Watching the Watchman

Full Federal Court rejects Australian Privacy Commissioner's stance on metadata

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The Full Federal Court[1] has dismissed the Privacy Commissioner's appeal of a decision by the Administrative Appeals Tribunal which held that certain telecommunications metadata generated by Telstra did not constitute Personal Information under the Privacy Act.

In this article, we analyse what the Full Federal Court's judgment says about metadata regulation in Australia, and what it doesn't.

BACKGROUND TO THE DISPUTE

The case involved a dispute between the Australian Privacy Commissioner and Telstra Corporation (Australia's largest telco) over whether certain mobile network data (including IP addresses and URL data) held by Telstra constituted 'personal information' under the Privacy Act.

In December 2015, the Administrative Appeals Tribunal (AAT) held in favour of Telstra (see our previous case note here), and shortly thereafter the Commissioner appealed the AAT decision to the Full Federal Court.

The Commissioner's grounds for appeal focused on disputing the two-step test that the AAT had used when applying the Privacy Act's definition of 'personal information' to the metadata in question:

The AAT had held that the first step requirement was to first establish that the metadata was information 'about an individual' (as opposed to being 'about' something else). The question of whether the information could be used to reasonably identify an individual could only be considered if this initial threshold requirement was met.

The Commissioner disagreed with this 'two-step' test, and argued that the proper test for 'personal information' should focus on the potential for identification rather than the subject matter of the data.

THE FULL FEDERAL COURT'S DECISION

The Full Federal Court dismissed the Commissioner's appeal on all grounds (with costs).

The Court held that the AAT's 'two-step' test was supported by the wording of the Privacy Act, which defined 'personal information' in section 6(1) as:

"information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion" (emphasis added).[2]

The Commissioner argued that the words 'about an individual' were effectively redundant, and should be read as part of the broader phrase 'about an individual whose identity is apparent, or can be reasonably ascertained.'

The Court rejected this analysis, and instead held that the words 'about an individual' were intended to "direct attention to the need for the individual to be a subject matter of the information or opinion".[3] The Court affirmed the AAT's finding that the test involved two discrete steps – first, determining that the subject matter of the data was an individual, and only then considering whether the individual's identity could be reasonably ascertained.

Due to the limited grounds of appeal (which focused on the correct formulation of the test), the Court was not required to rule on whether any of the metadata in dispute actually constituted 'personal information' and the AAT's findings on these matters continue to stand.

By way of recap, the AAT held that neither the mobile network data generated by the customer's calls and text messages, nor the IP addresses assigned to the customer's mobile device when accessing the Internet, constituted 'personal information'.

APPLYING THE NEW 'TWO-STEP' TEST

While the Court declined to provide a view on whether the metadata in dispute would constitute 'personal information', the Court did set out some guidance on how the 'two-step' test for personal information should be applied.

Specifically, the Court noted the following:[4]

- both limbs of the test (i.e. 'about an individual' and 'reasonably identifiable') require 'an evaluative conclusion, depending on the facts of any individual case';
- data and information may have more than one subject matter, and the individual only needs to be one of those subject matters in order to satisfy the 'about an individual' limb of the test; and
- the data or information in question may be considered individually or in combination with other items of data or information when considering whether the "about an individual" requirement is satisfied.

Interestingly, the Court suggested that data such as certain information about a customer's mobile handset and network type (e.g. 3G or 4G) would not satisfy the 'about an individual' / 'subject matter' test.

The Court also noted the AAT's findings in relation to Telstra's mobile network data and IP address records, but did not comment on them other than to note that these findings were not challenged by the Commissioner on the appeal.

The Court did not elaborate on how the second limb of the test (which considers whether the individual is identifiable) will be applied. The AAT decision includes some discussion of the 'identifiability' limb, which is summarised in our case note on that decision.

WHAT ABOUT THE 2014 AMENDMENTS TO THE PRIVACY ACT?

Due to the timeline of the matter, the case was decided under the former version of the Privacy Act that applied until March 2014. Relevantly, the definition of 'personal information' was amended in March 2014, and now reads:

"information or an opinion about an identified individual, or an individual who is reasonably identifiable: (a) whether the information or opinion is true or not; and (b) whether the information or opinion is recorded in material form or not (emphasis added)."

The Court did not give any indication as to whether the interpolation of the word 'identified' in the phrase 'about an individual' will have any substantive impact on the formulation of the applicable test.

However, we think that the Full Federal Court's decision would likely be highly persuasive (even if not strictly binding) in the event that this issue is litigated again. The key features of the drafting that were emphasised by the Court (such as the repetition of the words 'about an individual' in the wording of the privacy principles) continue to apply in the current Privacy Act.

WHERE DOES THIS LEAVE US?

The decision has obvious ramifications for the regulation of metadata in Australia, but it also sets down some important markers for the way in which Australian courts will construe the limits of the Privacy Commissioner's jurisdiction under the Privacy Act 1988 (Cth).

At the time of writing this article, the Commissioner has not announced whether he intends to appeal the Full Federal Court's decision. Assuming that the decision is allowed to stand (or is affirmed on appeal), we see five key takeaways:

1. This is not the end of the discussion on metadata.

The Full Federal Court's decision does not, as some reports have suggested, categorically exclude metadata such as IP addresses and URLs from being regulated as personal information under any circumstances.

The AAT's finding that the mobile network data was not 'personal information' was based on technical evidence regarding the architecture and function of Telstra's mobile network database. It is possible that metadata generated in systems that are architected in a different way (e.g. in a way that creates a clearer association between data points and individual data subjects) could still be captured as 'personal information.'

The Court made it clear that the test must be applied on a case-by-case basis, and that the Commissioner is required to make an 'an evaluative conclusion' when applying the test. This gives the Commissioner some scope to exercise discretion, subject to the general parameters imposed by administrative review.

2. An incentive to implement Privacy By Design (but not necessarily the one that the Commissioner wanted).

The Full Federal Court's decision gives businesses further clarity regarding the 'goalposts' for architecting their systems and databases to minimise their exposure to regulatory obligations under the Privacy Act. This may actually serve as an incentive for businesses to conduct appropriate privacy and technical due diligence (such as Privacy Impact Assessments) at the outset of technology projects to inform decisions on system design.

3. New challenges for cross-border arrangements.

The Full Federal Court's decision runs contrary to the trend in other jurisdictions for greater regulation of telecommunications metadata (such as cookie and IP address data).[5]

The Full Federal Court made it clear that the Privacy Act will be interpreted as a domestic piece of legislation, and that overseas case law will be of limited relevance – even where such legislation derives from common international instruments such as the OECD Privacy Principles.

It remains to be seen what impact the Full Federal Court's decision will have on cross-border data transfers. However, the decision does serve as a clear reminder that Australian privacy law requirements must be considered

individually, and that international harmonisation on privacy issues (such as metadata) cannot be assumed.

4. A reminder of the statutory limits of the Commissioner's jurisdiction.

While it's difficult to fault the Court's application of established statutory interpretation principles to the Privacy Act, the practical outcome of this decision will undoubtedly pose some challenges for the Commissioner in managing his response to developments such as the Internet of Things and the increasing sophistication of online tracking and data analytics.

Adding the second limb to the 'personal information' test will give companies more grounds to resist the Commissioner when he asserts jurisdiction, and the Court's 'black letter' approach towards construing the Commissioner's jurisdiction could result in the Commissioner adopting a more conservative approach towards emerging or 'borderline' privacy issues.

Given the increasing profile and importance of these 'emerging' issues (and the absence of any other Australian regulator with clear jurisdiction), it would not be out of the question for the Commissioner to pursue a further appeal of this decision to the High Court.

5. Time for a more specific legislative response to new technologies?

This decision may also serve to highlight the gap between the general public's expectations regarding the Commissioner's role, and the technical limits of his jurisdiction under the Privacy Act.

This gap can be seen in the Full Federal Court's response to the amicus brief that was filed by the New South Wales Council for Civil Liberties as part of the appeal. The brief discussed a range of emerging technology issues that have been the cause of public concern in Australia (such as database aggregation and data linking), but the Court ultimately gave very little weight to the brief and noted that it was "unclear how any of those matters…had any bearing on the issues raised in this appeal."

It is interesting to note that the ACMA has been vocal in recent years about the need to restructure Australia's media and communications regulatory framework to accommodate new technologies and address convergence pressures.[6]

The Full Federal Court's decision could lead to similar calls for a review of the Privacy Commissioner's role (or some other form of specific legislative response to the privacy challenges raised by new technologies).

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[1] *Privacy Commissioner v Telstra Corporation Ltd[2017] FCAFC 4*

[2] The Privacy Act's definition of "personal information" was amended in March 2014 as part of the amendments that replaced the National Privacy Principle regime with the current Australian Privacy Principle regime.

[3] Privacy Commissioner v Telstra Corporation Ltd [2017] FCAFC 4 at [62]. The Court also noted that the words "about an individual" were repeated in the text of NPP 6.1, which weighed against the Commissioner's argument that they had no independent content of their own.

[4] Ibid at [63].

[5] For example, note the EU Court of Justice decision in Case 582/14 – Patrick Breyer v Germany, which held that dynamic IP addresses constituted personal information.

[6] See for example the ACMA's 2013 report, "Broken Concepts".