

Out of Sight But Not Out of Jurisdiction – Application of the *Privacy Act 1988* (Cth) to Extra-Territorial Companies

Marlia Saunders, partner and **Jessie Nygh**, lawyer at Thomson Geer, discuss the recent findings of the Full Federal Court in *Facebook Inc v the Australian Information Commissioner* and what it means to ‘carry on business’ in Australia in the digital age.¹

Introduction

It may, for the average Australian, feel like the Cambridge Analytica scandal is but a distant memory. Mark Zuckerberg apologised, Facebook rebranded to Meta and the Netflix smash hit *The Social Dilemma* highlighted how social media companies use data to target advertising to users. Nevertheless, our courts are still determining the parameters for the use of personal data by corporations like Facebook. In a recent decision, the Full Court of the Federal Court of Australia clarified that Facebook, a corporation without a shopfront or employees in Australia, ‘carries on business’ in Australia, at least for the purposes of the *Privacy Act 1988* (Cth) (**Privacy Act**).

Background

As any astute user of the internet would know, Meta provides users globally with access to their various social media platforms, including Facebook. In order to create a Facebook account, users input personal information including their name, age, email address or, from 2015, their telephone number. This account can then be used to connect with other users and build an online social network. Users may also find themselves inputting further personal information into the platform, including data relating to a person’s hometown, educational history, work experience, sexual orientation, relationship status, occupation, political and religious views, interests and photographs. Facebook then monetises this personal information in the form of advertising revenue, including targeted advertisements, which may account for the occasional feeling that your phone is listening to you.

It is alleged that between 12 March 2014 and 1 May 2015, Facebook released users’ personal information to a third party application called ‘*This is Your Digital Life*’. Approximately 50 Australians installed the application and permitted access to their personal information. However, through the use of Facebook’s social network and the connections of those 50 or so people, the application was able to obtain personal information (and in some cases sensitive information) from approximately 311,127 Australian Facebook users. The application then sold the information to political consulting firm Cambridge Analytica Ltd, where it is alleged the personal information was at risk of being used for political profiling.

Key Takeaways

- The Privacy Act specifically envisioned that it could be possible to carry on business in Australia without having a physical presence in Australia.
- As such, the decision of the Full Court indicates the court is willing to construe the legislation in a way that makes it possible for the Commissioner to bring cases in Australia where the ‘carrying on business’ might seem tenuous on first glance.
- It is possible that the decision of the Full Court may impact other foreign corporations which install cookies on Australian devices. Nonetheless, because the applicable test is one of fact finding, the exposure risk will depend on the circumstances in each individual case.
- The Full Court has indicated, at least in respect of privacy matters, a reluctance to apply case law which considered historical technologies to a modern landscape in circumstances where present day technology was not in existence in its relevant form at the time of the decision.

In proceedings brought by the Australian Information Commissioner, the Commissioner alleged that:

1. Facebook disclosed users’ personal information for a purpose other than that for which it was collected, in breach of the Australian Privacy Principle (**APP**) 6;
2. Facebook failed to take reasonable steps to protect the users’ personal information from unauthorised disclosure in breach of APP 11.1(b); and
3. these breaches amounted to serious and/or repeated interferences with the privacy of the users, in contravention of s 13G of the *Privacy Act*.

As a preliminary question, the Commissioner was required to establish a *prima facie* case that Facebook:

1. carried on business in Australia under s 5B(3)(b); and
2. collected or held personal information in Australia under s 5B(3)(c).

The matter proceeded before Justice Thawley at first instance.

¹ [2022] FCAFC 9.

Judgment at First Instance

The term ‘carrying on business’ for the purpose of the *Privacy Act* may have different meanings depending on context.²

In order to determine whether a company is ‘carrying on business’ in Australia, there needs to be a sufficient connection to the country. Simply transacting in Australia is not sufficient to establish that a company is carrying on business. That being said, it is possible that a company which does conduct business in Australia, but does not have a physical presence in Australia, may be found to carry on their business here.³ The court is invited to engage in a fact finding expedition in order to determine whether a sufficient connection is established in each circumstance.

In their submissions, the Commissioner placed significant emphasis on the Explanatory Memorandum to the *Privacy Amendment (Enhancing Privacy Protections) Bill 2012* (Cth), which amended s 5B of the *Privacy Act*. The Explanatory Memorandum states, in its relevant parts:

The collection of personal information ‘in Australia’ under paragraph 5B(3)(c) includes the collection of personal information from an individual who is physically within the borders of Australia or an external territory, by an overseas entity.

For example, a collection of personal information is taken to have occurred ‘in Australia’ where an individual is physically located in Australia or an external Territory, and the information is collected from that individual via a website, and the website is hosted outside of Australia, and owned by a foreign company that is based outside of Australia and that is not incorporated in Australia. It is intended that, for the operation of paragraphs 5B(3)(b) and (c) of the *Privacy Act*, entities such as those described above who have an online presence (but no physical presence in Australia), and collect personal information from people who are physically in Australia, carry on a ‘business in Australia or an external territory’.

The Commissioner submitted that, in installing, operating and removing cookies from Australian users’ devices, Facebook was both carrying on its business in Australia (for the purpose of s 5B(3)(b)) but also collecting and holding personal information (for the purpose of s 5B(3)(c)). Facebook’s 2013 Data Use Policy described cookies as:

Small pieces of data that are stored on your computer, mobile phone or other device. ... We use technologies like cookies, pixels, and local storage... to provide and understand a range of products and services.

In response, Facebook submitted the process of installing, operating and removing cookies was not performed by any person in Australia. Instead, on their submission, the cookies were uploaded overseas and then later downloaded

in Australia by Facebook users. To this point, Facebook relied on Justice Barrett’s judgement in *Campbell v Gebo Investments (Labuan) Ltd*, where His Honour opined:

Advances in technology making it possible for material uploaded on to the Internet in some place unknown to be accessed with ease by anyone in Australia with Internet facilities who wishes (or chances) to access it cannot be seen having carried with them any alteration of principles as to the place carrying on business developed at times when such communication was unknown. [...]

Unless there is evidence of activities in Australia of placing material on the Internet or processing and dealing with inquiries or applications received by Internet, the question whether (a corporation) carried on business in Australia must be addressed by reference to the elements of the evidence that go beyond internet solicitation.⁴

On balance, Justice Thawley was satisfied that the Commissioner had established that it was arguable that some of the data processing activities carried on by Facebook, including the installation of cookies onto users’ devices, occurred in Australia.⁵ His Honour found this to be so even though the evidence did not establish that any employee of Facebook was physically located in Australia. His Honour was also satisfied that Facebook directly collected and stored information through the use of cookies on users’ devices within Australia for the purpose of s 5B(3)(c).

Appeal

The Full Court upheld the decision of Justice Thawley, reasoning:

The acts occurring in Australia, on Australian users’ devices, being the installation and deployment of cookies to collect information and help deliver targeted advertising, and the management of the Graph API to facilitate the collection of even more data may lack an intrinsic commercial character in and of themselves, but they are integral to the commercial pursuits of Facebook.⁶

The Full Court considered that the use of cookies by Facebook is ‘one of the things which makes Facebook work’.⁷

The Full Court considered the concept of carrying on business in Australia must reflect the type of business being conducted. The Full Court also observed that the cases which have historically discussed the meaning of ‘carrying on business’ were not reflective of the current and emerging technological advances in business.⁸

The Full Court also upheld that the collection of users’ personal information through the use of cookies installed on their devices occurred within Australia for the purposes of s 5B(3)(c).⁹

2 *Tiger Yacht Management Ltd v Morris* (2019) 268 FCR 548, [50].

3 *Anchorage Capital Pty Ltd v ACPA Pty Ltd* (2018) 259 FCR 514, [99].

4 (2005) 190 FLR 209, [33]-[34].

5 *Australian Information Commissioner v Facebook Inc (No 2)* [2020] FCA 1307, [137] (Thawley J).

6 *Facebook Inc v Australian Information Commissioner* [2022] FCAFC 9, [9] (Allsop CJ).

7 *Ibid* [43] (Perram J).

8 *Ibid* [74] (Perram J).

9 *Ibid* [143] (Perram J).