

# *Before the High Court*

## Long-Arm Jurisdiction over Foreign Tech Companies “Carrying on Business” Online: *Facebook Inc v Australian Information Commissioner*

Michael Douglas\*

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### *Abstract*

In *Facebook Inc v Australian Information Commissioner*, the High Court of Australia will consider whether the American parent company behind the social media platform is amenable to the Federal Court of Australia’s jurisdiction in proceedings brought in the wake of the Cambridge Analytica data privacy scandal. The central issue is whether Facebook Inc ‘carries on business’ in Australia so as to be within the extraterritorial reach of the *Privacy Act 1988* (Cth). I argue that it does. Although traditional indicia for ‘carrying on a business’ may be absent in Facebook Inc’s operations as relevant to this case, the assessment should be approached having regard to the limitations of territorial thinking for analysis of digital subject matter. A purposive construction of the *Privacy Act* favours this analysis. I argue that the Federal Court was warranted in finding that the Commissioner had established a prima facie case sufficient to justify the Court’s exercise of its long-arm jurisdiction.

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## I Introduction

Millions of Australian consumers use digital platforms like Facebook whose functionality is underpinned by transnational corporate groups that purport to silo certain functionality into certain jurisdictions. Transnational corporate structures are not used simply for tax reasons.<sup>1</sup> A transnational structure may create a ‘jurisdictional veil’<sup>2</sup> by which the entities behind digital platforms might shield themselves from other foreign regulation contrary to their commercial interests.

In *Facebook Inc v Australian Information Commissioner*,<sup>3</sup> the High Court of Australia will consider whether the American technology company, formerly known as ‘Facebook Inc’ and now known as Meta Platforms Inc (‘Meta’), carries on business within Australia for the purposes of the *Privacy Act 1988* (Cth) (‘*Privacy Act*’). Resolution of that question will determine whether the Federal Court of Australia’s exercise of long-arm jurisdiction over Facebook Inc is appropriate. These issues arise in the context of a broader pursuit by Australia’s privacy regulator, the Office of the Australian Information Commissioner (‘Commissioner’), to hold Facebook Inc to account for the Cambridge Analytica data privacy scandal.

After setting out the background and procedural history to the High Court appeal, I address two issues that will be ventilated before the Court: the concept of ‘carrying on business’, and the test for exercise of the Federal Court’s long-arm jurisdiction. I also consider how recent changes to the *Federal Court Rules 2011* (Cth) (‘*FCR*’) concerning service outside Australia could impact this appeal.

## II Background and Procedural History

Between 2014 and 2015, consulting firm Cambridge Analytica used data obtained from Facebook to build voter profiles.<sup>4</sup> The data were the product of a Facebook application (‘app’) called ‘This is Your Digital Life’. The app would gather data not just about the installing user, but also about the user’s contacts (‘Facebook friends’). The result was the collection of 50 million user profiles, of which approximately 270,000 users had consented to their personal information being harvested.<sup>5</sup> The

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<sup>1</sup> See Bernard Pulle, ‘Tax Avoidance by Multinational Enterprises — Australian Government Initiatives to Avoid Erosion of Corporate Tax Base’ (Parliamentary Library Briefing Book, 44<sup>th</sup> Parliament of Australia, December 2013); Sebastian Beer, Ruud de Mooij and Li Liu, ‘International Corporate Tax Avoidance: A Review of the Channels, Magnitudes, and Blind Spots’ (2020) 34(3) *Journal of Economic Surveys* 660.

<sup>2</sup> A term coined by Peter Muchlinski, ‘Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases’ (2001) 50(1) *International and Comparative Law Quarterly* 1, 17, and considered in Mary Keyes, *Jurisdiction in International Litigation* (Federation Press, Sydney, 2005) 66–7.

<sup>3</sup> *Facebook Inc v Australian Information Commissioner* (High Court of Australia, Case No M137/2022).

<sup>4</sup> This account is summarised in Nicholas Confessore, ‘Cambridge Analytica and Facebook: The Scandal and the Fallout So Far’, *The New York Times* (online, 4 April 2018) <<https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html>>.

<sup>5</sup> *Australian Information Commissioner v Facebook Inc (No 2)* [2020] FCA 1307, [1]–[11] (‘*AIC v Facebook (No 2)*’); Kevin Granville, ‘Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens’, *The New York Times* (online, 19 March 2018) <<https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html>>.

corporations behind the Facebook platform allowed Cambridge Analytica to access the personal information of millions of people without those persons' knowledge or consent. This drew the ire of regulators around the world, including in Australia.

On 9 March 2020, the Commissioner commenced Federal Court proceedings against Facebook Inc and Facebook Ireland Ltd ('Facebook Ireland'), alleging contraventions of the *Privacy Act* s 13G with respect to 311,127 Australian Facebook users between 12 March 2014 and 1 May 2015.<sup>6</sup>

- (1) Facebook disclosed the users' personal information for a purpose other than that for which it was collected, in breach [of] 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);
- (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*.<sup>7</sup>

The Commissioner sought declarations and civil pecuniary penalties under statute. The litigation so far has focused on a threshold issue: the Federal Court's authority to decide this dispute.

The respondents to the proceedings are not located in the forum. Facebook Inc (Meta) is incorporated in Delaware and headquartered in California. Facebook Ireland is a Meta subsidiary based in the Republic of Ireland. Neither was registered to carry on business in Australia.<sup>8</sup> Facebook Inc's subsidiary, Facebook Australia Pty Ltd, is not party to the proceeding.

In April 2020, the Commissioner applied *ex parte* to serve the respondents outside of the jurisdiction. Orders to that effect were made on 22 April 2020.<sup>9</sup> Facebook Inc then applied to set aside those orders and the service of the originating application on Facebook Inc, arguing that the Court lacked jurisdiction.<sup>10</sup> Facebook Ireland appeared but did not press for the same relief.<sup>11</sup>

As the rules as to service define the limits of an Australian court's personal jurisdiction,<sup>12</sup> the application turned on construction of the *FCR* authorising service outside of the jurisdiction.<sup>13</sup> The Rules provided that a party may apply for leave to serve a person overseas if the Court is satisfied that:

- (a) it has jurisdiction in the proceeding;
- (b) the proceeding is of a kind listed in another rule, *FCR* r 10.42; and

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<sup>6</sup> *Australian Information Commission v Facebook Inc* (2020) 144 ACSR 88, 89 [1]–[2] ('*AIC v Facebook (No 1)*'); *AIC v Facebook (No 2)* (n 5) [1], [5].

<sup>7</sup> *AIC v Facebook (No 2)* (n 5) [12].

<sup>8</sup> See *Corporations Act 2001* (Cth) ss 601CD, 601CX(1).

<sup>9</sup> *AIC v Facebook (No 1)* (n 6).

<sup>10</sup> *AIC v Facebook (No 2)* (n 5) [15].

<sup>11</sup> *Ibid* [17].

<sup>12</sup> *Laurie v Carroll* (1957) 98 CLR 310, 323 (Dixon CJ, Williams and Webb JJ).

<sup>13</sup> See below Part V for an explanation of how relevant aspects of the *Federal Court Rules 2011* (Cth) ('*FCR*') have since been amended.

- (c) the party seeking leave has a prima facie case for any or all of the relief claimed in the proceeding.<sup>14</sup>

The first two criteria were easily satisfied. The real issue, which has been the focus of consideration at each stage of the proceedings, was the third criterion for leave to serve: whether the Commissioner has a prima facie case. As Thawley J framed it, in this context ‘prima facie case’ is used ‘to test whether there exists a controversy which is sufficiently made out at the commencement of proceedings to warrant exposing the respondent to litigation in Australia’.<sup>15</sup>

Facebook argued that the Commissioner had failed to make out a prima facie case because the text of the *Privacy Act* did not have extraterritorial effect in these circumstances. The *Privacy Act* applies to ‘an act done, or practice engaged in, outside Australia’ by an entity with an ‘Australian link’.<sup>16</sup> An entity will have an Australian link if it carries on business in Australia.<sup>17</sup> Among other things, Facebook argued that the Commissioner had failed to establish that Facebook had an Australian link because it failed to establish that Facebook carried on business in Australia.<sup>18</sup> Thawley J rejected that argument.<sup>19</sup> Facebook Inc sought leave to appeal to the Full Court of the Federal Court of Australia. In early 2022, the Full Federal Court granted leave to appeal and dismissed the appeal.<sup>20</sup>

The bulk of the Full Federal Court’s reasons were delivered by Perram J, with whom Allsop CJ and Yates J agreed.<sup>21</sup> Perram J dissected the s 5B(3)(b) issue into two questions: (1) what activities was Facebook Inc carrying on?; and (2) was that business being carried on in Australia? In answering these questions, his Honour considered a Data Processing Agreement between Facebook Inc and Facebook Ireland, pursuant to which Facebook Inc agreed to process personal data provided to it by the Irish subsidiary. Those data were ‘generated, shared and uploaded by the registered users of the Facebook platform’.<sup>22</sup> The purpose of the data processing was to ‘facilitate communications across the Facebook platform’,<sup>23</sup> which included personalising content and targeting advertisements.<sup>24</sup>

Part of the business conducted by Facebook Inc was the installation of cookies on Australian users’ devices,<sup>25</sup> and the provision to Australian developers of

<sup>14</sup> See the historical version of *FCR* (n 13) r 10.43(4), in force before 13 January 2023; *AIC v Facebook (No 1)* (n 6) 91 [14].

<sup>15</sup> *AIC v Facebook (No 2)* (n 5) [30].

<sup>16</sup> *Privacy Act 1988* (Cth) s 5B(1A) (*‘Privacy Act’*).

<sup>17</sup> *Ibid* s 5B(3)(b).

<sup>18</sup> *AIC v Facebook (No 2)* (n 5) [126]. To have an Australian link a company must also have collected or held personal information in Australia: *Privacy Act* (n 16) s 5B(3)(c). The lower courts’ reasoning on this requirement is not in issue before the High Court.

<sup>19</sup> *AIC v Facebook (No 2)* (n 5) [156].

<sup>20</sup> *Facebook Inc v Australian Information Commissioner* (2022) 289 FCR 217 (*‘Facebook v AIC (FCAFC)’*).

<sup>21</sup> *Ibid* 218 [1], 255 [166].

<sup>22</sup> *Ibid* 224 [30].

<sup>23</sup> *Ibid* 224 [31].

<sup>24</sup> *Ibid* 224–5 [31].

<sup>25</sup> ‘A cookie is a small data file stored on your device’s browser. Its purpose is to help a website keep track of your visits and activity.’: Office of the Australian Information Commissioner (Cth), *Targeted*

‘Graph API’ — a platform by which developers could enable third party applications to utilise the Facebook login.<sup>26</sup> With respect to cookies, Perram J considered that whether installation in Australia amounts to carrying on business in Australia is a question ‘unlikely to have a single answer’.<sup>27</sup> With respect to the Graph API, his Honour held that the inference was open on the available evidence that Facebook Inc’s management of the Graph API included providing the login to Australian developers for use in Australia.<sup>28</sup>

Facebook Inc argued that these attributes were not enough to characterise it as carrying on business in Australia for the purposes of s 5B(3)(b). It argued that the activities carried on in Australia lacked a commercial quality; the only business carried on in Australia was that of its subsidiary, Facebook Ireland, which was party to contracts with Australian developers. Perram J rejected that submission by applying *Hope v Bathurst City Council*, where Mason J framed the carrying on of a business as ‘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’.<sup>29</sup> Perram J split the definition into two limbs: ‘(a) activities undertaken as a commercial enterprise as a going concern with a view to a profit; and (b) carried on in a continuous and repetitive basis’.<sup>30</sup> His Honour explained:

if a company conducts business in a foreign jurisdiction and it does acts within Australia as part of that business which fall within either limb in *Hope* then, subject to any contrary implication arising from the statutory context, it will conduct business in Australia.<sup>31</sup>

There was a *prima facie* case that Facebook Inc was carrying on business in both foreign jurisdictions and in Australia, which was enough to engage s 5B(3) of the *Privacy Act*.<sup>32</sup>

The High Court will consider two issues:

- (1) whether a foreign corporation can ‘carry on business’ for the purposes of s 5B(3)(b) of the *Privacy Act* in the absence of the traditional indicia of carrying on business in the forum; and
- (2) what evidence is required to establish a ‘*prima facie* case’ for the purposes of leave to serve under *FCR* r 10.43(4)(c).

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*Advertising* (Web Page) <<https://www.oaic.gov.au/privacy/your-privacy-rights/advertising-and-marketing/targeted-advertising>> cf Facebook, *Cookies on Facebook* (Web Page) <<https://www.facebook.com/help/336858938174917>>.

<sup>26</sup> *Facebook v AIC (FCAFC)* (n 20) 225 [35].

<sup>27</sup> *Ibid* 228 [46].

<sup>28</sup> *Ibid* 232 [64].

<sup>29</sup> *Ibid* 238 [87], 240 [96], quoting *Hope v Bathurst City Council* (1980) 144 CLR 1, 8–9 (Mason J, Gibbs, Stephen and Aickin JJ agreeing).

<sup>30</sup> *Facebook v AIC (FCAFC)* (n 20) 240 [96].

<sup>31</sup> *Ibid* 242 [103].

<sup>32</sup> *Ibid* 242–3 [107].

### III Carrying on Business

#### A Localising Digital Businesses

Whether Facebook Inc carried on business in Australia for the purposes of s 5B(3)(b) of the *Privacy Act* turns on the text, context and purpose of the provision;<sup>33</sup> a point the Commissioner makes plain in her submissions to the High Court.<sup>34</sup> The context for the extraterritorial operation of the *Privacy Act* includes the common law and other legislation in which the concept of ‘carrying on business in the forum’ grounds jurisdictional analyses.

The common law of Australia maintains a territorial doctrine of personal jurisdiction.<sup>35</sup> Generally, the defendant must be served while present in the territory of the court that issued the originating process in order to be amenable to that court’s command.<sup>36</sup> For corporate persons, at common law, a defendant is considered present for the purposes of service if it carries on business within the forum territory.<sup>37</sup> Whether a company carries on business in the forum is a question of fact,<sup>38</sup> to be answered with reference to common indicia. Those indicia include that a local agent has authority to bind the corporation within the forum; that the business is carried on at a fixed and definite place within the forum; and the business has been carried on for a sufficient period of time.<sup>39</sup> The nature of the defendant’s business is relevant to determining the factual issue.<sup>40</sup>

The common law test for jurisdiction over corporations has been adopted by various legislatures in formulating criteria for determining whether a jurisdiction has authority over a foreign corporation.<sup>41</sup> That is, legislatures have repeated the concept of ‘carrying on business in the forum’ in defining the jurisdictional scope of various

<sup>33</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956, 966 [43] (*‘Impiombato’*); *Acts Interpretation Act 1901* (Cth) s 15AA (*‘Acts Interpretation Act’*).

<sup>34</sup> Australian Information Commissioner, ‘First Respondent’s Submissions’, Submission in *Facebook Inc v Australian Information Commissioner*, Case No M137/2022, 2 December 2022, [12] (*‘AIC’s Submissions’*).

<sup>35</sup> *Gosper v Sawyer* (1985) 160 CLR 548, 564 (Mason and Deane JJ). For a critique, see Andrew Dickinson, ‘Keeping up Appearances: The Development of Adjudicatory Jurisdiction in the English Courts’ (2016) 86(1) *British Yearbook of International Law* 6.

<sup>36</sup> *Laurie v Carroll* (n 12) 323 (Dixon CJ, Williams and Webb JJ).

<sup>37</sup> *National Commercial Bank v Wimborne* (1979) 11 NSWLR 156, 165; *Okura & Co Ltd v Forsbacka Jernverks Aktiebolag* [1914] 1 KB 715 (CA) 718–20, 722. Early authority described carrying on business in the forum as indicating the company was ‘resident’ in the forum and amenable to service: *Dunlop Pneumatic Tyre Co Ltd v Actien-Gesellschaft für Motor und Motorfahrzeugbau Vorm Cudell & Co* [1902] 1 KB 342 (CA) 346–7, 349.

<sup>38</sup> *Anchorage Capital Partners Pty Ltd v ACPA Pty Ltd* (2018) 259 FCR 514, 538 [99] (Nicholas, Yates and Beach JJ), citing *Luckins v Highway Motel (Carnarvon) Pty Ltd* (1975) 133 CLR 164, 186 (*‘Luckins’*).

<sup>39</sup> *National Commercial Bank v Wimborne* (n 37) 165.

<sup>40</sup> *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725, 731–2.

<sup>41</sup> With respect to adjudicatory jurisdiction, see Lord Collins and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 16<sup>th</sup> ed, 2022) vol 1, 471–6 [11-050]–[11-061]; Trevor C Hartley, ‘Basic Principles of Jurisdiction in Private International Law: The European Union, the United States and England’ (2022) 71(1) *International & Comparative Law Quarterly* 211, 214–15.

pieces of Australian legislation,<sup>42</sup> ousting the presumption that general words of legislation do not extend to subject matter outside of the legislature's territory.<sup>43</sup> The *Privacy Act* operates to that effect.

When grappling with each of these statutory contexts, courts must engage in a process of construction that is familiar to the characterisation exercises within the discipline of private international law. Connecting persons, things and events to a particular territory is often necessary to resolve jurisdictional issues and to identify the applicable law. The task might be described as 'localisation', or as applying the 'connecting factor'; a form of characterisation.<sup>44</sup>

Localisation is not always simple. An event may be the product of a series of causes attributable to various fora, as in the case of a man who suffered asbestos-related injuries after exposure in Belgium and Malaysia.<sup>45</sup> In the case of localising a wrong, 'the place of the tort may be ambiguous or diverse'.<sup>46</sup> Where the relevant subject matter is on the internet, the ambiguity is magnified. A single matter may have an overwhelming number of connections to diverse legal systems.<sup>47</sup>

Localisation problems are most acute where the task is to identify a single 'natural' forum for a cross-border matter,<sup>48</sup> or a place with which a cross-border matter has its 'centre of gravity'.<sup>49</sup> Different factors may point in different directions.<sup>50</sup> Fortunately, for the purpose of most carrying-on-business tests, there is no need to identify a single forum. A business may be carried on in multiple places simultaneously. It may be carried on overseas, but also in Australia. As much is obvious if one observes the global goods and services brands that Australians engage with each day. As McKerracher J noted in *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (No 2)*, '[p]articularly, in modern times, a company may

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<sup>42</sup> See, eg, *Corporations Act 2001* (Cth) ss 9 (definition of 'Part 5.7 body'), 582, considered in *Tiger Yacht Management Ltd v Morris* (2019) 268 FCR 548 ('*Tiger Yacht*'). See also *Competition and Consumer Act 2010* (Cth) s 5(1)(g), considered in *Australian Competition and Consumer Commission v Valve Corporation (No 3)* (2016) 337 ALR 647 (Edelman J) ('*ACCC v Valve (No 3)*'), affirmed in *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190 ('*Valve v ACCC*'); *Carnival plc v Karpik* (2022) 404 ALR 386 ('*Ruby Princess*').

<sup>43</sup> A presumption in favour of comity: *Impiombato* (n 33) 962–3 [23]. On the diminishing role of the presumption for cross-border litigation, see Michael Douglas, 'Choice of Law in the Age of Statutes: A Defence of Statutory Interpretation after *Valve*' in Michael Douglas, Vivienne Bath, Mary Keyes and Andrew Dickinson (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing, 2019) 201.

<sup>44</sup> See Symeon C Symeonides, *Choice of Law* (Oxford University Press, 2016) 64; Martin Davies, Andrew Bell, Paul Le Gay Brereton and Michael Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10<sup>th</sup> ed, 2019) ch 13; Michael Douglas, 'Characterisation of Breach of Confidence as a Privacy Tort in Private International Law' (2018) 41(2) *University of New South Wales (UNSW) Law Journal* 490, 492.

<sup>45</sup> *Puttick v Tenon Ltd* (2008) 238 CLR 265.

<sup>46</sup> *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 538 [81] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

<sup>47</sup> Tobias Lutzi, *Private International Law Online: Internet Regulation and Civil Liability in the EU* (Oxford University Press, 2020) 27 [2.36].

<sup>48</sup> See Andrew Bell, 'The Natural Forum Revisited' in Andrew Dickinson and Edwin Peel (eds), *A Conflict of Laws Companion* (Oxford University Press, 2021) 3.

<sup>49</sup> A term used in identifying the law applicable to a contract with foreign elements: see *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, 437 (Toohey, Gaudron and Gummow JJ).

<sup>50</sup> *ACCC v Valve (No 3)* (n 42) 662 [69] (Edelman J).

be found to be carrying on business in Australia even though the bulk of its business is conducted elsewhere'.<sup>51</sup>

Facebook Inc has placed much weight on the fact that the traditional indicia of carrying on business in a place — local physical assets, revenues and so on — are absent in the case of its business.<sup>52</sup> But indicia are just that. They may indicate that a business is carried on locally, but they are not exhaustive of the circumstances in which a business is carried on locally.<sup>53</sup> Whether a business is carried on in the forum is a question of fact, which should be approached with regard to the character of the particular business in question and the reason for which the question is being asked.<sup>54</sup>

Facebook Inc's business is of the digital age. Yet it has appealed to precedent that grappled with the indicia applicable to business models and activities from before the digital age: intra-Australian bus tourism<sup>55</sup> and the sale of Queensland kangaroo skins in New South Wales.<sup>56</sup> Those appeals were understandable, for they aligned to a convenient fiction: that the Facebook platform may derive billions of dollars from Australian consumers, yet the business of the parent company has no real connection to Australia.

Approaches to localisation that depend on traditional physical indicia are ill-suited to digital business models.<sup>57</sup> With this in mind, as recognised in the Commissioner's submissions, the extraterritorial reach of the *Privacy Act* was specifically designed to extend to entities 'who have an online presence (but no physical presence) in Australia, and collect personal information from people who are physically in Australia'.<sup>58</sup> In the case of Facebook Inc, as with so many other modern businesses, the business is about deriving value from information about consumers.<sup>59</sup> Facebook Inc extracts a huge amount of value from Australians through the collection and exploitation of a large amount of Australians' data. It actively seeks Australians' contribution to that value-extraction, by allowing Australian developers to utilise Facebook login functionality in third-party apps, and installing cookies on Australian users' devices. With respect, Allsop CJ was right to imply that Facebook Inc's analysis of territorial connection was 'to mischaracterise by oversimplification through the application of a false taxonomy of activity'.<sup>60</sup>

While businesses that engage in one-off or limited cross-border transactions into Australia are unlikely to be characterised as 'carrying on business in

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<sup>51</sup> *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (No 2)* (2019) 369 ALR 192, 197 [19].

<sup>52</sup> See, eg, Facebook Inc, 'Appellant's Submissions', Submission in *Facebook Inc v Australian Information Commissioner*, Case No M137/2022, 4 November 2022, [11], [24]–[26] ('Facebook Inc's Submissions').

<sup>53</sup> *Club Resorts Ltd v Van Breda* [2012] 1 SC 572, 618–19 [91] (LeBel J).

<sup>54</sup> *Facebook v AIC (FCAFC)* (n 20) 219 [5] (Allsop CJ); *Valve v ACCC* (n 42) 230 [133].

<sup>55</sup> *Luckins* (n 38).

<sup>56</sup> *Smith v Capewell* (1979) 142 CLR 509.

<sup>57</sup> See Peter D Trooboff, 'Globalization, Personal Jurisdiction and the Internet: Responding to the Challenge of Adapting Settled Principles and Precedent' (2021) 415 *Recueil des Cours* 9, 45.

<sup>58</sup> See AIC's Submissions (n 34) [15], quoting the Explanatory Memorandum accompanying the introduction of *Privacy Act* (n 16) s 5B(3)(b): Explanatory Memorandum, Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth), 218 [Item 6 Subsection 5B(3)].

<sup>59</sup> *Facebook v AIC (FCAFC)* (n 20) 218–19 [3] (Allsop CJ).

<sup>60</sup> *Ibid* 219 [4] (Allsop CJ).



Australia’,<sup>61</sup> the business of Facebook Inc involves more than isolated activity in Australia. It involves continuous, repetitive extraction of value from Australian consumers through digital technologies that may be notionally physically located in both Australia and elsewhere. For Facebook Inc to deny its obvious connection to Australia ‘has an air of unreality’.<sup>62</sup>

## **B** *A Purposive Construction*

While the context of s 5B(3)(b) of the *Privacy Act* is important, the primary question before the High Court is not the meaning of ‘carrying on business’ in the abstract, but with respect to the extraterritorial scope of the Act. The purpose of the particular statute is important. Perram J recognised as much by invoking the objects expressed in s 2A of the *Privacy Act*, which include facilitating ‘the free flow of information across national borders while ensuring that the privacy of individuals is respected’.<sup>63</sup> The latter part of that object echoes s 2A(a), the first-listed object: ‘to promote the protection of the privacy of individuals’.

That primary object should inform the High Court’s approach to analysis of whether Facebook Inc carries on business in Australia under s 5B(3)(b). Characterising territorial connection for the purposes of the statute depends on more than logic; the task has normative content. As Allsop CJ has written extrajudicially, characterisation may involve value judgments ‘that are often disguised, hidden and suppressed’.<sup>64</sup> In this case, the characterisation of Facebook’s territorial connection should be undertaken with express consideration of the value of Australian consumers’ privacy, the importance of which is expressed in the objects of the *Privacy Act*.

If Facebook Inc’s territorial analysis is preferred, the practical result is that the Australian public, through the standing of the Commissioner, is left without a remedy for a gross invasion of their privacy. It is left in that position for the convenience of a multinational business, which has shielded itself from the externalities of its business through a cross-border structure and clever contracting within its corporate group. Moreover, if Facebook Inc’s position is preferred, then various other multinational businesses, and especially those behind the digital platforms on whom millions of Australian consumers increasingly depend,<sup>65</sup> will be beyond the reach of other important Australian consumer protection legislation. The mischief to which that legislation is primarily directed will continue. As a matter of orthodox statutory construction, the Court is justified in piercing Facebook’s jurisdictional veil<sup>66</sup> via the localisation exercise in s 5B(3)(b) with appeal to the

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<sup>61</sup> See Richard Garnett, ‘Arbitration of Cross-Border Consumer Transactions in Australia: A Way Forward?’ (2017) 39(4) *Sydney Law Review* 569, 577. See also, eg, *Lucasfilm Ltd v Ainsworth* [2010] Ch 503 (CA) 552–3 [192]–[193].

<sup>62</sup> Cf Google’s approach in *Google LLC v Deferos* (2022) 96 ALJR 766, 791 [112] (Gordon J).

<sup>63</sup> *Facebook v AIC (FCAFC)* (n 20) 234 [70], quoting *Privacy Act* (n 16) s 2A(f).

<sup>64</sup> Chief Justice James Allsop, ‘Characterisation: Its Place in Contractual Analysis and Relation Enquiries’ (2017) 91(6) *Australian Law Journal* 471, 471.

<sup>65</sup> See generally Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019).

<sup>66</sup> Cf the task in other jurisdictional contexts: see, eg, *Adams v Cape Industries plc* [1990] Ch 433 (CA).

policy of the *Privacy Act*. With respect, in this circumstance, Facebook Inc's appeal to the construction of 'carrying on business' in other jurisdictions<sup>67</sup> runs contrary to the purposive approach to statutory construction mandated by Australian law.<sup>68</sup>

#### IV The Exercise of the Federal Court's Long-Arm Jurisdiction

Historically, the test for leave to serve outside of the jurisdiction in the Federal Court of Australia has differed to that applicable in other Australian jurisdictions.<sup>69</sup> In the Federal Court, an applicant for leave to serve must demonstrate a prima facie case. With respect, the nature of this test was never particularly controversial; the Court applied it without issue all the time. As the Full Court noted in *Tiger Yacht Management Ltd v Morris*, the requirement related 'to "all or any" of the relief claimed in the proceeding', and it was 'not necessary to demonstrate merit in all of the claims made in the proceeding'.<sup>70</sup> The evidence necessary to establish a prima facie case for the purposes of leave to serve was obviously less extensive than that required to establish a cause of action.<sup>71</sup>

On 13 January 2023, before the High Court had heard this matter, but after submissions were filed, the *Federal Court Legislation Amendment Rules 2022* (Cth) ('Amendment Rules') came into force. The amended *FCR* scrap the historical approach to service outside Australia, replacing it with a regime that is shared by most Australian state and territory Supreme Courts and agreed to by the Council of Chief Justices' Harmonised Corporations Rules Monitoring Committee.<sup>72</sup> In most cases, leave to serve is no longer required.<sup>73</sup> The 'prima facie case' aspect of the historical test for leave is therefore gone. However, in cases where service has occurred, an analogue is in the new *FCR* r 10.43A(2)(c). A court may allow an application by a person served to stay or dismiss the proceeding, or to set aside service, if 'the claim has insufficient prospects of success to warrant putting the person served outside Australia to the time, expense and trouble of defending it'.<sup>74</sup>

The Amendment Rules may warrant the High Court revoking the grant of special leave as regards this second issue. But if the Court were to express an opinion on the historical rule, it would not be without value for the development of the law.

<sup>67</sup> Facebook Inc's Submissions (n 52) [8], [16]–[23].

<sup>68</sup> *Acts Interpretation Act* (n 33) s 15AA.

<sup>69</sup> See generally Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis Butterworths, 4th ed, 2019) 46–74; Michael Douglas and Vivienne Bath, 'A New Approach to Service outside the Jurisdiction and outside Australia under the *Uniform Civil Procedure Rules*' (2017) 44(2) *Australian Bar Review* 160.

<sup>70</sup> *Tiger Yacht* (n 42) 557 [45].

<sup>71</sup> *Ruby Princess* (n 42) 465 [303] (Derrington J). Cf Facebook Inc's Submissions (n 52) [38].

<sup>72</sup> See *Court Procedures Rules 2006* (ACT) div 6.8.9; *Uniform Civil Procedure Rules 2005* (NSW) pt 11, sch 6; *Uniform Civil Procedure Rules 1999* (Qld) ch 4 pt 7 div 1; *Supreme Court Civil Rules 2006* (SA) ch 3 pt 4 div 2; *Supreme Court Rules 2000* (Tas) div 10; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ord 7 pt 1.

<sup>73</sup> See the new *FCR* (n 13) r 10.42 as substituted by the *Federal Court Legislation Amendment Rules 2022* sch 1, with effect from 13 January 2023.

<sup>74</sup> *FCR* (n 13) r 10.43A(2)(c) as substituted by the *Federal Court Legislation Amendment Rules 2022* sch 1, with effect from 13 January 2023.

The position under the Amendment Rules also considers the strength of the applicant's case, albeit with different language, in considering whether the circumstances warrant putting a foreigner to the trouble of defending a claim.<sup>75</sup> The issue informs the proper exercise of the Court's discretion,<sup>76</sup> taking into consideration the overarching purposes of case management.<sup>77</sup>

With respect to Facebook Inc's challenge to the grant of leave in this case, the High Court will surely be mindful that appellate courts should be hesitant to interfere with such an exercise of discretion.<sup>78</sup> This is especially the case given that considerations that have historically militated against long-arm jurisdiction are of diminishing significance. As Lord Sumption JSC once stated,

service of the English Court's process out of the jurisdiction [has been described] as an 'exorbitant' jurisdiction ... This is no longer a realistic view of the situation. ... Litigation between residents of different states is a routine incident of modern commercial life.<sup>79</sup>

The carrying on business test ensures 'a jurisdictional nexus as a matter of comity',<sup>80</sup> but the assertion of personal jurisdiction over a foreign company operating a global business is no affront to comity. Rather, to adapt the words of Lord Sumption, it is a routine incident of the consumer protection necessary for our digital lives.

## V Conclusion

Facebook Inc's place of business is not 'Facebookistan' — there is no such place.<sup>81</sup> Facebook's natural habitat is the internet, and the internet's 'natural habitat is global'.<sup>82</sup> There is no single jurisdiction in which it carries on its business. Australia is part of the world in which Facebook Inc has chosen to do business, and therefore Facebook ought reasonably to expect to face regulation from Australia. As Kirby J stated in *Regie Nationale des Usines Renault SA v Zhang*, '[g]enerally speaking, the law should not be applied in a way that takes ordinary expectations by surprise'.<sup>83</sup> It is sound policy that Facebook Inc should be amenable to Australian jurisdiction.

<sup>75</sup> See *Michael Wilson & Partners Ltd v Emmott* (2021) 396 ALR 497, 520–6 [64]–[79], 539 [121] (Brereton JA); *International Management Group of America Pty Ltd v Media Niugini Ltd* [2020] NSWSC 559, [104]–[105] (Stevenson J).

<sup>76</sup> See *Trina Solar (US), Inc v Jasmin Solar Pty Ltd* (2017) 247 FCR 1, 7 [18] (Greenwood J), 23 [100] (Beach J) ('*Trina Solar*').

<sup>77</sup> *Federal Court of Australia Act 1976* (Cth) s 37M.

<sup>78</sup> *Trina Solar* (n 76) 24 [102] (Beach J); *House v The King* (1936) 55 CLR 499.

<sup>79</sup> *Abela v Baadarani* [2013] 1 WLR 2043, 2062 [53] (Lord Sumption JSC), partly quoted in *Morris v McConaghy Australia Pty Ltd* [2018] FCA 435, [40] (Rares J), quoted in *Tiger Yacht* (n 42) 565–6 [89], Steven Rares, 'Commercial Issues in Private International Law' in Michael Douglas, Vivienne Bath, Mary Keyes and Andrew Dickinson (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing, 2019) 1, 1.

<sup>80</sup> *Tiger Yacht* (n 42) 539 [50] (McKerracher, Derrington and Colvin JJ).

<sup>81</sup> See Anupam Chander, 'Facebookistan' (2012) 90(5) *North Carolina Law Review* 1807; Niloufer Selvadurai, 'The Proper Basis for Exercising Jurisdiction in Internet Disputes: Strengthening State Boundaries or Moving towards Unification?' (2013) 13 (Spring) *Pittsburgh Journal of Technology Law and Policy* 1, 13; Alex Mills, 'The Law Applicable to Cross-Border Defamation on Social Media: Whose Law Governs Free Speech in "Facebookistan"?' (2015) 7(1) *Journal of Media Law* 1.

<sup>82</sup> *Google Inc v Equustek Solutions Inc* [2017] 1 SCR 824, 827 (Abella J for the Court).

<sup>83</sup> *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 538 [130].

It is also sound policy that the Australian public should be able to secure justice, according to the policy of Australian law — including Australian private international law — when foreign businesses wrong them.<sup>84</sup> Recent steps to strengthen Australia's privacy laws<sup>85</sup> signal that Facebook Inc's attempts to avoid accountability for the Cambridge Analytica scandal run contrary to the values that Australians expect to be expressed in our law.

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<sup>84</sup> A similar point was made a century ago: William F Cahill, 'Jurisdiction over Foreign Corporations and Individuals Who Carry on Business within Territory' (1916–17) 30(7) *Harvard Law Review* 676, 676.

<sup>85</sup> *Privacy Legislation Amendment (Enforcement and Other Measures) Act 2022* (Cth).