

# Data science and the law

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# Data science and the law

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- A 40,000' view
- Some recent developments
- Theme: "clunky"

# Ownership

- Some bad news, you probably don't "own" your data
- Law doesn't deal well with ownership of information
- Re data & databases:  
not clear what we mean (legally) by "I own that data"
  - exclusive possession
  - authored / originated with
  - curate
  - exclusive access & use / right to prevent others' use

# Ownership – copyright

- Copyright the main legal mechanic for written work
  - software considered a type of written work
  - reproduction, transmission, publication, adaptation
- Data? Historically, effort to compile -> © protection
- *IceTV v Nine* (HC 2009)
- *Telstra v Phone Directories Company* (FFC 2010)

# Ownership – copyright – implications

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- No copyright in most databases
  - requires significant human authorship / original intellectual effort
- Confidentiality,  
contractual control,  
technological protection (eg, API access controls)  
become much more important

# Confidentiality & privacy

- Sound like the same thing, but very different legally
- **Confidentiality**: info *owner's* right to have secrets:
  - kept secret
  - not used
- **Privacy**: info *subject's* right to transparency and proper use of information about them

# Confidentiality

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- To access, need to show data is considered confidential and managed appropriately
- Can impact individuals, eg [ex-]employees
- *SAI Global v Johnstone* (2016 FCA)

# Information privacy

- Regulated in the interest of the data subject
- Fairly well-known, most orgs have formal policies
- Only data about *identified/identifiable individuals*
- Regulated by OAIC
- Example case: *KA v Commonwealth Bank* (2016 OAIC)



# Info privacy – what is “personal information”

- 2013 Journalist Ben Grubb tested definition
  - Under Privacy Act, asked Telstra for *all* his data (specifically including metadata: context – metadata retention)
  - Telstra refused to provide telco metadata eg cell geoloc data
- *Privacy Commissioner v Telstra* [Jan 2017 FC]
  - Individual needs to be *a* subject of the information; here info about network / service provision, not “about” Grubb (directly)
  - But was a narrow question

# De-identification / Re-identification

- De-ident, done properly, can avoid privacy issues
- Occasionally not done properly, and significant data sets make good academic and amateur targets
- *Privacy Amendment (Re-identification Offence) Bill 2016*
  - offence to re-identify Cth data (personal info only)
  - 2 years jail / \$150,000 fine
- Currently in Senate committee

# Data breach notification

- *Privacy Amendment (Notifiable Data Breaches) Act 2017*
  - classical hacking/cracking, but also lost devices/media, provision to wrong person in error
  - breaches on/after 22 Feb 2018
  - personal information only
  - small business exception
  - 'serious' breaches only (ie, which may result in serious harm)
  - effective remedial action -> no need to notify
  - penalties: up to \$1.8M for serious breaches

# Potential liability

- Regulatory, contract, confidentiality, negligence
- Individual exposures?
  - employee obligations
  - director's duties / Corporations Act ss182, 183
  - direct liability for offences like re-identification offence
  - accessorial liability for breach of copyright
  - Privacy, Competition & Consumer Acts: "knowingly concerned"

# Thank you

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