HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

Facebook Inc
Appellant

and

Australian Information Commissioner
First Respondent

Facebook Ireland Limited
Second Respondent

APPELLANT'S REPLY

Part I: Certification: This submission is in a form suitable for publication on the Internet.

Part II: Argument

1. **Ground 1:** The question that arises on this ground is how to apply the statutory criterion ("carries on business in Australia") in the context of online service providers. The Full Court attempted to answer that question via the test in the last sentence of FC[103] (CAB 143) – a clearly flawed test which the Commissioner does not seriously defend. The Appellant's case is that "carrying on business" requires ***commercial*** indicia: *not* "physical" indicia, which is a straw man that the Commissioner keeps attacking, despite repeated disavowals.

2. The same question has been discussed at length in North America (AS[16]–[23]), in what is a mature jurisprudence that grapples in a sophisticated way with the issues presented by online service providers. The Commissioner does not dispute that *commerciality* is the touchstone in that jurisprudence (AS[24]). Her attempt to distinguish the cases (RS [31]–[33]) is unpersuasive. ***First***, the sliding scale in *Zippo* has arisen in contexts just like the present, eg. in Florida's long-arm statute (AS[19], not addressed in RS), which extends jurisdiction to a non-resident "carrying on a business" in that state. Courts in that circuit have applied *Zippo* to hold that mere Internet presence is insufficient, because an element of e-*commerce* (buying and selling online) is required.[1] ***Second***, courts in other US circuits (in addition to *Caddo*) have also found "cookies" to have limited jurisdictional significance.[2]

3. Ignoring the principle that Parliament is taken to have adopted the settled construction of a pre-existing statutory phrase (AS[8]), the Commissioner insists that the *Privacy Act 1988* (Cth) (**the Act**) creates its own special context for application of the criterion (eg RS[14]). Yet she then urges upon this Court a principle articulated by the Full Court in *Valve* (a *Competition and Consumer Act 2010* (Cth) case) following *Gebo* (a *Corporations Act 2001* (Cth) case). The reliance on *Valve* is misplaced: it was a case *overflowing* with commercial indicia (AS[15]), all of which are lacking here.

4. **NOC Ground 1(a) – agency:** Contrary to RS[35]–[40], Facebook Ireland is not the Appellant's agent. There is nothing in the nature of an ultimate holding company that makes

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[1] *Alternate Energy Corp v Redstone*, 328 F Supp 2d 1379, 1383 (SD Fla, 2004) (merely posting information online is insufficient); *Verizon Trademark Servs LLC v Producers Inc*., 810 F Supp 2d 1321, 1333 (MD Fla, 2011) ("[t]he Internet does not provide cause to abandon traditional principles guiding the personal jurisdiction analysis"); *Pathman v Grey Flannel Auctions*, 741 F Supp 2d 1318, 1324-26 (SD Fla, 2010); *Carmel & Co v Silverfish LLC* (SD Fla, No. 1:12-cv-21328-KMM, 21 March 2013) slip op 20 n 5 ("[d]oing business over the internet is a characteristic of an active or interactive website").

[2] Cf RS[33]: ***Caddo*** *Systems v Siemens Aktiengesellschaft (AG)* (ND Ill, No. 20 C 05927, 9 March 2022) slip op 17 is not confined to its facts. See *Shippitsa Ltd v Slack* (ND Tex, Civ No 3:18-CV-1036-D, 5 June 2019) slip op 16 ("if *Zippo* were to take into account the technical instructions sent to a user's web browser, the courts would be faced with a line-drawing problem, because the number of invisible messages exchanged between users and websites is greater today than at the time when *Zippo* was decided"); ***Harris*** *v SportBike Track Gear* (D NJ, Civ No: 2:13-cv-6527-JLL-JAD, 24 September 2015) slip op 5-6; *Murphy v Humbolt Clothing Co* (WD Pa, Civ No: 1:20-cv-58-SPB, 29 January 2021) (citing *Harris*).

its subsidiaries agents for it. The group's corporate structure, and the distinct legal personality of its members, cannot be brushed aside. Nor can the specific intragroup agreements governing the entities' relationship, including critically cl 2.5 of the Data Hosting Services Agreement dated 15 September 2010 (**DHSA**), which provides that the Appellant and Facebook Ireland "are and shall at all times remain independent contractors, and ***not*** partners, ***agent*** or joint venturers" (PJ[86], CAB 63). Unless that contractual agreement to form no agency relationship is a sham – which has not been submitted – this ground must fail.

5. None of the four matters relied upon by the Commissioner constitute Facebook Ireland an agent of the Appellant. As to the first (RS[37]), the supposed uniformity of the services offered by entities in the Facebook Group (of which there is no evidence) is irrelevant. Even if there were evidence that the services provided through the website were identical in every jurisdiction, a uniform product does not indicate or even suggest that all subsidiaries are agents carrying out a "worldwide business" of the parent. Otherwise, franchisor companies and global retailers of uniform products would be caught, even if they had a structure that deliberately divided up their business by region, by country, or by store.

6. As to the second matter (RS[38]), the Commissioner cherry-picks a reference to "the business" of the Appellant and Facebook Ireland in Recital A of the Sweden Data Hosting Agreement dated 1 June 2013, but does not mention Recital C of the very same agreement, which refers to "*their businesses*" (PJ[76], CAB 60).

7. As to the third matter (RS[39]), the Commissioner asserts without evidence that the acts in Appendix 1 of the Data Processing Agreement (**DPA**) were "essential for the delivery of the Facebook service to Australian users". Even were that so, it would not make Facebook Ireland the Appellant's agent. A company that engages service providers to enable it to carry on its business does not thereby become the agent of those providers. Also, cl 5(a) of the DPA provides that the activities can be performed only *on Facebook Ireland's direction*. That there is "no evidence of such directions" is hardly surprising as the Commissioner in using her s 44 powers never asked for any; she "asked the *opposite*" (PJ[108], CAB 70). In any event, to invoke an ***absence*** of evidence as a basis for a prima facie case is to reverse the onus.

8. As to the fourth matter (RS[40]), it is unclear why this should have any bearing at all. This clause merely allowed such sharing and transferring. There is no evidence that any such sharing or transferring actually occurred, any more than the existence of an indemnity in a contract is evidence that the indemnity was exercised. In any event, even if sharing and transferring did occur, that is irrelevant: information is routinely exchanged between

separate entities without rendering one of those entities the agent of the other.

9. **NOC Ground 1(b):** As the Commissioner accepts at RS[30], it is critical to identify with precision the specific business being carried on, including by identifying the transactions that make up the business. But the Commissioner does neither task, resorting instead to artificial assertions about the nature of the Appellant's business contrived to suit whichever argument is being advanced at the time (RS[9], [22], [26], [30], [35], [38], [41]). Caution should be exercised before accepting the Commissioner's paraphrases of the FC's paraphrases of the evidence. The evidence itself should be checked. This is especially true of ground 1(b), which posits that the Appellant's involvement in cookies and the Graph API in Australia[3] was somehow linked to the Appellant's separate business of selling advertising in the US; a totally speculative theory with no foundation in the evidence. Even if that were the case, it is difficult to see why that would entail the Appellant *carrying on its business* here, rather than in the US, where it sells advertisements to American (not Australian) users.

10. **Ground 2 – prima facie case**: The Commissioner's assertion at RS[44] that this ground was not argued below is wrong; it was argued at every stage below, in some detail.[4]

11. Nor is it correct that this ground cannot affect the outcome. It is said that the FC appeared to apply the correct test in certain paragraphs (RS[46]). So much may be accepted. But it did not do so universally, and importantly, it did not do so on the issue the subject of this ground, namely, whether there was a prima facie case that the Appellant collected the personal information by means of cookies. On that issue, the FC engaged in fuzzy reasoning (FC[138]–[141], CAB 153-154), conflating the way that cookies supposedly ***used*** information[5] with the distinct question of whether they were involved in ***collecting*** any such information. This elision is especially apparent at FC[140] (CAB 153-154) the last sentence of which does not logically follow and amounts to speculation. The reasoning at RS[58] has the same vice. The first and second propositions are correct, so far as they go. But the third does not follow. It assumes that cookies could only "fulfil their purposes" if the information they used was also collected by the cookies themselves. The fourth proposition is likewise incorrect from the words "and therefore collected" onwards. Both the FC's and the Commissioner's reasoning depend upon speculation that if cookies make *use* of information, then they will have also *collected* that information. That is insufficient to satisfy the correct test; namely, that on the material before the Court, inferences are open which, if translated into findings of fact, would support the relief claimed. An inference of collection by cookies

[3] Findings made by the FC on a prima facie basis, which for the purposes of this appeal only are not disturbed.
[4] *First instance*: Confidential Submissions of the First Respondent in support of its Interlocutory Application dated 6 May 2020 at [11]–[14], Book of Supplementary Further Material (**SFM**) 7-8. *Appeal*: Applicant's Written Submissions filed 31 March 2021 at [10], SFM 32; Applicant's Written Submissions in Reply at [2]–[4], SFM 42-43.
[5] A prima facie finding itself based wholly on speculation rather than evidence: see third sentence of FC[140], CAB 153.

is not "open" on the present material. A prima facie case could exist only if *Century Insurance* were to be applied, and a mere controversy sufficed for a prima facie case – which is the wrong test.

12. The Commissioner's submissions on this ground fail to engage with this Court's decision in *May v O'Sullivan*, which holds there is no distinction between civil and criminal cases as to the meaning of "prima facie case", endorsing *Wilson v Buttery*.[6] The submission in the first sentence at RS[45] is thus unavailable, as the Commissioner does not seek leave to re-open *May*. And since *May* predated the adoption of 1970 and 1979 rules, the drafters of the rules can be taken to have adopted the meaning it declared. This is not to submit that "time stopped in the 1970s" (cf RS[50]), but rather to recognise that where legislators repeat words which have been judicially construed, they can be taken to have intended the words to bear the meaning already judicially attributed to them.[7] In the same way, *Stanley Kerr*[8] also informs the construction of the 1979 Rules. Contrary to RS[54], that case *was* concerned with the "prima facie case" requirement, which was set out at 374, and picked up again at 375 by the reference to "Pt 10, r 2", which introduced the key passage relied upon at AS[39]. Neither *May* nor *Stanley Kerr* can be shrugged off. Each directly bears on the question, as Heerey J recognised in *Merpro Montassa* (see AS[41]).

13. The meaning of "prima facie case" did not change in 2011 (cf. RS[51]). As the Commissioner submitted on the special leave application, r 10.43 relevantly copied the terms of the former O 8 r 3, and "prima facie case" was intended to retain the meaning *already* judicially attributed to it.[9] The present debate is as to which meaning that was.[10]

14. Lastly, the 1970 NSW Rules did not adopt the position in equity (cf. RS[53]). As *Agar v Hyde* explains (at [44]), r 90(a) of the *Consolidated Equity Rules 1902* (NSW) *expressly* allowed affidavits on an application for service out merely to state that "the applicant has, in the belief of the deponent, good grounds for relief". *That* is why a solicitor's affidavit was sufficient under those rules: r 90(a) permitted it, *in terms*. But the test in r 90(a) was patently not adopted in r 2(2)(b) or its progeny. To allow a solicitor's mere belief that there exist good grounds for relief to satisfy the now express "prima facie case" requirement in r 10.43 would be to reduce that requirement to nothingness.

15. **NOC Ground 2 – constructive collection:** Section 5B(3)(c) focusses in terms on the place where the personal information was "collected or held by the organisation or

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[6] ***May*** *v O'Sullivan* (1955) 92 CLR 654 at 657–8, citing *Wilson v Buttery* (1926) SASR 150.
[7] *DPP Reference No 1 of 2019* (2021) 95 ALJR 741 at [51] (Gageler, Gordon and Steward JJ).
[8] ***Stanley Kerr*** *Holdings Pty Ltd v Gibor Textile Enterprises Ltd* [1978] 2 NSWLR 372.
[9] Commissioner's Special Leave Response at [21].
[10] On that issue, little is gained by seeking to apply the presumption from re-enactment to *Ho v Akai*, which repeated ***both*** the *Merpro Montassa* and *Century Insurance* tests, falsely equating them: AS[44]; cf RS[50].

operator"; not on the individual to whom the information relates. The Commissioner's argument disregards the clear words of s 5B(3)(c), which require that "the personal information was collected or held ***by*** *the organisation or operator* ***in*** *Australia*". Those words require the organisation in question (a) to be the collecting entity and (b) to perform the act of collection in Australia. The Commissioner's theory of "constructive collection" (as she termed it below) disregards both requirements. It deems every receipt of a copy of information anywhere up the chain as being a collection of that information at the place where the information first originated. That is to elide the careful distinction in the Act between the distinct acts of "collection", "use" and "disclosure" (see, eg, s 16A). Further, if "collection" included "constructive collection" via a related body corporate, this would render unintelligible much of s 13B, which governs sharing of personal information between related bodies corporate. Moreover, this argument appears to rely in some way upon the "purposes" for which one or other of the entities acted (RS[60]). But notions of "purpose" form no part of s 5B(3)(c) and are a further departure from the statutory text.

16. **NOC Ground 3 – holding information by "controlling" cookies:** The theory of this ground is that once a cookie has been installed upon the device of a user, it is subject to the Appellant's continuing "control" and is thus a record "held" by the Appellant. But there is no evidence at all to suggest that once a cookie has been installed on a user's device, that the Appellant retains any power to access, alter or otherwise affect it without some contributing action on the user's part. All that the Data Use Policy says is that the *user* can remove or block cookies using settings in their browser, and that if they do, it may affect their ability to use Facebook (RFM 41). Once installed, both "possession" and "control" of the cookie are with the user alone; the evidence does not even suggest that the Appellant could *access* a cookie installed on a user's device. The Commissioner says that any "control" that the Appellant had was "not exclusive". Putting to one side the inherent contradiction in the idea of "non-exclusive control", it is clear that it could not amount to "control" in the definition of "holds" in s 6. That is because such "control" must be of a kind that would enable the Appellant to comply with APPs 11 and 12 (Sch 1, Pt 4), which are predicated on the Appellant being able to take steps to secure the information from misuse or loss, and to give access to the information. The "control" referred to in s 6 must be "sufficient to enable a person to meet the affirmative content of the obligations" that attach to "control" and thus "holding" of information under the Act.[11]

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[11] See, similarly, *Comptroller-General of Customers v Zappia* (2018) 265 CLR 416 at 427–9 [28]–[32].