HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number:	S137/2022
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Important Information

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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 OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

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

PART II: OUTLINE OF PROPOSITIONS

1. Application to Revoke Special Leave: Whether the material before the Court reasonably admits of different conclusions on the question whether the Appellant's activities constitute a "business" is a question of law,[1] which remains of general public importance because of the prevalence in Australian statutes of the phrase "carries on business". Further, the revocation application is based upon two wrong premises:

   a. First, the First Respondent is not at liberty to re-serve because r 43.02 applies to originating applications *first* served on or after the commencement of the new rules. The First Respondent's broader construction produces the unlikely consequence that any stale originating application could be re-served under the new rule, and deprives r 43.04 of sensible operation;

   b. Second, there is no evidence that the First Respondent *will* re-serve.[2]

2. Further, success in the appeal would provide a compelling basis to apply for dismissal under r 10.43A(1), on the ground in r 10.43A(2)(c). Even if it did successfully re-serve, this Court's decision would bind the parties in the litigation.

3. Ground 1: The transactions making up the Appellant's business are relevantly to provide data processing services to Facebook Ireland, from its data centres in the United States and Sweden, in return for consideration. The Appellant was found to perform two non-commercial activities in Australia: the installation and removal of "cookies", and the management of the Graph API. There were no commercial transactions in Australia.

4. The phrase "carrying on business" has a common sense meaning established in the case law. The legislature has chosen to adopt *that* concept as the test, notwithstanding that the *Privacy Act 1988* (Cth) (**Privacy Act**) is concerned with information about people. The word "business" in the phrase "carrying on business" means "commercial enterprise

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1 Eg *Hope v Bathurst City Council* (1980) 144 CLR 1, 9 (Mason J).

2 The Affidavit of Katrina Mary Close sworn 17 February 2023 states at [9(c)] that the First Respondent "would be entitled to re-serve", not that it *would* or presently intends that it *will* re-serve.

as a going concern": *Hope v Bathurst City Council* (1980) 144 CLR 1, 547. It is *that* which must be carried on *in* Australia.

5. In order to establish that a business is being carried on by a person in Australia, it is necessary at a minimum to show that the person "entered into commercial transactions" in the jurisdiction: ***Luckins** v Highway Motel* (1975) 133 CLR 164, 169. *Luckins* holds that the transactions need not be on revenue account, but can be on cost account. The traditional "indicia" or "elements" of carrying on business are a surrogate for identifying a sufficient degree of *commerciality* in the "acts" within the jurisdiction.

6. In the absence of commercial transactions, an act in the jurisdiction which merely "goes towards carrying on a business" is insufficient to constitute the carrying on of a business in the jurisdiction.[3] Read fairly, *Valve Corporation* at [149] intends or could sustain no broader principle.

7. Notice of Contention Ground 1(a): The contention that Facebook Ireland carried on business as agent for the Appellant is precluded by cl 2.5 of the Data Hosting and Services Agreement (**DHSA**) which provides that the parties are not agents of each other (Book of Further Materials, Tab 15, p 63).

8. Notice of Contention Ground 1(b): This ground speculates that the installation of cookies on Australian devices for Facebook Ireland's Australian business may somehow produce a commercial benefit connected with the Appellant's provision of services to its North American users. There is no evidentiary basis for that. It is contrary to cl 4(b) of the Data Transfer and Processing Agreement (**DTPA**).

9. Ground 2: The correct test, most consistent with the course of authority, is that 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": *Western Australia v Vetter Trittler (in liq)* (1991) 30 FCR 102 at 110.

10. The Commissioner submits that it suffices if "the material presented shows that a controversy exists between the parties that warrants the use of the Court's processes to resolve it": *Century Insurance Ltd (in prov liq) v New Zealand Guardian Trust Ltd* [1996] FCA 376. That test reduces to a bare discretion (for there will virtually always

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[3] *Grant v Anderson* [1892] 1 QB 108; *Okura & Co Limited v Forsbacka Jernverks Aktiebolag* [1914] 1 KB 715; *Campbell v Gebo Investments (Labuan) Ltd* (2005) 190 FLR 209; ***Valve Corporation** v ACCC* (2017) 258 FCR 190

be a controversy) and thus eliminates the rigour formerly required of an applicant by the need to show a "prima facie case".

11. The correct test is consistent with the settled judicial constructions of the meaning of "prima facie case": see *May v O'Sullivan* (1955) 92 CLR 654. *Ho v Akai Pty Ltd (in liq)* (2006) 247 FCR 205 is correct insofar as it endorses the *Vettler* test but not insofar as it then equates that with the *Century Insurance* test.

12. Notice of Contention Ground 2: The theory of "constructive collection" is contrary to cl 4(b) of the DTPA (above). In any event, "collected" within the meaning of the Privacy Act refers to actual collection, not a deemed collection arising from an imputed purpose.

13. Notice of Contention Ground 3: This contention depends upon speculation that the Appellant retains control over a cookie once it is installed on a user's device. But there is no basis for that in the evidence, and indeed such evidence as there is shows that it is the *user* that has control over cookies installed on their device, being able to remove or block them at will.

Dated: 7 March 2023

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