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CARRYING ON A BUSINESS IN AUSTRALIA USING COOKIES: *FACEBOOK INC V AUSTRALIAN INFORMATION COMMISSIONER* (2022) 402 ALR 445

I Introduction

The decision of *Facebook Inc v Australian Information Commissioner* (2022) 402 ALR 445[1] ('*Facebook v AIC*') confirmed the decision of Thawley J of the Federal Court of Australia ('Federal Court') that Facebook Inc was carrying on a business in Australia which was connected to the Cambridge Analytica breach. The case involved consideration of the need for an 'Australian link' under the extra-territorial application of the *Privacy Act 1988* (Cth) ('*Privacy Act*')[2] — specifically whether Facebook Inc was 'carrying on a business' in Australia through the use of cookies and Graph API services. Cookies are small pieces of data stored on an electronic device (computer or mobile phone) and allow internet browsers or applications to track and save information about each user's session.[3] In contrast, a graph API is a facility which allows an individual to log into an application using their login details from another third party application,[4] for example an individual using their Facebook details to log in to Telstra.[5] In *Facebook v AIC*, the Full Federal Court ('FFC') also briefly considered whether Facebook Inc held or collected personal information for the purposes of the extra-territorial application. *Facebook v AIC* provides useful commentary regarding the extra-territorial application of the *Privacy Act*, which has not been litigated in detail previously. The decision is also very relevant given the federal government's review of the *Privacy Act* and proposed reform to modify the extra-territorial application of the *Privacy Act*, and generally to increase regulation of social media and online platforms.

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1 (2022) 402 ALR 445 ('*Facebook v AIC*').

2 *Privacy Act 1988* (Cth) ss 5B(1A), (3)(b)–(c) ('*Privacy Act*').

3 *Facebook v AIC* (n 1) 454–5 [39]–[40]; See also Salinger Privacy Consulting, 'Cookies and Other Online Identifiers' (Research Paper, 15 June 2020) ch 2, 14–15.

4 *Facebook v AIC* (n 1) 453 [35].

5 Ibid 456–9 [48]–[57].

II Background

A *Facts*

In early 2020, the Australian Information Commissioner ('AIC') commenced proceedings against Facebook Inc and Facebook Ireland (together, 'Facebook'). The AIC alleged that Facebook had, in relation to the Cambridge Analytica breach, committed serious and/or repeated interferences with privacy in contravention of the *Privacy Act*.[6]

The Cambridge Analytica breach occurred in the 2010s and involved the collection of personal data from millions of Facebook users without their consent by British consulting firm Cambridge Analytica, through an application known as 'This Is Your Digital Life'.[7] The application invited persons to log in using their Facebook account.[8] Users who logged in as such were asked for permission to access their personal information held by Facebook, as well as the personal information of their Facebook friends.[9] Under the terms which governed the use of the Facebook login, the application's developers were not permitted to use the information other than for the purposes of the application.[10] The developers breached this requirement by permitting the personal information to be used for political campaigns.[11]

The AIC alleged that 53 Facebook users in Australia installed the application and had their data provided. The personal information of over 300,000 people who had not installed the app, but were Facebook friends of the users, was also provided.[12]

The AIC alleged that Facebook Ireland and Facebook Inc both breached s 15 of the *Privacy Act*.[13] Section 15 of the *Privacy Act* provides that an organisation must not act, or engage in a practice, that breaches an Australian Privacy Principle ('APP').[14] The AIC alleged that APP 6 and 11.1(b) were breached.[15] APP 6 prevents an organisation which has collected information for a particular purpose from using or disclosing it for another purpose.[16] APP 11.1(b) requires an organisation which

6 *Privacy Act* (n 2) s 13G; *Australian Information Commission v Facebook Inc* (2020) 144 ACSR 88, 89 [1]–[2] ('*AIC v Facebook*'). See also Brendan Scott, 'If You Use Cookies in Australia Are You Carrying on a Business Here?' (2022) 24(8) *Internet Law Bulletin* 146, 146.

7 *Facebook v AIC* (n 1) 449–50 [15]–[16] (emphasis omitted).

8 Ibid 450 [17].

9 Ibid.

10 Ibid 450 [18].

11 Ibid.

12 Ibid 450 [19].

13 Ibid 450 [19]–[20].

14 See *Privacy Act* (n 2) sch 1 for an overview of the Australian Privacy Principles.

15 Ibid sch 1 cls 6, 11.1(b); *Facebook v AIC* (n 1) 450 [20].

16 *Privacy Act* (n 2) sch 1 cl 6.1; *Facebook v AIC* (n 1) 450 [20].

holds personal information to take reasonable steps to protect that information from unauthorised disclosure.[17]

B *Australian Information Commissioner v Facebook Inc*

The AIC commenced proceedings against Facebook Inc and Facebook Ireland on 9 March 2020.[18] The AIC alleged that Facebook Inc and Facebook Ireland contravened s 13G of the *Privacy Act*, which provides that an entity contravenes the section — and is therefore liable to a civil penalty — if it acted or engaged in a practice that was a serious and/or repeated interference with the privacy of an individual.[19]

As Facebook Inc is a 'person in a foreign country'[20] the AIC was required to show that they had a 'prima facie case' that Facebook Inc was carrying on a business in Australia, such that leave could be granted to serve proceedings overseas.[21]

Justice Thawley of the Federal Court accepted that the AIC had a prima facie case and therefore granted leave for the AIC to serve originating process documents on Facebook Inc in the United States.[22] Facebook then conditionally appeared to set aside the service, but Thawley J rejected this application.[23] Facebook Inc appealed Thawley J's decision to the FFC.[24]

C *Facebook Inc v Australian Information Commissioner*

In *Facebook v AIC*, the FFC confirmed Thawley J's previous decision that Facebook Inc was indeed carrying on a business in Australia.[25] Justice Perram focused on whether Facebook Inc had an 'Australian link' as required under s 5B(3) for the extra-territorial application of the *Privacy Act*. This in turn depended on whether: (1) Facebook Inc was carrying on a business in Australia; and (2) whether the personal information was collected or held by Facebook Inc in Australia.[26]

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17 *Privacy Act* (n 2) sch 1 cl 11.1(b); *Facebook v AIC* (n 1) 450 [20].

18 *AIC v Facebook* (n 6) 89 [1]–[2].

19 Ibid; *Privacy Act* (n 2) s 13G.

20 *Facebook v AIC* (n 1) 449 [12].

21 Ibid; *Federal Court Rules 2011* (Cth) rr 10.42, 10.43(1)–(4).

22 *AIC v Facebook* (n 6) 96 [40]; *Facebook v AIC* (n 1) 449 [12].

23 *Australian Information Commissioner v Facebook Inc [No 2]* [2020] FCA 1307, [198]; *Facebook v AIC* (n 1) 449 [12].

24 *Facebook v AIC* (n 1) 449 [12].

25 Ibid 481 [163].

26 *Privacy Act* (n 2) s 5B(3); *Facebook v AIC* (n 1) 450–1 [20]–[25].

III Comment

A *Carrying On a Business*

To determine whether Facebook Inc carried on a business in Australia, Perram J first considered the nature of the business being conducted by Facebook Inc, specifically the relationship between Facebook Inc and Facebook Ireland.[27] Facebook Inc provides the Facebook platform to users located in North America, whilst Facebook Ireland is a subsidiary of Facebook Inc and provides the Facebook platform to users located anywhere else in the world.[28]

Justice Perram considered that the evidence presented a prima facie case that Facebook Inc was engaged in the business of providing data processing services to Facebook Ireland.[29] This evidence was an agreement between Facebook Ireland and Facebook Inc entitled 'Data Transfer and Processing Agreement' ('Data Processing Agreement').[30] The Data Processing Agreement identified the data which Facebook Ireland was to transfer to Facebook Inc for processing, as well as the nature of the processing which Facebook Inc was to carry out.[31] Justice Perram was satisfied that this evidence sufficed in establishing that Facebook Inc was providing data processing services to Facebook Ireland and therefore proceeded in considering whether Facebook Inc was carrying on a business in Australia.[32]

The FFC concluded that Thawley J was correct in rejecting Facebook Inc's argument that, assuming it was conducting a business, it was not conducting a business in Australia. This is because the business being conducted by Facebook Inc included two elements under the Data Processing Agreement of installing the cookies on the users' devices and the provision to Australian application developers of an interface known as the Graph API.[33]

1 *Cookies and Graph API*

The FFC accepted that in the conduct of its business of providing data processing services to Facebook Ireland, Facebook Inc installed cookies on devices in Australia and this activity occurs in Australia.[34]

27 *Facebook v AIC* (n 1) 452–3 [28]–[34].

28 Ibid 449 [13].

29 Ibid 452 [29].

30 Ibid.

31 Ibid.

32 Ibid 453 [33].

33 Ibid 453 [35].

34 Ibid 456 [47].

Facebook Inc argued that expert evidence was necessary regarding the specific nature of cookies.[35] The FFC rejected this on the basis that the Data Processing Agreement (as well as other supporting documents) provided sufficient evidence that Facebook Inc installed cookies on terminal devices.[36]

Facebook also relied on the case of *Gebo Investments (Labuan) Ltd v Signatory Investments Pty Ltd*[37] ('*Gebo*') as authority for the proposition that a web page is not located where the user who accesses the web page is located.[38] Facebook Inc argued that the installation of a cookie involves purely an act of uploading some data and the corresponding download by the user.[39] This was rejected by Perram J, who held that there was prima facie evidence that cookies are 'small pieces of data that are stored on your computer' and they are not analogous to using browsers to examine documents located on servers outside of Australia.[40] Justice Perram therefore held that cases such as *Gebo* do not have any bearing on the significance of the location where the cookie installation occurs.[41] Justice Perram further held that 'cookies are central to the Facebook platform' and are not 'an outlier activity'.[42]

With respect to the Graph API, this is a facility which allows third party applications to utilise the Facebook login.[43] For example in the context of Facebook, this involved Telstra allowing customers to log in to the Telstra website using their Facebook login.[44]

Facebook Inc argued that it completes processes in the United States and Sweden which then subsequently result in the Facebook login being available for commercial use by developers in Australia via the Graph API.[45] Facebook Inc argued therefore that there was no evidence that anything was installed or operated in Australia through the Graph API.[46] This argument was rejected by the FFC which held that it was incorrect to focus on the precise internal mechanics of the Graph API and each individual login.[47] Instead, the necessary focus involved a consideration of the business of providing the Facebook login functionality to Australian developers and whether Facebook Inc, on behalf of Facebook Ireland, makes the Facebook login

35 Ibid 454 [38].

36 Ibid.

37 (2005) 190 FLR 209.

38 *Facebook v AIC* (n 1) 454 [39].

39 Ibid.

40 Ibid.

41 Ibid.

42 Ibid 455 [40], [43].

43 Ibid 453 [35].

44 Ibid 458–9 [56]–[57].

45 Ibid 457 [53].

46 Ibid.

47 Ibid 459 [59].

available to Australian developers in Australia.[48] The FFC held that this was clearly the case.[49]

It is interesting therefore to observe the distinction between the cookies and Graph API. Whilst the FFC considered that Facebook's main business was the installation and removal of the cookies in Australia, the FFC instead held that there was no installation of the Graph API in Australia, but rather focused on the business of providing the Facebook login functionality to Australian developers. Despite the distinction, Perram J's judgment provides clear commentary on the nature of cookies and the Graph API. It appears that the FFC was willing to take a relatively flexible approach in coming to the above conclusions, as they focused heavily on the Data Processing Agreement and other associated documents to determine that a business was being carried on. Despite this flexible approach, both Allsop CJ[50] and Perram J[51] emphasised the importance of context in determining the meaning of 'carrying on a business' from case to case.

B *Further Arguments*

Facebook Inc raised three further arguments contesting that they were carrying on a business in Australia. These three arguments were all rejected by the FFC, further supporting the flexible approach that the FFC adopted in determining whether an online entity is carrying on a business in Australia.

1 *Absence of Physical Indicia*

Justice Perram rejected Facebook Inc's argument that it was not carrying on a business in Australia as it had no physical presence in Australia (being no physical assets, customers, or revenues in Australia).[52] Given that Facebook's main business in Australia was the installation of cookies and management of the Graph API, this appears to be an appropriate conclusion by the FFC. Despite this, Perram J's analysis highlights the need for considering statutory context in coming to such conclusions.[53]

The FFC held that 'carrying on a business' is not defined in the *Privacy Act* and therefore its meaning is informed by the statute itself.[54] Considering the object of the *Privacy Act* and the Explanatory Memorandum to the Bill which introduced

48 Ibid.

49 Ibid 460 [65].

50 Ibid 447 [5]–[6].

51 Ibid 461–2 [70].

52 Ibid 461 [69].

53 Ibid 461–2 [70].

54 Ibid.

s 5B(3) of the *Privacy Act*,[55] the FFC held that the *Privacy Act* has 'as its focus a non-material concept' being information and therefore the meaning of 'carrying on a business' is not reliant on the need for physical presence.[56]

In making this argument, Facebook Inc again relied on the case of *Gebo*. This case provided that in the situation where a business simply has a website which is accessed by individuals outside the jurisdiction, then there is a need for physical activity in Australia through human instrumentalities in order for the entity to be carrying on a business.[57] Justice Perram highlighted that the situation in the case was distinct to that in *Gebo*, as the case did not simply involve management of a website.[58]

2 *Commercial Quality of Facebook's Activities*

Facebook Inc submitted that its activities in Australia lack a commercial quality because Facebook Inc is not engaged in any commerce in Australia.[59] Facebook Inc cited the case of *Luckins*.[60] In *Luckins*, the High Court left unanswered the question of whether a business is carried on in a particular location where there are no commercial activities undertaken.[61] Justice Perram decided it was appropriate to answer this question in the current proceedings.[62] Facebook Inc's business of providing data processing services to Facebook Ireland is conducted from its data centres which are not in Australia. Despite this, the FFC held that Facebook Inc was carrying on a business in Australia. The FFC considered the general description given by Mason J in *Hope v Bathurst City Council*[63] of the nature of the carrying on of a business as a collection of 'activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis'.[64] The FFC considered that under this test, a company has been previously held to conduct a business where it undertakes a single commercial transaction in a place where it otherwise does not conduct

55 Explanatory Memorandum, Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth) 218.

56 *Facebook v AIC* (n 1) 461–2 [70]–[72].

57 Ibid 464 [80]–[81]. The need for human instrumentalities was rejected in the case of *Valve Corporation v Australian Competition Consumer Commission* (2017) 351 ALR 584.

58 *Facebook v AIC* (n 1) 465 [83].

59 Ibid 467 [93].

60 *Luckins (Receiver and Manager of Australian Trailways Pty Ltd) v Highway Motel (Carnarvon) Pty Ltd* (1975) 133 CLR 164 ('*Luckins*').

61 *Facebook v AIC* (n 1) 467 [94]–[95].

62 Ibid 467 [93].

63 (1980) 144 CLR 1.

64 *Facebook v AIC* (n 1) 467–8 [96].

business.[65] The FFC held that the position should be the same where a company does not engage in any commercial activity, but nonetheless conducts a business in a foreign jurisdiction.[66]

3 *Floodgates*

Facebook Inc argued that if the FFC were to conclude that the installation of cookies involves 'carrying on a business' in the absence of physical indicia, then this would open the floodgates for many online businesses in terms of breaching the *Privacy Act*.[67] The FFC stated that it was outside the scope of the judgment to consider the floodgates argument.[68] The FFC decision was only considering whether there was extra-territorial application of the *Privacy Act* to Facebook Inc, not the AIC's broader submission that Facebook Inc had committed a serious and/or repeated interference with privacy in potentially breaching the APPs in question. Justice Perram further stated that 'the menace of opened floodgates from which Facebook Inc was commendably keen to protect the Australian legal system, is in my view very much overstated'.[69]

The FFC's approach would 'open the floodgates' for the extra-territorial application of the *Privacy Act* to many online businesses, even simply those businesses with cookies in Australia. Such businesses will therefore need to be vigilant in their business practices. Again however, Allsop CJ[70] and Perram J[71] both emphasised the importance of context in determining whether a business is being conducted, which counters the 'floodgates' argument. In addition, the floodgates argument is premature, given that the AIC's proceedings against Facebook Inc regarding the Cambridge Analytica breach are yet to be heard. Nonetheless, it appears necessary that the FFC ruled in this way to ensure that in today's digital age, online businesses (both within and outside Australia) are respecting people's privacy and using personal information for its intended purpose.

C *Did Facebook Inc Hold or Collect Personal Information?*

As mentioned above, it was also necessary for the FFC to consider whether Facebook Inc held or collected personal information for the purposes of establishing that Facebook Inc had an 'Australian link' under s 5B(3) for the extra-territorial application of the *Privacy Act*. In contrast to the consideration of whether Facebook was carrying on a business, the FFC considered this issue briefly.

65 Ibid 467–9 [96]–[102], citing *Smith v Capewell* (1979) 142 CLR 509 and *Lowe v Cant* [1961] SASR 333.

66 *Facebook v AIC* (n 1) 469 [103].

67 Ibid 455–6 [44]–[45], 463 [75].

68 Ibid 455 [44]–[45].

69 Ibid 463 [75].

70 Ibid 447 [5]–[6].

71 Ibid 461–2 [70].

The AIC submitted that Facebook Inc directly collected the personal information through its caching servers, cookies and instantaneous transfer of personal information from Facebook Inc's data centres to Facebook Ireland.[72] The FFC held that the caching servers in Australia were not operated by Facebook Inc and therefore not used to 'collect' personal information.[73] The FFC also did not accept Thawley J's finding that it was inferable that Facebook Inc collected data from Australian users through instantaneous servers.[74]

The FFC ultimately found that there was a prima facie case that installing cookies on users' devices involved the collection of personal information. Justice Perram highlighted that cookies are involved in the process of creating targeted advertising and therefore it can be inferred that they were used for the collection of personal information by Facebook Inc.[75]

The FFC also held that Facebook Inc did not 'hold' the information.[76] Again, this was because Facebook Inc did not operate caching servers and did not possess or control the devices with the cookies.[77]

IV Case Impact and Broader Implications

The FFC therefore held that there was a prima facie case that Facebook Inc was carrying on a business in Australia and was collecting personal information through use of its cookies to establish an 'Australian link' under the *Privacy Act*.[78] The AIC therefore has jurisdiction to serve proceedings on Facebook with regards to the Cambridge Analytica breach.

Facebook v AIC provides useful commentary on s 5B(3) of the *Privacy Act* regarding the 'Australian link'. The decision is particularly helpful as s 5B(3) of the *Privacy Act* was introduced fairly recently in 2012 and had not been litigated. However, it is important to note that s 5B(3) may change. In 2020, the Attorney-General's Department commenced a review of the *Privacy Act* and published an Issues Paper for stakeholder submissions.[79] In October 2021, the Attorney-General's Department published a Discussion Paper explaining the recommended changes

72 Ibid 472 [119].

73 Ibid 474 [131].

74 Ibid 477–9 [144]–[151].

75 Ibid 476 [137].

76 Ibid 470–1 [108]–[114].

77 Ibid 479–81 [154]–[162].

78 *Privacy Act* (n 2) s 5B(3).

79 Attorney-General's Department, *Privacy Act Review* (Issues Paper, October 2020) ('Privacy Act Issues Paper').

to the *Privacy Act*.[80] The then Attorney-General's Department also released an exposure draft of the Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 (Cth) ('Online Privacy Bill').[81] The exposure draft of the Online Privacy Bill was not tabled in Parliament before the federal election in May 2022. The Attorney-General's Department is currently in the process of reviewing submissions on its Discussion Paper.[82] The current Attorney-General, Mark Dreyfus, has indicated that following review of the submissions by stakeholders on the Discussion Paper, the Attorney-General's Department will publish a final report of the proposed reforms to the *Privacy Act*.[83] The Attorney-General has indicated that the final report will be brought into the public domain for debate, prior to introducing the Bill in Parliament, in the coming months.[84]

The Online Privacy Bill recommended the removal of the requirement that an organisation has to collect or hold information from Australian sources under s 5B(3)(c). Instead, it has been suggested that this requirement is incorporated as a consideration of whether an organisation is carrying on a business in Australia under s 5B(3)(b).[85] The fact that the AIC only succeeded on one of three grounds regarding whether Facebook Inc was collecting or holding information supports the proposition that these proposed changes may be necessary, although these changes have not yet been considered by Parliament.

The proposed removal of the requirement under s 5B(3)(c) that an entity collects or holds information was recommended by the current AIC, Angelene Falk,[86] as part of the Attorney-General's Department's review of the *Privacy Act*.[87] The recommendation was made on the basis that the requirement to hold or collect information under the *Privacy Act* was considered a 'threshold issue' which can be resource-intensive to establish jurisdiction for the extra-territorial application.[88] Further, this recommendation was made to align the *Privacy Act* with New Zealand's privacy

80 Attorney-General's Department, *Privacy Act Review* (Discussion Paper, October 2021) ('Privacy Act Discussion Paper').

81 Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 (Cth) (Exposure Draft).

82 Tom Burton, 'Dreyfus Pledges Sweeping Data Privacy Reforms', *Australian Financial Review* (online, 29 June 2022) <https://www.afr.com/politics/federal/dreyfus-pledges-sweeping-data-privacy-reforms-20220627-p5awvw>.

83 Ibid.

84 Ibid.

85 Explanatory Paper, Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 (Cth) (Exposure Draft) 22–3 ('Explanatory Paper for Online Privacy Bill').

86 Angelene Falk, Office of the Australian Information Commissioner and Privacy Commissioner, Submission to the Attorney-General's Department, *Privacy Act Review: Issues Paper* (11 December 2020) 113–5.

87 Privacy Act Issues Paper (n 79); Privacy Act Discussion Paper (n 80) 159.

88 Falk (n 86) 114 [8.30]–[8.31]. See also: Explanatory Paper for Online Privacy Bill (n 85) 22; Privacy Act Discussion Paper (n 80) 159.

legislation,[89] the *Privacy Act 2020* (NZ). Considering these factors and the FFC's brief consideration of this issue, this reform seems appropriate.

Although the FFC adopted a broad interpretation in ruling that Facebook Inc was carrying on a business in Australia, it remains to be seen whether this does in fact expand the boundaries for the AIC to serve proceedings on foreign entities. This depends on the outcome of the AIC's case against Facebook Inc. The proceedings will involve a consideration of whether Facebook Inc did in fact breach the APPs in question, specifically whether Facebook Inc's actions amounted to a serious and/or repeated interference with the privacy of Australians under s 13G of the *Privacy Act* (as raised in the initial Federal Court proceeding).[90] This is the first case in fact to consider whether an organisation's actions amounted to a serious and/or repeated interference with privacy under s 13G of the *Privacy Act* and therefore, it will be interesting to see what eventuates.

If the AIC is successful in establishing that there has been a serious and/or repeated interference with privacy of Australian individuals under s 13G of the *Privacy Act*, then Facebook Inc will be liable to civil penalties. It is unclear whether any penalty will be calculated based on one single breach, or rather multiple breaches for each interference with privacy, by Facebook Inc. Either way, the penalties will arguably be significant given that the personal data of over 300,000 Facebook users was in fact obtained.

V Conclusion

The decision in *Facebook v AIC* indicates that the FFC is willing to adopt a flexible approach, considering context, in determining whether an online entity is conducting a business in Australia for the extra-territorial application of the *Privacy Act*. The flexibility of this approach seems appropriate in the digital age where it is becoming increasingly difficult to regulate the activities of online businesses. The decision also supports the federal government's approach to not only increase regulation of online businesses, but also to remove the requirement that an online business collects or holds information to establish an 'Australian link' for the extra-territorial application of the *Privacy Act*. It remains to be seen what eventuates with the AIC's proceedings against Facebook, but nonetheless *Facebook v AIC* touches on very relevant topics and provides insight into the likely future regulation of online businesses serving customers in Australia.

89 Falk (n 86) 115 [8.34].

90 *AIC v Facebook* (n 6) 89 [1]–[2].