McKEAN PARK LAWYERS

MATTERS

SEPTEMBER 2014

DEATH IN CYBERSPACE

BY INES KALLWEIT

We live in the age of digital media. Even if you don't have your own blog or regularly post on Twitter, you probably have an email account and sometimes purchase music on iTunes. While the internet is a great way to communicate and transact, have you ever thought about what will happen to your online presence when you die?

HOW TO DEAL WITH INFORMATION STORED IN CYBERSPACE WHEN A PERSON DIES?

Australia has no uniform policies or laws dealing with digital assets. Each internet company has its own guidelines when it comes to allowing executors access to a deceased member's site and those guidelines are constantly changing. Laws on how we deal with digital assets have yet to be formalised.

EXECUTORS AND DIGITAL ASSETS

Dealing with digital assets is often not as easy as taking care of physical assets. If a person fails to communicate their online account information, executors can find themselves in difficulties.

In contrast to cupboards and storage sheds, online accounts are often much harder to open. Without the passwords, executors often have to engage in tedious correspondence with each provider and may only be able to close the accounts rather than access the stored information. Unless there is a paper trail, executors may not even know what is out there. Many credit card applications and insurance policy renewals are now being done completely online.

Digital assets are not limited to online accounts, but also include digitally stored content such as images, music, videos, data and text files on computers, external hard drives, USBs, CDs, DVDs and mobile phones. Finalising digital assets is not only important for compiling the probate inventory. A person's online presence should also be investigated and brought to a close to prevent identity theft and misuse.

TREATING DIGITAL ASSETS WITH RESPECT

While checking digital assets is as important as checking the physical property of a deceased, looking through a person's private emails or online photos may surprise unsuspecting relatives. Digital assets can contain sensitive information and may provide clues about the deceased's relationship with others. Treating digital assets with respect is an important part of an executor's role.

PLANNING FOR DIGITAL ASSETS

Digital assets should be considered carefully in estate planning.

You can determine how your 'digital life' should be brought to an end; e.g. whether a Facebook page is to be memorialised or deleted. With this information, your executor can follow your wishes promptly.

It may also be worth considering whether your executor will be able to deal with digital assets, or whether the appointment of a tech-savvy executor is warranted. If no particular provisions are made, your online possessions fall into residue and will be dealt with along with everything else by the executor appointed in your will.

WHAT DO OTHERS DO?

A survey at the University of London found that one in ten people in the UK leave passwords to sites such as Facebook, Flickr and Tumblr in their will. Compiling a list of login information seems counter-intuitive, since we are told not to leave our passwords in one place. Once the will is probated it becomes a public record and anyone can read and gain access to these accounts, unless the executors are quick enough to change the passwords.

Other options include leaving login information in a sealed envelope in our strongroom with your will or on a USB stick in a safe deposit box. Alternatively, there are online services which allow people to organise and end their internet accounts.

The more information that you leave for your executors, the easier the process of dealing with your affairs will be. An experienced Wills and Estates Lawyer can help with the finalising of your digital affairs.

DIGITAL ASSETS CHECKLIST

Your executor should have:

- **A list of everything you access digitally or electronically, particularly anything that has real monetary or significant emotional value;**
- **A list of the hardware owned, e.g. computers, laptops, back up hard drives, USB flash drives, etc;**
- **Information on special programs used, e.g. financial programs for compiling tax returns;**
- **File locations;**
- **Details of online memberships, e.g. blogs, social networking sites, email, online bank accounts, etc;**
- **Instructions for websites, blogs and Facebook accounts;**
- **A list of passwords and pin numbers.**

For further information on this topic, please contact Ines Kallweit at:

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INTERNET LAW AND BUSINESS: CLICK HERE TO 'AGREE'

BY GLENN BUSHETT

Commercial engagement has evolved so much in the 21st century that it is now almost commonplace for parties to be contractually bound to one another simply by the click of their mouse. Nonetheless, terms and conditions are likely to apply to a transaction even if you fail to read them. It is important for online consumers to be aware of the ways in which a website can impose terms on them and the transaction at hand. Equally, retailers and other businesses should consider what is required of them to ensure their terms are not struck down for lack of notice or for being unfair to a consumer.

Individuals entering online contracts will do so pursuant to terms contained in either a 'clickwrap' or 'browsewrap' style agreement. They are both designed to provide notice to the party entering into the contract that certain terms and conditions will apply to the transaction. Clickwrap agreements are often entered into by an Internet user being presented set terms and conditions which are non negotiable, and in order to proceed, must click the appropriate button such as 'I agree' or 'submit' to indicate that they accept the terms presented. Courts accept that a valid contract can be formed in this manner.

Browsewrap terms have generally proven harder to enforce as they are more susceptible to the requirements of whether the user was given reasonable notice of the terms. Browsewrap agreements involve directing the user to terms and conditions displayed within the web site usually via a hyperlink. However, there is no obligation on a consumer to accept them prior to using the site or purchasing. The enforceability of such an agreement therefore depends on how much notice is given to the user about the existence of the terms, and whether such notice is reasonable in the circumstances. Where terms are more onerous than usual, courts generally expect a greater level of notice to be given to the end user. Even if a contract is formed by a clickwrap or browsewrap agreement the terms in online contracts could still be struck down if they are considered unfair under the new Australian Consumer Law.

Online contracting and the risks associated with their formation can be avoided if users adopt a strategic approach when considering the terms presented and by providing adequate notice to each party that such terms exist.

For further information on this topic please contact Glenn Bushett at:

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VICTORIAN COURT OF APPEAL RESOLVES CONFLICT OVER LIMITATION PERIOD FOR BUILDING CLAIMS

BY ROLAND BURT

Section 134 of the Victorian Building Act says: *"Despite any thing to the contrary in the Limitation of Actions Act 1958 or in any other Act or law, a building action cannot be brought more than 10 years after the date of issue of the occupancy permit in respect of the building work …"*

For a number of years now, this apparently straightforward provision has been the subject of conflicting interpretations in Victorian courts.

Many building claims are put in both contract and negligence. The *Limitation of Actions Act* provides for a 6 year limitation period for both. For a claim under the building contract, the 6 year period starts from when the defective work was performed. For a claim in tort or negligence, where the owner alleges the builder breached a duty of care owed to the owner, the 6 year period runs from when defects become manifest, even though they may have laid dormant (latent defects) for many years.

In the 2011 case of *Brirek Industries v McKenzie Group* [2011] VCC 294, the Victorian County Court held that despite the wording of section 134, the 10 year period in the Building Act does not replace the normal 6 year limitation period in the *Limitation of Actions Act* – instead, it acts as a "longstop", or an extra or an absolute cap on the limitation period. It held that section 134 does not extend any periods, and in certain circumstances – especially latent defects – it may shorten the time within which a party might sue.

This directly contradicted the approach in the Victorian Civil & Administrative Tribunal. In *Thurston v Campbell* [2007] VCAT 340 and *Hardiman v Gory* [2008] VCAT 267 VCAT held that the 10 year period in section 134 replaces the 6 year period for all building claims. Under the "replacement" theory, owners have 10 years from occupancy permit to sue in all building cases.

Brirek appealed to the Victorian Court of Appeal, which handed down judgment in the appeal on 6 August 2014 (*Brirek Industries v McKenzie Group* [2014] VSCA 155).

The Court of Appeal unanimously backed the replacement theory. It held that the intent of Parliament in enacting section 134 was to replace the Limitations Act in relation to building actions. The judges said (paragraph 115):

"The words '[d]espite any thing to the contrary in the Limitation of Actions Act 1958 or in any other Act or law' have work to do in s 134. The Limitation of Actions Act and other Acts provide for different periods of limitation. The period provided for in s 134 operates despite those different periods."

And at paragraph 96 the Court explained the problem, and the rationale for the replacement theory, very succinctly:

"Time limits in contract could be very hard on owners; time limits in tort could be very hard on building professionals. In enacting s 134, Parliament had struck a balance: it had extended the time for bringing claims in contract; but it had placed a bar on all claims in tort, notwithstanding that they may not have become manifest until after the expiry of 10 years."

Whatever else might have been said for the longstop interpretation, it made it more difficult to determine when the limitation period for particular defects expired. The beauty of the replacement theory is that it is much simpler to apply: find the date of the occupancy permit; add 10 years; that's your period. And no need to disentangle contract and tort claims.

My prediction: McKenzie won't appeal to the High Court over this. One has the feeling that the Court of Appeal has got it exactly right.

For further information on this topic, please contact Roland Burt at:

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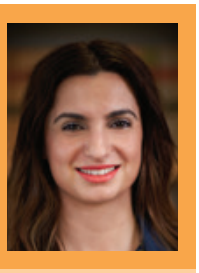
IS YOUR BUSINESS READY FOR THE NEW PRIVACY LAW REGIME?



BY LIANA DIMASI

On 12 March 2014, the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth) ("the Privacy Amendment Act") came into force, which amends the *Privacy Act 1988* (Cth) ("the Privacy Act") to include a set of new, harmonised, privacy principles called the 'Australian Privacy Principles' ("APPs") that regulate the collection, use, storage and disclosure of personal information by Australian Government agencies and some businesses.

DOES THE PRIVACY AMENDMENT ACT AFFECT YOU?

If the Privacy Act covered your business or Commonwealth government agency before 12 March 2014, it will continue to be covered, and it is important you are aware of and comply with the changes imposed by the Privacy Amendment Act.

Complying entities, or 'APP entities' (as defined in the Privacy Act) include:

- individuals, companies, partnerships and unincorporated associations with an annual turnover of $3 million or more; and
- agencies, for example, a Department of State Government or bodies established or appointed for a purpose under the Commonwealth legislation.

HOW DO YOU COMPLY?

Compliance with the APPs requires more than just preparing and publishing a privacy policy. Your organisation must have documented policies and procedures in place to manage personal information about individuals.

In most cases the new regime requires your business to have and implement a robust and accessible written privacy policy which addresses the following points:

- the reasons your business or agency collects the information;
- how the information will be collected and used by your business or agency;
- the length of time the information will be held by your business or agency;
- how an individual can access and correct the information;
- how the individual can complain about breaches of privacy, and
- whether the information will be shared with other businesses both within and outside Australia

PROVIDING CREDIT

A wide range of businesses are now caught by the credit provider requirements, which apply more broadly than to traditional credit providers (such as banks and financiers).

You will be considered a credit provider and have to comply with onerous credit provider obligations if your business provides customers with more than 7 days credit. Accordingly, credit providers must ensure the following are updated:

- standard terms and conditions if goods or services are purchased on delayed payment terms;
- credit application documentation;
- privacy statements, and
- any arrangements with credit reporting agencies.

DIRECT MARKETING

The most notable APP is perhaps APP7, which deals with the use and disclosure of personal information for direct marketing. The use of an individual's personal information, for example, their home address to send advertising, may now require the consent of the individual. Your business or agency must ensure individuals are given the choice to 'opt out' of direct marketing, and their requests not to receive marketing communications must be met in a reasonable time and at no cost.

INCREASED AUSTRALIAN INFORMATION COMMISSIONER POWERS

The Office of the Australian Information Commissioner now has enhanced powers to investigate businesses' compliance with the new regime, and if non-compliance is found, it is empowered to impose penalties of up to $340,000.00 for an individual (2,000 penalty units), and up to $1.7 million for an APP entity.

WHAT SHOULD YOU DO NOW?

You should immediately conduct an assessment of your current privacy and information gathering regime in order to ascertain whether your business complies with the new obligations.

WE RECOMMEND THAT YOU:

- familiarise yourself with the APPs. You can access a complete list of the APPs by visiting the Office of Australian Information Commissioner's website at www.oaic.gov.au/privacy, and following the links.
- update your privacy policy to comply with the APPs
- review your current marketing procedures for compliance with APP7. If your business is permitted to direct market, you should ensure it provides people with a simple means to 'opt out', and comply with the request
- if you disclose personal information to recipients offshore, review your contract to ensure there is an obligation on the recipient to handle personal information in accordance with the APPs
- review your security/software measures. Are they reasonable in the circumstances?
- consider whether staff are adequately trained in the collection, security and disclosure of personal information.

You should also seek legal advice to consider the implications of these changes upon your business. The significant penalty, new investigative powers and potential damage to business reputation should prompt a thorough investigation and consideration on how the changes to the Privacy Act affect your business and how best you can protect the personal information you collect and utilise.

For further information on this topic, please contact Liana Dimasi at:

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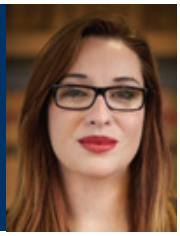
DEBT RECOVERY – LETTER OF DEMAND

BY CHARMAINE GROVES



WHAT IS A LETTER OF DEMAND?

A letter of demand is a letter sent to a person or organization who owes you money. The letter advises the debtor of the amount outstanding and threatens court action to recover the debt, if it is not paid within a certain time.

WHY SEND A LETTER OF DEMAND?

A letter of demand can serve two purposes.

First, it warns the debtor of your intention to commence legal proceedings unless payment is made and gives the debtor an opportunity to pay.

Secondly, the letter may be tendered in evidence during court proceedings as written proof of your claim of the debt owed and your attempt to settle the matter.

Copies of any relevant documents such as contracts, letters of agreement, invoices etc should be supplied to assist the debtor identify the transaction and the liability to pay money.

If a fax number or email address for the debtor is known it is beneficial to send the letter of demand by fax or email to confirm receipt, as well as ordinary post. Only one letter should be sent and you should be prepared to act on any threat to initiate legal action otherwise the debtor may simply call your bluff.

If a debtor does not respond to a letter of demand it may be necessary to commence Court proceedings. The amount of the debt will determine in which Court you seek recovery of the debt together with your costs and penalty interest in pursuing the debt. In most cases, proceedings are issued in the Magistrates Court of Victoria, which deals with debts up to $100,000.00.

HOW TO RESPOND TO A LETTER OF DEMAND

- **Do not ignore a letter of demand from a creditor, law firm or debt collection agency for monies owing.**
- **Carefully check the letter and if there are any matters that are unclear or if you require further details, write or ring the creditor (and keep a copy of the letter if one is used).**
- **Seek legal advice if the claim is disputed.**
- **If you do not dispute the claim, contact the creditor and attempt to negotiate settlement of the matter on a 'without prejudice' basis. This means that you can try to reach a compromise without putting at risk your legal rights. That is, you are keeping open the option that you may take a different stance if the matter ends up in Court.**
- **If you are the creditor sending the letter of demand and the debtor contacts you negotiating on a 'without prejudice' basis can be particularly useful, as you do not give up the right to sue for the full amount if a satisfactory compromise is not agreed.**
- **Keep in mind that most creditors are willing to accept less than the full amount, as it relieves them of the administrative and legal expense and delay in pursuing debt recovery action through the Courts.**
- **If you cannot afford to pay the amount in full, offer to pay by instalments that are reasonable in the circumstances (this option is usually also available if the matter is taken through the Courts).**
- **If you are unable to pay at all then advise the creditor by letter.**

For further information on this topic, please contact Charmaine Groves at:

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Welcome Ines Kallweit

McKean Park is pleased to welcome Ines Kallweit who has joined our Wills & Estates Team as a Partner. Ines brings a wealth of knowledge and experience to her new role. She trained and qualified as a lawyer in Germany before coming in Australia to study law and settle in our country.

Ines has gained her professional experience with another well regarded Melbourne legal firm. She continues her association with Germany by acting for a number of German speaking clients.

The real interest of Ines is helping clients document their personal estate planning requirements and administering estates and resolving the issues that inevitably arise in the event of death.

Outside of her busy practice Ines has a growing family with her husband Jim and two children Lucas and Jelena. In her free time she enjoys teaching German, sewing and gardening.

We also congratulate Liana Dimasi and Glenn Bushett who have both been admitted to practice as lawyers in Victoria. Liana works in the Property Law Team and Glenn works in the Litigation Law Team.

BECAUSE WE KNOW YOU'RE BUSY....

SPECIAL EVENT – WILL CLINIC – SATURDAY, 29 NOVEMBER 2014

McKean Park's Wills and Estates Team will be available to give you expert advice, take your instructions or, if we receive your instructions beforehand, have your estate planning documents ready to sign on Saturday 29 November 2014 between 10am and 4pm.

Please call Lidija or Jennifer on 8621 2888 to book your appointment today. Places are limited.

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