There has been very little case law on the application of the Privacy Act and APPs. One recent exception is the Privacy Commissioner v Telstra case involving technology journalist Ben Grubb’s metadata. Unfortunately, it is unclear in the aftermath of the case whether dynamic IP addresses constitute ‘personal information’ for the purposes of Australian privacy law. (NB It would constitute ‘personal data’ in EU data protection law.)

***Privacy Commissioner v Telstra Corporation Ltd***[[1]](#footnote-1)

The case arose from a request by journalist, M. Grubb, who sought access to all metadata held by Telstra Corporation Ltd related to his mobile phone. While Telstra provided some data, it refused him access to its mobile network data, including metadata. In 2013, the (former) National Privacy Principle (**‘NPP’**) 6.1 (now reflected in Article 13 of the APP[[2]](#footnote-2)) ‘…gave individuals the right to access, subject to some exceptions, their own personal information held by an organisation, such as Telstra’. [[3]](#footnote-3)

The Privacy Commissioner argued that this metadata constituted personal information, as Telstra had the capacity to link it to Mr. Grubb’s account, making him identifiable. The Administrative Appeals Tribunal (**AAT**) disagreed with the Privacy Commissioner's assessment, ruling that the mobile network data was not information 'about' Mr. Grubb. Instead, the Tribunal viewed it as information about *how* Telstra provided services to Mr. Grubb. The Tribunal emphasised that merely being able to identify an individual from the data was insufficient; the data must also be about the individual to qualify as personal information under the Privacy Act.

The Privacy Commissioner appealed the decision, arguing that the Tribunal had misinterpreted the phrase 'about an individual' in the definitional context of ‘personal information’. Privacy advocates welcomed the appeal, anticipating it would provide the first comprehensive judicial guidance from the Federal Court on this fundamental concept within Australia’s privacy legislation. However, the Full Federal Court dismissed the appeal.

The judgment found that telecommunications metadata did not qualify as personal information under the *Privacy Act 1988* (Cth). This ruling highlighted that the classification of technical data as personal information is context-dependent and illustrated ambiguity as to what constitutes ‘personal information’ for the purposes of privacy regulation in relation to the internet.

At [3], Dowsett J, with Kenny and Edelman JJ concurring, determined that:

… [T]he definition of the term ‘personal information’ in s 6 of the Privacy Act clearly contemplates identification of information or opinion concerning the relevant applicant… In other words, personal information is information or opinion:

* About the relevant applicant; and
* From which his identity is apparent or could reasonably be ascertained.

**Recent Developments**

To assist in elucidating the scope of the word 'about', the Explanatory Memorandum of the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* (Cth)[[4]](#footnote-4) outlines two steps to determine whether information is personal information under the current Privacy Act:

1. Whether there is a sufficient nexus between the information and the individual.
2. The cost, difficulty, practicality, and likelihood that the information will be linked to identify that individual.

1. *Privacy Commissioner v Telstra Corporation Ltd* [2017] FCAFC 4. [↑](#footnote-ref-1)
2. Office of the Australian Information Commissioner. (2019). *Chapter 13: APP 13 Correction of personal information*. Australian Government. Available at: <https://www.oaic.gov.au/privacy/australian-privacy-principles/australian-privacy-principles-guidelines/chapter-13-app-13-correction-of-personal-information>. [↑](#footnote-ref-2)
3. Normann Witzleb and Julian Wagner. (2018). *When is Personal Data 'About' or 'Relating To' an Individual? A Comparison of Australian, Canadian and EU Data Protection and Privacy Laws*. Monash University Faculty of Law Legal Studies Research Paper No. 3189376, Available at: <https://ssrn.com/abstract=3189376> or [http://dx.doi.org/10.2139/ssrn.3189376](https://dx.doi.org/10.2139/ssrn.3189376). [↑](#footnote-ref-3)
4. Parliament of Australia. (2012-13). *Privacy Amendment (Enhancing Privacy Protection) Bill 2012.* Available at: <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1213a/13bd020#_Toc340068484>. [↑](#footnote-ref-4)