

NOTICE OF FILING

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Details of Filing

Document Lodged: Concise Statement
File Number: NSD246/2020
File Title: AUSTRALIAN INFORMATION COMMISSIONER v FACEBOOK INC &
ANOR
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 9/03/2020 12:32:12 PM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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CONCISE STATEMENT

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL

NO NSD OF 2020

AUSTRALIAN INFORMATION COMMISSIONER

Applicant

FACEBOOK INC

First Respondent
and another named in the Schedule

A. INTRODUCTION

1. The Australian Information Commissioner (**Commissioner**) alleges that, during the period 12 March 2014 to 1 May 2015 (the **Relevant Period**), Facebook Inc and Facebook Ireland Ltd (together, **Facebook**) seriously and/or repeatedly interfered with the privacy of approximately 311,127 Australian Facebook Users (**Affected Australian Individuals**) by disclosing their personal information (including sensitive information) to a third party application (the **“This is Your Digital Life” App**).
2. Facebook disclosed personal information of the Affected Australian Individuals. Most of those individuals did not install the “This is Your Digital Life” App; their Facebook friends did. Unless those individuals undertook a complex process of modifying their settings on Facebook, their personal information was disclosed by Facebook to the “This is Your Digital Life” App by default. Facebook did not adequately inform the Affected Australian Individuals of the manner in which their personal information would be disclosed, or that it could be disclosed to an app installed by a friend, but not installed by that individual.
3. Facebook failed to take reasonable steps to protect those individuals’ personal information from unauthorised disclosure. Facebook did not know the precise nature or extent of the personal information it disclosed to the “This is Your Digital Life” App. Nor did it prevent the app from disclosing to third parties the personal information obtained. The full extent of the information disclosed, and to whom it was disclosed, accordingly cannot be known. What is known, is that Facebook disclosed the Affected Australian Individuals’ personal information to the “This is Your Digital Life” App, whose developers sold personal information obtained using the app to the political consulting firm Cambridge Analytica, in breach of Facebook’s policies.
4. As a result, the Affected Australian Individuals’ personal information was exposed to the risk of disclosure, monetisation and use for political profiling purposes.

Filed on behalf of the Applicant, Australian Information
Commissioner

File ref: 20201855

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1903

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5. The Commissioner alleges that Facebook's disclosure of the Affected Australian Individuals' personal information for a purpose other than that for which it was collected breached Australian Privacy Principle (**APP**) 6.
6. The Commissioner further alleges that Facebook's failure to take reasonable steps to protect the Affected Australian Individuals' personal information from unauthorised disclosure breached APP 11.
7. These breaches amounted to serious and/or repeated interferences with the privacy of the Australian Affected Individuals, in contravention of s 13G of the *Privacy Act 1988* (Cth) (**Privacy Act**).

B. IMPORTANT FACTS GIVING RISE TO THE CLAIM

(1) How Facebook works

8. The website www.facebook.com, which is also accessible via Facebook's associated mobile applications (**Facebook Website**), allows users who create an account (**Users**) to build an online social network with other Users on the Facebook Website.
9. The accumulation of Users' personal information is integral to Facebook's business. Facebook encourages Users to share detailed personal information, such as their real name, date of birth, hometown, current city, employer, as well as "sensitive information" (as defined in the Privacy Act, s 6) about their relationships, political views, sexual orientation and religious beliefs. Through this, Facebook collects and holds a substantial volume of information about Users. Facebook monetises that information by selling advertising, including advertisements targeted at Users by reference to their particular demographics. In 2019, almost all of Facebook's global US\$70.69 billion revenue came from advertising.

(2) Apps and the "This is Your Digital Life" App

10. During the Relevant Period, apps could request personal information from Users' Facebook accounts using a tool called the Graph Application Programming Interface (**Graph API**). Version 1 of the Graph API was in place during the Relevant Period (**Graph API V1**).
11. Through the Graph API V1, an app could request a wide range of information about not only those who had installed an app (**Installers**) but also their friends who had not installed the app (**Friends**). This included requests for sensitive information. Although Facebook had in place rules about what kinds of information an app could request, Facebook relied on app developers' self-assessment that an app complied with its rules.
12. In response to a request from an app, Facebook disclosed information about Installers and Friends, subject to the User's settings. However, a User's "privacy settings" did not alone control how a User's personal information was shared with apps, including apps installed by Users' friends. Unless a User modified their "apps settings", various categories of the User's personal information, including sensitive information, would be disclosed to apps installed by their friends by default.

13. The “This is Your Digital Life” App was a personality survey or quiz. It was developed by Dr Aleksandr Kogan, a researcher, who later established Global Science Research Limited (**GSR**). It was not part of, and operated independently of, the Facebook Website. The Graph API allowed the “This is Your Digital Life” App to request information from the Facebook accounts of 305,000 Facebook Users globally who were also Installers of the app, of which approximately 53 were Australian. The Graph API also allowed the app to request from Facebook the personal information of approximately 86,300,000 Facebook Users globally (approximately 311,074 of whom were Australian Facebook Users) who were Friends (that is, they did not install the app themselves).
14. On 30 April 2014, a new version of the Graph API (**Graph API V2**) was launched by Facebook. Under Graph API V2, app developers wishing to request more than basic information from Friends and Installers had to undergo a manual app review process (**App Review**). Such requests would only be approved where, among other things, the additional information clearly improved the User’s experience of the app. However, Facebook allowed apps using Graph API V1 a 12-month ‘grace period’ (**Grace Period**) to migrate to Graph API V2.
15. On 6 May 2014, the developers of the “This is Your Digital Life” App submitted an application for App Review. On 7 May 2014, Facebook rejected that application, on the basis that the app would not be using the data gained through extended permissions to enhance a User’s in-app experience. Despite this, Facebook permitted Dr Kogan and/or GSR to continue requesting Installers’ and Friends’ information using the Graph API V1 for a further 12 months until the end of the Grace Period on 1 May 2015. In effect, this meant that Dr Kogan and/or GSR were able to continue requesting Friends’ and Installers’ information under Graph API V1 until 1 May 2015.

C. ALLEGED CONTRAVENTIONS OF THE PRIVACY ACT

(1) Contraventions of APP 6 – Facebook disclosed personal information unlawfully

16. Under Australian Privacy Principle (**APP**) 6, if Facebook held personal information that was collected for a particular (primary) purpose, it could not disclose that personal information for a secondary purpose unless it had the individual’s consent or certain exceptions applied.
17. Facebook collected the Affected Australian Individuals’ personal information for the purpose of enabling those individuals to build an online social network with other Users on the Facebook Website. However, Facebook did not disclose those individuals’ personal information to the “This is Your Digital Life” App for that purpose.
18. On each occasion on which Facebook disclosed the personal information of the Affected Australian Individuals to the “This is Your Digital Life” App, it breached the Privacy Act.

(2) Contraventions of APP 11 - Facebook’s failure to take reasonable steps to protect personal information from unauthorised disclosure

19. Under APP 11, Facebook was required to take such steps as were reasonable in the circumstances to protect the personal information Facebook held from unauthorised disclosure. During the Relevant Period, the steps that Facebook should have taken to comply with APP 11 included at least the following:

- 19.1. conducting an initial assessment and regular review of whether the “This is Your Digital Life” App’s requests for Users’ information complied with Facebook’s policies;
 - 19.2. maintaining records of the personal information disclosed, and regularly reviewing these records to audit the nature and scope of disclosures;
 - 19.3. implementing measures to ensure that any consent was obtained directly, before or at the time of disclosure, and was clear and specific;
 - 19.4. after 7 May 2014, when Facebook had rejected the “This is Your Digital Life” App’s application to access Graph API V2: (i) carrying out a review of the categories of data which the “This is Your Digital Life” App had previously requested and obtained about the Affected Australian Individuals; and (ii) ceasing the disclosure of the Affected Australians Individuals’ personal information (including sensitive information) to Dr Kogan and/or GSR.
20. By failing to take such steps, Facebook breached the Privacy Act. These failures were systemic, in that deficient systems and processes were the root of Facebook’s failure to take these reasonable steps. And these omissions were inconsistent with the objects of the Privacy Act and APP 11, which seek to promote the responsible and secure handling of personal information.

(3) Civil penalties

21. Under s 13G of the Privacy Act, an entity will be liable for a civil penalty if: (a) it does an act, or engages in a practice, that is a *serious* interference with the privacy of an individual (that is, a serious breach of the Privacy Act in relation to personal information about the individual); or (b) *repeatedly* does an act, or engages in a practice, that is an interference with the privacy of one or more individuals. Each contravention within the Relevant Period attracted a maximum penalty of \$1,700,000.
22. In this case, each of the acts done, or practices engaged in, by Facebook set out above was a contravention of s 13G(a) and/or (b) of the Privacy Act.

D. RELIEF SOUGHT

23. The Commissioner seeks the following relief from the Court:
- 23.1. Declaratory relief under s 21 of the *Federal Court of Australian Act 1976* (Cth);
 - 23.2. Orders that Facebook pay civil pecuniary penalties under s 80W of the Privacy Act (as applicable for contraventions that occurred during the Relevant Period);
 - 23.3. Costs.

E. ALLEGED HARM

24. A fundamental principle underpinning the Privacy Act is that organisations are responsible for the personal information they hold. Contrary to this principle, Facebook in effect transferred responsibility for protecting personal information to its Users and the operators of third party apps. Its 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 its Users' reasonable expectations.
25. The opacity of Facebook's settings and policies hampered the Australian Affected Individuals in understanding that their data was disclosed to the app. The design of the Facebook website was such that Users were unable to exercise consent or control over how their personal information was disclosed. This was inconsistent with the objects of the Privacy Act, which seek to promote the protection of the privacy of individuals, and responsible and transparent handling of personal information by entities such as Facebook.
26. Facebook's disclosures, and its failure to take steps to prevent them, were systemic failures to comply with Australian privacy laws by one of the world's largest technology companies. Failure to hold Facebook to account is apt to undermine public confidence in Australia's privacy laws. Accountability for breaches of the Privacy Act that interfere with Australians' privacy will encourage entities to comply with applicable privacy laws and to build privacy protections into the design and operation of their services.
27. To date, Facebook has been unable to provide the Commissioner with a precise record of the Australian Affected Individuals' personal information that Facebook disclosed to the "This is Your Digital Life" App's developers. That significant failing produces a circumstance in which anomalies may not be detected, or effectively investigated, in order to protect the personal information that the entity still holds. It underscores the shortcomings in Facebook's attempts to protect its Users' personal information from unauthorised disclosure.

This concise statement was drafted by Melissa Gangemi, Adam Zwi and Sonja Marsic, lawyers and settled by Ruth C A Higgins SC, Thomas Prince and Emma Bathurst of counsel.

CERTIFICATE OF LAWYER

I, Sonja Marsic, certify to the Court that, in relation to the concise statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 9 March 2020



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Sonja Marsic
AGS lawyer
for and on behalf of the Australian Government Solicitor
Solicitor for the Applicant

Schedule

**FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
Division: General**

No NSD of 2020

Defendants

Second Respondent

Facebook Ireland Limited

Date: 9 March 2020