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# Privacy

Editor: Normann Witzleb

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## PRIVATE LIFE IN A DIGITAL WORLD – A BOOK REVIEW

BY LAUREN ANDERSON

*Private Life in a Digital World* by Margaret Jackson and Gordon Hughes: Thomson Reuters Lawbook Co, 2015.

### Editor's note:

*Hardly a day goes by when data protection and privacy issues are not in the news. In December 2015, after more than three years of drafting and negotiations, the European Parliament and the Council of the European Union finally reached an informal agreement on the new EU General Data Protection Regulation. Expected to enter into force in 2018, this framework with global significance will provide for largely uniform data protection rules across Europe. Also in December, the Australian Government released the long-awaited exposure draft for a mandatory data breach notification regime, which will require entities to disclose serious breaches of Australian data protection standards. In January 2016, the European Commission and the US Department of Commerce announced agreement over a new framework for transatlantic data-flows, the "EU-US Privacy Shield", which is set to replace the "Safe Harbour" scheme that had been declared invalid by the European Court of Justice. Also in January, Australian Privacy Commissioner Timothy Pilgrim appealed a decision of the Administrative Appeals Tribunal (Telstra Corp Ltd and Privacy Commissioner [2015] AATA 991 (18 December 2015)) that mobile phone metadata held by Telstra were not "personal information" about its customers under the Privacy Act 1988 (Cth). This appeal will give the Federal Court a rare opportunity to interpret a definition of fundamental importance to data protection law in Australia..*

*Against this background of ever-evolving laws at national and international level, it remains important to have a sound understanding of the basic issues surrounding the protection of personal information. The following book review critiques an important new Australian text that provides an accessible introduction to privacy laws in the digital world.*

– Normann Witzleb,  
section editor

Six months ago, the hacking of marital infidelity website Ashley Madison reportedly exposed the personal details of some 460,000 Australians, and triggered a spate of multi-million dollar lawsuits worldwide.<sup>1</sup> Regardless of the morals of the website itself, the hack and its aftermath illustrate the myriad of issues and challenges faced by legal and IT professionals in the digital world: What duties exist between social media sites and their users? What level of data security and privacy protection are these sites required to provide? What legislation is relevant, especially in cross-border cases, and how does it apply to a particular case?

For lawyers, the answers to these questions are by no means clear-cut – the digitalisation of society adds further complication to two concepts that are already difficult and unsettled in the offline world: privacy and "private life". Similarly, IT professionals must find a way to identify and deal with the legal issues which are increasingly encroaching upon their previously isolated realm of expertise. Between both groups there is a disconnect that is often difficult to address. Both lawyers and IT professionals are notoriously bad at communicating the intricacies of their work; this is compounded when they require information from one another.

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<sup>1</sup> M Papadakis and K Walsh, "Ashley Madison Hack a Feast for Lawyers", *AFR*, 28 August 2015, 33; Eric Goldman, "Top 10 Internet Law Developments of 2015", *Forbes* (online), 25 January 2016, <<http://www.forbes.com/sites/ericgoldman/2016/01/25/top-10-internet-law-developments-of-2015-2/#1b4495096711>>.

In this atmosphere, *Private Life in a Digital World* helps to bring down these knowledge barriers and provides professionals with an authoritative yet readable resource for privacy law in the internet age.

Written by internet and privacy lawyers Margaret Jackson and Gordon Hughes, *Private Life in a Digital World* employs a snapshot-like approach towards the digital products of the modern world and their associated privacy challenges. All chapters have a similar structure and are of comparable length, including a brief overview of the subject matter; a breakdown of relevant policy, legislation, and related common law (including, very helpfully, related international approaches); and an appendix of related materials of interest. In addition, practical questions posed by the authors throughout the text acquaint and acclimatise readers with the legal, logistical, technical and philosophical issues surrounding privacy law and private lives online.

In the text's introductory chapter, authors Jackson and Hughes examine the key challenges to a "private life" in the modern era, and identify three distinct but overlapping concerns: identity, anonymity, and privacy. While these concepts describe important personality interests, the law does not adopt this categorisation in providing legal protection. Indeed, it is one of the enduring difficulties of privacy protection in Australia that the common law does not recognise privacy, nor identity or anonymity, as legal concepts. Instead, private life remains rather a fragile ideal dependant on incidental protection in tort, property law, equity or under contract, extended through piecemeal legislation for specific areas. The text's conceptual approach unifies the "real world" interests at stake in preference of the more or less arbitrary legal categorisations, which firstly makes the authors' discussion more accessible and secondly forms a basis, both legal and technical, which is built upon and expanded in later chapters.

The first half of *Private Life in a Digital World* eases readers into some of the basic legal and technical issues surrounding the digital world, and analyses the general protection of identity, anonymity and privacy in current Australian law. The text traces the various traditional sources of protection of identity under common law and legislation, up to very recent developments such as the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015*. It generally also includes other relevant aspects of regulation and policy affecting the pseudo-legal notion of a private life under Australian law. Where helpful, the authors explain how the law has developed over time. In relation to a common law right to privacy, for example, the discussion starts with the "classic" (albeit unsuccessful) tort privacy case of *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 before explaining the unsatisfactory current state of the case law and moving on to the recent reform recommendations for a statutory privacy tort.

Chapters on surveillance and government verification also supply supplementary points of interest, serving as practical counterpoints to what can often seem like academic legal issues. For example, the text's discussion of the challenges of reforming identity verification in India illustrates the often invisible hurdle of logistics – a consideration frequently overlooked by legal professionals overly focused on best practice rather than minimum standards. This pragmatic approach distinguishes *Private Life in a Digital World* from more traditional legal texts, and accordingly will appeal to a broad range of readers.

In most of the text's chapters the "Australian approach" is compared to the regulatory regimes in other countries, chiefly those of the United States, United Kingdom and Canada. Given the global nature of the digital world, in which many transactions or disputes are across borders, the inclusion of privacy law and policy from other jurisdictions has direct relevance to those operating within a digital environment. However, *Private Life in a Digital World's* encompassing approach to international legislation is also indicative of the fact that Australian lawyers and IT professionals are often faced with novel challenges about which the Australian law remains either stubbornly sluggish, or else alarmingly silent.<sup>2</sup>

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<sup>2</sup> See, eg, Ch 6 on data security, in which Australia's soon-to-be-replaced voluntary data breach notification scheme appears particularly paltry when compared to the mandatory data breach notification regimes adopted in the US and some European jurisdictions.

The recent extensive reforms of the *Privacy Act 1988* (Cth), which make this text so timely, are covered in depth. Chapter 9 provides a detailed breakdown of the new Australian Privacy Principles.<sup>3</sup> These principles, which apply to both government agencies and selected private sector organisations, cover the collection, use, disclosure and storage of personal information, replaced the previously separate Information Privacy Principles and National Privacy Principles from March 2014. *Private Life in a Digital World* contains both the full text of the principles and accompanying explanatory paragraphs by the authors. In particular those grappling (or indeed wondering if they should be grappling) with issues regarding personal information should consult page 233, which breaks down the key features of the Australian Privacy Principles into one checklist-like paragraph for quick consultation. IT professionals may also find this checklist to be a useful resource when attempting to engage legal advisers in a discussion on effective data management.

As the title *Private Life in a Digital World*, suggests, the text has a focus on the new challenges posed by technology to the notion of a “private life”. To this end, much of the text’s strength is underpinned by its appealingly simple approach to explaining contemporary technologies, neatly breaking down often complex technological products into their legally relevant attributes. Importantly too, the text also has a focus on the contractual arrangements which surround technologies such as cloud computing – relationships which are easily overlooked and often difficult to ascertain. Written with the less technically adept in mind, the authors’ approach to educate rather than inundate provides the reader with a model for effective communication with regards to more complex technical offerings.

The second half of *Private Life in a Digital World* covers applications of privacy law in specific contexts, such as social media, mobile applications, the media, cloud computing, health and credit information. Mobile devices have dramatically affected previously established physical and psychological boundaries between private, personal, professional and public life. Jackson and Hughes provide an extensive summary of issues associated with mobile devices, with particular emphasis on Bring Your Own Device (BYOD) workplace policies and, in the absence of Australian authorities, the US case law that has arisen as a result of these kinds of policies. Many cases involve demands for access involving third party providers, raising novel issues that cut across the traditional domains of employment law, copyright law, civil procedure and others. These cases demonstrate the advantage of both understanding and communicating the various contractual and legislative obligations associated with technology and its use, particularly to clients seeking to reduce litigation risk.

The media privacy chapter contrasts the Australian approach with recent UK developments, including the reforms following the *News of the World* phone hacking scandal. The text’s final chapters, which cover health and credit information, are more specialised, although they undoubtedly have intrinsic relevance to readers as citizens of a digital world. Given that consumer credit reporting was a key aspect of the 2014 amendments to the *Privacy Act 1988* (Cth),<sup>4</sup> the text provides a useful update on the handling and use of this kind of information.<sup>5</sup>

In addition to chapter content, lawyers and IT professionals contending with privacy issues will appreciate the case studies, model policies and tips appended to selected chapters. The case studies give the abstract concept of privacy a practical dimension. They also double as well-timed intervals, breaking up the at times unavoidably dry legal and technical discussion with interesting examples. Professionals specialising in the management of risk may find a convenient starting point in Jackson and Hughes’ model mobile device and social media policies. These appendices could also be adapted into an auditing checklist to evaluate internal or external policies for outstanding risk areas. Moreover, the sobering examples of massive data breaches within ostensibly secure servers<sup>6</sup> may serve to

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<sup>3</sup> *Privacy Act 1988* (Cth) Pt III, Div 2.

<sup>4</sup> *Privacy Act 1988* (Cth) Pt IIIA.

<sup>5</sup> In line with the *Privacy Act 1988* (Cth), this chapter relates only to consumer credit information, not corporate credit information.

<sup>6</sup> For example, in the Cupid Media hack, a case study provided in Ch 6, user passwords were stored in plain text rather than encrypted, the electronic equivalent of writing passwords on a notepad.

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facilitate conversations about the proper level of precautions to secure private data and safeguard it from unauthorised use. These materials present an insight into the concerns faced by legal professionals in the digital world.

Despite its educational and professional utility, *Private Life in a Digital World* is not an exhaustive resource. Contemporary topics such as information barriers within organisations and data exchange protocols are notably absent from the text, although they ostensibly ought to fall under its purview. While the chapter on social media contains a valuable discussion of the business models and privacy policies of the main providers, it is somewhat scant on practical advice how privacy invasions in social media can be counteracted. This is somewhat surprising given the increasing prevalence of these platforms in personal, professional and public life, but perhaps less so given the practical difficulties of obtaining effective legal redress in this area. The text also does not cover State and Territory privacy legislation in detail nor does it explain the complaints procedures and powers of the Australian Privacy Commissioner (and his counterparts in some States).

Of course, these are in many ways moot critiques. There are, after all, no classic canons when it comes to textbooks on privacy; and indeed a more expansive overview would require a much larger volume and be prone to lose currency much sooner.

It is also important to consider the context of the digital world and its significance to lawyers and other professionals. The practice of law is increasingly interdisciplinary and collaborative – it is unlikely that one individual would be expected to intimately grasp every current and foreseeable issue related to privacy and the digital world, and accordingly *Private Life in a Digital World* does not seek to deliver this. What Jackson and Hughes do provide, however, is a set of tools for students, lawyers, and IT professionals to recognise situations in which privacy might be a concern, and a starting point from which to tackle these issues.

As a result of its practical approach, *Private Life in a Digital World* is an ultimately indispensable textbook for anyone, legal or otherwise, attempting to circumnavigate the perils to personal information while seizing the opportunities provided by the information age.

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