HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: Facebook Inc
Appellant

and

10 Australian Information Commissioner
First Respondent

Facebook Ireland Limited
Second Respondent

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APPELLANT'S SUBMISSIONS

Part I: Certification

1. This submission is in a form suitable for publication on the Internet.

Part II: Issues

2. The issues in this proceeding are as follows:

(a) Can a foreign corporation "carry on business" in Australia (within the meaning of s 5B(3)(b) of the *Privacy Act 1988* (Cth) (**the Act**)) if it has no commercial activities or other recognised indicia of carrying on business in this country? The Appellant contends that the answer is "no".

(b) Does the requirement of a "prima facie case" in r 10.43(4)(c) of the *Federal Court*
10 *Rules 2011* (Cth) (**Rules**) require evidence that could itself support inferences sufficient to establish the cause of action, or is it enough to show only that there is a controversy as to those matters? The Appellant contends that only the former suffices.

Part III: Section 78B notice

3. The Appellant considers that no s 78B notice is required in this proceeding.

Part IV: Citations

4. **PJ**: *Australian Information Commissioner v Facebook Inc (No 2)* [2020] FCA 1307.

5. **FC**: *Facebook Inc v Australian Information Commissioner* (2022) 289 FCR 217.

Part V: Facts

6. In the primary proceeding, the Commissioner alleges that 53 Facebook users in
20 Australia installed an app on the Facebook platform, and that the app's developers were allowed to obtain personal information of approximately 311,074 of their Facebook friends (FC[19]). This is alleged to have amounted to a breach of Australian Privacy Principles (**APP**) 6 and 11 by two entities: Facebook Ireland Limited (**Facebook Ireland**), and, relevantly for this Court, the Appellant.

7. During the relevant period (PJ[5]), Facebook Ireland *alone* provided the Facebook service to Australian users (FC[144]). Facebook Ireland has filed a Notice of Address for Service, and has no active role in this appeal. By contrast, the Appellant is the "ultimate holding company of a group of companies that included" Facebook Ireland (PJ[72]). During the relevant period, it had no commercial presence in Australia: there
30 was no evidence that the Appellant had any contracts with Australian users (or other counterparties), it employed no personnel here, it derived no revenues here, and it had no business premises or other real property here. Despite these matters, the Full Court

held at a prima facie level that the Appellant "carried on business" in Australia (FC[107]) because of two ***non-commercial***, digital activities which the Court treated as occurring in Australia even though the Court accepted that those activities were done by the Appellant: from computers located in the United States and Sweden (FC[64]); under a contract with Facebook Ireland (FC[29]); and, importantly for this appeal, that they did "not themselves comprise the commercial dealings which are the business" of the Appellant (FC[95]).[1]

Part VI(a): Ground 1 – "carrying on business"

8. The expression "carrying on business" in s 5B(3)(b) of the Act expresses the jurisdictional nexus which Parliament requires in order to connect a putative defendant with Australia as the country asserting jurisdiction.[2] The expression "carrying on business" has an ordinary meaning, informed by a considerable body of jurisprudence in England and Australia.[3] To understand its meaning, as it appears in s 5B(3)(b) of the Act, it is necessary to have regard to that jurisprudence; because, where Parliament deploys a phrase with a settled judicial construction, it can be taken to have adopted that construction.[4] That jurisprudence was not adequately analysed below.

English and Australian jurisprudence

9. English courts have considered the jurisdictional expression "carrying on business", in a statutory form or otherwise, since the mid-nineteenth century.[5] The earliest examples involved the application to railway companies of statutes conferring jurisdiction on county courts.[6] Those cases, while largely concerned with the location of the contract's formation and the railway company's head office,[7] were alive to the geographical reach

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1 "In my opinion, the evidence certainly presents a prima facie case that Facebook Inc was engaged in the business of *providing data processing services to Facebook Ireland*" (Perram J, FC[29], emphasis added).

2 See *Tiger Yacht Management Ltd v Morris* (2019) 268 FCR 548, [50] (McKerracher, Derrington and Colvin JJ).

3 See generally Cheshire, North and Fawcett, *Private International Law* (15th ed, Oxford, 2017) 530–1; Dicey, Morris & Collins, *The Conflict of Law* (15th ed, Sweet & Maxwell, 2012) Vol I, 11-120, 14-065.

4 *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing & Engineering Employees (Cth)* (1994) 181 CLR 96, 106–7 (the Court); *Director of Public Prosecutions Reference No 1 of 2019* (2021) 95 ALJR 741, 746 [10] (Kiefel CJ, Keane and Gleeson JJ); 754 [51] (Gageler, Gordon and Steward JJ); 758 [66] (Edelman J).

5 See eg *Companies Act 1862* (UK), s 4 ("association … formed … for the purpose of carrying on any ... business"), considered in *Smith v Anderson* (1880) 15 Ch D 247. Cases that considered the phrase in the absence of a statute include: ***Schibsby*** *v Westenholz* (1870) LR 6 QB 155; *Newby v Von Oppen* (1872) Law Rep 7 QB 293; ***Badcock*** *v Cumberland Gap Park Co* [1893] 1 Ch 362.

6 *County Courts Act 1846* (UK), ss 60, 128 (actions may be brought in the jurisdiction where the defendant "carries on his business" at the time of action brought), considered in ***Adam*** *v Great Western Railway Company* [1861] 30 Law J Rep (NS) Exch 124; ***Shiels*** *v Greater Northern Railway Co* (1861) 30 LJ QB 331. See also ***Mackereth*** *v Glasgow and South Western Banking Co* (1873) LR 8 Ex 149.

7 *Bourne v South Eastern Railway Company* [1855] 26 Law Times, 60; *Adam* [1861] 30 Law J Rep (NS) Exch 124, 127; *Brown v London & North Western Railway Company* (1863) 32 LJ QB 318, 319-20.

of this trade and thus the application of the legislation to what was (then) a modern form of commerce. It was clear in those cases that the company was not to be sued in every single district in which it operated a station.[8] In Australia, the first decision was ***Woods** v Pacific Mail Steamship Company*,[9] which held that a foreign shipping company did not carry on business in NSW merely because it pulled into port, even where it engaged agents at the port to carry out various tasks incidental to the business, such as obtaining freight.

10. Over time, and across different statutory contexts, there emerged in the UK a series of indicia which operated as limiting factors on the concept of where business was "carried on": repeated acts were held to be required;[10] the presence of an agent merely bearing the name of the corporation was insufficient;[11] and merely owning property in the jurisdiction was also insufficient.[12] The decisions sought to synthesise these indicia into "tests" or "principles".[13] As early as 1914, Lord Buckley observed that "three matters" determine if a foreign corporation carries on business in the jurisdiction: (1) acts that continued "for a sufficiently substantial period of time"; (2) those acts were carried out "at a fixed place of business"; and (3) the corporation (and not simply its agent) was present in the jurisdiction.[14]

11. As in the UK, a collection of "usual elements"[15] also crystallised in the Australian cases[16] and private international law commentaries.[17] These elements included: a place

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8 *Shiels* (1861) 30 LJ QB 331, 332-33 ("the words 'carry on his business' are not to be taken in their most extended sense"); *Mackereth* (1873) L R 8 Ex 149, 153 (running power lines over the station did not constitute carrying on business in that district).

9 ***Woods** v Pacific Mail Steamship Company* (1879) 1 SCR NS (NSW) 91, 97-8.

10 ***Smith** v Anderson* (1880) 15 Ch D 247, 277-78; *Dunlop Pneumatic Tyre Co Limited v Actiengesellschaft fur Motor und Motorfahrzeugbau vorm Cudell & Company* [1902] 1 KB 342, 349 ("a substantial period of time" is necessary).

11 ***Grant** v Anderson & Co* [1892] 1 QB 108, 117 (Lord Esher); *The Princess Clementine* [1897] P 18, 21.

12 *Schibsby* (1870) LR 6 QB 155, 163.

13 ***Okura** and Co Ltd v Forsbacka Jernverks Aktiebolag* [1914] 1 KB 715, 718-19 (Buckley LJ); *The "Lalandia"* [1933] P 56, 66; *Smith, Stone & Knight Ltd v Lord Mayor, Alderman and Citizens of City of Birmingham* [1939] 4 All ER 116, 120-121 (Atkinson J); ***Sfeir** & Co v National Insurance Co of New Zealand Ltd* [1964] 1 Lloyd's Rep 330, 338.

14 *Okura* [1914] 1 KB 715, 718-19 (Buckley LJ), 722 (Phillimore LJ agreeing); see also *National Commercial Bank v Wimborne* (1979) 11 NSWLR 156, 164 (Holland J).

15 *Norcast S.ár.L v Bradken Ltd (No 2)* (2013) 219 FCR 14, 77 [255] (Gordon J), and see *Adams v Cape Industries Plc* [1990] Ch 433, 530 (Slade LJ for the Court).

16 Eg ***Pearce** v Tower Manufacturing & Novelty Co* (1898) 24 VLR 506, 506-8 (a foreign company did not carry on business in Victoria merely because it employed someone there to receive orders on commission and to transit them to its office abroad); *Lucas v Smith* [1948] Tas SR 111, 113 (to carry on business, at least a single *transaction* must be established within the jurisdiction); *Hyde v Sullivan* (1956) 56 SR (NSW) 113, 119 ("[s]peaking generally, the phrase 'to carry on business' means to conduct some form of commercial enterprise, systematically and regularly, with a view to profit").

17 *Nygh's Conflict of Laws in Australia* (10th ed, LexisNexis, 2020) [35.15]–[35.25]; Sykes and Pryles, *Australian Private International Law* (2nd ed, Law Book, 1987) 352–4.

of business in Australia, customers in Australia, employees or agents in Australia, business assets in Australia, and the generation of income in Australia.[18]

12. In a trilogy of cases between 1975 and 1980,[19] this Court clarified that the territorial concept of "carrying on business" in its ordinary meaning requires the identification within the relevant territory of at least "a succession of acts"[20] or "some repetitive act in a trade",[21] which are "undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of a profit on a continuous and repetitive basis".[22] That test remains useful. But it is important to emphasise that the statutory test is not "repetitive acts in Australia" – it is "*carrying on business*" in Australia. Whilst "carrying on" requires repetitive acts,[23] it is not the case that *any* class of repetitive "acts" compels the conclusion that what is carried on is a "business" within the jurisdiction.[24] It has always been clear in Australian, English and (as will be shown) North American jurisprudence that it is the "commerciality" of the "acts" that is necessary to characterise them as being done in the carrying on of a business.

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13. The "usual elements" (see [10]-[11] above) reflect two broader propositions. *First*, commercial acts which are insufficiently connected to the carrying on of the business are not enough.[25] Pertinent examples include: acts *preparatory* to the establishment of

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18 See, eg, *ACCC v Yazaki Corporation (No 2)* (2015) 332 ALR 396, [356] (Besanko J) (citing *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1, [77]–[81]).

19 ***Luckins*** *(Receiver and Manager of Australian Trailways Pty Ltd) v Highway Motel (Carnarvon) Pty Ltd* (1975) 133 CLR 164; ***Smith v Capewell*** (1979) 142 CLR 509; ***Hope*** *v Bathurst CC* (1980) 144 CLR 1.

20 *Luckins* (1975) 133 CLR 164, 178 (Gibbs J); *Smith v Capewell* (1979) 142 CLR 509, 517 (Gibbs J).

21 *Smith v Capewell* (1979) 142 CLR 509, 515 (Barwick CJ); see also *Hope* (1980) 144 CLR 1, 8-9 (Mason J) ("the repetition of acts").

22 *Hope* (1980) 144 CLR 1, 8-9 (Mason J); *Luckins* (1975) 133 CLR 164, 178 (Gibbs J) ("acts designed to advance some enterprise of the company pursued with a view to pecuniary gain").

23 *Hope* (1980) 144 CLR 1, 8 (Mason J); cf *Smith v Capewell* (1979) 142 CLR 509, 519 (Gibbs J); *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 15 (Dawson J); *Donoghue v Russells (A Firm)* [2021] FCA 798, [50(3)] (Rangiah J).

24 Eg ***Hungier*** *v Grace* (1972) 127 CLR 210, 217 (Barwick CJ): This Court, in answering the question of whether a person carried on the business of money-lending, observed that "[w]hilst no doubt system and regularity are involved in the carrying on of a business, it does not necessarily follow that one who has transactions of the same kind systematically or regularly is carrying on a business in those transactions. One may systematically make regular deposits to a bank account but not be carrying on a business of doing so"; see generally *Murphy v State of Victoria (No 2)* [2014] VSC 404, [40].

25 *Nygh's Conflict of Laws in Australia* (10th ed, LexisNexis, 2020) [35.23] ("[a] foreign corporation does not carry on business here merely because it becomes a party to litigation, invests or holds property, maintains a bank account, secures or collects any of its debts or enforces its rights in regard to any securities relating to such debts, invests any of its funds or holds any property, or engages in isolated transactions"). See also *Vautin v By Winddown, Inc (formerly Bertram Yachts) (No 4)* (2018) 362 ALR 702, [236] (Derrington J) ("It is apt to keep in mind that there is a difference between 'engaging in' business in a place and 'carrying on' business there. The latter requires the repetition of acts which are usually in the nature of commercial activities and which possess something of a permanent character").

a business;[26] and acts merely carrying *out* transactions that make up the business[27] (as opposed to acts carrying *on* the business).[28] *Secondly*, it has always been clear that *repetitive non-commercial acts* are insufficient. Relevant examples include: repeated acts by agents who lack any discretion over contractual terms;[29] continually engaging solicitors in the jurisdiction merely to provide legal advice;[30] and the act of merely passing through a jurisdiction.[31] Both the "usual elements" and the two broader propositions above show that the presence within Australia of ***commercial activities*** – transactions, trade, dealings[32] – is the *sine qua non* of carrying on business.[33] Before the decision of the Court below, there had ***never*** been a case in which an overseas entity
10 had been held to "carry on business" in a jurisdiction without at least ***one*** of those "usual elements".

14. In *Luckins*, Gibbs J posed a question (which did not arise in that case) whether a tour bus operator would carry on business within Western Australia if the only relevant fact that occurred within the State was that its tours proceeded *through* that State without

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26 *Pioneer Concrete Services Ltd v Galli* [1985] VR 675, 705-6 (Crockett, Murphy and Ormiston JJ).

27 See *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 (where this Court noted the distinction between "carrying on" and "carrying out" a business).

28 *Tycoon Holdings Ltd v Trencor Jetco Inc* (1992) 34 FCR 31, 40 (Wilcox J). See, eg, *Woods* (1879) 1 SCR NS (NSW) 91, 97-8; *Grainge & Son v Gough* [1896] AC 325, 336 (a foreign corporation does not carry on business simply by engaging an agent to solicit orders from customers and transmit them abroad. Such an act "is only ancillary to the exercise of his trade in the country where he buys or makes, stores, and sells his goods"); *Allison v Independent Press Cable Association of Australasia Ltd* (1911) 28 The Times LR 128, 129 (a foreign media company did not carry on business in the UK merely because it engaged a journalist to act as a correspondent there: "[i]t was not sufficient that agents should merely be doing work ancillary to the business of the corporation"); *Pearce* (1898) 24 VLR 506, 506; *City Finance Co Ltd v Matthew Harvey & Co Ltd* (1915) 21 CLR 55, 61-62 (Griffths CJ), 66 (Isaacs J) (a receiver appointed under a debenture trust deed carrying on business in the jurisdiction does not mean that he or she does so as agent of the beneficiaries who are outside the jurisdiction). See also *SSL International plc v TTK LIG Ltd* [2012] 1 WLR 1842, [66] (holding occasional board meetings and approving expenditure in the jurisdiction does not constitute carrying on business there: "if it were, most holding companies would be held to be carrying on business in every country in which they established a subsidiary").

29 *Noble Caledonia Ltd v Air Niugini Ltd* [2017] EWHC 1095, [51], [56] (Gilbart J); *Bowden Brothers & Co v Imperial Marine and Transport Insurance Co* (1902) 2 SR (NSW) 257, 262–263 (it is not enough to show that the foreign corporation has an agent here if they are a mere ministerial agent).

30 ***BHP Petroleum*** *Pty Ltd v Oil Basins Ltd* [1985] VR 725, 731-33 (Murray J); *Attorney-General v Bailey (Malta) Ltd* [1963] 1 Lloyd's Rep 617, 625.

31 *Grant* [1892] 1 QB 108, 117 (otherwise, "[o]ne might as well say that the defendants carry on business in any place through which their goods pass while being sent to their customers") (Lord Esher).

32 See generally *Fasold v Roberts* (1997) 70 FCR 489, 524 (Sackville J) (defining business as "trade, commercial transactions or engagements").

33 *Amalgamated Wireless (Australasia) Ltd v McDonnell Douglas Corporation* (1987) 16 FCR 238, 240 (Wilcox J) (focusing on "the actual business activities" in Australia by the foreign corporation, notwithstanding that the company was "extremely interested" in Australia and closely supervised the activities and provided the personnel and advice for those activities); *Thiel* (1990) 171 CLR 338, 359 (McHugh J) ("the carrying on of a business requires the habitual pursuit of business activities"); *Tiger Yacht* (2019) 268 FCR 548, [51] ("The activities must form a commercial enterprise"); *BHP Petroleum* [1985] VR 725, 732 ("It is necessary in my opinion to consider the nature of the business carried on by the defendant if indeed what it does can be properly described as a business").

stopping in or commercially dealing with any persons within the State.[34] In the Court below, Perram J treated this as a "particular manifestation of a more general question" (FC[96]), namely whether repetitive "acts in the performance of its business" involving "no commercial activity" in a territory provide a sufficient territorial connection to establish carrying on business there. Perram J treated this as an "interesting question" left unanswered by Gibbs J in *Luckins* (see FC[93]). Yet it is clear that it had been asked and answered in earlier cases, including *Woods*.[35] Commerciality is essential to the ordinary meaning of a "business". The essence of a "business" is to win custom and to conclude transactions with the customers so won. That is why a business's goodwill is
10 the "attractive force which brings in *custom*",[36] and it is why Mason J repeatedly said in *Hope* that carrying on business consists of "activities undertaken as a *commercial* enterprise", "in the nature of a *going concern*", "for the purpose of making a *profit*".[37] It is not enough merely to do acts repetitively here: those acts must have "the quality of being business activities" (cf FC[67]).

15. Australian cases show that this test is not altered by the advent of digital commerce. The first is *Gebo Investments*,[38] which concerned Australian consumers who responded to solicitation on an overseas website. Barrett J there observed that in light of "[a]dvances 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", "[t]here is some
20 need for physical activity in Australia *through human instrumentalities*".[39] The second is *Valve Corporation*,[40] where the appellant was held to carry on business in Australia because it had millions of Australian customers and "significant personal property and servers located in Australia", including floor space and server racks, power, connectivity, and exchange linkages. The Full Court found Barrett J's observations instructive, save that "human instrumentalities" were unnecessary if it could be shown that there was property and income in the jurisdiction.

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34 *Luckins* (1975) 133 CLR 164, 178–179 (Gibbs J) and 187 (Mason J, agreeing).

35 *Woods* (1879) 1 SCR NS (NSW) 91, 97 ("I am not prepared to hold that a foreign mail steamship sending steamers from one port to another, and having agents at the different ports … [is] to be considered as carrying on business here"); see also *Grant* [1892] 1 QB 108, 117.

36 *Commissioner of State Revenue (WA) v Placer Dome Inc* (2018) 265 CLR 585 at 615 [97].

37 *Hope* (1980) 144 CLR 1, 8–9.

38 *Campbell v* ***Gebo Investments*** *(Labuan) Ltd* (2005) 190 FLR 209.

39 *Gebo Investments* (2005) 190 FLR 209, [33] (emphasis added).

40 ***Valve Corporation*** *v Australian Competition and Consumer Commission* (2017) 258 FCR 190, [34(c)], [43], [150]. The appellant's content was "deposited" on those servers in Australia, and the appellant incurred tens of thousands of dollars per month of expenses in Australia for those servers: *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196, [199]-[204] (Edelman J).

North American jurisprudence

16. The proposition that "carrying on business" requires *commerce* within the jurisdiction is also consistent with a large body of case law in the United States and Canada. The US Supreme Court comprehensively considered the phrase "carrying on or doing business," as used in the Corporation Tax Law,[41] in a series of decisions from 1911 to 1917.[42] Although the statutory context is different, the Court's reasoning is still instructive. Corporations carry on business if they have engaged in *activities such as* leasing property, collecting rents, managing office buildings, making investments of profits, collecting royalties, managing wharves, dividing profits, and investing the
10 surplus.[43] Corporations do *not* carry on business through mere receipt of income from property, or the payment of organisation and administration expenses incidental to the receipt and distribution thereof.[44]

17. The emphasis on *commerciality* can also be seen in the Court's consideration of the US antitrust statute.[45]

18. In *Eastman Kodak Company v Southern Photo Materials Company*,[46] the Court held that the phrase "transacts business" in the statute's venue provision – which had been inserted to capture foreign corporations[47] – requires that the corporation engage in "a continuous course of business" of a "substantial character" in the venue where it is being subjected to suit.[48] The Court later affirmed this holding in *Scophony*,[49] where it
20 explained that the phrase "transacts business," as used in the statute, should be interpreted as a practical, everyday "commercial concept" of "carrying on business of any substantial character".[50] Conduct deemed to satisfy this test has generally involved a combination of different activities, including: selling, promoting, and soliciting orders for the corporation's goods within the venue;[51] maintaining offices, soliciting orders, collecting proceeds, and providing customer service in the venue;[52] and making

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41 Revenue Act of 1909, § 38, 36 Stat. 11, 112.
42 See *Von Baumbach v Sargent Land Co*, 242 US 503, 514-7 (1917).
43 *Flint v Stone Tracy Co*, 220 US 107, 171 (1911).
44 *McCoach, Collector of Internal Revenue v Minehill & SHR Company*, 228 US 295, 308 (1913) .
45 Clayton Antitrust Act, 15 USC § 22.
46 273 US 359 (1927) (***Kodak***).
47 See *United States v* ***Scophony*** *Corporation of America*, 333 US 795, 808, 817 (1948).
48 *Kodak*, 273 US 359 (1927) 373–74.
49 333 US 795 (1948).
50 *Scophony*, 333 US 795, 807 (1948) (holding that the phrase "transacts business" denotes "the practical, everyday business or commercial concept of doing business or carrying on business of any substantial character").
51 *Kodak*, 273 US 359, 374 (1927).
52 *Banana Distributors Inc v United Fruit Company*, 269 F 2d 790, 794, 794 n 8 (2d Cir, 1959).

substantial sales and purchases in the venue.[53] These are all commercial activities, and illustrate the importance of *commerciality* to the ordinary meaning of "carrying on business" in a place. By contrast, simply holding stock in local, subsidiary companies has been held to be insufficient.[54]

19. There is also a developed body of law in the State of Florida about the expression "carrying on business" when used to extend long-arm jurisdiction over foreign corporations,[55] and where a "usual elements" approach has also been adopted. Relevant factors include:[56] the presence and operation of an office in the jurisdiction,[57] the possession and maintenance of a license to do business in the jurisdiction,[58] the number of clients within the jurisdiction served,[59] and the percentage of overall revenue derived from clients in the jurisdiction.[60] Conversely, none of the following indicia have constituted "carrying on business" in the jurisdiction: owning shares in companies in the jurisdiction;[61] being the parent company of a subsidiary that trades in the jurisdiction;[62] passively owning real estate in the jurisdiction;[63] acting as a trustee of an employee pension fund in the jurisdiction in which the trustee "received no compensation, made no profit, and engaged in no activity, whatsoever, of a business nature";[64] or navigating a commercial vessel through the jurisdiction's waters.[65]

20. US courts have also grappled with the question of carrying on business by means of the Internet. The development of the digital economy has not been seen as altering the required approach. Instead, US courts have continued to focus on "the nature and quality of *commercial* activity" that is being engaged in.[66] Specifically, all twelve regional US circuit courts have made reference to a "sliding scale" test for determining

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53 *Black v Acme Markets Inc*, 564 F 2d 681, 687 (5th Cir, 1977).

54 *People's Tobacco Company v American Tobacco Company*, 246 US 79, 87 (1918).

55 Florida Statutes, Title VI, Civil Practice and Procedure, § 48.193(1)(a)(1).

56 *Future Tech Today, Inc v OSF Healthcare Sys*, 218 F 3d 1247, 1249 (11th Cir, 2000) (per curiam); see also *Horizon Aggressive Growth, LP v Rothstein-Kass PA*, 421 F 3d 1162, 1167 (11th Cir, 2005).

57 ***Milberg** Factors, Inc v Greenbaum*, 585 So 2d 1089, 1091 (Fla, 1991).

58 *Hobbs v Don Mealey Chevrolet, Inc*, 642 So 2d 1149, 1153 (Fla, 1994).

59 *Milberg*, 585 So 2d 1089, 1091.

60 *Milberg*, 585 So 2d 1089, 1091; *Sculptchair, Inc v Century Arts, Ltd*, 94 F 3d 623, 628 (11th Cir, 1996).

61 *Stonepeak Partners, LP v Tall Tower Capital LLC*, 231 So 3D 548, 556 (Fla, 2017).

62 *MeterLogic, Inc v Copier Solutions Inc*, 126 F Supp 2d 1346, 1353–4 (Fla, 2000); ***Goodyear** Inv Corporation v Campbell*, 139 F 2D 188, 189–190 (6th Cir, 1943).

63 *Goodyear*, 139 F 2d 188, 189–190 (6th Cir, 1943).

64 *Goodyear*, 139 F 2d 188, 189–190 (6th Cir, 1943).

65 *New York Marine Managers, Inc. v Maitland Bros Co*, 746 F Supp 95, 97 (Fla, 1990).

66 ***Zippo** Manufacturing Company v Zippo Dot Com Incorporated*, 952 F Supp 1119, 1124 (W D Pa, 1997) (holding that whether jurisdiction can be exercised is "directly proportionate" to this fact).

whether jurisdiction can be exercised over a corporation based on its Internet presence.[67] The test affirms that repetitive non-commercial acts are insufficient to establish jurisdiction: "maintenance of a website is, in a sense, a continuous presence everywhere in the world", but that alone is not enough.[68] At one end of the scale (where jurisdiction is improper) are passive websites, "where a defendant has simply posted information on an Internet Website which is accessible to users in foreign jurisdictions".[69] At the other end of the scale (where jurisdiction is proper) are highly interactive, commercial websites, "where a defendant clearly does business over the Internet".[70] The Facebook service has been cited[71] as an example of a "middle category", being websites that

10 "allow for the exchange of information between customers and a business, but do not directly facilitate transactions".[72] Whether jurisdiction can be exercised for websites in the "middle category" is "determined by examining the level of interactivity and *commercial nature* of the exchange of information that occurs".[73] In applying this "sliding scale" test, some US circuit courts have reasoned that "website interactivity is important only insofar as it reflects commercial activity".[74] Consistent with this

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[67] This test was first introduced in *Zippo*, and has since been adopted by all 12 regional US circuit courts. See generally *Toys "R" Us Inc v Step Two SA*, 318 F 3d 446, 452 (3d Cir, 2003), describing *Zippo* as the "seminal authority regarding personal jurisdiction based upon the operation of an Internet web site"; David M Fritch, "Beyond *Zippo*'s 'Sliding Scale': The Third Circuit Clarifies Internet-Based Personal Jurisdiction Analysis" (2004) 49 *Villanova Law Review* 931, 942 n 56 ("the *Zippo* model has been highly influential", citing examples from 8 of the 12 regional US circuit courts); Eric C Hawkins, "General Jurisdiction and Internet Contacts: What Role, If Any, Should the *Zippo* Sliding Scale Test Play in the Analysis?" (2006) 77 *Fordham Law Review* 2371, 2392 n 208 ("The *Zippo* sliding scale test has become a staple of Internet-related personal jurisdiction analysis, and many US courts of appeals apply it in one form or another", citing examples from 7 of the 12 regional US circuit courts). See generally *Baker v Carnival Corp* (D Fla, No. 06-21527-CIV, 6 December 2006) slip op 9-10 ("Mindful of the ever-expanding growth of the internet, the courts, both federal and state, have been careful to limit the reach of personal jurisdiction when based on contacts established by the use or maintenance of internet website s. In that spirit, the case of [*Zippo*] set out a sliding scale of web activity that can be used to analyze the nature and quality of contacts that involve the internet").

[68] *Revell v Lidov*, 317 F 3d 467, 471 (5th Cir, 2002).

[69] See generally *McBee v Delica Co Ltd*, 417 F 3d 107, 124 (1st Cir, 2005) ("[t]he mere existence of a website does not show that a defendant is directing its business activities towards every forum where the website is visible; as well, given the omnipresence of Internet websites today, allowing personal jurisdiction to be premised on such a contact alone would 'eviscerate' the limits on a state's jurisdiction over out-of-state or foreign defendants").

[70] *Zippo*, 952 F Supp 1119, 1124 (WD Pa, 1997). For example, "where a website facilitates contractual relationships and the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper": ***Autoflex*** *Leasing-Dallas LLC v Autoflex LLC* (D Tex, Civ No 3:16-CV-2589-D, 23 February 2017) slip op 8.

[71] ***Blockchange*** *Ventures I GP v Blockchange, Inc* (D NY, No 21 Civ. 891, 22 July 2021) slip op 14, citing *Katiroll Co v Kati Roll & Platters, Inc* (D NY, No. 10 Civ. 1703, 9 July 2010) slip op 11-12.

[72] *Blockchange* (D NY, 21 Civ. 891, 22 July 2021) slip op 14. Examples of the "middle category" offered at 14 n 5 include websites that: permit customers to send information to the company; have chat functions which connect customers to company representatives; allow users to download program information, access forms and contact institutional representatives; and social media sites such as LinkedIn and Facebook.

[73] *Zippo*, 952 F Supp 1119, 1124 (WD Pa, 1997) (emphasis added).

[74] See, eg, *Shamsuddin v Vitamin Research Productions*, 346 F Supp 2d 804, 813 (D Md, 2004).

emphasis, US courts have held that the following conduct is insufficient to establish jurisdiction: installing "cookies";[75] merely being able to access the website in the jurisdiction;[76] and the mere possibility of sales through advertising or solicitation (as opposed to actual Internet sales).[77] Rather, "something more" is required, most often being evidence of *business* having taken place (for example, the sale of goods into the forum).[78]

21. Of course, the Facebook service was provided in Australia by *Facebook Ireland*, which has consented to jurisdiction at the *prima facie* level. On the application of the tests discussed above, US courts would undoubtedly decline to exercise jurisdiction over the Appellant.

22. The position in Canada is similar to the UK and Australia. In *HMB Holdings Ltd v Antigua and Barbuda*,[79] the Supreme Court of Canada recently adopted the test for "carrying on business" for personal jurisdiction propounded by Gascon J in *Chevron Corp v Yaiguaje*.[80] Citing *Adams v Cape,*[81] Gascon J held that there will be "compelling indicia of corporate presence" if the company has "some direct or indirect presence in the state asserting jurisdiction, *accompanied by a degree of business activity which is sustained for a period of time*". Gascon J also referred with approval to the earlier statement of LeBel J in *Club Resorts Ltd v Van Breda*,[82] who said that it was necessary to have:

> …some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction.

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[75] See, eg, *Caddo Systems v Siemens Aktiengesellcschaft (AG)* (ND Ill, No 20 C 05927, 3 September 2022) at 17 ("the cookies, privacy, and terms of use agreements are imposed on all website visitors as a condition of use. The jurisdictional significance of these routine or technical interactions, which are increasingly pervasive, is questionable") citing *Shippitsa Ltd v Slack* (ND Tex, Civ No 3:18-CV-1036-D, 5 June 2019) at 6–7; *Harris v Sportbike Track Gear* (D NJ, Civ No 13–6527(JLL)(JAD), 24 September 2015) at 5–6.

[76] *Autoflex* (D Tex, Civ No 3:16-CV-2589-D, 23 February 2017) slip op 10.

[77] *Autoflex* (D Tex, Civ No 3:16-CV-2589-D, 23 February 2017) slip op 10.

[78] *Cybersell, Inc v Cybersell, Inc*, 130 F 3d 414, 417-18 (9th Cir, 1997) ("there has been 'something more' to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state"); *ALS Scan, Inc v Digital Service Consultants, Inc*, 293 F 3d 707, 714 (4th Cir, 2002) (whether the corporation's conduct had "the manifested intent of engaging in business or other transactions" in the jurisdiction).

[79] [2021] SCC 44, [41].

[80] *Chevron Corp v Yaiguaje* [2015] 3 SCR 69, [85] (Gascon J).

[81] [1990] 1 Ch 433, referred to at fn 22 above.

[82] *Club Resorts Ltd v Van Breda* [2012] 1 SCR 572, [87] (LeBel J).

23. The position in North America is consistent with the proposition that "carrying on business" in its ordinary meaning requires *commerce* within the jurisdiction. As with *Gebo Investments* and *Valve Corporation*, the advent of digital commerce has not changed that fundamental requirement. The "sliding scale" test adopted in the US is useful as a way of analysing whether a website or other purely digital activity is sufficiently *commercial* to constitute the carrying on of a business in Australia. The North American cases reveal that the requirement of commercial activities within the jurisdiction is even *more* crucial in the digital sphere, for without it, every website globally (eg that uses cookies and is accessible from Australia) will potentially result in its owner carrying on business here, amounting to a form of universal jurisdiction which the legislature cannot be taken to have intended.

The error in the Full Court's approach

24. It is clear that the necessary quality of commerciality is totally missing on the unchallenged facts before this Court. The Full Court held that the Appellant performed two kinds of activity in Australia: installing "cookies" on the computers of Australian users (who were customers of Facebook Ireland), and providing the "Graph API" to Australian App Developers (who were in a contractual relationship with Facebook Ireland, not the Appellant): FC[35]–[65]. Critically for this appeal, the Full Court accepted that these were *not* activities of a *commercial* kind: they "lack an intrinsic commercial quality in and of themselves" (FC[9]), and "do not themselves comprise the commercial dealings which are the business" (FC[95]). The Appellant submits that this lack of any "commercial quality" to the acts done here should have been fatal to the Commissioner's prima facie case.

25. In deciding this point adversely to the Appellant (FC[91]–[107]), Perram J discerned that the reasoning of Mason J in *Hope* (see [16] above) involved two limbs: (1) that the activities be or be undertaken *as a* ***commercial*** *enterprise* or *for the purpose of a profit*; and (2) on a ***repetitive*** basis. Perram J therefore posed two questions (FC[96]): (1) does a company carry on business in Australia where it engages in a single commercial transaction here; and, (2) does a company carry on business where it "engages in repetitive acts in the performance of its business in a place where it otherwise does not conduct business but in doing so it engages in no commercial activity"? The Appellant submits that the answer to (1) is "maybe": *Smith v Capewell* shows that an isolated transaction *may* amount to carrying on a business where, for example, it is intended to be the first of many. But the answer to (2) must be "no": for reasons developed above, commerce within the jurisdiction is *always* essential to the existence of a business within

the jurisdiction. Without *commercial acts* here, there is no business here.

26. According to the test stated by Perram J at FC[103], if a company engages in repetitive non-commercial acts in Australia, it *will* conduct business here. That cannot be the test – it is, on any view, too rigid; and it changes the statutory language from "carrying on business" to "engaging in repetitive acts". The Appellant submits that this Court should reaffirm that a degree of commerciality (which may differ on a case-by-case basis) is a necessary quality of the acts. Given the finding below that the Appellant's acts in Australia did "not themselves comprise the commercial dealings which are the business" of the Appellant (FC[95]), the evidence in this case could not establish a prima facie
10 case that the Appellant carries on business here.

Part VII(b): Ground 2 – "prima facie case"

27. Rule 10.43(4)(c) of the Rules provides that an applicant for leave to serve an originating application outside the jurisdiction "*must satisfy* the Court that … the party has a *prima facie case* for all or any of the relief claimed in the proceeding" (emphasis added). The Appellant contends that the demonstration of a "prima facie case" requires an applicant to place before the Court material which is capable, in its own right, of supporting the findings of fact necessary for the relief sought. It can be accepted that it is unnecessary to prove that those findings *will*, or even *would probably*, be made. But it *is* necessary to show that those findings ***could*** be made on the material before the Court.

20 28. Material adduced on a "service out" application will satisfy this requirement either if: (a) it is capable of supporting the necessary findings of fact directly; or (b) it is capable of supporting findings of intermediate fact from which it is open to draw inferences that the ultimate facts exist. But in a case of mere inferences – of which this is one – it is critical that the inferences are "open" on the evidence before the Court. Speculation and conjecture will not suffice. The difference between inference and speculation was explained by Sir Frederick Jordan in *Carr v Baker*,[83] in a passage recently affirmed by the NSW Court of Appeal:[84]

> The existence of a fact may be inferred from other facts when those facts make it ***reasonably probable*** that it exists; if they go no further than to show that it is ***possible*** that it may exist,
> 30 then its existence does not go beyond mere conjecture. Conjecture may range from the barely possible to the quite possible.

29. Thus, if an applicant seeks to demonstrate the existence of a "prima facie case" by way of mere inferences, then it must place before the Court at least some evidence that, if

[83] (1936) 36 SR (NSW) 301, 306.

[84] *DIF III – Global Co-Investment Fund LP v DIF Capital Partners Ltd* [2020] NSWCA 124, [146] (Bathurst CJ, Bell P, Meagher JA) (emphasis added).

accepted, would make it reasonably probable that the fact to be inferred exists. It is not sufficient to adduce evidence that raises the existence of the fact as a mere speculative possibility. If it were, it would be sufficient to serve an affidavit from an applicant's solicitor deposing that they are instructed that the necessary facts exist.

30. The Commissioner argued below that a lower threshold applies. Her submission was that a prima facie case will be made out where "the material presented shows that *a controversy exists* between the parties that *warrants the use of the Court's processes* to resolve it".[85] That formulation may be traced to an unreported 1996 judgment of Lee J in *Century Insurance Ltd (in provisional liquidation) v New Zealand Guardian Trust*
10 *Ltd*,[86] which was subsequently adopted in *Ho v Akai*.[87] This was the test applied in this matter by the Full Court (eg FC[38]), and also by the primary judge (eg PJ[30]).

31. The *Century Insurance* test sets the bar too low. It is self-fulfilling. There will always be "a controversy" between the parties as soon as the respondent moves to set aside service. Its second limb (that the controversy "warrants the use of the Court's processes to resolve it") is a statement of the conclusion that is reached once the court is satisfied of the existence of a "prima facie case". As a formulation of a test, it suggests that rather than assessing the legal capacity of the evidence to prove an applicant's case, the Court is to exercise a broad and unconfined discretion as to whether service out is "warranted". This diverts attention from whether the current evidence is legally capable of
20 establishing the applicant's case, and instead encourages speculation as to what further evidence might emerge in due course (see, eg, PJ[35]). Moreover, as next explained, the test is contrary to authoritative statements of the meaning of the term "prima facie case" predating the legislative adoption of the test in this context.

Legislative history

32. The Rules were based in large part on the *Federal Court Rules 1979* (Cth) (**1979 Rules**).[88] The predecessor to r 10.43(4)(c) of the Rules was O 8 r 3(2)(c) of the 1979 Rules, which required the Court to be "satisfied that … the person seeking leave has a prima facie case for all or any of the relief claimed by the person in the proceeding". The 1979 Rules were in turn based on the *Supreme Court Rules 1970* (NSW) (**1970**

85 Commissioner's FCAFC Appeal Submissions, [6]–[7].

86 [1996] FCA 376.

87 (2006) 247 FCR 205, 208 [10].

88 Explanatory Statement, Federal Court Rules 2011 (Cth) 11, explaining that Part 10 "adopts, simplifies and streamlines the process and procedures which operated under the former [1979] Rules and does not substantially alter existing practice."

NSW Rules).[89] The predecessor to O 8 r 3(2)(c) of the 1979 Rules was Pt 10 r 2(2)(b) of the 1970 NSW Rules, which required the Court to be "satisfied … that the applicant has a prima facie case for the relief which he seeks". The 1970 NSW Rules appear to be the origin of the use of "prima facie case" as the statutory test for service out applications.

33. The 1970 NSW Rules were drafted by the NSW Law Reform Commission, and were contained in draft form in an appendix to the *Report of the Law Reform Commission on Supreme Court Procedure* (LRC 7) published on 8 September 1969. Of this project, Sir Laurence Street was later to say "[t]his was a necessary, a long overdue reform … codifying in meticulous detail the practice to govern almost every conceivable variety of litigious and non-litigious procedures of the Court."[90] As to Pt 10 r 1 – which lists the categories of case in which service out is allowed – the Commission explained its intent as follows:

> The cases for service outside the State specified in rule 1 involve ***some extension*** of the present provisions under the Common Law Procedure Act and the Equity Act and ***go beyond*** the provisions of the English revised rules of 1965. We think, however, that the extensions do not go beyond cases having a sufficient connection with New South Wales for it to be proper for the Court to have jurisdiction so that its judgment will have effect at least within New South Wales. (emphasis added)

34. The underlined words referred to the following:

    (a) The *Common Law Procedure Act 1899* (NSW), ss 18 and 19, permitted service out, but only for two categories of case (s 18(3)(a)), and then only if the defendant wilfully neglected to appear or was living out of the jurisdiction in order to defeat and delay his creditors (s 18(3)(c)).

    (b) The *Equity Act 1880* (NSW) made no provision for service out. However, under the *Consolidated Equity Rules 1902* (NSW), r 90, service out was permitted in equitable suits with leave upon the filing of an affidavit by the applicant stating "that the applicant has, in the belief of the deponent, good grounds for relief".

    (c) The *Rules of the Supreme Court (Revision) 1965* (UK), O 11 r 4(2), permitted service out where an applicant filed "an affidavit stating the grounds on which the application is made and that, in the deponent's belief, the plaintiff has a good cause of action", but with the proviso that "[n]o such leave shall be granted unless it

[89] Thomson Reuters, Federal Court Practice [FCR0.400]; LexisNexis, *Practice & Procedure High Court & Federal Court of Australia* (online at 6 October 2022) Overview of the Federal Court Rules 2011, 'History' [37,750].

[90] G K Whalan and C G E Allfree, *Supreme Court Manual* (Law Book Company, 1973) page v.

shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order".

35. The reference in the passage extracted above to "some extension" is to be understood in context as referring to the enlarged list of categories or "cases" in which service would be permitted outside the jurisdiction (of which the NSWLRC proposed that there should be an unprecedented 23 in number), while tempering that enlargement by introducing a more stringent test for obtaining leave (the "prima facie case" test) to ensure that there would always remain "a sufficient connection with New South Wales for it to be proper for the Court to have jurisdiction".

10 36. The question, then, is what was the legal meaning of the expression "prima facie case" as at 1970 and as at 1979?

37. ***First***, in *May v O'Sullivan*,[91] the High Court endorsed the decision of the Full Court of the Supreme Court of South Australia in *Wilson v Buttery*,[92] a case which explained the meaning of "prima facie case" in the criminal context of a "no case" submission. It was explained that, in that context, demonstration of a "prima facie case" required that "when the evidence came to be finally considered it was necessary that it should be such as ***enabled*** the Court to come to a conclusion, free from any reasonable doubt".[93] The Full Court in *Wilson*, and the High Court in *May*, both relevantly said (in the words of the former): "we cannot find any distinction between civil and criminal cases".[94]

20 38. The Court in *May* then restated the test for determining the existence of a "prima facie case" as follows: "the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he ***could*** lawfully be convicted. This is really a question of law".[95] That is now a frequently cited statement of the meaning of "prima facie case". It has been associated[96] with the similar comments of Kitto J in *Zanetti v Hill*,[97] where his Honour framed the question as being "whether … there is with respect to every element of the offence ***some evidence which, if accepted, would either prove the element directly or enable its existence to be inferred***". These authorities established the general meaning of the expression "prima

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91 (1955) 92 CLR 654 at 657–8.

92 (1926) SASR 150.

93 *May v O'Sullivan* (1955) 92 CLR 654 at 657 (emphasis added).

94 *May v O'Sullivan* (1955) 92 CLR 654 at 658.

95 (1955) 92 CLR 654 at 658 (emphasis in original).

96 See, eg, *R v LK* (2010) 241 CLR 177 at 195 [29] (French CJ); Nygh and Butt, *Butterworths Australian Legal Dictionary* (Butterworths, 1997), p 914–5, "prima facie case".

97 (1962) 108 CLR 433 at 442.

facie case" as at 1970, when the NSWLRC decided to adopt it as the test for service out.

39. ***Secondly***, in the period between the enactment of the 1970 NSW Rules and the 1979 Rules, the operation of Pt 10 r 2(2)(b) of the 1970 NSW Rules was considered by the Supreme Court of New South Wales in ***Stanley Kerr*** *Holdings Pty Ltd v Gibor Textile Enterprises Ltd*.[98] There, Sheppard J set aside an order for service out, on the basis that the plaintiff had not discharged its onus of establishing a prima facie case, having relied upon an affidavit from the plaintiff's solicitor merely stating what his instructions were. His Honour held:[99]

> I make it quite clear that it is my view that to proceed in this way is wrong, and that the jurisdiction which is exercised under Pt 10 ought only to be exercised ***upon proper evidence of the facts***, that is to say, evidence from persons who are able to speak directly of them, and evidence which discloses in a little detail what the facts are, ***so as to enable the judicial officer who deals with the matter to come to a conclusion*** as to whether, if r 1(b) is relied upon, a breach of the contract really was committed within the State.

40. In support of that view, his Honour relied upon, and expressly held to be applicable to the NSW 1970 Rules, the "six matters" referred to in the judgment of Megarry J in *GAF Corporation v Amchem Products Inc*.[100] Relevant to this case are the first, second and fourth of those matters, which are as follows:[101]

    (a) First, "there is the overriding consideration that it is a very serious question whether a foreigner ought to be subjected to the inconvenience of having to come to this country in order to defend his rights: the Court ought therefore to be exceedingly careful before allowing a writ to be served out of the jurisdiction".[102]

    (b) Secondly, the onus lies on the plaintiff to establish that the case falls within one of the permissible categories for service out, and that leave should be granted.[103]

    (c) Fourthly, if there is any doubt, whether as to the construction of the rules or as to the service out application more generally, that doubt should be resolved in favour of the foreigner.[104]

Nine months later, the Judges of the Federal Court of Australia made the 1979 Rules, and in doing so, adopted the precise model contained in Pt 10 r 2(2)(b) of the 1970 NSW

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98 [1978] 2 NSWLR 372.

99 [1978] 2 NSWLR 372 at 375F–G (emphasis added).

100 [1975] 1 Lloyd's Reports 601.

101 [1975] 1 Lloyd's Reports 601 at 604–605.

102 Citing *The Hagen* [1908] P 189 at 201; *The Brabo* [1949] AC 326 at 350; *Cuban Atlantic Sugar Sales Corporation v Compania de Vapores San Elefterio Limitada* [1960] 1 QB 187 at 196; [1959] 2 Lloyd's Rep 505 at 507; *Mackender v Feldia AG* [1967] 2 QB 590.

103 Citing *Mauroux v Soc Com Abel Pereira da Fonseca SALR* [1972] 1 WLR 963.

104 Citing *The Hagen* [1908] P 189 at 201.

Rules as construed in *Stanley Kerr*.

41. These two strands of authority were synthesised in the judgment of Heerey J in ***Merpro Montassa*** *Ltd v Conoco Specialty Products Inc*.[105] His Honour accepted the applicability of *Stanley Kerr*, though he added the qualification that there may be cases in which statements of information and belief would be acceptable.[106] His Honour then turned to the concept of a "prima facie case", which his Honour said was "well known to the law".[107] Its meaning, his Honour said, was explained in *May*.[108] Whilst that was a criminal case, his Honour said "[t]he same considerations apply, mutatis mutandis, in a civil case".[109] Three months later, French J accepted that approach as correct in

10 *Western Australia v Vetter Trittler Pty Ltd (in liq)*.[110] In doing so, his Honour devised a formulation that fairly captured the law to date on this issue: "a prima facie case is made out if, on the material before the court, inferences are open which if translated into findings of fact, would support the relief claimed".[111] That test is correct.

42. In 1996, in the unreported judgment of *Century Insurance Ltd (in prov liq) v New Zealand Guardian Trust Ltd*,[112] Lee J held:

> What the Court must determine is whether the case made out on the material presented shows that ***a controversy exists*** between the parties that ***warrants the use of the Court's processes to resolve it*** and whether causing a proposed respondent to be involved in litigation in the Court in Australia is justified.

20 43. No authority was cited for this proposition, for none existed. It was a fundamentally different and looser test to that which had been carefully worked out in the succession of cases outlined above. It was reached notwithstanding that his Honour evidently did have regard to the authorities stating the correct test. In any event, it was a wrong test, and for 10 years it was also an obscure one, with no subsequent citations.

44. That changed with the decision of ***Ho v Akai*** *Pty Ltd (in liq)*.[113] There, the Full Court started by correctly endorsing the *Merpro Montassa* test, requiring that "on the material before the court, inferences are open which, if translated into findings of fact, would support the relief claimed".[114] However, the sentence that follows stated: "Or, to put

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105 (1991) 28 FCR 387.
106 (1991) 28 FCR 387 at 389.
107 (1991) 28 FCR 387 at 390.
108 (1991) 28 FCR 387 at 390.
109 (1991) 28 FCR 387 at 390.
110 (1991) 30 FCR 102 at 109–110.
111 (1991) 30 FCR 102 at 110.
112 (16 May 1996, Federal Court of Australia, unreported).
113 (2006) 247 FCR 205.
114 *Ho v Akai* (2006) 247 FCR 205 at 208 [10].

the matter more prosaically as Lee J did in *Century Insurance*", and then the Court proceeded to quote the *Century Insurance* formulation extracted above. But this was to equate the *Century Insurance* test with the *Merpro Montassa* test. One is not a "more prosaic" statement of the other. They are simply different tests: the former imposes on an applicant the discipline of adducing evidence capable of substantiating its claims for relief, whereas the latter requires no more than the existence of a controversy. The *Century Insurance* test is wrong, and *Ho v Akai* was wrong insofar as it equated that test with the body of case law that had preceded it.

45. *Century Insurance* should be expunged from the law. In its place, a test should be laid down that reflects the pre-1970 and pre-1979 understandings of the meaning of "prima facie case", for that it is what the drafters of the rules must be taken to have had in view in adopting it. A relatively recent and accurate statement of the law, which eschewed any mention of the *Century Insurance* test, was given by Jagot J in *GE BetzDearborn Canada Company v Memcor Australia Pty Ltd*[115] in these terms:

> In other words, if inferences are open on the material which, if they did become final findings of fact, would support the relief claimed, then that is sufficient to establish a prima facie case. Although it is true that it must be a process of reasoning which involved inference and not mere speculation … the question is whether the inference is open on the documents.

46. Such a test is to be preferred, recognising as it does the need for the material before the Court to be legally capable, in and of itself, of proving the facts necessary for the claimed relief, and the impermissibility of speculation as a step towards such a conclusion.

Application to present facts

47. One element of the Commissioner's claim for relief is that the personal information the subject of the proceeding was collected by the Appellant in Australia (s 5B(3)(c) *of the Act*). The Full Court found that there was a "prima facie case" for such collection *solely* through the Appellant's involvement in the installation and maintenance of cookies on the devices of Australian users. The Commissioner's "prima facie case" thus required her to point to evidence that was able to support a finding that the Appellant (as opposed to any one of its subsidiaries) used cookies to collect the particular personal information of Australian users that is the subject of the Commissioner's claims (see FC[24]).

48. The only evidence relied upon by the Full Court on this point was the 2013 Data Use Policy. This was rightly described by Perram J as being Facebook Ireland's policy (see FC[140], cf FC[39]), insofar as Australian users were concerned. Accordingly, as an initial observation, to the extent that the 2013 Data Use Policy could be used to support

[115] [2013] FCA 78.

any inferences, they would be as to the conduct of Facebook Ireland (as the provider of the Facebook service to Australian users) rather than that of the Appellant. The whole of the relevant terms of the 2013 Data Use Policy is as follows:

> We receive data whenever you visit a game, application, or website that uses Facebook Platform or visit a site with a Facebook feature (such as a social plugin), sometimes through cookies. This may include the date and time you visit the site; the web address, or URL, you're on; technical information about the IP address, browser and the operating system you use; and, if you are logged in to Facebook, your User ID. …
>
> <u>V. Cookies, pixels and other similar technologies</u>
>
> 10 Cookies are small pieces of data that are stored on your computer, mobile phone or other device. Pixels are small blocks of code on webpages that do things like allow another server to measure viewing of a webpage and often are used in connection with cookies.
>
> We use technologies like cookies, pixels, and local storage (like on your browser or device, which is similar to a cookie but holds more information) to provide and understand a range of products and services. Learn more at: https://www.facebook.com/help/cookies
>
> We use these technologies to do things like:
>
> - make Facebook easier or faster to use;
> - enable features and store information about you (including on your device or in your browser cache) and your use of Facebook;
> - 20 deliver, understand and improve advertising;
> - monitor and understand the use of our products and services; and
> - protect you, others and Facebook. …
>
> Cookies and things like local storage help make Facebook work, like allowing pages to load faster because certain content is stored on your browser or by helping us authenticate you to deliver personalized content.

49. The important question when considering this evidence is whether it could support an inference that the *Appellant* (rather than, eg, one of its subsidiaries) used *cookies* (rather than, eg, one of the other technologies mentioned, like pixels, local storage, and others) 30 to *collect* (rather than, eg, to use) *<u>the</u> personal information the subject of the proceedings* (rather than, eg, "technical information", or personal information *not* the subject of these proceedings). The Appellant submits that no trial judge could accept the 2013 Data Use Policy - the only evidence relied on by the Full Court – as proof of the "collecting" element of the cause of action, in the absence of any other evidence to explain what "cookies" are and how they operate upon the information the subject of the proceeding.

50. The high point of the extract above is perhaps the first paragraph. It mentions cookies as only one example of a technology that is "sometimes" used by Facebook Ireland to receive data. But the only types of data mentioned in this context are technical data, such as technical information about IP addresses, browsers and operating systems. 40 There is no evidence whatsoever from which it could be inferred that that type of data received was the personal information the subject of these proceedings: that is, personal

information of Facebook users that was, or at least could have been, provided to the offending app through the Facebook platform.

51. The Appellant submits that the Full Court resorted ultimately to conjecture, rather than available inference, in finding that cookies collected *the* personal information the subject of these proceedings (see FC[135]–[141]). Apart from the issues already noted, there was no evidence capable of establishing or supporting an inference about how cookies work, how the cookies said to be relevant in the proceedings work, or how those cookies could be said to work in relation to the information that is the subject of these proceedings. Perram J seemed to rely on his own conceptions about how the Internet works; assuming without evidence that, for example, the Appellant "installs executable code on that computer *and then causes it to be executed*" (FC[78]), rather than requiring the Commissioner to adduce evidence to support that position. That assumption was unavailable on the evidence and is incorrect.

52. The evidentiary lacuna on this issue is explicable by the fact that the Commissioner did not rely on this matter in her original *ex parte* application.[116] It was thought up later. Yet no additional evidence was served to support it. It should not be forgotten in this regard that the Commissioner had, over a period of some years, used mandatory information-gathering powers to gather evidence, including evidence directed to jurisdiction. There is no reason why she could not have used those powers to gather some specific evidence about what cookies do, if that was to be a necessary part of her case.

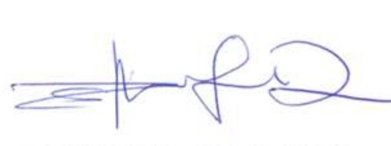
Part VII: Orders

53. The Appellant seeks the orders contained in its Notice of Appeal.

Part VIII: Estimate

54. The Appellant estimates that it will need half a day to present its argument.

Dated: 4 November 2022



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116 See *Australian Information Commission v Facebook Inc* [2020] FCA 531 (22 April 2020), which contains no mention of "cookies".

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to paragraph 3 of the Practice Direction No 1 of 2019, the Appellant sets out below a list of the particular constitutional provisions and statutes referred to in its submissions.

Privacy Act 1988 (Cth), s 5B

Federal Court Rules 2011 (Cth), rr 10.43, 13.01