

Digital Identity – The Legal Person?

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Abstract. This paper examines the concept of digital identity which the author asserts is now evident in the United Kingdom as a consequence of the Identity Cards Act (UK) 2006 and the National Identity Scheme it establishes. The nature and functions of the concept, particularly the set of information which constitutes an individual's transactional identity, are examined. The paper then considers the central question of who, or what, is the legal person in a transaction i.e. who or what enters into legal relations. The analysis presents some intriguing results which were almost certainly not envisaged by the legislature. The implications extend beyond the United Kingdom to similar schemes in other jurisdictions, and to countries, like Australia, which may implement such a scheme.

Keywords: Digital identity, legal person, national identity scheme.

1 Introduction

Individuals, businesses and governments are increasingly dependant on technology. Technology is now no longer used just as a means of collecting, storing and processing data and information. It is embedded in processes fundamental to economic and social order and it has created a whole new environment for interaction.¹ As dealings previously conducted in person are replaced by dealings conducted without a history of personal acquaintance, and frequently without face to face interaction, the requirement to establish identity for transactional purposes has increased.²

Compared to just a few years ago, it is now a relatively common occurrence to be asked to for proof of identity for transactions. Although rarely defined, the term

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¹ As Andrew Feenberg observes, this is the 'substantive impact' of technology. See Andrew Feenberg, *Critical Theory of Technology*, (1991), 5. For a recent example of theory of technology see Arthur Cockfield and Jason Pridmore, 'A Synthetic Theory of Law and Technology' (2007) 8 *Minnesota Journal of Law, Science and Technology*, 491.

² The internet, for example, was originally designed for sending data between trusted, known organisations so neither security, nor identity, was considered critical. Now the internet is a critical part of national and international infrastructure. Its distributive nature makes it a crucial communication tool but it founded on, to use Daniel Solove's word's, 'an architecture of vulnerability.' See Daniel Solove, 'Identity Theft, Privacy and the Architecture of Vulnerability (Enforcing Privacy Rights Symposium)' 2003 54 *Hastings Law Journal*, 1227.

'identity'³ now appears in hundreds of statutes and regulations in Australia alone, mainly because of the extensive use of identity cards for government employees and contractors working in areas ranging from airports to zoos.⁴ As technology becomes more sophisticated and ubiquitous, it is inevitable that identity will assume a crucial role in most, if not all transactions.⁵ However, whilst considerable attention has been given to security, particularly by system designers and users, little attention has been given to identity⁶ and no attention has been given to identity in a transactional context from a legal perspective. All these factors make analysis of the legal role and nature of identity in a transactional context, particularly important.

Historically, identity has been in the background, resulting in uncertainty about its legal role and nature in a transactional context. Contract law, for example, focuses on whether the transaction is at arms length and generally the parties are assumed to be indifferent to each others' identity.⁷ Consequently, what constitutes a person's identity and its precise role in a transactional context at common have been unclear.

In this paper, I analyse the role and nature of an individual's⁸ digital identity⁹ in a transactional context,¹⁰ from a legal perspective. I argue that a new legal concept of

³ See, however, the Enforcement and National Security (Assumed Identities) Act 1998 (NSW) which is one of the few statutes in Australia to define identity in a context which is broadly relevant to identity for transactional purposes.

⁴ See for example, s 234 of the Airports Act 1996 (Cth), s 80 of the ACIS Administration Act 1999 (Cth), s 2B of the Court Security Act 1980 (Vic), s 8 of the Fisheries Act (NT), 9A of the Brands Act (NT), s 151 of The Gene Technology Act 2003 (ACT), s 399A of the Health Act 1958 (Vic), s 145 of the Heritage Act 1995 (Vic), s 221I of the Transport Act 1983 (Vic) and s 28 of the Zoological Parks Authority Act 2001 (WA).

⁵ Especially considering the increase which has occurred just this century, in the requirement to establish identity for transactions.

⁶ Identity management has recently become a focus for the IT industry, largely because of system needs which have necessitated the checking and updating of user records but also as a result of concerns about identity fraud especially the use of false identities for terrorist activities and money laundering.

⁷ A similar line of reasoning can be found in other branches of the law such as agency, particularly in relation to the doctrine of undisclosed principal. As one commentator observes in relation to identity, 'much legal doctrine obscures the salience of identity qua identity, though when confronted directly with the issue, the law does give substance to the importance of identity.' See Richard R.W. Brookes 'Incorporating Race' (2006) 106 *Columbia Law Review*, 2023, 2097.

⁸ 'Individual' is a natural person who has been born, irrespective of whether or not the person is currently alive or is deceased The relevant legislation, particularly the *Identity Cards Act 2006* (UK) also uses the term 'individual.'

⁹ In his paper 'digital identity' is an individual's identity which is composed of information stored and transmitted in digital form. 'Information' includes 'data,' unless otherwise indicated.

¹⁰ 'Transaction' is used in this paper to cover a dealing, whether in person (i.e. face to face) or using remote communication (such as a telephone, the internet or a computer network), for which an individual, i.e. a natural person, is required to identify himself/ herself. A transaction may be between an individual and a government department or agency or with a private sector entity, and can range from an enquiry to a contract but does not include transactions and dealings of a non- business nature such as domestic and social interaction. However, when discussed in the context of legal relations such as in relation to the legal person, transaction should be construed to mean a legal transaction such as a contract, for example.

transactional identity is now clearly evident in the United Kingdom as a result of the Identity Cards Act 2006 (UK) c 15 ('Identity Cards Act') and the United Kingdom National Identity Scheme established by that Act.¹¹ Although my analysis is based on the Identity Cards Act, the implications of my research extend beyond the United Kingdom to jurisdictions which have enacted, or are likely to enact similar legislation, including Australia. Indeed, the same concept of individual identity is evident in the *Human Services (Enhanced Service Delivery) Bill (Cth) 2007* ('Access Card Bill'),¹² the enabling legislation for the Access Card Scheme proposed for Australia in 2007.¹³ Although the Access Card Bill has now been shelved following a change of federal government in Australia,¹⁴ any such scheme must use a concept of transactional identity which consists of a defined set of information which is stored and transmitted in digital form. An individual's transactional identity must be a set of information which is sufficiently detailed in order to single out the individual from a large population, but which is not so detailed as to prevent its efficient use in transactions. The United Kingdom Scheme is the most current model of a national identity registration scheme, particularly in a jurisdiction with a common law heritage.

¹¹ Arguably, a concept of transactional identity which consists of a defined set of information has been evident in commercial practice for several years. However, its presence in legislation which establishes a national identity scheme is a significant development which confirms its emergence as a new legal concept.

¹² The Access Card Bill is remarkably similar to the *Identity Cards Act* especially in the change it proposed to the common law in relation to identity. While both the Act and Bill appear to merely set the criteria for identification of individuals for the purposes of the scheme, they both rely on the same concept of identity. The Access Card Bill contains provisions which are very similar to those in the *Identity Cards Act*.

¹³ A similar concept of identity is also evident in other Australian legislation. See for example, the customer identification procedures under the Federal *Anti-Money Laundering/ Counter-Terrorism Financing Act 2006* (Cth) enacted by federal Parliament in Australia on 12 December 2006.

¹⁴ On 15 March 2007 the Bill was delayed following a Senate Inquiry. Like the *Identity Cards Act*, the Bill establishes the framework for the new scheme and operational details including security and privacy aspects were to be covered in subsequent legislation. The Senate Inquiry recommended that the entire legislative package be presented in one Bill, rather than separately as originally planned. The government agreed and the new Bill was to be introduced into Parliament in 2007, with a view to beginning the scheme in April 2008. See Australian Broadcasting Corporation, '*Govt Stands by Smart Card Despite Senate Concerns*' <http://www.abc.net.au/newsitems/200703s18_7309_3.html> 16 March 2007. However, the federal election intervened and the change of government in 2007/8 lead to the Access Card Bill being shelved as the new government pursued different policy and funding objectives.

2 Registered Digital Identity

Considering the current stated purposes and the longer term objectives of the United Kingdom Scheme¹⁵ and that the Scheme is founded on the basis of ‘one person: one identity,’¹⁶ the digital identity registered under the National Identity Scheme, becomes *the* identity of the individual to whom it is attributed in the Register.¹⁷ Registration under the Scheme brings into being an officially recognised identity.¹⁸

This concept of identity is a collection of digitally stored and transmitted information which is given legal effect by the Identity Cards Act and the Scheme. I call this collection of information, ‘database identity.’ Database identity is all the data and information digitally recorded about an individual in the database/s accessible under the Scheme.¹⁹ Within database identity is a smaller subset of information which I call ‘token identity.’ Token identity is a defined and limited set of information which determines an individual’s identity for transactional purposes. It is an individual’s transactional identity. Under the United Kingdom Scheme, token identity comprises name, gender, date and place of birth, date of death, handwritten signature, appearance through a head and shoulders photograph and biometrics. The biometrics are 10 fingerprints, two iris scans and a face scan, although it seems that only fingerprints will be used, at least initially.²⁰

¹⁵ As set out in s1 (3), the purpose of the National Identity Register is to set up a ‘secure and reliable record of registrable facts about individuals in the United Kingdom.’ The information in the register is to be used for a wide range of purposes including provision of public services, crime prevention and detection and national security. See s1 (4). The government wants to make the national identity scheme ‘gold standard of identity verification’. See report by the United Kingdom Information Commissioner, *The Identity Cards Bill—The Information Commissioner’s Concerns* (June 2005), 1 <<http://www.ico.gov.uk/eventual.html>> 10 May 2006. The *Identity Cards Act* is enabling legislation, as was the Access Card Bill. Consequently, the Act does not contain all the detail of the operation of the National Identity Scheme. That detail is contained in the Business Plan and Framework Agreement. See Identity and Passport Service, ‘*Corporate and Business Plans 2006–2016*’ <<http://www.ips.gov.uk/identity/publications-corporate.asp>> 1 September 2008; and Identity and Passport Service, ‘*Framework Agreement*’, 14 <<http://www.gov.uk/identity/publications-general.asp>> 1 September 2008.

¹⁶ See John Wadham, Coailfhionn Gallagher, Nicole Chrolavicius, *The Identity Cards Act 2006* (2006), 127.

¹⁷ At least on a prima facie basis.

¹⁸ ‘Registered identity’ is defined in this paper as the identity as registered under the Scheme. Registered identity is an individual’s database identity including token identity as recorded for the Scheme.

¹⁹ Information, not the ID card, constitutes identity. See sch 1 *Identity Cards Act* which sets out the information which comprises database identity under the National Identity Scheme.

²⁰ Home Secretary, ‘*The National Identity Scheme – Delivery Plan 2008*’ Speech by the Right Honourable Jacqui Smith, MP on 6 March 2008, 3.

3 The Role and Nature of Token Identity

Token identity plays a significant role. It is the identity which is used for transactions but it is also the gateway to the information which comprises the remainder of database identity. Most importantly, token identity provides the link between an individual and the information which constitutes his/her database identity, through the 'identifying information' i.e. the registered signature, photograph and biometrics.²¹

The information which comprises token identity is limited. It is summary in nature and is irreducible, although not all the token identity information is used for all transactions.²² In comparison with the other information which comprises database identity, token identity is also relatively stable. Other than in exceptional cases such as gender re-assignment and changes required under a witness protection program for example, the only birth information which is more commonly subject to change is name, mainly for women in the event of marriage, though also as a consequence of change of name by deed poll. By contrast, the other data and information which makes up database identity is much more extensive, and it is augmented on an on-going basis.

Under the scheme there is a difference between identification and identity. Identification is just one part of the two processes used to establish identity which are firstly, the initial authentication of identity at the time of registration; and secondly, verification of identity which occurs at the time of a transaction. Information collected at the time of registration is used to authenticate identity in the sense that it is used to 'establish the truth of; establish the authorship of; make valid'²³ the identity. Of the information recorded at the time of registration, the signature, photograph²⁴ and biometrics provide the link to a physical individual, at least notionally. The signature, photograph and biometrics identify an individual under the Scheme in that they are regarded as being 'identical with, or as associated inseparably with,' the individual²⁵ to whom they are attributed in entry in the National Identity Register.

²¹ See sch1.

²² There are basically three levels of identity verification for transactional purposes. The lowest level will be a check using the photograph on the ID card. The highest level check will include biometrics but usually not all the biometrics, i.e. face scan, iris scans and fingerprints, will be used. Depending on the nature of the transaction, the token identity information may be also supplemented by additional information such as a Personal Identification Number ('PIN') or answers to designated questions, although there are conflicting statements as to the use of a PIN and additional questions. This additional information is not part of token identity. It is used to check that the token identity is in the correct hands. Token identity establishes and verifies identity for transactional purposes. See Identity and Passport Service, 'What are the Benefits of the National Identity Scheme?', 'Using the Scheme in Daily Life' and 'What Kind of Organizations will use the Scheme?' <<http://www.identity.cards.gov.uk/scheme.html>> 10 May 2006. For a recent statement see also Identity and Passport Service, 'Using the Scheme in Daily Life' <<http://www.ips.gov.uk/identity/how-idcard-daily-providing.asp>> 1 September 2008.

²³ Definition of 'authenticate' in the *Concise Oxford Dictionary*.

²⁴ I refer to a photograph as well as a face scan which I include in biometrics because a face scan will not be used to verify identity for all transactions. Many transactions will only involve matching the appearance of the person present with the photograph.

²⁵ 'Identify' is defined in the *Concise Oxford Dictionary* as '[T]reat (thing) as identical with; associate oneself inseparably with (party, policy, etc) ; establish identity of.'

Token identity links database identity to an individual, through the ‘identifying information’²⁶ i.e. signature, photograph and biometrics; and is used to access the more extensive data and information which, with token identity, comprises database identity. The relationship between an individual and database identity including token identity, can be depicted diagrammatically:

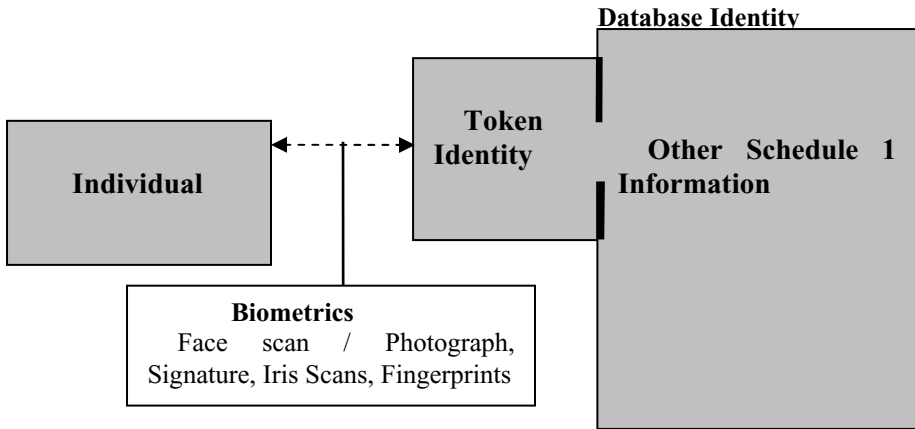


Fig. 1.

At the time of a transaction, identity is verified when all the required token information presented, matches the information on record in the National Identity Register²⁷ If the token identity information, as presented, matches that on record in the Register,²⁸ identity is verified under the Scheme.²⁹

Matching as a feature of identity is evident in its general definition. The Concise Oxford Dictionary defines ‘identity’ as ‘absolute sameness.’³⁰ Under the National Identity Scheme, the matching is not with a human being. Identity is verified by matching information about a human being. When presented at the time of a transaction,

²⁶ The signature, photograph and the biometrics are the ‘identifying information.’ See, sch 1 *Identity Cards Act*.

²⁷ Verify’ as used in the United Kingdom scheme and for the Australian Access Card Scheme accords with *Concise Oxford Dictionary* which definition of ‘[T]ruth (of statement etc); true statement; really existent thing..’ though under the schemes this truth is really a *presumption* of truth.

²⁸ And where applicable, on the identity card, though it is the matching of the token identity information presented, with that on record that is necessary.

²⁹ This is true for registration too because the individual must establish his/her identity for registration purposes by producing documents such as birth certificate, driver’s license and other government issued cards. The information in these documents is cross checked to see if it matches and where possible, it will also be checked against the database of the relevant department/agency.

³⁰ The definition also adds ‘individuality, personality.’

token identity is a token i.e. as a ‘sign, symbol, evidence ...serving as proof of authenticity’,³¹ of identity under the Scheme.

Through this matching process, token identity performs a number of vital, sequential functions at the time of a transaction. First, token identity identifies, by singling out one identity from all the identities registered under the Scheme. The photograph, signature and biometrics are used to identify the individual, though depending on the nature of the transaction and the requirements of the transacting entity, not all the ‘identifying information’ need be used, nor is it all likely to be used.³² Secondly, token identity verifies identity by determining whether there is a match between all the token identity information presented, with that on record.³³ These two steps enable the system to recognise and then transact with, the registered identity.

No doubt the role and legal significance of token identity particularly in transactions, exceeds the original intentions and objectives of the government in establishing the scheme. The intention was that dealings be with the individual who is presumed to be correctly represented by the token identity information and who is presumed to present that token identity at the time of the transaction. On this view, a transacting entity deals with that individual. The transaction is via the registered identity, but is with the individual:

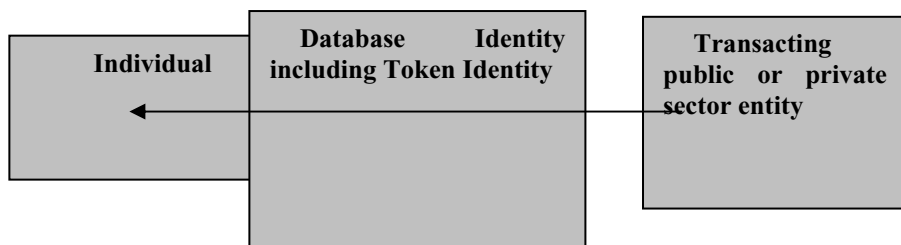


Fig. 2.

The information which constitutes token identity was intended to be just a credential, to be presented by an individual as part of the identification process, in much the same way traditional identity papers are used. However, there are crucial differences between traditional identity papers and token identity. Traditionally,

³¹ Definition of ‘token’ in the *Concise Oxford Dictionary*. Although this definition refers to authenticity, under the National Identity Scheme, authentication refers to the registration whereas verification occurs at the time of a transaction. Nevertheless, the plain meaning of ‘authenticity’ in the definition of ‘token’ in the *Concise Oxford Dictionary* is clear.

³² Especially for transactions conducted remotely, using telephone or the internet, for example. Recall that there are basically three levels of verification contemplated by the National Identity scheme.

³³ Such as name, date and place of birth as well as with signature, photograph and biometrics but bear in mind that not all transactions will use all the identifying information. Routine transactions may only require that appearance match the photo or signature may be compared, for example.

identity papers have been used to support claimed identity. Although the identification function of token identity may seek to replicate this traditional function, there are two important distinctions. Firstly, identity papers are presented in person. A human being is not only present, but is central to the identification process. Secondly, although apparently-valid identity papers are needed to support an officer’s decision, that decision requires judgment, based on a number of factors including firsthand observation of the individual. Any authorization given by an officer,³⁴ is based on his/her judgment and to an extent, his/her discretion.³⁴

Unlike traditional identity papers, the information which comprises token identity plays the critical role in the transaction, not the individual who presents the information which constitutes token identity, or who is presumed to present it, in the case of transactions which are not in person.³⁵ The system looks for a match between the information presented and the information on record. Token identity does not just identify. It also enables the system to transact. Regardless of whether the token identity information is presented in person or remotely, if all the token identity information presented, matches the information recorded in the National Identity Register, then the system automatically authorises dealings with that identity.

Within these parameters the system ‘can act and will for itself’³⁶ to recognise the defined set of information which comprises token identity and then transact with the registered identity. The individual who is assumed to be represented by that registered identity is connected to token identity by the signature, appearance (through the photograph) and the biometrics, but is not central to the transaction:

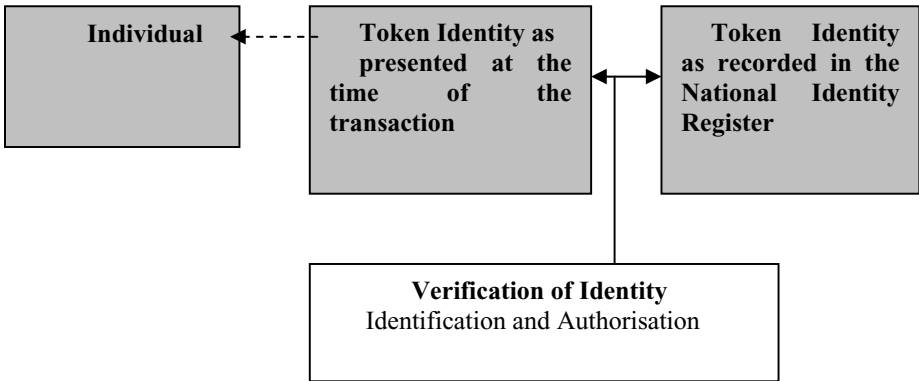


Fig. 3.

³⁴ There is also a further point of difference. Token identity is used for a wide range of transactions including commercial transactions, whereas identity papers were usually used for more limited purposes such as access to defined geographical areas and government entitlements.

³⁵ The information may be presented remotely and even automatically using computer programming, without any active involvement by an individual *at the time of a transaction*, though of course some human involvement is required at same stage.

³⁶ David Derham, ‘Theories of Legal Personality’ in Leicester C. Webb (ed) *Legal Personality and Political Pluralism* (1958) 1, 14.

The system and the transacting entity deals with the registered identity via token identity, not with the individual represented by the token identity:

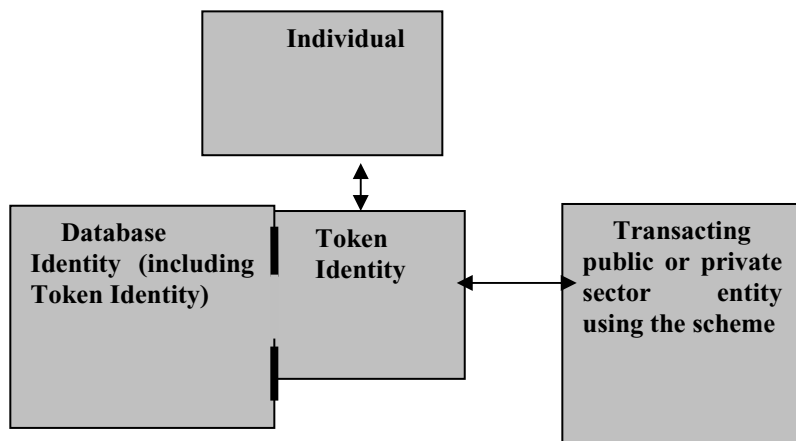


Fig. 4.

Although the intention was to ‘reach behind’ token identity to deal with the individual presenting it, the system does not actually operate in that way. If the token identity data/information presented at the time of a transaction, does not exactly match the record in the National Identity Register, the system will not recognize the identity and the system will not recognise, nor deal with, the individual presenting that token identity,³⁷ even if the token identity is otherwise legitimate and authentic.

No doubt procedures will be established for dealing with situations in which the system, through an apparent malfunction, does not recognise what seems to be a legitimate registered identity, and to deal with people who for a variety of reasons are not registered.³⁸ However, this aspect does not change the role of token identity. It strengthens its significance. If an individual’s token identity is not recognized by the system, any protocol designed to deal with that contingency must authorise dealings with the individual, not with his/her token identity.

The automatic authorisation to transact which occurs when the presented token identity information matches that on record in the National Identity Register, raises

³⁷ The authenticity of a registered identity is clearly presumed, primarily on the basis that biometrics are reliable identifiers, and on the overall integrity of the scheme. There is obviously a presumption that the initial registration process is sufficiently robust to ensure authenticity and that subsequent use of the token identity is by the individual to whom it is attributed in the national identity register. However, the ‘identifying information’ including the biometrics, is not infallible. For a discussion of this aspect see Clare Sullivan, ‘The United Kingdom Identity Cards Act 2006 – Proving Identity?’ (2006) Vol 3 *Macquarie Journal of Business Law* 259.

³⁸ Especially since the scheme will be used for government social security benefits. These procedures will require a delicate balance between equity and security concerns, with the balance likely to tip in favour of security, particularly given heightened terrorism concerns.

the question as to the legal nature of database identity, and particularly the legal nature of token identity. These questions raise the central question of who, or what, is the legal person³⁹ in the transaction i.e. who or what enters into legal relations. Is it the individual who is connected to the identity in the National Identity Register, primarily by the ‘identifying information’ and particularly by his/her biometrics; or is it the individual who presents the token identity at the time of the transaction? Although it is intended that it be the same person, it may not be. There is also an intriguing third option that token identity itself is the legal person. While this view is controversial because it invests token identity with legal personality, it is a view which sits easily with the functional role of token identity under the Scheme.

4 Token Identity – The Legal Person?

Who, or what, is a person in law, is the subject of vigorous intellectual debate. Central to this debate is whether the legal person must ‘approximate a metaphysical person,’ to use the words of Ngaire Naffine.⁴⁰ Naffine usefully summarises the three main theories into three types of legal persons which she calls P1, P2 and P3, respectively.⁴¹

As Naffine explains, P1 is the orthodox positive view. Personality arises from rights and duties, rather than from intrinsic humanity.⁴² In the words of Alexander Nekam: ‘[E]verything.... can be the subject- a potential carrier – of rights.’⁴³ ‘[T]here is nothing in the notion of the subject of rights which in itself, would necessarily, connect it with human personality, or even with anything experimentally existing.’⁴⁴ Once a legal right is in evidence, so is a (legal) person.⁴⁵ According to Derham, ‘[I]t follows of course, that any ‘thing’ which is treated by the appropriate legal system as capable of entering legal relationships ‘is’ a legal person, whether it can act and will

³⁹ The ‘legal person’ is the entity or unit which bears legal rights and duties and so possesses what is called legal personality.

⁴⁰ Ngaire Naffine, ‘Who are Law’s Persons? From Cheshire Cats to Responsible Subjects’ (2003) May *The Modern Law Review*, 346.

⁴¹ *Ibid*, 350.

⁴² In Nekam’s words, ‘[T]he rights themselves are given not for human personality or will but for the interests which the law-maker wants to protect. It is the socially protected interests which in legal abstraction we call rights. Since any conceivable interest attributed to any conceivable entity may be regarded as socially important by some community, anything may become a subject of rights – anything existing or anything to which the lawmaking community attaches any existence at all; and human personality or will is by no means a preliminary condition to its formation.’ Alexander Nekam, *The Personality Conception of the Legal Entity* (1938), 27.

⁴³ *Ibid*, 26. See also Derham, above n 36,13-15.

⁴⁴ *Ibid*, 26 and 28. Nekam asserts that the proposition that every individual is a natural subject of rights by virtue of his/her inherent humanity is flawed. However, as Nekam asserts, a connection between a right and a human being is inevitable. Nekam distinguishes the subject of the right from its administrator. While it is inevitable that the administrator of the right be human, the subject of the right need not be human.

⁴⁵ Margaret Davies and Ngaire Naffine, ‘Are Persons Property? Legal Debates Debates About Property and Personality’ (2001), 54.

for itself or must be represented by some designated human being.⁴⁶ In other words, a ‘thing’ can be transformed into a legal person through the legal endowment of rights and duties.

By contrast, P2 theorists maintain that that inherent humanity is absolutely necessary for true personhood. The abstract, artificial nature of P1 troubles P2 legal theorists who regard ‘[T]he human being as the paradigmatic subject of rights’,⁴⁷ which begin at birth and cease on death. The rationale for the P2 view is that ‘a human does not have to be sentient to be a (legal) person; his moral and hence legal status comes from being human.’⁴⁸ (my addition). This view of the legal person is the basis for fundamental human rights which include the right to privacy and the right to identity which are important rights in the context of the Scheme⁴⁹ but it does not fit as well as P1 with the transactional role of token identity.

Token identity is even further removed from P3. P3 theorists insist that the legal person must be human and further assert that the human being must be legally competent.⁵⁰ P3 theorists ‘maintain that those who lack the will personally to enforce their own rights cannot be truly said to possess those rights and so, it follows that they cannot properly be regarded as legal persons.’⁵¹ Richard Mohr takes this argument one step further to include judgment and responsibility. Mohr asserts that ‘[T]he legal subject must be capable of acting and of judging actions, must be prudent for the future and responsible for the past. He or she must have experience and must learn from it.’⁵²

The theoretical underpinnings of P2 and P3 are not features of, nor prerequisites for, the effective functioning of token identity. Token identity is indeed abstract and artificial. While a human being is linked to the registered identity and specifically to token identity, through signature, appearance (photograph) and biometrics, the

⁴⁶ Derham, above n 36,13-15. Derham asserts that ‘the wrong questions have been asked in the process of resolving many problems concerning legal personality.’ He suggests that the appropriate questions are:

‘[I]s there personateness? (a) Do the rules of the legal system establish that this entity.....is to be recognized as an entity for the purposes of legal reasoning (is to have the capacity to enter legal relations)?

What is the personality? (b) If so, do the rules of the legal system establish just what kinds of legal relations this entity may enter, or more commonly, do those rules establish whether or not this entity may enter the legal relation claimed or denied on its behalf?

Should there be personateness? (c) If the rules of law in (a) above are silent or ambiguous, should this entity be recognized as an entity for the purposes of legal reasoning?

What kind of personality should there be? (d) If either the rules of law in (a) or (b) above are silent or ambiguous and if (c), being relevant, is answered in the affirmative, then should the entity be recognized as having a personality which includes the capacity claimed or denied on its behalf to enter the legal relation concerned?’

⁴⁷ P. Ducor, ‘The Legal Status of Human Materials’ (1996) 44 Drake Law Review 195 at 200 cited by Naffine, above n 41,358.

⁴⁸ Naffine, above n 40, 361.

⁴⁹ For a further discussion see, Clare Sullivan, ‘Identity or Privacy?’(2008) Vol 2 No 3 *International Journal of Intellectual Property Management* 289.

⁵⁰ As Naffine points out that this concept of the legal person as both an intelligent and moral subject is particularly evident in criminal jurisprudence. Naffine, above n 40, 362.

⁵¹ Naffine, above n 40,363.

⁵² Richard Mohr, ‘Identity Crisis: Judgment and the Hollow legal Subject,’ (2007) 11 *Passages – Law, Aesthetics, Politics*, 106,118.

transactional functions of token identity under the Scheme are not necessarily dependant on inherent humanity, nor on a legally competent, rational human actor (though a human administrator is required). While many transactions will be in person, and will include comparison of appearance with a photograph, a signature and/or matching a biometric,⁵³ the Scheme clearly envisages remote transactions where these links with a physical person are either not required, or are provided on-line, not in person. Rationality and legal competency are also not part of the information which collectively comprises token identity. Rationality and legal competency also do not impact on the functions of token identity under the Scheme, except perhaps in the case of individuals who are minors (which is obvious from the date of birth) and those who are flagged by system as not being competent.

As Naffine observes:

P1 has neither biological nor psychological predicates; nor does it refer back to any social or moral idea of a person and it is to be completely distinguished from those philosophical conceptions of the person which emphasise the importance of reason. ... The endowment of even one right or duty would entail recognition of their ability to enter into legal relations and so be a person, even though a human would necessarily be required to enforce any right.⁵⁴

To strict legalists who adhere to this P1 view of the person, the legal person should not be confused with flesh and blood people. As F. H. Lawson explains '[A]ll that is necessary for the existence of the person is that the lawmaker..... should decide to treat it as the subject of rights or other legal relations.'⁵⁵

Unlike other notions of the legal person, i.e. P2 and P3, the potentially expansive and inclusive nature of P1 also accords with the enduring nature of identity. Identity, unlike privacy for example, does not necessarily cease on death,⁵⁶ though of course death affects the way in which rights and duties are enforced.

5 Token Identity Is the Legal Person

In many ways, P1 fits the concept of token identity now established under the legislation and the actual functions of token identity under the scheme. Indeed, token

⁵³ Depending on the nature of the transaction.

⁵⁴ Naffine, above n 40, 351. Alexander Nekam also maintains that 'everything.... can be the subject- a potential carrier – of rights. 'everything.... can be the subject- a potential carrier – of rights.' 'There is nothing in the notion of the subject of rights which in itself, would necessarily, connect it with human personality, or even with anything experimentally existing. In other words, legal personality arises from rights and duties, rather than from inherent humanity. Nekam, above n 42, 26-28.

⁵⁵ F.H.Lawson, 'The Creative Use of Legal Concepts' (1957) 32 *New York University Law Review* 909, 915.

⁵⁶ Neither database identity nor token identity cease on death and this is reflected in the fact that token identity under the National Identity scheme includes date of death as well as date of birth. S 1(7) (d) *Identity Cards Act*. This feature distinguishes identity from closely related concepts, particularly privacy.

identity is a relatively pure example of P1. Although date of birth and death and gender, appearance, signature and biometrics are part of token identity information, token identity need not be coloured by what Naffine refers to as ‘metaphysical notions of what it means to be a person.’⁵⁷ Although there is a notional connection with a human being, it is the information which plays the crucial role in the transaction, not the individual to whom it is presumed to relate.

Token identity ‘exists only as an abstract capacity to function in law, a capacity which is endowed by law because it is convenient for law to have such a creation.’⁵⁸ Although the lawmaker may not have made a conscious decision to create token identity, let alone endow it with legal personality, the legislation has crystallized the concept and through the operation of the scheme, it has been endowed with legal personality.

Richard Tur’s description of P1 as ‘an empty slot’⁵⁹ that can be endowed with legal capacity resonates with the role of token identity under the National Identity Scheme. Verification of identity involves two steps; and an analogy can be drawn with a key being used to open a door. First, the token identity information is presented to establish identity;⁶⁰ like inserting the key into a lock - or a slot, to use Tur’s metaphor. In the second step, the presented information is compared with that on record in the chip on the ID card⁶¹ and/or in the National Identity Register, to see if it matches. The slot remains empty and non- functional until the key is inserted. If the information matches, it is like the indentions on the key aligning with the indentations in the slot which enable the key to open the door. When the token identity information presented matches that on record in the Register, rights and duties such as those arising under contract for example, then endow the ‘empty slot’, i.e. token identity, with legal personhood.⁶²

On this view, legal relations are between the registered identity through token identity, and the transacting public or private sector entity. Transactional rights and duties initially attach to token identity and then to the registered identity, not to the notional individual (who is associated with that registered identity because his/her signature, photograph and/or biometrics are so recorded in the National Identity Register):

⁵⁷ Although Naffine notes that ‘P1 is not immune from metaphysical notions of what it is to be a person.’ Naffine, above 40, 356.

⁵⁸ Naffine, above n 40, 351.

⁵⁹ Richard Tur, ‘The “Person” in Law’ in A. Peacocke and G. Gillett (eds), (1987) *Persons and Personality: A Contemporary Inquiry*, 123, 121

⁶⁰ Presentation may be by personal attendance at which time the information is provided by a person and/or the ID card is presented. The required information may also be provided by telephone or using the internet.

⁶¹ The ID card is optional and card- not- present verification is clearly contemplated. See *Regulatory Impact Assessment, Identity Cards Bill Introduced to House of Commons on 25 May 2005* (UK) <<http://www.homeoffice.gsi.gov.uk.html>> 16 May 2006 cards.gov.uk/scheme.html > 10 May 2006. See paragraphs 58 and 69 and Annex A.

⁶² Unlike other notions of the legal person, i.e. P2 and P3, the potentially expansive and inclusive nature of P1 also accords with the enduring nature of identity. Identity, unlike privacy for example, does not necessarily cease on death though of course death affects the enforceability of rights and duties. Neither database identity, nor token identity cease on death and that is reflected in the fact that token identity under the National Identity Scheme includes date of death as well as date of birth.

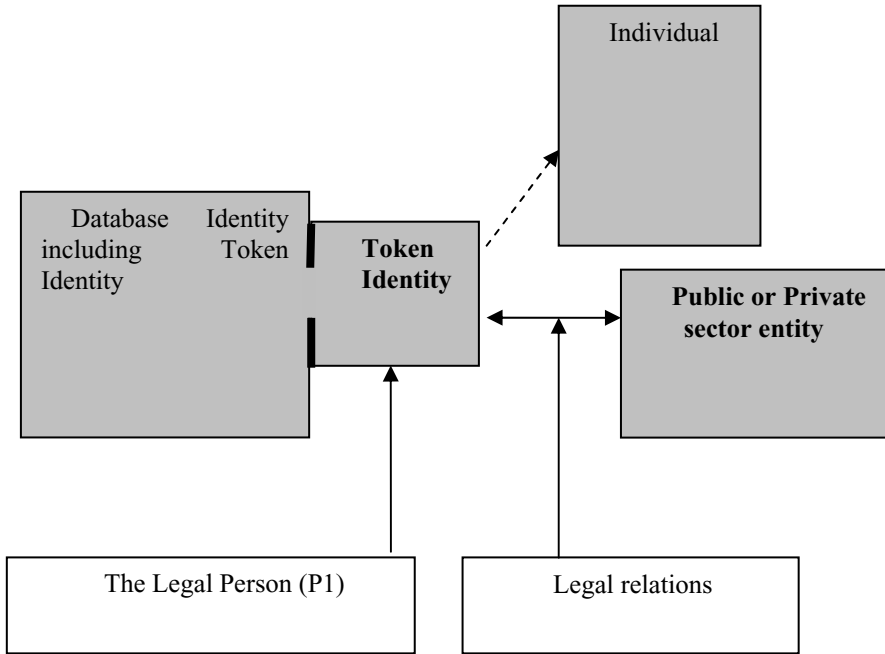


Fig. 5.

Transactional rights and duties, including those arising under contract, attach to the registered identity, through token identity. If, for example, there is subsequent default, the public or private sector entity will, as a matter of practicality, first look to the registered identity.

As a matter of law, this situation raises the line of contract cases on mistaken identity which are still law in both the United Kingdom and Australia.⁶³ Those cases have been described as impossible to reconcile.⁶⁴ However, although reconciliation is difficult, it is not impossible. With one exception (which turned on an unrelated point),⁶⁵ all the cases involved face to face, oral contracts and all pre-date the technology which is now a feature of the Scheme and of many, if not most, commercial transactions. The cases turn on the intention of the contracting parties and the particular circumstances, including the nature and seriousness of the mistake, especially whether an innocent third party would be disadvantaged if the contract was

⁶³ The leading cases are *Ingram v Little* (1961) 1 QB 31, *Lewis v Avery* (1972) 1 QB 198 and *Cundy v Lindsay* (1878) 3 App Cas 459. See also *Phillips v Brooks Ltd* (1919) 2 KB 243 and *Shogun Finance Ltd v Hudson* (2004) 1 AC 919 and in Australia, *Porter v Latec Finance (Qld) Pty Ltd* (1964) 111CLR 177, *Papas v Bianca Investments Pty Ltd* (2002) 82 SASR 581.

⁶⁴ See JW Carter, Elisabeth Peden, GJ Tolhurst, *Contract Law in Australia*, 5th Ed (2007), 459.

⁶⁵ *Shogun Finance Ltd v Hudson* (2004) 1 AC 919. In this case a written hire purchase contract was signed by a rogue in the name of Patel. The House of Lords held that the contract purported to be with Patel but because he did not sign it, nor did he authorise anyone else to sign it on his behalf, the contract was a nullity.

considered void. While that is the general justification for the courts' approach in finding the contract voidable, there is a strong theme in the decisions that the law will presume that in face to face dealings each party intends to deal with the person who is physically present. That presumption can, however, be rebutted by clear, admissible⁶⁶ evidence to the contrary – which can be presented in relation to transactions using token identity.

Unlike the parties in the line of mistaken identity cases, the public or private sector entity actually deals with token identity, not the individual.⁶⁷ This is so for all transactions which use token identity, but it is most clearly illustrated in remote transactions where the required token identity information is presented by telephone or using the internet. The token identity information is automatically compared to the information as recorded in the National Identity Register. If it matches, the system deals with the registered identity. Information and advice is provided to that registered identity. Invitations to treat and contracts are made with that identity – an identity which is composed of digitally stored information, which is accorded authenticity and given legal personality by the Scheme. There is no doubt that the transaction is with the registered identity.

6 Conclusion

It is a major departure from the familiar to assert that there is an emergent legal concept which is comprised of a set of information, let alone to assert that it is endowed with legal personality. To many, P1 is controversial because of its abstract, artificial nature and any assertion that token identity is invested with legal personality of this sort is also likely to be controversial. However, when viewed from the perspective of other disciplines such as computer science, the notion that information has function, as well as meaning, is well established.

No doubt a court will strive to find a human being behind the registered identity who can be considered the legal person in the transaction and in many ways it is appealing to follow the P2 theorists because it is the more conventional approach. It is the approach adopted in the mistaken identity contract cases, for example, but much has changed about how transactions are conducted since those cases were decided. Most significantly, it is not the way the National Identity Scheme actually works. Face to face dealings are now not the norm and computer technology, and in particular digital technology, is an integral part of commerce and of transactions, even those of a routine nature.

⁶⁶ I include the requirement of admissibility, primarily because of the parol evidence rule.

⁶⁷ In this regard it is important to distinguish the information which constitutes token identity from associated information such as a PIN or answers to additional designated questions which are used to provide additional security at the time of a transaction. Under the Scheme, a PIN and answers to designed questions are used to check that the identity is in the right hands. That information is part of an individual's database identity but it is not part of token identity. The same comment can be applied to the additional security measures including automatic messaging used by banks, for example. That information is generally not part of the individual's token identity in the context of the particular proprietary scheme, although it depends on the particular circumstances.

Under the Scheme, the system recognizes token identity and transacts with the registered identity, not the individual who is notionally associated with that identity. Even when aspects are discussed and clarified with a human being in person, by telephone or using the internet, the details are entered in the system against the registered identity. Of course, there is nothing new in this method. It is widely used for transactions. What sets the Scheme apart is that it is the official, national identity scheme of the United Kingdom. Its size and particularly, its nature mean that there is, and must necessarily be, less discretion given to human operators to ensure system security.

Information plays the critical role, not human beings. Although courts have traditionally resisted recognition of machine intelligence,⁶⁸ usually to prevent an obvious miscarriage of justice, this approach ignores that fact that computers are performing intelligent functions and making decisions which often cannot be readily overridden by human operators.

Under the Scheme, token identity determines a person's right to be recognised and transact as an individual. If the Scheme is sufficiently robust to ensure the integrity of identity authentication at the time of registration, and the unfailing accuracy of identity verification at the time of each transaction, then it is of little practical significance whether a Court would accept the argument that token identity is the legal person or whether the P2 approach would be followed. A human being must still be involved, albeit as the administrator of the rights and duties attaching to P1. The individual to whom the identity is attributed in the National Identity Register is the most obvious administrator. That individual is presumed to present the token identity at the time of a transaction, and is identified by his/her signature, photograph and /or biometrics.

However, if there is a possibility of human or system error or malfunction or fraud, which affects that accuracy and integrity of authentication, and/or verification of identity, then the practical and legal issues become much more complex and problematic. If there is error, malfunction, or manipulation, or even a possibility of it (as there must be, because no system is infallible), a registered identity may be incorrectly attributed, or not attributed, to an individual.

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⁶⁸ See for example, *Davies v Flackett* (1972) Crim L R 708 and *Kennison v Daire* (1985) 38 SASR 404, 416 per O'Loughlin J. See also *Kennison v Daire* (1986) 160 CLR 129.

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