

## Review of, *Electronic Information and the Law*

Jessica Berry\*

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### 1 Authors' Background

Professor Margaret Jackson is RMIT University's Professor in Computer Law. Professor Jackson's research interests are in the areas of internet law, data protection, privacy and copyright.

Marita Shelley is a PhD candidate within the Graduate School of Business and Law at RMIT University. Her PhD topic is in the area of copyright law and universities.

### 2 Introduction

This book was an interesting and enjoyable read. More than a dry summary of the legal issues that arise in relation to electronic information, it presents a thoroughly-researched compilation of how people's interaction with technology and the internet has changed over time, how perceptions of how this interaction should be regulated have developed and how governments in several jurisdictions have responded. The authors examine the public's concerns about internet-based transactions and privacy, security and social issues associated with any kind of online presence. In addition to good discussion of the legal issues surrounding electronic contracting, copyright infringement, and privacy breaches, the book also provides detailed analysis of emerging issues such as web accessibility obligations, online delivery of government services and the notion of 'Government 2.0.' The authors' commentary, always backed by meticulous research, brings together an absorbing summary of the main issues arising from technology's indelible impact on the law.

As an indication of how quickly knowledge in this area has developed, the book does not include a glossary and spends no time explaining what the internet is or how various pieces of technology work as many books in this area still did just a few short years ago.<sup>1</sup> However, as

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\*Jessica Berry, BBus, is an LLB Candidate at Murdoch University. Jessica can be contacted via email at [jmberry50@hotmail.com](mailto:jmberry50@hotmail.com). Written correspondence can be sent care of *Murdoch University Law Review*, Murdoch University School of Law, 90 South Street, Murdoch, Western Australia 6150.

an indication of how far away a settled legal framework for this area still is, the book casts a very wide net and compares and contrasts the different legislative approaches of Australia, the United States, the United Kingdom and the European Union. Although this book does not attempt a true comparative analysis,<sup>2</sup> the authors nevertheless show how different the legislative approaches in different jurisdictions are and how the borderless nature of electronic information has presented many a challenge to law makers, courts and businesses alike.

The book includes interesting discussion of unique contemporary issues such as how non-government organisations can wield considerable power by virtue of the amount and nature of the electronic information they collect, store and sell; the Wikileaks scandal; and the Australian identity card debate. Unusually, this book does not discuss trademarks and domain name disputes, perhaps because much has already been written about this topic.<sup>3</sup> Other topics not covered include issues regarding faulty software products and software licensing,<sup>4</sup> or taxation relating to internet-based activities.<sup>5</sup>

### 3 Chapter Summaries

Two of the most interesting chapters in the book are Chapters 8 and 11 which address the issues of web accessibility obligations and online government service delivery respectively. These are emerging issues and not discussed in great detail in the wider literature. The authors present detailed discussion of these topics including policy implications and forward-looking commentary. Chapter 8 examines the few Australian cases dealing with the obligations of companies to provide accessibility in their websites for people with a disability or any other disadvantage such as living in a remote location. The *Maguire v SOCOG*<sup>6</sup> case and its potential impact on Australian businesses seeking to sell online is analysed. This chapter includes some practical information for business including how the Australian government has adopted the Web Accessibility Initiative's Web Content Accessibility Guidelines. Legislation such as the *Disability Discrimination Act 1992* (Cth) and industry standards such as the *Guiding Principles for Accessible Authentication* for the financial

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<sup>1</sup> See, for example Graham J H Smith, *Internet Law and Regulation* (Sweet and Maxwell, 4<sup>th</sup> ed, 2007) 1–15; Jay Forder and Patrick Quirk, *Electronic Commerce and the Law* (Wiley, 2001) 5-17. Kevin J Connolly *Law of Internet Security and Privacy* (Aspen Publishers, 3<sup>rd</sup> ed, 2004) provides a specialist technical perspective on the legal issues arising from technology.

<sup>2</sup> For a detailed comparison of international legislative approaches and discussion on the impact jurisdiction can have on investigating, prosecuting and controlling cybercrime, including an excellent chapter on the Australian approach, see Bert-Japps Koops and Susan W. Brenner (eds) in *Cybercrime and Jurisdiction – A Global Survey* (T.M.C. Asser Press, 2006).

<sup>3</sup> For a lengthy discussion of this topic, please see Graham J H Smith, above n 1, 140–312.

<sup>4</sup> The legal issues surrounding software licensing and defective software products are discussed in Ian J Lloyd, *Information Technology Law* (Oxford University Press, 5<sup>th</sup> ed, 2008) and Diane Rowland, Uta Kohl and Andrew Charlesworth, *Information Technology and the Law* (Routledge, 2012). Arne Kold, 'Protection of Computer Software' in Lilian Edwards and Charlotte Waelde (eds), *Law and the Internet* (Hart Publishing, 5<sup>th</sup> ed, 2009) 335–360.

<sup>5</sup> Yee Fen Lim, *Cyberspace Law: Commentaries and Materials* (Oxford University Press, 2<sup>nd</sup> ed, 2007) 715–729.

<sup>6</sup> *Maguire v SOCOG*, Human Rights and Equal Opportunity Commission, Case No H 99/115 (18 October 1999).

services industry are also outlined. Case law analysis from US, UK and European jurisdictions, where this issue is not so new, is also provided. The concept of self-regulation, although relevant to this topic is not discussed.<sup>7</sup> Online delivery of government services is rapidly growing.

Chapter 11 discusses and explains the notion of ‘Government 2.0’ as an efficiency and engagement tool. The impact of electronic information on the health services industry is discussed in detail. A summary of the 2008 Australian Law Review Commission’s review of the *Privacy Act 1998* (Cth) and its recommendations in relation to electronic health data are specifically examined.

Chapters 1 – 4 and 7 deal with some of the ‘big ticket’ legal issues concerning electronic information including electronic contracts and signatures, electronic document discovery and retention and copyright law. The legal side of these issues is well covered in the literature.<sup>8</sup> These chapters contribute well to the field by examining how the public is becoming more aware of just how easily personal information can be accessed online and the implications of unauthorised access. Chapter 1 delivers a succinct explanation of the privacy principles in the *Privacy Act 1998* (Cth), the *Spam Act 2003* (Cth) and a good presentation of the thorny privacy issues that can arise when data is stored in a country different to that where it was collected. Australian, US and EU approaches to managing discovery of electronic documents are compared. A discussion of the impact *McCabe v British American Tobacco Australia Services Ltd*<sup>9</sup> had on the clarity around a company’s obligation to retain documents prior to the commencement of legal proceedings is included.

Chapter 2 examines the key features of the *Electronic Transactions Act 1999* (Cth) and the recommendations in the 2005 United Nations *Convention on Electronic Communications in International Contracts*. The authors include a brief summary of the history of legislative action in this area and the impact of the UNCITRAL *Model Law on Electronic Commerce* on Australian law.<sup>10</sup> A good overview of recent case law in this area, including *Reed Constructions Australia Pty Ltd v Eire Contractors Pty Ltd*,<sup>11</sup> *Austar Finance Group Pty Ltd v Campbell*<sup>12</sup> and *GetUp! Ltd v Electoral Commissioner*<sup>13</sup> is included.

Chapter 4 provides an interesting compilation of statistics about how the internet is used to buy and sell goods, and how this has changed over time. This chapter presents detailed research into people’s concerns about transacting online and how online businesses are

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<sup>7</sup> For two different discussions on the notion of self-regulation, its history and impact, and the various groups most heavily involved in it, please see Jeanne Pia Mifsud Bonnici, *Self-Regulation in Cyberspace* (T.M.C. Asser Press, 2008) and Yee Fen Lim, above n 5, 370–416.

<sup>8</sup> See Graham J H Smith, above n 1; Lilian Edwards and Charlotte Waelde (eds), above n 4; Diane Rowland, Uta Kohl and Andrew Charlesworth, above, n 4.

<sup>9</sup> [2002] VSC 73.

<sup>10</sup> Alan Davidson provides a more detailed discussion of the UNCITRAL Model Law on Electronic Commerce in *The Law of Electronic Commerce* (Cambridge University Press, 2009).

<sup>11</sup> [2009] NSWSC 678.

<sup>12</sup> [2007] NSWSC 1493.

<sup>13</sup> (2010) 268 ALR 797.

responding to these concerns. The chapter concludes with a practical guide to what information should be included on any website selling goods to consumers in Australia.

Chapter 7 is an interesting chapter dealing with the challenges faced by courts in balancing the need of modern consumers and businesses to access information via the internet and the rights of copyright owners. A good discussion of the law as it relates to copyright infringements and defences to such a charge in Australia is provided along with a comparison of the US and Australian safe harbour provisions as they relate to mitigating liability for service providers. Discussion of the *Roadshow Films Pty Ltd v iiNet Limited*<sup>14</sup> cases up until approval by the High Court of leave to appeal in 2012 is included. The authors also provide good analysis of several recent cases involving Google.<sup>15</sup> This discussion is particularly relevant in light of the opinion that, in Australia, search engines likely do face a risk of being found to have committed copyright infringement in respect of the documents that might be copied, indexed and stored by their robots.<sup>16</sup>

Chapters 5 and 6 deal with some of the areas where the use of electronic information and technology can lead to things ‘going wrong,’ for example, identity theft and privacy breaches. There is no discussion of the phenomenon of computer hacking or the criminology of internet-based crime, the focus rather on how incidents can impact individuals and how governments have attempted to amend old legislation to cope with new ways to commit fraud.<sup>17</sup> Chapter 5 provides an excellent overview of the legal issues arising out of internet banking and electronic funds transfers. Australia is one of the countries with the highest rate of online banking service adoption in the world<sup>18</sup> and a history of the government inquiries and initiatives that lead to this status is provided. Identity crime in its various forms is examined, and a succinct discussion of legislation specifically enacted to deal with these types of offences is included.

Traditionally, organisations holding personal data have not been under any legal obligation to protect computer systems or data. Chapter 6<sup>19</sup> examines how this is changing in some jurisdictions and how courts and parliaments are responding to increasing public demand for

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<sup>14</sup> [2011] FCAFC 23; [2011] FCAFC 82.

<sup>15</sup> For an excellent explanation of how Google keyword advertising works and discussion about how it creates copyright infringement issues, see Tobias Bednarz and Chalrotte Waelde, ‘Search Engines, Keyword Advertising and Trade Marks: Fair Innovation or Free Riding?’ in Lilian Edwards and Charlotte Waelde above n 4, 267–309.

<sup>16</sup> Margaret Jackson and Marita Shelly, *Electronic Information and the Law* (Thompson Reuters, 2012) 195–196 citing P Ganley, *Google Book Search: Fair Use, Fair Dealing and the Case for intermediary Copying* (13 January 2006): <[http://www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=875384](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=875384)>.

<sup>17</sup> For a detailed discussion on how legislators and prosecutors grapple with the phenomenon of computer-based crime, please see, Richard Jones, ‘Cybercrime and Internet Security: A Criminological Introduction’ in Lilian Edwards and Charlotte Waelde (eds), above n 4, 601–622; Diane Rowland, Uta Kohl and Andrew Charlesworth, above n 4, 100 – 145; Ian J Lloyd, above n4, 207–220.

<sup>18</sup> M Jackson and M Shelly, above n 16, 93 citing P Yeow, Y Yeun and D Tong, ‘User Acceptance of Online Banking Services in Australia’ (2008) 1 *Communications of the IBIMA* 191.

<sup>19</sup> Chapter 6 is an updated version of, Margaret Jackson, ‘Legal Issues’ in B Rosenberg (ed), *Handbook of Financial Cryptography and Security* (Chapman & Hall/CRC Press 2011).

better protection of personal information. The different approaches taken by various jurisdictions are compared. Industry standards and consumer protection and trades practices legislation as approaches to increased data protection in Australia are examined. A practical explanation of the *Privacy Act 1999* (Cth) and how the National Privacy Principles and Australian Privacy Principles apply to different organisations is provided. This chapter includes excellent discussion of the limited remedies available against those gaining access to or using data without authority and the fact that there is no legal obligation to report data breaches in Australia. Again, the authors present a well-rounded overview of the issues by including research about the frequency of data breaches and a summary of instances of high profile unauthorised access cases worldwide. Proposed law reforms and some of their potential problems are also discussed.

Chapters 9, 10 and 12 deal with a number of issues around privacy including concerns about the workings of online social networking sites to revisiting the Australian identity card debate. The book does not include discussion about massively multiplayer online role-playing games and the privacy issues these can create.<sup>20</sup> Chapter 9 presents detailed discussion of the privacy issues that arise from online social media sites generally, and Facebook and Google specifically. There is detailed discussion of how online social networking sites, as currently defined, will probably not fall foul of *Copyright Act 1968* (Cth) provisions. Leading American and English cases dealing with copyright, contract issues and misuse of information in a social media context are reviewed. The issue of online defamation is also discussed in this chapter. It is opined that in Australia, internet hosts and internet service providers are unlikely to be liable for the publication of defamatory material as they will be able to rely on the innocent dissemination defence under Australia's uniform defamation laws.<sup>21</sup>

Chapter 10 will be particularly useful to practitioners and businesses as it presents a practical discussion of the *Privacy Act 1998* (Cth) and how it applies to Australian businesses as well as providing advice regarding the development of company privacy policies. This chapter also examines new developments in this area including the 2011 review of online privacy conducted by the Senate Environment and Communications References Committee. Rounding out the legal analysis is an interesting discussion on how online privacy laws could impact behavioural advertising techniques.<sup>22</sup>

Chapter 12 revisits the Australian identity card debate – another topic not well covered by the literature in this area. A history of the debate, the approaches various governments have taken

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<sup>20</sup> For a brief overview of the legal issues that can arise from massively multiplayer online role-playing games please see, Yee Fen Lim, above n 5, 668–678.

<sup>21</sup> For more detailed discussion online defamation generally, please see Graham J H Smith, above n 1, 313–346; Gregor Urbas and Peter Grabosky provide an overview about online defamation law in Australia in particular in 'Cybercrime and Jurisdiction in Australia' in Bert-Japps Koops and Susan W Brenner (eds) above n 2, 47–67.

<sup>22</sup> The clash of advertising and privacy is addressed in Lilian Edwards, 'Consumer Privacy Law 1: Online Direct Marketing' in Lilian Edwards and Charlotte Waelde (eds), above n 4, 489–510; and Lilian Edwards and Jordan Hatcher, 'Online Direct Marketing 2: Data Collection, Profiling and Targeting' in Lilian Edwards and Charlotte Waelde (eds), above n 4, 511–544.

to the issue and the criticisms raised are presented. In line with the authors' approach of presenting community views on the issues they discuss, an overview of the Australian Law Review Commission's 2008 review of the *Privacy Act 1998* (Cth) and the issues this that raised in light of the identity card debate are also included.

#### **4      Conclusion**

Although less a guide for businesses than a broad discussion of current legal issues, several chapters nevertheless provide practical guidelines for businesses with an online presence. *Electronic Information and the Law* will be a valuable resource for students or practitioners seeking to gain a broad, Australian-flavoured understanding of the overarching issues in the area and how governments the world over are trying to respond. Overall, this book provides a thoroughly well-researched and engaging discussion of contemporary issues arising from the use of electronic information that face businesses, consumers, communities and governments alike.