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A REVIEW OF AUSTRALIAN PRIVACY COMMISSIONER V TELSTRA CORPORATION LIMITED FULL FEDERAL COURT OF AUSTRALIA [2017] FCAFC 4, 19 JANUARY 2017

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The Full Federal Court dismissed an application by the Privacy Commissioner seeking orders in relation to a decision by the Australian Administrative Appeals Tribunal that had overturned a determination by the Australian Privacy Commissioner granting journalist Ben Grubb access to certain data relating to Mr Grubb's use of Telstra mobile services. The Court's judgement clarifies that the particular context of data collection and use is relevant to determination of whether information is personal information. In this particular context (cell tower location and call usage information relating to a mobile phone) the device-related and network-related information sought by Mr Grubb could be traced back to Mr Grubb as an 'identifiable individual' but was not sufficiently related to that individual to be information 'about that individual' protected as 'personal information' under the Australian Privacy Act. The Court's reasoning makes it clear that there are significant limits as to when device-related and network related information is 'about an individual whose identity may be reasonably ascertained from the information' - a key issue that arises for many Internet of Things ('IoT') applications now entering the market - but fails to provide a methodology or useful guidance as to the point at which relevant information ceases to be 'about an individual'.

In May 2015, the Australian Privacy Commissioner, Mr Timothy Pilgrim PSM, had found that Telstra had breached the (Australian Federal) Privacy Act 1988 (the 'Privacy Act') by failing to provide Mr Grubb with access to requested metadata relating to his use of Telstra telecommunications services as collected and held by Telstra in various databases for various purposes, some being purely technical e.g. operation of the network and monitoring its performance: Ben Grubb v. Telstra Corporation [2015] AICmr 35, 1 May 2015. The case applied the pre-March 2014 definition of 'personal information', being information about an individual, whose identity is apparent or can reasonably be ascertained from the information or opinion about the individual. This definition is be contrasted to the current Privacy Act definition of 'personal information', which is information 'about an identified individual, or an individual who is reasonably identifiable'.

The Commissioner considered that the question of whether an individual's identity can 'reasonably be ascertained' from information required an assessment as to how unreasonably high the level of effort necessary to link an individual through to non-identifying information must be before an entity receiving an access request can say that the access that is requested is not to information from which an individual's identity can reasonably be ascertained. It was not contended that Mr Grubb as an individual could be linked to some network data relating to use by Mr Grubb of his mobile phone through a multi-step process (requiring significant labour input and including manual matching) of tracing and matching

records through multiple databases in Telstra's systems. Although Mr Grubb's identity was not apparent in relevant Telstra databases where relevant metadata was held, the device identifiers or IP addresses or other transactional information there held could be traced through from mobile tower records to operational and network databases and on to personally identifying databases (in particular, the Telstra customer billing database). Telstra regularly facilitated request by law enforcement agencies for lawful assistance as to use of mobile phones by persons of interest by undertaking such tracing and matching processes.

Deputy President S A Forgie, in the Administrative Appeals Tribunal's Decision ([2015] AATA 991 (18 December 2015)) overturning the Privacy Commissioner's Determination, stated (at para 97) that where an individual is not intrinsically identified in information, a two-step characterisation process should be applied. The first step is determining whether relevant information is 'about an individual'. The second step is working out whether an individual's identity 'can reasonably be ascertained from the information or opinion'. If relevant information is not 'about an individual', that is the end of the matter. But if information is information 'about an individual', the second step must be applied. DP Forgie stated (at para 112, cited with approval in the appeal decision):

"Had Mr Grubb not made the calls or sent the messages he did on his mobile device, Telstra would not have generated certain mobile network data. It generated that data in order to transmit his calls and his messages. Once his call or message was transmitted from the first cell that received it from his mobile device, the data that was generated was directed to delivering the call or message to its intended recipient. That data is no longer about Mr Grubb or the fact that he made a call or sent a message or about the number or address to which he sent it. It is not about the content of the call or the message. The data is all about the way in which Telstra delivers the call or the message. That is not about Mr Grubb. It could be said that the mobile network data relates to the way in which Telstra delivers the service or product for which Mr Grubb pays. That does not make the data information about Mr Grubb. It is information about the service it provides to Mr Grubb but not about him."

The Full Federal Court understood the Privacy Commissioner to assert that if there is information from which an individual's identity could reasonably be ascertained, and that information is held by the organisation, then it will always be the case that the information is about the individual. By so construing the Commissioner's contention the Court (at para 63) had little difficulty in rejecting it:

"The words 'about an individual' direct attention to the need for the individual to be a subject matter of the information or opinion. This requirement might not be difficult to satisfy. Information and opinions can have multiple subject matters. Further, on the assumption that the information refers to the totality of the information requested, then even if a single piece of information is not "about an individual" it might be about the individual when combined with other information. However, in every case it is necessary to consider whether each item of personal information requested, individually or in combination with other items, is about an individual. This will require an evaluative conclusion, depending upon the facts of any individual case, just as a determination of whether the identity can reasonably be ascertained will require an evaluative conclusion."

Or as the Court later put it (at para 73), "this appeal concerned only a narrow question of statutory interpretation which was whether the words 'about an individual' had any substantive operation. It was not concerned with when metadata would be about an individual". This then left the Court able to elect not to go on to elucidate a methodology to determine when facially device-related or network related information should nonetheless be considered to be information 'about an individual'. The Court noted that in "some instances the evaluative conclusion will not be difficult. For example, although information was provided to Mr Grubb about the colour of his mobile phone and his network type (3G), we do not consider that that information, by itself or together with other information, was about him. In other instances, the conclusion might be more difficult".

Without any prior case law guidance or a methodology to work out when metadata would be about an individual, Australian lawyers would usually seek to construe the statute having regard to its legislative objects and by reference to analogous decisions in comparable jurisdictions. However, the Court did not accept arguments by the Australian Privacy Foundation and the New South Wales Council for Civil Liberties, made by those bodies in seeking leave to be heard as amici curiae, that in working out when metadata would be 'about an individual' reference should be made to policy underpinning the Act. Although the Privacy Act referenced Australia's accession to the International Covenant on Civil and Political Rights (ICCPR) and its commitment to adopt such legislative measures as may be necessary to give effect to the right of persons not to be subjected to arbitrary interference with their privacy, home or correspondences, the Court said that these commitments took 'aspirational form' and should not advance the substantive evaluation of the specific statutory provision. The Court also distinguished the statutory context in which arguably analogous matters had been determined in other jurisdictions, most notably the decision of the Canadian Federal Court of Appeal in The Information Commissioner of Canada v The Executive Director of the Canadian Transportation Accident Investigation and Safety Board and NAV Canada [2007] 1 FCR 203; 2006 FCA 157. That case concerned refusals by the relevant Canadian Board to disclose records of air traffic control communications concerning four aviation incidents. In that case Desjardins JA was called on to consider whether conversations between air traffic controllers and pilots revealed information about the relevant individuals, and reasoned (at par 53):

"The information at issue is not 'about' an individual … the content of the communications is limited to the safety and navigation of aircraft, the general operation of the aircraft, and the exchange of messages on behalf of the public. They contain information about the status of the aircraft, weather conditions, matters associated with air traffic control and the utterances of the pilots and controllers. These are not subjects that engage the right of privacy of individuals."

The Full Federal Court then noted that the provisions in the Canadian statute were substantively different from those in the Australian regime, although the relevance of those differences was not explained. The Court also noted that the Canadian regime is concerned to protect from disclosure the personal information about an individual in order to preserve the privacy of the individual, without considering how the Australian Privacy Act clearly reached beyond creation of rights of access to records of personal information, to require transparency as to collection, use and disclosure of personal information in order to protect the privacy of individuals. Nor did the Court consider the carefully reasoned New Zealand precedents involving similar questions in the context of a closely analogous statute, notably including CBN v McKenzie Associates HRRT 020/04 (30 September 2004) and Apostolakis v Sievwrights HRRT 44/03 (14 February 2005), the Article 29 Data Protection Working Party's Opinion 4/2007 on the concept of personal data, or the relevant post Durant English jurisprudence, notably the Information Commissioner's Data Protection Technical Guidance: Determining what is personal information (August 2007), Information Commissioner v Financial Services Authority & Edem [2012] UKUT 454 (AAC) and Google v Vidal Hall & Ors [2015] EWCA Civ 311.

The Court's election not to go on to elucidate a methodology to determine when facially device-related or network related information should nonetheless be considered to be information 'about an individual' leaves a fundamental question of Australian privacy law unanswered. There is no objectively determinable point at which information that has multiple subject matters (for instance, relating to a thing, or the operation of a network or a device, and also relating to an identifiable person) engages the right of privacy of that person. Determination of that point requires a subjective assessment of the particular context of collection and use of that data and whether that collection and use engages the right of privacy of that individual. But the reticence of the Court to apply the 'aspirational' policy objects in considering the substantive operation of the definition provides an adviser with no guide to the conduct of the necessarily

conceptual evaluation. Consider this example: let us assume that a person that is a property owner has three properties, two listed on a property letting website and another not so listed. The information on the listing website and available lettings is about the property, although information as to the identity of the host (owner) and the identity of guests is information about those individuals. Is information about which of the three properties is not let information about the host, given a possible inference that the property may be the host's residence? Is information about periods of past lettings also information about the individuals that let the property in those periods? Any answer necessarily requires consideration of the context of the relevant enquiry and whether that context engages the right of privacy of an affected individual. Inevitably, the policy objects of the Privacy Act must be applied to the substantive evaluation of what is 'personal information', but we are given no assistance as to when to apply or how to interpret those policy objects.

In summary, the reasoning of the Full Federal Court provides little guidance for Australian privacy professionals as to when facially device-related or network related information should nonetheless be considered to be information 'about an individual'. Given the narrow, technical context in which the decision is framed, and the absence of consideration of the protection of privacy objects of the Australian Privacy Act, it is also unlikely that the decision will be regarded as persuasive in other jurisdictions. The decision illustrates the problem often confronting privacy professionals advising as to IoT deployments in determining when and how a particular context of collection, use or disclosure of information about a device that may be reasonably inferred to be in use by an identifiable individual should be regarded as information about that individual. These questions now frequently arise because personal IoT devices are becoming both more sensitively personal as well as more ubiquitous. The issues will become even more complex as services provided to share environments (such as households), or to or in shared devices (such as motor vehicles), become able to reliably distinguish patterns of usage of different individuals (i.e. distinctive driving behaviour) and analytically infer which individual is engaging in a particular activity or using the device.

As the networked society and IoT continues to grow, we may be confident that cases addressing similar questions to those considered in Australian Privacy Commissioner v Telstra Corporation Limited are certain to arise for determination in many jurisdictions. The Court's judgement usefully clarifies that the particular context of data collection and use is relevant to determination of whether information is personal information: the question cannot simply be answered by looking at whether information is of a particular type or possibly could be associated back to an identifiable individual. Unfortunately we remain unguided by the Full Federal Court when answering the question of when metadata is 'about an individual'.

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