



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number: S137/2022
File Title: Facebook Inc v. Australian Information Commissioner & Anor
Registry: Sydney
Document filed: Form 27C - Intervener's submissions
Filing party: Respondents
Date filed: 04 Jan 2023

Important Information

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IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY

BETWEEN:

Facebook Inc
Appellant

and

Australian Information Commissioner
First Respondent

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Facebook Ireland Limited
Second Respondent

INTERVENER SUBMISSIONS

Part I: Certification

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

20 **Part II: Basis of Intervention**

2. The intervener, Andrew Hamilton, seeks leave to be heard as intervener on the basis that it is the Applicant in ongoing Federal Court proceedings against the Appellant, *Hamilton v Meta Platforms, Inc*, NSD 899/2020 ("**Hamilton Proceedings**") where leave to serve the Appellant in the USA was granted, in part, in reliance upon the Full Federal Court's decision in *Facebook Inc v Australian Information Commissioner* (2022) 289 FCR 217 ("**FC**"). The intervener is also an experienced senior solicitor with appellate Court advocacy experience.
3. The judgment, *Hamilton v Meta Platforms, Inc (Service out of Jurisdiction)*
 30 [2022] FCR 681 which applied *FC* (at paragraph 32), was referred to in the Appellant's oral submissions on special leave (at paragraph 161 of [2022] HCATrans 157).
4. This intervener submission supports the outcome sought by First Respondent.

Part III: Why leave to be heard as intervener should be granted

5. Leave to be heard as intervener is sought on the basis:

(a) of the intervener's interest in the outcome of this hearing as set out above, see *Levy v Victoria* (1997) 189 CLR 579, 604 and footnote 32 per Brennan CJ; and

(b) that the position, seemingly accepted by all parties, that Facebook Inc. did not directly contract with and provide services to users of the Facebook platform in Australia in the relevant period, is incorrect as a matter of common knowledge to which the Court may take judicial notice under section 144 of the *Evidence Act 1995* (Cth).

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6. The intervener acknowledges that these submissions should have been filed by 16 December 2022 (as per r 44.04.2 of the High Court Rules 2004) and requests leave for late filing on the following basis:

(a) due to pressing timetable commitments in the Hamilton Proceedings during the September to December 2022 period (see 21 September 2022 and 27 October 2022 orders of Cheeseman J in those proceedings) the intervener only yesterday became aware of the filing of submissions in this High Court appeal;

(b) the period of delay has been over the pre-Christmas and Christmas-New Year period when the Courts have been in recess and most practitioners on holidays;

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(c) the Appellant has not suffered prejudice from this delay because it was already aware of the intervener's material and argument since August 2022 when the evidence and submissions setting out these facts and argument was served upon the Appellant in accordance with the 10 June 2022 orders of Cheeseman J in the Hamilton Proceedings.

Part IV: Issues

7. The Court may take judicial notice under section 144 of the *Evidence Act 1995* (Cth) of the following matters of common knowledge in Australia that are not reasonably open to question:

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(a) that large numbers of persons resident in the United States and Canada visited Australia during the relevant period; and

(b) that many of these North American visitors used the Facebook platform while in Australia during the relevant period ("**North American Visitor Users**").

8. These North American Visitor Users had a contractual relationship with Facebook Inc. and were provided services directly by Facebook Inc, during the relevant period. See paragraph 65 of *Australian Information Commissioner v Facebook (No 2)* [2020] FCA 1307 ("**PJ**"): "*If you are a resident of or have your principal place of business in the US or Canada, this Statement is an agreement between you and Facebook, Inc. ...*"

10 9. The activity of these North American Visitor Users on the Facebook platform in Australia during the relevant period puts Facebook Inc. in the same position as Facebook Ireland Limited with regard to doing business in Australia.

10. The situation is analgous to *Smith v Capewell* (1979) 142 CLR 509 ("**Smith**") as discussed at *FC* paragraphs 97 - 99, although with the number of cross border transactions of Facebook Inc. is many orders of magnitude greater than Mr Capewell.

11. As matters of common knowledge or "notorious facts" are considered to have always been part of the material before the trial Court, the High Court may take judicial notice of them. See *Woods v Multi-Sport Holdings Pty Ltd* [2002] HCA 9, per McHugh J at paragraphs 63 to 70 (adopting a permissive approach) and per Callinan J at paragraphs 162 to 169 (adopting a cautious approach).

12. The above matters of common knowledge meet the requirements of Callinan J's cautious approach of "*wherever a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it*".

13. If the Court needs to make further enquiries to confirm these matters of common knowledge:

a) the large number of North American visitors can be confirmed from the Australian Bureau of Statistics Short Term Arrivals from the USA and Canada (Series IDs A85375695A and A85375650W);

30 b) the percentage of North American residents using the Facebook platform on a daily basis can be calculated from the US population and information on the

number of Daily Average Users of the Facebook Platform in Facebook Annual Reports (see e.g. pages 45 and 46 of the Facebook 2019 Annual Report).

Part V: Estimate

14. The Intervener estimates that it will need 20 minutes to present its argument via MS Teams video link.

Dated 4 January 2023



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ANNEXURE TO INTERVENER SUBMISSIONS

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

Evidence Act 1995 (Cth), s 144