

OAIC v Facebook

Katherine Sainty, Principal and **Belyndy Rowe**, Senior Associate at Sainty Law discuss the Privacy Commissioner's claim against Facebook in relation to Cambridge Analytica.

The Australian Information Commissioner (**Commissioner**) has been granted leave by the Federal Court of Australia to serve legal documents on US-based Facebook Inc and Facebook Ireland.¹ The Commissioner brought proceedings against the Facebook entities in the Federal Court in March this year, alleging the social media platform has committed 'serious and/or repeated interferences' with privacy in contravention of Australian privacy law.²

1. Background to claim

The Commissioner's claim relates to the Cambridge Analytica revelations of March 2018. To recap, Facebook is alleged to have shared the data of more than 300,000 Australians with British firm Cambridge Analytica through the personality quiz application 'This is Your Digital Life' (**App**). Cambridge Analytica was caught boasting that it used the data harvested from Facebook user profiles to target political advertising and affect the outcome of the 2016 US Presidential election.³

At the time of the Cambridge Analytica breach, Facebook said the data of 311,127 Australians was shared with the App between March 2014 and May 2015, accounting for 0.4% of users affected by the breach worldwide.⁴ However, the OAIC's Statement of Claim says only around 53 people in Australia actually installed the app.⁵

This demonstrates the reach of the App, which collected not only the data of people who installed it, but also 'friends' in their Facebook network.

The Commissioner's move against Facebook follows action already taken by its international counterparts. Facebook was fined £500,000 by the UK data protection regulator, Cambridge Analytica and Facebook's Mark Zuckerberg received a congressional grilling in the US, and Facebook paid \$US5 billion following an investigation by the US Federal Trade Commission over allegations it 'deceived' users about their ability to control their personal information.⁶ The Commissioner's claim marks the first attempt in Australia to seek civil penalties through the Federal Court for contraventions of the *Privacy Act 1988* (Cth) (**Privacy Act**).

2. The Commissioner's claim

The Commissioner alleges that Facebook disclosed the personal and sensitive information of Australian Facebook users to the App during the period 12 March 2014 to 1 May 2015. The Commissioner argues this amounted to serious and/or repeated interferences with the privacy of the Australian users, in contravention of s13G of the Privacy Act.⁷

The Privacy Act establishes the 13 Australian Privacy Principles (**APPs**). These are binding principles that govern the collection, use and disclosure of personal information

by businesses (other than small businesses) and agencies operating in Australia.⁸ Both of the respondent Facebook entities are subject to Australian privacy laws because they conduct business in Australia, which means they are organisations with an Australian link within the meaning of s 5B(3) of the Privacy Act.⁹

APP 6 Contraventions

The Commissioner alleges that Facebook breached APP 6 by disclosing the users' personal information for a purpose other than that for which it was collected.¹⁰ An APP entity can only use or disclose personal information for a purpose for which it was collected, known as the 'primary purpose', or for a secondary purpose if an exception applies.¹¹

Facebook collected the users' personal information for the purpose of enabling those individuals to build an online social network with other users on the Facebook platform. Facebook contravened APP 6 because its disclosure of the personal information of users to the App was not for that same purpose.¹² The Commissioner argues that each separate disclosure constitutes a breach of the Privacy Act.¹³

APP 11 Contraventions

The Commissioner also alleges that Facebook breached APP 11 by failing to take reasonable steps to protect the users' personal information from unauthorised disclosure.¹⁴

¹ *Australian Information Commissioner v Facebook Inc* [2020] FCA 531; Office of the Australian Information Commissioner, 'Statement on Facebook proceedings' (Statement, 22 April 2020) <<https://www.oaic.gov.au/updates/news-and-media/statement-on-facebook-proceedings/>>.

² Australian Information Commissioner, 'Concise Statement', *Australian Information Commissioner v Facebook Inc & Anor*, NSD246/2020, 9 March 2020, [1].

³ Emma Graham-Harrison, Carole Cadwalladr and Hilary Osborne, 'Cambridge Analytica boasts of dirty tricks to swing elections', *The Guardian* (online), 20 March 2018 <<https://www.theguardian.com/uk-news/2018/mar/19/cambridge-analytica-execs-boast-dirty-tricks-honey-traps-elections>>.

⁴ Josh Taylor, 'Facebook sued by Australian information watchdog over Cambridge Analytica-linked data breach', *The Guardian* (online), 9 March 2020, <<https://www.theguardian.com/technology/2020/mar/09/facebook-cambridge-analytica-sued-australian-information-watchdog-300000-privacy-breaches>>.

⁵ Australian Information Commissioner, 'Statement of Claim', *Australian Information Commissioner v Facebook Inc & Anor*, NSD246/2020, 9 March 2020, [45].

⁶ Information Commissioner's Office, 'Investigation into the use of the data analytics in political campaigning' (11 July 2018), <<https://ico.org.uk/media/action-weve-taken/2259371/investigation-into-data-analytics-for-political-purposes-update.pdf>>; Information Commissioner's Office, 'Notice of Intent', (19 June 2018), <<https://ico.org.uk/media/2259364/facebook-noi-redacted.pdf>>; United States of America Before the Federal Trade Commission, In the Matter of Cambridge Analytica, LLC, a corporation, Opinion of the Commission, <https://www.ftc.gov/system/files/documents/cases/d09389_comm_final_opinionpublic.pdf>.

⁷ Australian Information Commissioner, above n 2, [7].

⁸ *Privacy Act 1988* (Cth) s 28(1) (**Privacy Act**).

⁹ Australian Information Commissioner, above n 5, [3.5]; *Australian Information Commissioner v Facebook Inc* [2020] FCA 531, [39] (Thawley JJ).

¹⁰ Australian Information Commissioner, above n 2, [17].

¹¹ *Privacy Act*, sch 1 APP 6.

¹² Australian Information Commissioner, above n 2, [17].

¹³ *Ibid*, [18].

An APP entity must take reasonable steps to protect personal information it holds from misuse, interference and loss, as well as unauthorised access, modification or disclosure. Where an entity subject to the APPs no longer needs personal information for any purpose for which the information may be used or disclosed under the APPs, the entity must take reasonable steps to destroy the information or ensure that it is de-identified, unless an exemption applies.¹⁵

The Commissioner alleges Facebook failed to take reasonable steps to protect those individuals' personal information from unauthorised disclosure. In fact, the Commissioner has claimed Facebook did not know the precise nature or extent of the personal information it disclosed to the App, nor did it prevent the app from disclosing the personal information it obtained to third parties.¹⁶ The full extent of the information disclosed, and to whom it was disclosed, is still not known.

Systemic Failures

The Commissioner has described Facebook's breaches of the APPs, and its failure to take steps to prevent the breaches, as 'systemic failures' to comply with Australia's privacy laws.¹⁷ Aside from Facebook's failure to protect personal information from misuse, it alleges Facebook's default settings left users 'unable to exercise consent or control' about how their personal information was disclosed to the App.¹⁸

To register for a Facebook account, a user was required to accept the Facebook website's Terms of Service (Statement of Rights and Responsibilities) and agree that

they had read the Facebook Data Use Policy.¹⁹ The Commissioner's Statement of Claim details the registration process, noting the documents were not located on the user registration page, but located in a separate page accessed via a link, and that registration could be completed without the user viewing either document. To modify their account privacy settings after registering, a user was required to search for settings across multiple screens.²⁰ In short, privacy by design was not a feature of Facebook's services.

3. Privacy implications

Some commentators have criticised the Commissioner for the length of time taken to launch action against Facebook, given that it commenced its investigation of Facebook over the breach in April 2018.²¹ Since then, Facebook has cooperated with international regulators and made changes to its privacy settings and permission controls. Facebook has also taken steps to restrict the information available to app developers.²²

There are several possible reasons for the Commissioner's timing, including resource constraints and the scope of the investigation. The timing is perhaps not as important as the Commissioner's message to entities operating in Australia. It is clear this behaviour will not be tolerated – even when it concerns big tech.

Implications for entities

The case could provide valuable judicial guidance in an area of law that is rarely litigated and will likely have compliance implications for entities dealing in data and operating in Australia.

The notion that entities are responsible for the personal information they collect and hold is a fundamental principle underpinning the Privacy Act.²³ The Commissioner alleges Facebook failed to take responsibility by allowing third party apps to access data without proper processes in place.

The App operated separately to the Facebook platform and requested data about Facebook users from Facebook, including data from users that did not install the App. At the time, Facebook relied on app developer self-assessments of their compliance with Facebook's policies and procedures, including the terms of the Platform Policy, rather than conducting its own assessments.²⁴ In doing this, Facebook effectively transferred responsibility for protecting users' personal information to the operators of third party apps.

OAIC's expectations of Facebook in relation to data sharing with third parties is relevant to all entities operating in Australia and sharing personal information under contractual arrangements. The Commissioner expected that Facebook should have, at a minimum, investigated whether the third-party App's requests for Facebook users' information complied with Facebook's own policies, maintained and regularly reviewed a record of the personal information it disclosed to the App, and ensured clear and specific consent was obtained directly from the users.²⁵

In May 2014, Facebook found the App did not meet Facebook's updated app requirements and rejected its application to access further information.²⁶ The Commissioner

¹⁴ Ibid, [19].

¹⁵ Privacy Act, sch 1 APP 11.

¹⁶ Australian Information Commissioner, above n 2, [3].

¹⁷ Ibid, [26].

¹⁸ Ibid, [25].

¹⁹ Australian Information Commissioner, above n 5, [11], [13].

²⁰ Australian Information Commissioner, above n 5, [16] – [24].

²¹ Office of the Australian Information Commissioner, 'Investigation into Facebook Opened' (Statement, 5 April 2018) <<https://www.oaic.gov.au/updates/news-and-media/facebook-and-cambridge-analytica/>>; Christopher Knaus, 'Australian privacy watchdog fails to deliver findings on Cambridge Analytica scandal after 18 months', *The Guardian* (online), 19 October 2019, <<https://www.theguardian.com/australia-news/2019/oct/19/australian-privacy-watchdog-fails-to-deliver-findings-on-cambridge-analytica-scandal-after-18-months>>.

²² Facebook, 'Actions We're Taking: Protecting Privacy and Security' (2018) <<https://about.fb.com/actions/protecting-privacy-and-security/>>.

²³ Privacy Act 1988 (Cth), sch 1 APP 11.

²⁴ Australian Information Commissioner, above n 5, [36.3].

²⁵ Ibid, [76].

²⁶ Carole Cadwalladr and Emma Graham-Harrison, 'Revealed: 50 million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach', *The Guardian* (online), 18 March 2018 <<https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election>>.

argues that at this point, Facebook should have reviewed the categories of data the App had previously collected and stopped disclosing the information to the App.²⁷ The Commissioner alleges that Facebook allowed the App to continue accessing users' personal information for a further 12 months.²⁸

Part of the Commissioner's claim focuses on Facebook's failure to take reasonable steps in the circumstances to protect Facebook users' personal information from unauthorised disclosure. Facebook's default settings facilitated the disclosure of personal information, including sensitive information, at the expense of user privacy. Its failure to take proper steps to protect Australians' personal information exposed its users' data to disclosure, monetisation and deployment for political profiling purposes beyond users' reasonable expectations.²⁹

The Commissioner alleged that Facebook's disclosure of the personal information of users breached the Privacy Act 'on each occasion' and that Facebook engaged in further breaches of the Privacy Act including by failing to take appropriate security steps. The Federal Court can impose a civil penalty of up to \$1.7 million for each serious or repeated interference with privacy, but has never been called to do so.³⁰ If the Court agrees with the Commissioner, Facebook could be found to have contravened the Act several hundred thousand times. It will be interesting for entities operating in Australia to see how the Court calculates a penalty if it finds against Facebook.

Implications for platform users

Our privacy laws seek to give us the knowledge to make an informed decision about how our data is used. But for customers trading their data for the use of 'free' services like Facebook, breaches such as this make it clear that this cannot be a fair, or even an informed exchange when we are not allowed to see what is being collected from us and for what purpose. This is one of the key points of the Commissioner's claim, which characterises Facebook's actions as a breach of privacy by complexity of terms of use.³¹ Facebook's opaque design meant users' ability to understand that their data was being disclosed to the App was diminished.³²

Facebook has already made changes to the layout of its privacy settings, but the continued use of data collecting methods and corresponding explanations that are not clear and transparent, means consumers remain far from being able to effectively control access to their personal information.³³ The Commissioner has increasingly raised the intersection between privacy and consumer law, and their 'complementary ability to address consumer harm',³⁴ and the Australian Competition and Consumer Commission (ACCC) was critical of the privacy practices of digital platforms in the Final Report of the Digital Platforms Inquiry.³⁵

The ACCC's report findings and recommendations complement the Commissioner's issues with Facebook. These include criticism of privacy policies as too complex and low on real choices for consumers, and recommendations that notification and consent should be strengthened, disclosures of personal information

should be 'fair', unfair contract terms should be prohibited, and individuals should have direct rights of action for breaches.³⁶ The ACCC is concerned that customers of the platforms are not provided with meaningful control over the use of their data, and the bargains struck between consumers and digital platforms lack bargaining power equality and are unfair.³⁷

Alongside *OAIC v Facebook*, we will watch ongoing scrutiny of digital platforms by the ACCC, including the introduction of compulsory fees for Facebook and Google's use of media content, and the ACCC's commencement of an action against Google for allegedly misleading consumers by failing to disclose that their applications may be collecting location information about users irrespective of their settings.³⁸ This action by ACCC is the first of what could be a series of consumer law actions against the digital platforms for their misleading privacy practices.

4. Conclusion

It is too early to comment on the potential outcome of the litigation, but the fact that the action has commenced is significant. The OAIC wants the Australian public to know that it takes its privacy rights seriously. Making an example of a major international player that has breached Australian law sends this message. The action can also be seen as part of the increasing regulatory pressure on big tech operations in Australia, alongside concurrent work by the ACCC. The continuing rise of digital platforms means that the uses and abuses of platform users' personal data will continue to be a key issue for both privacy and consumer law.

27 Australian Information Commissioner, above n 2, [19].

28 Ibid, [15].

29 Office of the Australian Information Commissioner, 'Commissioner launches Federal Court action against Facebook' (Statement, 9 March 2020) <<https://www.oaic.gov.au/updates/news-and-media/commissioner-launches-federal-court-action-against-facebook/>>.

30 Privacy Act 1988 (Cth) s 13G; Office of the Australian Information Commissioner, 'Chapter 6: Civil penalties – serious or repeated interference with privacy and other penalty provisions' (Guide to privacy regulatory action, May 2018), <<https://www.oaic.gov.au/about-us/our-regulatory-approach/guide-to-privacy-regulatory-action/chapter-6-civil-penalties/>>.

31 Australian Information Commissioner, above n 2, [25].

32 Ibid.

33 Karim Amer, Jehane Noujaim, 'The Great Hack' (2019), documentary film.

34 Office of the Australian Information Commissioner, 'Privacy implications of the Digital Platforms Inquiry' (Speech 20 November 2019), <<https://www.oaic.gov.au/updates/speeches/privacy-implications-of-the-digital-platforms-inquiry/>>.

35 Australian Competition and Consumer Commission, *Digital Platforms Inquiry - Final Report*, 26 July 2019, <<https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>>.

36 Ibid.

37 Australian Competition and Consumer Commission, above n 34.

38 *Australian Competition and Consumer Commission v Google Australia Pty Ltd & Anor*, NSD1760/2019, 29 October 2019.