Facebook, for example, allows accounts to be 'memorialised' after an account holder dies. An account may be memorialised by anyone who chooses to fill out the person's form, provide their name and date of birth and provide 'optional proof' of death such as a scanned obituary. A memorialised account is annotated to indicate the account owner has died, and depending on privacy settings, confirmed friends will still be able to post to their wall. Account holders may appoint a 'legacy contact', to manage their memorialised account after death, who must also be on Facebook. That person's access to the account is restricted – they cannot post new material or delete old material, and they may not access the deceased's messages. But they may download a copy of what the deceased has posted on their Facebook account in its entirety. Instagram has similar measures. Both Instagram and Facebook allow only 'verified family members' to delete an account entirely. Verification of identity is achieved by a family member submitting a form with a scanned copy of a death certificate, power of attorney document, an estate letter, and proof of an individual's having passed away such as an obituary. will or similar. We have discussed the issue of access to emails above.

Google allows users to appoint up to ten 'account trustees' who can access a person's Google account after a period of inactivity of between three and 18 months, specified by the account owner. The account owner can decide in advance what parts pf their Google identity contacts can access. 'Account trustees' are verified via phone numbers and email contact. This is, of course, somewhat vulnerable to fraud, and does not take account the possibility of changed phone numbers. Account holders may also choose to have all their account data automatically deleted after a period of inactivity. Twitter will not let other users access an account after the original account holder has died, but will work with relatives to deactivate or delete an account. Deletion of an account may only occur on provision of a death certificate.

Other platforms, such as Snapchat, or Tumblr, simply have no option for memorialisation or legacy contacts.

Proof of death – practical considerations

In the case of platforms which require scanned documents to prove death or relationship to the deceased, there are no publicly available procedures describing how Facebook or Instagram, for example, verify those documents. And information provided to these platforms by those wishing to have an account memorialised or deleted must match the information provided to Facebook or Instagram by the initial account holder, leaving little capacity for the deceased's family to manage the implications of platforms which do not require real name verification. In Google's case, there are no publicly available documents which explain how the company manages verification in the case of trustees having changed phone numbers. Nor are there guidelines on how to manage conflicts between trustees, given they will all theoretically have access to the same initial log-in.

Problems with verification leave the system open to abuse. This is particularly pertinent in the case of memorialisation, where accounts may be 'frozen' by malicious actors who simply create fake death notices and alert the platforms. Account holders face a long and difficult process to have their account reinstated. It is also important to note that accounts may be memorialised by those who, for their own reasons, wish to stop those who may have password access to a deceased individual's account, such as parents or spouses, accessing private Facebook messages. If this occurs, there is no option for the deceased's family to 'unmemorialise' an account and, in the case of Facebook, the company will not provide information on the identity of the person who originally requested the memorialisation. Further, none of the platforms provide specific access by parents to the social media accounts of minors. Facebook has controversially resisted providing such access in the past.

The systems for verification also do little to protect the personal identity of the deceased or family members in terms of documentary evidence of death or authority. In the case of Facebook and Instagram, family members are simply advised to 'cover' sensitive information such as social security numbers when scanning the documents.

In none of the examples outlined above where there are processes for memorialisation or legacy access are there established and published guidelines for expected timelines or administrative processes for appealing a decision.

Digital wills and electronic signatures

A related issue is whether individuals can make their will digitally (for example, by saving it as a computer file). To make a formally valid will under the Australian legislation requires writing. This means that if a testator writes a will on his or her computer, if he or she is able to sign it digitally and the witnesses are also able to see it and sign it digitally at the same time, it may be possible for a wholly digital will to meet

the requirements of writing and signing. At present it seems doubtful that this is possible. Electronic signatures are permitted and can be valid signatures to a will.[5] "Electronic signature" is a broad term which covers 'any mark applied to a document in electronic form, intended, at that time to be the signature of the signatory'.[6] This is to be distinguished from a digital signature which involves cryptography. The major difficulty in executing a will by electronic signature is that, although a testator can acknowledge such a signature before witnesses, having the witnesses also do an electronic signature may mean there is a breach of the formal requirements for witnessing. The NSW Electronic Transactions Act legislation provides:

> ***9 Signatures***
> *(1) If, under a law of this jurisdiction, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if:*
> *(a) a method is used to identify the person and to indicate the person's intention in respect of the information communicated, and*
> *(b) the method used was either:*
> *(i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement, or*
> *(ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence, and*
> *(c) the person to whom the signature is required to be given consents to that requirement being met by way of the use of the method mentioned in paragraph (a).*

We have found no examples of use of electronic signatures in wills. Sub-section (c) may be problematic in that 'the person to whom the signature is required to be given' might be regarded as either the testator themselves or the court of probate. If it is the testator, the clause is circular and unhelpful. If it is the probate court, legislation might be required to ensure that the probate court consents to the electronic signature. As stated before, the current requirements for the witness to see the testator making the signature may still require the testator and the witnesses to all be in the room together, in which case it may be simpler just to sign the will in the traditional way.

However, digital wills, despite not meeting formal requirements, may still be admitted to probate under the dispensing power.[7] Most of the Australian jurisdictions' definition of a 'document' in their Interpretation legislation go so far as to mention articles on which 'information has been stored or recorded electronically' or 'anything from which sounds, images or writings can be reproduced'. In *Treacey v Edwards* (2000) 4 NSWLR 739, Austin J noted that although the authors of the NSW Law Reform Commission who proposed the dispensing power rejected audiotaped or videotaped wills, the New South Wales Parliament enacted the dispensing power using the word 'document' only two years after the *Interpretation Act 1987* had expanded the definition of document to include 'anything from which sound, images or writings can be reproduced …'. On that basis he admitted an audiotape to probate as part of a will under the dispensing power. In *Re Trethewey* [2002] 4 VR 406, the Victorian Supreme Court admitted a document that the deceased had typed and saved on his hard drive to probate. Similarly, a document entitled 'will.doc' was admitted to probate in *Yazbek v Yazbek* [2012] NSWSC 594 because it contained directions about a significant part of the estate and also used

[5] *Electronic Transactions Act 2001* (NSW) s 9
[6] T Rollo, 'Validity and Enforceability of Electronic and Digital Signatures' (2017) 35 *Law Society Journal* 84.
[7] *Succession Act 2006* (NSW) s 8

words anticipating death. However, where a document entitled 'will.doc' had significant blanks the court refused to admit it to probate as it did not demonstrate the finality of intention required: *Re Application of Tristram* [2012] NSWSC 657. In 2017 in Queensland, a will written as an unsent text saved on a smart phone was admitted to probate as an informal document. The testator wrote quite a detailed will as a text on his smart phone. The message was addressed to his brothers, ended with an abbreviation matching his initials and date of birth, and ended with the date and the words 'My will'. The deceased then committed suicide and his mobile phone was found on a workbench in the shed where his body was found. Brown J held that the text was intended to operate as the testator's will and noted that the fact that he did not send the text indicated only that he did not want to alert his brother to his intention to commit suicide but did want the text to be found after his death.[8] These cases suggest that digital wills can be accommodated, in practice, by the current law.

Conclusion

To summarise, there is a need to take account of the diversity of "digital assets" and their complex relationship with notions of property. There are also practical challenges in relation to passwords and access that should be considered, as well as improving the means by which identity is verified in the context of access or memorialisation.

Yours sincerely,

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[8] *Nichol v Nichol* [2017] QSC 220