

In the Loop - Autumn 2017

The Hicks Oakley Chessell Williams Newsletter

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Digital Assets - Online Life after Death

What will happen to my online life after I die? This is not a question our great grandparents would have dreamt of asking however it is fast becoming a modern dilemma. Online life is now a normal part of our existence. Material assets can be identified, valued and bequeathed according to our wishes as set out in our Will. However, it's not quite so straight forward dealing with our digital assets, although making a digital register can help.

What are digital assets?

Some examples of digital assets and online information, data and accounts that may be useful to include in a digital register:

- emails
- online banking & financial products
- online retail & payment systems, e.g. PayPal
- direct debits
- customer loyalty programmes, e.g. Flybuys
- websites & domain names
- computer hard drives
- online gaming/betting
- online games/virtual worlds
- blogs
- social media accounts & the material on these accounts, e.g. Facebook, twitter, LinkedIn
- photo/video/music/document storage services, e.g. Flickr, Dropbox, YouTube
- subscriptions/streaming accounts, e.g. iTunes, Spotify Premium, Netflix
- mobile phones
- mobile phone apps
- password location services
- computers, storage disks

Why make a digital register?

Every day we use online services and accumulate more and more data, some of which becomes very important to us and we do not want it to be lost or forgotten when we die.

By making a digital register and recording each asset we are helping to put a plan into place so that the digital assets that we want kept are protected from being lost, locked or destroyed. We can also request the closure of online accounts so that sensitive and confidential material can be deleted and online subscriptions cancelled.

How to make a digital register

Do an inventory of online services and computer hardware associated with digital assets. It should include the account name/description, username and passwords, the location of hardware and

storage disks, together with instructions for friends, family, and the executor to put into place upon death. Indicate if the account should be kept or deleted, who should have access to the digital assets and where can they be found, i.e. on a storage disk or in the cloud. Note: if accounts are to be closed formal proof of death may be required.

The digital executor needs to be technically capable of locating and accessing files and carrying out instructions and wishes. A digital register will make it easier for the executor to do this.

Terms of use agreements

Online services' terms of use agreements are designed to protect the individual's privacy, even in death. Having an online account, i.e. social media account, means agreeing to the Terms of Use.

In some cases an account may terminate upon an individual's death and others may not be allowed to access the account. Many years of photos, videos and documents may be lost if access is not arranged. It's also wise to periodically download these files and store in a safe place. The location should be noted in the digital register.

We do not always own our digital assets. Some are non-transferrable, e.g. iTunes. Music and videos purchased are not owned by you, you simply have a licence to access them.

Memorialisation – memorial profile

Various online sites offer memorial profiles, e.g. upon one's death some social media sites can either delete or memorialise a profile page. It's important to check each site's terms of use as to how the privacy and security for the profile will work.

Important consideration should be given as to who should take control of an online memorial profile. How will messages be moderated, who can post comments and who can see the profile?

How will you deal with digital inheritance and memorialisation in an ever changing virtual world?

One way is to create a digital register leaving clear instructions on how digital assets should be accessed, deleted or distributed. Individuals should be aware of terms of use agreements for each of their accounts so that they are clear about what happens to their online account after death. Keeping an up to date digital register will also make it less stressful for family, friends and the executor and help to protect precious photographs for generations to come.

For more information or for a sample of a digital register form please contact:

Lachlan Vallance - Principal
LIV Accredited Specialist - Wills & Estates



**Law Institute of Victoria
Accredited Specialists in**
Business Law;
Commercial Litigation;
Commercial Tenancy Law;
Wills & Estates.

Melbourne

Postal address
PO Box 16067
Collins Street West
Melbourne VIC 8007

Level 14
114 William Street
Melbourne VIC 3000

tel 03 9629 7411
fax 03 9629 7422

Mount Waverley

Postal address
PO Box 2165
Mount Waverley VIC 3149

Central 1, Level 2, Suite 17
1 Ricketts Road
Mount Waverley VIC 3149

tel 03 9550 4600
fax 03 9544 8711

enquiries@hocw.com.au
www.hocw.com.au

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Retail Leases - Tenants, did you know you have a right to a minimum term of 5 years?

One of the protections provided by the *Retail Leases Act 2003* ("the Act") to retail tenants is the right to a minimum term of 5 years.

Long term lease versus short term lease

Security of tenure is extremely important for businesses which operate out of leased premises. It is vital for tenants to have time to build goodwill and add value to their business as well as to depreciate the costs associated with fitting out the premises.

Conversely, a tenant may be cautious about entering into a long term lease in case the premises/location turns out to be unsuitable or the business is unsuccessful. Or the tenant may want a short term lease to start with, e.g. in the case of a "pop-up" shop.

On occasion the landlord may only be able to provide a short term lease due to re-development plans or a desire to use the premises themselves or they may have the intention of selling with vacant possession. In such cases a 5 year Waiver Certificate may be applied for at the time of negotiating the lease.

5 Year Waiver Certificates - surrendering the right to a 5 year term

Under the Act tenants have the right to a 5 year term but they can waive this right for a shorter term lease.

A minimum term of 5 years can be waived if:

- the Victorian Small Business Commissioner (VSBC), at the tenant's request, issues a certificate stating that the tenant knowingly wishes to waive their right to a 5 year term;

- the tenant gives the landlord a copy of the certificate.

Waiver Certificates can be downloaded from **VSBC** website. The tenant must sign the certificate however it can be completed and submitted by the landlord. An officer from VSBC will then telephone the tenant to explain Section 21 of the Act and ensure the tenant understands the effect of waiving its rights. Provided the VSBC is satisfied, it will issue a certificate within 21 days after being requested to do so by the tenant.

Tenants - ensure that the lease term (taking into account options to renew) if not exceeding 5 years, is sufficient to operate your business without the disruption of being forced to find new premises. A cautious tenant should request a shorter term with a series of options; however this alternative may not always be available.

Landlords - if you require the premises sooner than the 5 years, after the lease was entered into, the tenant will need to sign a Waiver Certificate to ensure that you are entitled to vacant possession.

Contact us - if you have any questions on how the length of your lease is determined under the Act (taking into account timing of options, extensions and renewals). Also contact us if you have any queries as to which leases are excluded from the operation of the Act, e.g. leases for a term of less than one year (however the Act will apply if the tenant remains in possession for more than a year).

Dianne Hodge - Senior Associate

LIV Accredited Specialist - Commercial Tenancy Law

Family Law - 7 points to be aware of before you enter into a Financial Agreement & why you may need one

1. Binding Financial Agreements (BFAs) can be entered into before you commence a de facto relationship (including same sex) or marry, during, or after the relationship has broken down and you have separated.
2. A BFA isn't viewed as terribly romantic; however it can certainly alleviate the stress of financial issues if the relationship does ultimately break down. It may prove to be worthwhile to have such a formal agreement in place, particularly if you enter the relationship with far superior financial interests than your partner.
3. BFAs must comply with the *Family Law Act 1975* (Cth) ("the Act"). The Act makes provision for parties to enter into a binding legal agreement regarding their financial arrangements in the event of their relationship breaking down or if one party predeceases the other.
4. For a BFA to be legally binding each party needs to receive independent legal advice before signing the Agreement. The legal representative for each party must sign a certificate stating that they provided their respective clients with advice as to the effect of the Agreement and their rights under the Act. For it to be legally binding you can't do it yourself.
5. In the event of the de facto relationship or marriage ending, BFAs can cover the division (between the parties) of assets, superannuation entitlements, financial resources (such as Trusts) and financial support (spousal maintenance) as well as issues incidental to those matters.
6. Once separated, there are two ways to formalise an agreement reached between the two parties in relation to a property division: (i) using a BFA or (ii) entering into Minutes of Consent Orders and filing the Orders, together with an Application for Consent Orders, with the Court.
7. Under the provisions of the Act, BFAs can only be set aside by the Court on grounds that include: fraud; failure to disclose relevant financial information; creditors' petitions; unconscionability; impracticality; and material change in circumstances that will cause hardship to a child or to the party who will have the ongoing primary care for a child of the relationship if the Agreement is not set aside.

If you are thinking about entering into a Binding Financial Agreement or for information on consent Court Orders and how they would relate to your own situation, please contact: **Mr Elias Hanna - Senior Associate - Family Law**

