HIGH COURT OF AUSTRALIA

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### Details of Filing

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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

# OUTLINE OF ORAL SUBMISSIONS OF THE AUSTRALIAN INFORMATION COMMISSIONER

## PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

## PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

**Special leave should be revoked with costs**

2. Both grounds of appeal turn on whether the Full Court erred in holding there was a "prima facie case": **CAB 184**. That test no longer applies: *Federal Court Legislation Amendment Rules 2022*, sch 1 items 13 and 50.

3. The second ground, as articulated in **AS [2(b)]** and **AS [27]-[52]**, concerns the meaning of "prima facie case" in a repealed rule. It now manifestly lacks public importance.

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4. As to the first ground at **AS [8]-[26]**, whether the appellant "carries on business in Australia" is a question of fact (or perhaps a mixed question of fact and law): *Luckins v Highway Motel (Carnarvon)* (1975) 133 CLR 164 (**JBA 3, Tab 18**) at 178; *Nygh's Conflict of Laws in Australia* (10th edn, 2020) (**JBA 6, Tab 48**) at [35.22]; *Hope v Bathurst City Council* (1980) 144 CLR 1 (**JBA 3, Tab 17**) at 6-9. There is no substantial question as to the construction of s 5B(3)(b) of the ***Privacy Act*** *1988* (Cth) to be resolved. Instead, the dispute is about whether particular facts established a prima facie case that the appellant's activities in Australia bring it within the ordinary meaning of the expression. The resolution of that issue at the prima facie case stage will not determine any question of public importance. In addition, deciding that question will no longer

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determine the parties' rights, as the appellant could be re-served under the new rules: *Federal Court Legislation Amendment Rules 2022*, sch 1 item 50 (FCR r 43.02).

**Carries on business in Australia (RS [12]-[34])**

5. The meaning of the phrase "carries on business in Australia" in s 5B(3)(b) is affected by the statutory context: FC [70] (**CAB 133**). The Privacy Act promotes the privacy of individuals, including where information flows across national borders: Privacy Act (**JBA 1, Tab 3**), ss 2A, (c), (d), (f), 5B(1A). That context suggests a wide interpretation of the phrase.

6. A foreign organisation that is carrying on business overseas "carries on business in

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Australia" if it engages in acts within Australia that "amount to, or are ancillary to, transactions that make up or support the business": *Valve Corporation v ACCC* (2017) 258 FCR 190 (**JBA 5, Tab 37**) at [143], [144], [149] (the Court). There is no requirement

that the acts within Australia, when viewed in isolation, be "intrinsically commercial": FC [3], [8]-[9] (**CAB 113, 115**), [84], [87], [103] (**CAB 138, 139, 143**).

7. The North American cases relied on by the appellant are of no assistance for they are directed to very different legal questions: *Caddo Systems v Siemens,* ND I11, No 2C 05927 (2022) (**JBA 4, Tab 24**) at 854-857. In particular, the *Zippo* "sliding scale" test is relevant only to whether the exercise of jurisdiction will satisfy the Fourteenth Amendment's due process requirement: *Zippo Manufacturing Company v Zippo Dot Com Inc* 952 F Supp 1119 (WD Pa, 1997) (**JBA 5, Tab 42**) at 1124, 1126.

8. The appellant was engaged in the business of the provision of data processing services to Facebook Ireland: FC [29], [33]-[34], [88]-[89] (**CAB 121-123, 139**); Data Transfer and Processing Agreement, cl 2(4) and Appendices 1-2 (**RFM 50, 57-60**); as an aspect of its worldwide business of data processing: FC [75] (**CAB 135**). Although the data processing services were conducted in data centres overseas, the data processing included acts by Facebook Inc in Australia: FC [90]-[91], [95], [104] (**CAB 139, 141, 144**). Specifically, they included: (i) the installation of cookies on user devices, and (ii) the administration of the Graph API: FC [3], [107] (**CAB 113, 144**).

9. **Cookies**: Cookies are multifunctional pieces of data physically placed on a user's device. They enabled the appellant to identify and track internet activity undertaken by means of that device, and were installed for commercial purposes: Data Use Policy (**RFM 40, 41**), Data Transfer and Processing Agreement, Appendices 1-2 (**RFM 57-60**). There was a prima facie case that, as part of conducting its business of providing data processing services to the second respondent, the appellant installed cookies on devices in Australia and that activity was one which was conducted in Australia: FC [37], [43], [47] (**CAB 123, 125-126**). Those facts established a prima facie case that the appellant was "carrying on business in Australia": FC [104]-[107] (**CAB 144**).

10. **Graph API**: The Graph API is a software that allowed apps to create a link or interface between the Facebook platform's social graph and the app: FC [54] (**CAB 128**). The appellant managed the Graph API on behalf of the second respondent as part of its business in providing the Facebook login functionality to Australian developers: FC [59], [64] (**CAB 130, 131**). The management of the Graph API by the appellant was "integral to the commercial pursuits" of the appellant: FC [9] (**CAB 115**).

**"Prima facie case" (RS [44]-[55])**

11. There was no ground of appeal below that suggested that the primary judge applied the wrong test at PJ [26]-[30] (**CAB 44-45**). The ground should be rejected for three reasons. First, the Full Court applied the *Merpro Montassa* test: **RS [46]**, **Reply [11]**. Secondly, even if the Full Court applied the *Century Insurance* test, that was consistent with r 10.43: *Ho v Akai Pty Ltd* (2006) 247 FCR 205 (**JBA 5, Tab 30**) at [10]; **RS [52]-[53]**. Thirdly, the Full Court did not err in applying the prima facie case test to s 5B(3)(c) regarding the collection of personal information in Australia: FC [137], [140] (**CAB 152-153**).

**Alternatively, the appeal should be dismissed on the grounds in the Notice of Contention**

12. **Ground 1(a) (RS [35]-[40])**: The Commissioner established a prima facie case that the appellant was carrying on its worldwide business in Australia through its agent, the second respondent: Statement of Rights and Responsibilities, cll 17-19 (**RFM 21-22**), Data Transfer and Processing Agreement, cll 2, 5, 12, Appendix 1 (**RFM 50, 52, 56, 57**), 2010 Data Hosting Services Agreement (PJ [84]-[86]; **CAB 62-64**), 2013 Data Hosting Services Agreement, Recitals A-C, cl 1.5 (**RFM 61-62**); FC [43] (**CAB 125**); PJ [112]-[113] (**CAB 71**).

13. **Ground 1(b) (RS [41]-[43])**: The Commissioner established a prima facie case that the appellant was carrying on business directly in Australia, by installing and operating cookies and managing the Graph API for the purpose of providing the Facebook service in North America: FC [106] (**CAB 144**), 2010 Data Hosting Services Agreement, cl 1.5 (PJ [85]; **CAB 63**), Statement of Rights and Responsibilities, cl 18(1) (**RFM 21**); PJ [4] (**CAB 39**).

14. **Ground 2 (RS [60]):** The Commissioner established a prima facie case that the appellant "collected" personal information in Australia, through the second respondent: Data Transfer and Processing Agreement, cl 12 (**RFM 56**), Statement of Rights and Responsibilities, cl 17(1) (**RFM 21**), Privacy Act (**JBA 1, Tab 3**), ss 5B(3)(c), 13B.

15. **Ground 3 (RS [61]):** The Commissioner established a prima facie case that the appellant "held" personal information in Australia by reason of its use and installation of cookies on Australian users' devices: PJ [122]-[123], [193]-[196] (**CAB 74, 97**); cf FC [154]-[162] (**CAB 157-160**), Privacy Act (**JBA 1, Tab 3**), s 6.

Dated: 7 March 2023

Stephen Donaghue Ruth Higgins Thomas Prince Emma Bathurst