

# Data: it's not just about breaches

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# Intro and perspective

- data is a problem child for lawyers (and accountants)
- meanwhile:
  - exponential data creation, storage
  - rapidly falling costs, improving accessibility, new tools
  - new uses for large data repositories  
in particular Machine Learning type AI
- worth considering some broader legal issues around data

# Is data “property”?

- No.
- *Victoria Park Racing v Taylor*
- *Breen v Williams*
- *Your Response v Datateam Business Media*
- *Dixon v R*



# Does copyright protect data?

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- No.  
(well, not unless the data originated by an author from some independent intellectual effort)
- IceTV v Nine
- Telstra v Phone Directories Company

# Can data be “confidential”?

- YES!
- but a personal obligation, not proprietary
- and only where criteria are met:
  - in fact confidential
  - disclosed in circumstances of confidence
- or, contract with confidentiality terms

# Proving confidentiality

- “In fact confidential”
  - Identify confidential data, use different process
  - Internal access controls, “need to know”
  - Practical external controls, eg, parts only, query only, throttles on queries or access
  - Audit trail and audit of access
- “Imparted in circumstances of confidence”
  - Confidentiality notice or click-wrap before access
  - Warnings in communications disclosing data
  - Marking on screen or printouts

# Leveraging data

- Trade-off between keeping essentials...
  - reduce risk of breach, minimize attractiveness as target
  - minimise compliance costs
  - [personal information] comply with APP 3.1, 3.2, 11.2
- and keeping everything...
  - storage/processing now very, very low cost
  - you never know when something might be useful  
(Machine Learning AI being a case in point)
  - increase organizational value
  - improve decision-making



# Risks of being data-driven

- “In God We Trust, all others bring data”  
(W. Edwards Deming)
- More learning-oriented than received-wisdom
- BUT
- Data-reliance / Machine Learning AI may entrench discrimination/bias already present in training data
- Examples: imSitu SRL, California PSA System, PredPol

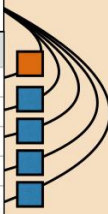
# imSitu SRL



COOKING	
ROLE	VALUE
AGENT	WOMAN
FOOD	PASTA
HEAT	STOVE
TOOL	SPATULA
PLACE	KITCHEN



COOKING	
ROLE	VALUE
AGENT	WOMAN
FOOD	FRUIT
HEAT	∅
TOOL	KNIFE
PLACE	KITCHEN



COOKING	
ROLE	VALUE
AGENT	WOMAN
FOOD	MEAT
HEAT	STOVE
TOOL	SPATULA
PLACE	OUTSIDE



COOKING	
ROLE	VALUE
AGENT	WOMAN
FOOD	∅
HEAT	STOVE
TOOL	SPATULA
PLACE	KITCHEN



COOKING	
ROLE	VALUE
AGENT	MAN
FOOD	∅
HEAT	STOVE
TOOL	SPATULA
PLACE	KITCHEN

# De- and Re-identification

- August 2016
- de-identified MBS/PBS claim data on 10% of population – 2.9M individuals
- badly flawed encryption
- linkage attacks (with enough data points, everyone is unique)
- potentially identified entire medical history of multiple individuals

# MBS/PBS 10% outcomes

- data withdrawn
- the mathematics is important
- de-identification guidelines cannot be assumed to guarantee privacy protection
- some datasets can never be published in a useful form while retaining individual privacy
- proposed re-identification offence

# De-identification decision-making framework

- OAIC & Data61 (CSIRO)
- comprehensive and non-technical approach
- model of issues, areas for investigation
- basis for scoping/briefing/discussion with experts
- focus on “data situation,” ie, data in context
- emphasis on understanding, identifying, planning
- may still be judgement calls, including whether to release at all (cf MBS/PBS release)

# NDB – a “black hat” view

- small business exemption: 94% of AU enterprises
- state depts & agencies also excluded
- only unauthorized disclosures
- only where likely to result in serious harm
- will guidance in s26WG become exceptions?
- remedial action is effective self-certification
- notification options & practicability
- potential for abuse of OAIC declaration process
- application of penalties is light-touch

# Data breach & class actions

- a real concern for major breaches
- Equifax breach may cost USD600M:  
technology upgrades, legal fees, free credit monitoring services, provision for claims
- at least one current class action in NSW  
(NSW Ambulance)  
breach of confidence, breach of contract,  
misleading conduct, tortious invasion of privacy

# Data & commercial transactions

- significant business asset, worthy of consideration
- consider copyright, confidentiality, regulated data
- copyright: explore subsistence & providence, existing licence arrangements
- confidential: explore steps taken to maintain confidentiality, nature of relationships where disclosed
- regulated: nature of regulation, compliance steps



# Exploiting data

- typically via “licence” (even where no copyright)
- confined in usual ways: exclusivity, geography, time, field or purpose of use.
- if confidential, confidentiality terms (!)
- if regulated, to comply with regulation, to assist with enquiries, complaints and investigations
- ownership / delivery-up / destruction
- warranty and liability (typically excluding liability from use/reliance on data)

# Thank you

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