HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

FACEBOOK INC
Appellant

-and-

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AUSTRALIAN INFORMATION COMMISSIONER
First Respondent

and

FACEBOOK IRELAND LIMITED
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the Internet.

PART II ISSUES

2. The Commissioner alleges that, during the period 12 March 2014 to 1 May 2015, the appellant and the second respondent (**Facebook Ireland**) seriously and/or repeatedly interfered with the privacy of approximately 311,127 individual Australian Facebook users in contravention of s 13G of the *Privacy Act 1988* (Cth) (the **Act**), by disclosing their personal information to a third-party app known as "This is Your Digital Life". Most of the Australian users whose personal information was allegedly disclosed did not install the app; their Facebook "friends" did. The Commissioner alleges that the Facebook entities did not adequately inform the affected Australian individuals of the manner in which their personal information would be disclosed, or that it could be disclosed to an app installed by a friend, but not installed by that individual, in breach of Australian Privacy Principle (**APP**) 6.1. She further alleges that the Facebook entities failed to take reasonable steps to protect those individuals' personal information from unauthorised disclosure, in breach of APP 11.

3. This appeal concerns whether the primary judge ought to have made orders granting leave to serve the appellant outside Australia.[1] The appellant challenged those orders on the basis that the Commissioner did not have a *prima facie* case that the appellant: (a) carried on business in Australia under s 5B(3)(b) of the Act; and (b) collected and/or held personal information the subject of the acts and/or practices about which the proceedings are concerned under s 5B(3)(c) of the Act. The primary judge dismissed that challenge.[2] The Full Federal Court (**FC**) granted leave to appeal but unanimously dismissed the appeal.[3]

4. The two grounds of appeal raise the two issues identified above. Ground 1 requires the Court to construe the phrase "*carries on business in Australia*" in s 5B(3)(b) of the Act and then determine, as a question of fact,[4] whether the Commissioner demonstrated a *prima facie* case in respect of that requirement. In relation to the constructional question, in summary the Commissioner submits that for an entity to be carrying on business *in Australia* it is sufficient if there are acts within Australia that amount to, or are ancillary

[1] *Australian Information Commissioner v Facebook Inc* [2020] FCA 531 (CAB 5).
[2] *Australian Information Commissioner v Facebook Inc (No 2)* [2020] FCA 1307 (**PJ**) (CAB 35).
[3] *Facebook Inc v Australian Information Commissioner* (2022) 289 FCR 217 (**FC**) (CAB 110).
[4] See *Anchorage Capital Partners Pty Ltd v ACPA Pty Ltd* (2018) 259 FCR 514 at [99] (Nicholas, Yates and Beach JJ); ***Tiger Yacht*** *Management Ltd v Morris* (2019) 268 FCR 548 at [50] (McKerracher, Derrington and Colvin JJ).

to, transactions that make up or support the entity's business (wherever those transactions occur). That was the construction given to the same phrase, albeit in a different statute, in ***Valve*** *Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190 at [149]. The appellant did not challenge the *Valve* approach before the FC, and the FC applied it: FC[10], [83] and [87] (CAB 115, 138-139). There is no direct challenge to it here. This Court should endorse the *Valve* approach. Contrary to the appellant's submissions (**AS**), the phrase does not require "*usual elements*" of physical activity in Australia through human instrumentalities, or that the acts within the relevant territory are themselves intrinsically commercial (whatever that precisely means).

5. If the Court adopts the *Valve* approach, ground 1 fails. The evidence established that two key activities the appellant performed in Australia — installing, operating and removing cookies on Australian users' devices, and providing the Graph Application Interface (**API**) to Australian app developers — supported (indeed, were integral to) the appellant's commercial pursuits, including as part of its business of providing data processing services to Facebook Ireland: FC[8], [9] and [104] (CAB 115, 144). At the *prima facie* stage, that was all that was required.

6. The second issue raised by the appellant concerning the meaning of "*prima facie* case" does not arise because the FC applied what the appellant contends is the correct test: whether, on the material before it, inferences were open which, if translated into findings of fact, would support the relief claimed: FC[34], [37], [39], [43], [47], [48], [57], [59], [64]-[66], [106], [115], [119], [122], [131], [132], [137], [142], [143], [151], [152], [158], [163] (CAB 123-126, 129-132, 144, 146-148, 151-152, 154, 156-158, 160). Ultimately, the appellant's argument on ground 2 collapses into asking this Court to determine whether, on the available evidence, it was reasonably open to infer that the appellant collected the personal information the subject of the proceeding in Australia through the use of cookies, so as to fall within s 5B(3)(c) of the Act. For the reasons the FC gave, plainly it was.

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

7. No s 78B notice is necessary.

PART IV FACTS

8. The following factual findings are relevant to this appeal.

9. *First*, by the **Data** Transfer and **Processing Agreement**, the appellant was engaged in the business of providing data processing services to Facebook Ireland: FC[29]-[34] (CAB 121-123). The data processed pursuant to this agreement included personal data: FC[30] (CAB 121-122).

10. *Secondly*, one of the obligations of the appellant under the Data Processing Agreement was to install, operate and remove cookies (small pieces of data) on the devices of Australian users of the Facebook platform: FC[36]-[37] (CAB 123-124). Cookies were central to the operation of the Facebook platform. Information collected by cookies included: the date and time a user visited the site; the web address, or URL, the user was on; technical information about the IP address, browser and operating system the user used, and, if the user was logged onto Facebook, the user's User ID: FC[40] (CAB 125).[5] For the Facebook service, cookies had a broader purpose than merely making the Facebook platform easier or faster to use and enabling features and storing information about users and their use of the Facebook platform. Cookies helped the delivery and improvement of targeted advertising, and monitored users' use of the Facebook platform and other Facebook products and services: FC[41]-[42] (CAB 125). The appellant's installation and operation of cookies on devices in Australia was integral to the commercialisation of the personal information it collected; it was "*not an outlier activity. It is one of the things 'which makes Facebook work'*": FC[43] (CAB 125).

11. *Thirdly*, apps could request personal information from the accounts of users of the Facebook platform using a tool called the Graph API. The Graph API operated in the manner described at FC[55] (CAB 129). There was evidence that supported an inference that, in Australia, the appellant managed the Graph API on behalf of Facebook Ireland. This included the appellant providing the tool known as "Facebook Login" to Australian app developers, albeit from servers located in the United States and Sweden: FC[64] (CAB 131).

PART V ARGUMENT

(a) Carries on business in Australia

(i) <u>The Act</u>

12. As Perram J correctly observed at FC[70] (CAB 133), "*[w]hilst it is common to speak of the general approach to the question of whether an entity is carrying on business in*

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[5] See Exhibit SJH-1 tab 6.6.2, p 178 (Respondent's Further Material (**RFM**) 30).

a jurisdiction, usually the question arises in a particular statutory context".[6] For that reason, contrary to AS[8], the starting point in addressing ground 1 is not a diverse and dispersed jurisprudence decided in different times and concerning different statutes, but the text of the Act, interpreted in context and in light of its purpose.[7]

13. Section 5B concerns the extra-territorial operation of the Act. Under s 5B(1A), the Act's application is extended to acts done, or practices engaged in, outside Australia by an organisation that has an Australian link. Under s 5B(3), an organisation has an Australian link if all of the following apply: (a) it is not an organisation described in s 5B(2); (b) the organisation carries on business in Australia; and (c) the personal information was collected or held by the organisation in Australia, either before or at the time of the act or practice.

14. The appellant's argument almost wholly ignores the statutory context in which s 5B(3)(b) appears, and thus fails to grapple with the purpose of the Act. As legislation dealing with the privacy of personal information, the Act is naturally concerned with the operation of businesses that seek to monetise the personal information of users including Australian residents. The Act promotes and establishes a set of general standards focused on the protection of personal information.[8] That concept is defined in s 6 as information or an opinion about an identified individual, or an individual who is reasonably identifiable: (a) whether the information or opinion is true or not; and (b) *whether the information or opinion is recorded in a material form or not* (emphasis added). As Perram J observed at FC[70] (CAB 133), one object of the Act is to facilitate the free flow of information *across national borders* (i.e., not just within them) while ensuring that the privacy of individuals is respected (s 2A(f)). These matters guide the meaning to be given to s 5B(3). They strongly caution against under-examined and over-confident distinctions between "*physical*" and "*digital*" or "*actual*" and "*virtual*". *A fortiori*, in a case concerning digital cookies, which are installed on physical devices to collect actual information, which is used in turn for advertising to generate profit.

15. The Explanatory Memorandum (**EM**) accompanying the introduction of s 5B(3)(b) observed that it was "*intended that, for the operation of paragraphs 5B(3)(b) and (c) of the [Act], entities…who have an online presence (but no physical presence in Australia),*

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6 See also PJ[40] (CAB 48-49), referring to *Tiger Yacht* (2019) 268 FCR 548 at [50].

7 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle and Gordon JJ); *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 at [48] (Kiefel CJ, Bell and Keane JJ); *Mighty River International Ltd v Hughes* (2018) 265 CLR 480 at [42] (Kiefel CJ and Edelman J).

8 *Jurecek v Director, Transport Safety Victoria* (2016) 260 IR 327 at [58] (Bell J); *Privacy Act 1988* (Cth), sub-ss 2A(a), (c).

and collect personal information from people who are physically in Australia, carry on a 'business in Australia… '": FC[71] (CAB 134). That confirms that there is no implicit negative proposition in the Act to the effect that its application does not extend to entities lacking what the appellant calls the "*usual*" indicia in Australia: FC[72] (CAB 134).

16. The focus of the Act is the protection of non-material personal information. Moreover, s 5B(3)(b) is always speaking.[9] Its construction must accommodate what it means to carry on business at the time the jurisdictional nexus is sought to be established; here, at a time when global, digital business models like the appellant's, reliant on non-monetary transactions with consumers and the commercialisation of data, were, and
10 continue to be, pervasive.

(ii) <u>The *Valve* construction</u>

17. In *Valve* at [149], a Full Court of the Federal Court, in construing s 5(1)(g) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) said that "*the case law makes clear that the territorial concept of carrying on business involves acts within the relevant territory that amount to, or are ancillary to, transactions that make up or support the business*". The Court also confirmed that this does not mean that in all cases there is a "*need for some physical activity in Australia through human instrumentalities, being activity that itself forms part of the course of conducting business*".[10]

18. The construction of the phrase "*carries on business in Australia*" that was adopted in
20 *Valve* is an appropriate construction to give to the same statutory phrase as used in s 5B(3)(b) of the Act, it being suitably flexible and capable of capturing modern business practices in both statutory contexts. If anything, the context of the Act and its focus on non-material information suggests that the construction of s 5B(3)(b) ought to be even broader than that adopted in *Valve*. At the very least, the context of the Act leads to the conclusion that there is no need for physical activity in Australia, as was confirmed in *Valve*. In *Gebo*, Barrett J's suggestion, at [33], that the requirement of "*physical activity*" was necessary by reason 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*" was perhaps understandable, in a case that involved Australian

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[9] *Attorney-General for Queensland v Attorney-General for the Commonwealth* (1915) 20 CLR 148, 174 (Isaacs J); *Aubrey v The Queen* (2017) 260 CLR 305 at [29]-[30] (Kiefel CJ, Keane, Nettle and Edelman JJ); *R v A2* (2019) 269 CLR 507 at [141] (Bell and Gageler JJ), [169] (Edelman J); *Port of Newcastle Operations Pty Limited v Glencore Coal Assets Australia Pty Ltd* [2021] HCA 39 at [86] (per curiam).

[10] PJ[134] (CAB 79) referring to *Valve* (2017) 258 FCR 190 at [149] (Dowsett, McKerracher and Moshinsky JJ), which rejected that concept (derived from *Campbell v **Gebo** Investments (Labuan) Ltd* (2005) 190 FLR 209 at [33] (Barrett J)).

consumers responding to solicitations made via material uploaded to the Internet in some unknown place (see also [29] and [30]). But the Full Court in *Valve* was correct not to see the reference to the last sentence of [33] in *Gebo* as laying down an inflexible rule or condition as to the circumstances in which a foreign company may be taken to be carrying on business in Australia.

19. The correctness of the construction of the phrase "*carries on business in Australia*" that was adopted in *Valve* was not challenged by the appellant before the primary judge or the FC. It was applied at FC[10], [83], and [87] (CAB 115, 138-139). The attempt that is now made by the appellant to demonstrate that this construction involves error should
10 be rejected. In particular, at AS[15] the appellant does not grapple with the clear statement of principle in *Valve* at [149]. Instead, it seemingly seeks to confine *Valve* to its facts (emphasising that the appellant had what it refers to as "*usual*" or "*physical*" indicia including "*significant personal property and servers located in Australia*"). However, as Perram J observed at FC[84] (CAB 138), that does not provide good reason for not applying the principle identified in *Valve* at [149].

(iii) <u>Applying the approach in *Valve*, the appellant carries on business in Australia</u>

20. If this Court construes s 5B(3)(b) of the Act consistently with the construction given to the same statutory phrase in *Valve* at [149], then the answer to the factual question identified at [4] above is that the Commissioner established a *prima facie* case that the
20 appellant was carrying on business in Australia.

21. As to cookies, there was evidence that: (a) one of the data processing activities undertaken by the appellant for Facebook Ireland under the Data Processing Agreement was "*[i]nstalling, operating and removing, as appropriate, cookies on terminal equipment for purposes including the provision [of] an information society service explicitly requested by Facebook users, security, facilitating user log in, enhancing the efficiency of Facebook services and localisation of content*" (FC[36] (CAB 123)); (b) of the physical nature of cookies as "*small pieces of data stored on your computer, mobile phone or other device*";[11] and (c) that the purpose of the installation of technologies "*like cookies*" onto such devices was to do things like "*enable features*" and "*deliver,*
30 *understand and improve advertising*",[12] a matter which was plainly critical to the

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[11] See Affidavit of Sophie Jane Higgins sworn 9 April 2020, Exhibit SJH-1 (**Exhibit SJH-1**) tab 6.6.2, p 189 (RFM 41). See also tab 6.6.2, pp 178, 188, and tab 6.6.3, p 193 (RFM 30, 40, 45).

[12] See Exhibit SJH-1 tab 6.6.2, p 189 (RFM 41).

appellant's commercial enterprise of providing data processing services to Facebook Ireland and the provision of the Facebook platform worldwide.

22. As to the Graph API, there was evidence that the appellant *managed* the provision of it to Australian apps. In particular, the appellant managed the software which allowed Australian apps to create a link or interface between the Facebook platform's "social graph" (being the network of connections through which users of the Facebook platform communicated information on the platform) and the app, with the purpose to make the Facebook service "*more connected and social*" (PJ[141]) and to facilitate the collection of more data by the appellant (FC[9]). The link or interface was facilitated by a further
10 tool, known as "Facebook Login", which allowed an installer of an app to utilise their Facebook account credentials to log into an app: FC[54]-[55] (CAB 128-129). That the software managed by the appellant to allow this to occur ran in data centres in the US and Sweden was not to the point. Rather, the point was that the software made up or was integral to the business of providing the Facebook Login functionality to Australian app developers, an activity which occurred in Australia: FC[59] (CAB 130).

23. On the basis of that evidence, the two acts accepted by the primary judge and the FC as establishing the jurisdictional nexus in the present case – the installation, operation and removal of cookies on the devices of Australian users and the provision of the Graph API to Australian app developers – were repetitive acts designed to advance the
20 appellant's commercial enterprise, including of providing data processing services to Facebook Ireland. As the FC recognised, they were acts that "*take their place as a material part of the working of the business*"; "*integral to the commercial pursuits of Facebook Inc*"; and were "*part of its business of providing data processing services to Facebook Ireland*": FC[8], [9], [104] (CAB 115, 144).[13] Applying *Valve*, that is sufficient to support the conclusion that the appellant carries on business in Australia.

24. Contrary to AS[26], the effect of Perram J's analysis, culminating in the conclusion at FC[103]-[104] (CAB 143-144), is not that his Honour ignored the requirement that, for there to be a business, there must be commerce. It was merely to recognise that, where there are repeated activities occurring in Australia, then so long as those acts amount to,
30 or are ancillary to transactions which make up or support the business of the foreign corporation (wherever those transactions occur, and whether they be monetary or non-

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[13] There is no challenge in this Court to the finding at FC[34] (CAB 123) that the provision of data processing services to Facebook Ireland pursuant to the Data Processing Agreement by Facebook Inc was a *business* being conducted by Facebook Inc.

monetary), that foreign corporation is "*carrying on business in Australia*". AS[14], in contending that acts carrying out transactions that *make up* the business are insufficient to establish the jurisdictional nexus, is inconsistent with *Valve*.[14]

25. For the above reasons, neither intrinsically commercial activities, nor transactions carried out in Australia, are prerequisites for carrying on business in Australia. Even if acts viewed in isolation do not appear commercial, when they are viewed in the context of a business as a whole often plainly they are. That was the situation here, as the FC correctly recognised.

(iv) The appellant's argument

10 26. The appellant invites this Court to confine the statutory requirement in s 5B(3)(b) that an "*organisation ... carries on business in Australia*" by reference to what is said to be a "*settled judicial construction*" which requires repetitive acts in the jurisdiction which are commercial "*in and of themselves*": AS[8]-[26]. It submits that acts will not have that character unless they comprise the "*usual*" (or "*physical*") indicia, being indicia referred to in a grab-bag of English, Australian and North American authorities some of which were decided well over a century ago. Unsurprisingly, indicia set out in authorities decided long before there were companies conducting business through anything remotely resembling the Facebook digital platform suit the appellant's purpose. That business is not "*manifested in physical or material matter or structures*

20 *or goods*", or defined by purely monetary transactions, but rather is focused on "*extracting value from information*" and data: FC[3] (CAB 113). By its submissions in this Court, the appellant seeks to take advantage of that fact, at the price of ossifying the law by entrenching criteria that have an undoubted historical pedigree, but that some modern businesses (including the appellant) can readily avoid.

27. In essence, the appellant's argument treats statements in the authorities that were accurate descriptive statements, at the time they were made, about what it meant to carry on a business in a place, as if they define the outer limits of the concept when it falls to be applied to businesses that make money in ways that were impossible even 20 years ago. For that reason, the authorities cited at AS[9]-[11] do not advance the appellant's

30 argument that s 5B(3)(b) requires a series of physical indicia which operate as "*limiting*

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[14] The appellant's reliance at AS[13] fn 27 on *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 in support of this submission is misplaced. The distinction between "*carrying on*" and "*carrying out*" was a specific distinction drawn in the context of the *Income Tax Assessment Act 1936* (Cth). And as Mason CJ, Brennan and Gaudron JJ observed at 344 "*[d]ecisions as to the meaning of expressions such as 'carrying on the business of a skin dealer' (see Smith v Capewell) are not strictly part of the law relating to Australian income tax and are therefore not made relevant*".

factors on the concept of where business was 'carried on'", or (put more generally) repetitive acts in the jurisdiction which are intrinsically commercial.

28. The "*trilogy*" of High Court cases cited in AS[12] likewise does not support the appellant's argument. ***Luckins*** *(receiver and manager of Australian Trailways Pty Ltd) v Highway Motel (Carnavon) Pty Ltd* (1975) 133 CLR 164 concerned s 344(1) of the *Companies Act 1961-1970* (WA), which provided that Div 3 Pt XI applied to a foreign company "*only if it has a place of business or is carrying on business within the State*". Certain express statutory limits within s 344 informed the meaning of "*carrying on business*". Subsection 344(3) had the effect that certain activities in themselves did not amount to the carrying on of business within the State: a company was not to be regarded as so doing simply because it conducted isolated transactions there. It was in the context of those statutory limitations that Gibbs J posed the "*conundrum*" set out by Perram J at FC[94] (CAB 140-141). Even if posed generally, it is wrong to submit that this question had been definitively answered by earlier cases, including *Woods v Pacific Mail Steamship Company* (1879) 1 SCR NS (NSW) 91 (*cf* AS[14]), where Martin CJ stressed that each case must depend on its own circumstances.[15] Further, and in any event, Gibbs J's statement that the expression would "*usually connote, at least, the doing of a succession of acts designed to advance some enterprise of the company pursued with a view to pecuniary gain*"[16] does not mandate the "*commerciality*" of those acts *per se*; rather the acts must be *designed to advance* the commercial enterprise. Here, that requirement was satisfied (see paragraph [23] above).

29. The focus of the analysis in ***Smith v Capewell*** (1979) 142 CLR 509 was the first question posed by Perram J at FC[96(1)] (CAB 141-142). That question does not arise here, because the appellant repetitively engaged in the two relevant activities. In any event, there is no support in the Court's analysis for the appellant's thesis that the "*acts*" in the territory (even if required to be repetitive[17]) must be commercial *in and of themselves*.

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[15] *Woods v Pacific Mail Steamship Company* (1879) 1 SCR NS (NSW) 91 at 97 (Martin CJ). See also Gibbs J in *Luckins* (1975) 133 CLR 164 at 178, where his Honour observed "*the question… is simply one of fact and must be decided by having regard to all the circumstances of the case*".

[16] *Luckins* (1975) 133 CLR 164 at 178 (Gibbs J).

[17] While the question does not arise here, *Smith v Capewell* did not hold that in all cases repetitive acts in the jurisdiction must be shown before the corporation can be found to be carrying on business therein. Both Barwick CJ (514-515) and Gibbs J (517-518) acknowledged that there may be circumstances where a single transaction will establish carrying on business in the jurisdiction. In other contexts, e.g., s 25 of the *Income Tax Assessment Act 1936* (Cth), a single transaction has sufficed: *Federal Commissioner of Taxation v Whitford's Beach Pty Ltd* (1982) 150 CLR 355.

30. As to ***Hope*** *v Bathurst City Council* (1980) 144 CLR 1 at 8-9, Mason J's observation[18] that the idea of a business denotes "*activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis*", does not support the appellant's argument that those activities must be intrinsically commercial. Indeed, as Perram J observed at FC[87] (CAB 139), while it is important to identify the business which is being carried on, subsequent authority has held that that process of identification involves: (a) identifying the transactions that make up or support that business; and (b) asking whether those transactions or the transactions ancillary to them occur in Australia.[19] As addressed in [23] above, here the relevant business or commercial enterprise being carried on was the provision of data processing services to Facebook Ireland by installing, operating and removing cookies on the devices of Australian users, and the provision of the Graph API to Australian app developers. Both activities occurred in Australia. There can be little doubt that the appellant's activities were "*undertaken as a commercial enterprise*", there being no other reason it would have engaged in those activities.

31. Finally, the North American jurisprudence is apt to distract: *cf* AS [16]-[23]. The context in which those cases arise differs from the present. But two issues can be noticed.

32. *First*, to the extent that the appellant relies on the "*sliding scale*" test adopted in *Zippo Manufacturing Company v Zippo Dot Com Incorporated*, 952 F Supp 1119, 1124 (W D Pa, 1997) as a "*useful… way of analysing whether a website or other purely digital activity is sufficiently commercial to constitute the carrying on of a business in Australia*" (AS[23]), it merits emphasis that the "*sliding scale*" is designed to provide guideposts to a court evaluating the exercise of specific jurisdiction. The questions that the court asks in that context are different to those that arise here.[20]

33. *Secondly*, the statement in AS[20] (and fn 75) that *Caddo* supports the proposition that *"installing cookies" is "insufficient to establish jurisdiction"* overstates the effect of a case that turned on its facts. In *Caddo*, there was evidence of the mere installation of cookies, without any further evidence as to their nature and purpose, such that it could not be concluded that the act was directed at residents of the forum for the purpose of establishing specific jurisdiction. That is in contrast with this case, where the appellant's

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[18] With which Gibbs and Stephen JJ (at 4), Murphy J (at 11) and Aickin J (at 11) agreed.

[19] *Valve* (2017) 258 FCR 190 at [149] (Dowsett, McKerracher and Moshinsky JJ), applying *Gebo* (2005) 190 FLR 209 at [31] (Barrett J).

[20] ***Caddo*** *Systems v Siemens Aktiengesellschaft* (AG) (ND Ill, No 20 C 05927, 9 March 2022), 15. The test requires that: "*(1) the defendant purposefully directed its activities at residents of the forum; (2) the claim arises out of or relates to the defendant's activities in the forum; and (3) assertion of personal jurisdiction is reasonable and fair*".

installation and operation of cookies can readily be seen to be integral to the commercialisation of the personal information it collected (FC[8]-[9] (CAB 115)). Indeed, the FC recognised that it is not the case that every foreign corporation that installs a cookie on a device in Australia will necessarily be engaging in a transaction that makes up or supports that corporation's business: FC[11] and [45] (CAB 116, 126).

34. For the above reasons, ground 1 of the appeal fails. The FC was correct to hold, at the *prima facie* case stage, that the relevant activities in which the appellant engaged in Australia amounted to transactions that made up or supported the appellant's business, including of providing data processing services to Facebook Ireland.

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(b) Notice of contention ground 1(a)

35. Ground 1(a) of the Notice of Contention only arises if ground 1 of the appeal is allowed. The Commissioner contends that the FC ought to have concluded that she had a *prima facie* case that the appellant was carrying on business in Australia within the meaning of s 5B(3)(b) of the Act by reason of Facebook Ireland carrying on business in Australia on behalf of, and as part of, the appellant's worldwide business. That contention was rejected at first instance: PJ[18] (CAB 42). The FC did not need to address this issue: FC[164] (CAB 160).

36. Agency is a "*protean*"[21] concept. In the context of a provision concerned with whether a company carries on business in Australia, the critical issue is whether, having regard

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to all the facts and circumstances, the putative agent is carrying on its own business or whether it is carrying on business on behalf of the principal.[22] The following matters, considered cumulatively, support the conclusion that, at least to the *prima facie* case standard, the appellant was carrying on business in Australia by reason of Facebook Ireland carrying on business on its behalf.

37. *First*, the terms of the services offered by the appellant and Facebook Ireland were, broadly speaking, the same.[23] Users of the Facebook platform throughout the world were provided with the same services through the same digital platform, the domain

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[21] *Scott v Davis* (2000) 204 CLR 333 at [4] (Gleeson CJ).

[22] *Australian Competition and Consumer Commission v Yazaki Corporation (No 2)* (2015) 332 ALR 396 at [358] (Besanko J) (while this decision was appealed to the Full Federal Court, this aspect of Besanko J's reasoning was not challenged: see *Australian Competition and Consumer Commission v Yazaki Corporation and Another* (2018) 262 FCR 243 at [40]). See also *Vogel v R & Kohnstamm Ltd* [1973] QB 133 at 143, applied in *Tycoon Holdings Ltd v Trencor Jetco* (1992) 34 FCR 31 at 38–39 (Wilcox J); *Bray v F Hoffmann-La Roche Ltd* (2002) 118 FCR 1 at [67]–[68], [70]–[71] (Merkel J).

[23] See description of "Facebook" in the Statement of Rights and Responsibilities cl 18(1): Exhibit SJH-1 tab 6.4.2, p 169 (RFM 21). A near-identical clause appeared in a later version of the Statement of Rights and Responsibilities at cl 17(1): Exhibit SJH-1 tab 6.4.3, p 175 (RFM 27). See also PJ[74] (CAB 60).

name for which was owned by the appellant.[24] This indicates that there was a single worldwide business of the appellant operated by multiple entities worldwide, and, in Australia, by Facebook Ireland.[25] As Allsop CJ described at FC[8] (CAB 115), the business is held out "*as providing to its users a single global network for the instantaneous transmission and exchange of information*".

38. *Secondly*, this is reinforced by the terms of the Data Hosting Services Agreement (referred to at PJ[76] (CAB 60)).[26] Recital A describes "*the business*" that the appellant and Facebook Ireland (as "Service Recipients") were operating: "*the business of maintaining an online social networking community of users, marketing and selling*
10 *advertising to advertisers targeting this user community, and marketing and selling digital goods and other goods and services to this user community*". While the Agreement draws certain distinctions between those "*Service Recipients*" (e.g., cl 5; PJ[80] (CAB 61)), that Agreement, considered together with the other matters addressed in this section, supports the broader agency case.

39. *Thirdly*, the contractual descriptor of the appellant — a "*data importer*" responsible for "*data processing*" activities — must be read in context. The list of activities in Appendix 1 of the Data Processing Agreement, together with the appellant's role in managing the provision of the Graph API to Australian-based apps, mark out activities that are essential for the delivery of the Facebook service to Australian users. A contractual
20 clause provided that the appellant could undertake these activities only on the direction of Facebook Ireland.[27] But there is no evidence of such directions.[28] Looking to the substance of the relationship between the two entities reveals that despite the "*protestations and excessive precautions*" of the appellant,[29] the true arrangement involved the appellant acting as principal, not agent, of Facebook Ireland.

40. *Fourthly*, the 2015 Data Use Policy[30] allowed for sharing and transferring of information within the Facebook "*family of companies*": PJ[114] (CAB 72). That plainly occurred having regard to the terms of the Data Processing Agreement, and further indicates the

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24 Facebook, Inc. 2014 annual report: "Our website is www.facebook.com": Exhibit SJH-1 tab 31, p 766 (RFM 150).

25 Cf *Amalgamated Wireless (Australia) Ltd v McDonnell Douglas Corporation* (1987) 16 FCR 238 at 240-241 (Wilcox J), which held that the Australian subsidiary of a world-wide information systems enterprise was carrying on the business of its parent.

26 Exhibit SJH-1 tab 11, p 301 (RFM 61).

27 Data Processing Agreement, cl 5(a): Exhibit SJH-1 tab 11, p 284 (RFM 52).

28 Exhibit SJH-1 tab 15, p 497, Answer 2, final paragraph (RMF 71). See also PJ[106]-[108] (CAB 70).

29 *Board of Trade v Hammond Elevator Co* 198 US 424 at 437-438, 440 (1905).

30 Exhibit SJH-1 tab 6.6.3, p 194 (cl III, penultimate bullet point) and 195 (cl VI, third paragraph) (RFM 46-47).

functioning of a single world-wide business of the parent company, the appellant, relevantly conducted in Australia on its behalf by Facebook Ireland.

(c) Notice of Contention ground 1(b)

41. Ground 1(b) of the Commissioner's Notice of Contention contends that, further or in the alternative to ground 1(a), the FC ought to have found that the Commissioner had a *prima facie* case that the appellant was carrying on business in Australia by reason of carrying out cookie installation and operation and Graph API activities in Australia *for the purpose of* operating the Facebook service in North America, that being a business which (having regard to the nature of the Facebook platform) was impossible to disaggregate from the Facebook service operating in the rest of the world: FC[32] (CAB 122). Perram J described the argument, at FC[106] (CAB 144), but did not accept it fell within the Commissioner's contention that Facebook Ireland was the appellant's agent. It may be accepted that this is "*quite a different argument*" to that the subject of ground 1(a) of the Notice, but it was put to the primary judge[31] and the FC[32] in the context of a contention that the appellant was *directly* carrying on business in Australia.

42. As to cookies, there is evidence supporting the inference that this activity was for the purpose, and benefit, of the appellant's North American business, not just the aspect of the appellant's business of providing data processing services to Facebook Ireland. Cookies were used to "*do things like… deliver, understand and improve advertising*",[33] and it is the business of selling advertising (albeit in North America) which is how the appellant generates revenue: PJ[4] (CAB 39). That those activities might have been for the purpose and benefit of the appellant's North American business does not preclude a conclusion that business was being carried on here. The repetitive activity of installing, operating and removing cookies on the devices of Australian users of the worldwide Facebook platform is at the very least ancillary to the transactions which make up the appellant's North American business: the collection and holding of personal information in order to generate revenue from advertising: PJ[4], [174] (CAB 39, 92).

43. As to the management of the Graph API, that activity also amounted to, or was at least ancillary to, the development and maintenance of the Facebook platform, which was experienced by its users as a single worldwide network, and was at the core of the appellant's North American business. That is clear in the appellant's own response to a

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31 See the Commissioner's written submissions of 22 May 2020 at [35]-[37] (RFM 178-179); Commissioner's written submissions of 18 June 2020 at [12], [15]-[16] (RFM 185-186); T79.17-47 (26 June 2020) (RFM 203).

32 T43.04-45.09; 52.26-53.13; 59.45-60.11 (7 May 2021) (RFM 205-210).

33 See Exhibit SJH-1 tab 6.6.2, p 189 (RFM 41).

question posed by the Commissioner, set out at FC[61] (CAB 131): "*Facebook Inc was the entity most directly involved in the development and maintenance of the Facebook service, including the Graph API, for Users worldwide (although Facebook Ireland remained responsible for all processing of personal information of Australian Users, with Facebook Inc conducting data processing activities on behalf of Facebook Ireland in relation to the provision of the Facebook service to Australian Users*". Its repetitive acts in Australia of providing the Facebook Login functionality to Australian app developers (FC[59] (CAB 130)) were integral to its own North American business of maintaining Facebook through a single worldwide digital platform.

10 **(d) "*Prima facie*" case**

44. The appellant's submissions concerning the meaning of "*prima facie* case" in r 10.43(4)(c) seek to raise a point not raised before either the primary judge (PJ[26]–[27] (CAB 44-45)) or the FC. While the appellant identifies it as the second issue raised by the appeal, in truth the point goes nowhere because it cannot affect the outcome of the appeal. In any event, the point is without merit.

45. The major premise (AS[37], [38], [44]) is that "*prima facie case*" in r 10.43 means the same as in the context of a "*no case*" submission at the close of the prosecutor's case in a criminal trial:[34] whether on the evidence before the court reasonably open inferences are available which, if drawn, would support the relief sought. The appellant calls this
20 the ***Merpro Montassa*** **test**.[35] The minor premise (AS[30]–[31]) is that the FC applied a lower threshold, namely the ***Century Insurance*** **test**: "*whether the material presented shows that a controversy exists between the parties that warrants the use of the Court's processes to resolve it*".[36] Both tests had previously been approved by the Full Federal Court in ***Ho v Akai*** *Pty Ltd (in liq)*.[37] The insuperable difficulty with the appellant's submission is that, even if the major premise were correct (which it is not, for reasons stated below), the minor premise is false.

(i) The FC applied the test that the appellant identifies as the correct test

46. The appellant refers to a single sentence in Perram J's reasons at FC[38] (CAB 124) in support of its submission that the FC applied the *Century Insurance* test, and not the
30 *Merpro Montassa* test. In that sentence, immediately after making the point that a

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[34] As to which, see *May v O'Sullivan* (1955) 92 CLR 654 at 656–658 (the Court); *Doney v The Queen* (1990) 171 CLR 207 at 214–215 (the Court); *R v A2* (2019) 269 CLR 507 at [91] (Kiefel CJ and Keane J; Nettle and Gordon JJ agreeing).

[35] *Merpro Montassa Ltd v Conco Speciality Products Inc* (1991) 28 FCR 387 (Heerey J).

[36] *Century Insurance Ltd (in prov liq) v New Zealand Guardian Trust Co* [1996] FCA 376 (Lee J).

[37] (2006) 247 FCR 205 at [10] (Finn, Weinberg and Rares JJ).

service out application is not a trial, Perram J said that the only question is whether "*enough evidence has been put before the Court to make it appropriate to require a respondent to answer*". In saying that, his Honour made no reference to *Century Insurance* or to *Ho v Akai*, the correctness of neither of which was raised in the FC. Nor did he suggest that this question rendered it unnecessary to consider whether the evidence adduced before the primary judge (including inferences reasonably able to be drawn from that evidence) supported the relief claimed. By contrast, there are literally dozens of paragraphs in which Perram J addressed himself to that very question: FC[34], [37], [39], [43], [47], [48], [57], [59], [64]-[66], [106], [115], [119], [122], [131], [132],
10 [137], [142], [143], [151], [152], [158], [163] (CAB 123-126, 129-132, 144, 146-148, 151-152, 154, 156, 158, 160). In those paragraphs, Perram J may well have applied a stricter test than required to establish a *prima facie* case under r 10.43. Regardless, the fact is that the Full Court applied the standard that the appellant contends was required.

47. In those circumstances, despite its elaborate ornamentation, the argument in relation to ground 2 amounts to nothing more than a factual complaint about whether, on the evidence (mainly comprising the appellant's own documents), it was reasonably open to infer that the personal information was collected by the appellant in Australia through the use of cookies. That issue is addressed below (see [56]-[58]).

(ii) Meaning of "*prima facie* case" in r 10.43

20 48. Even if this Court were to conclude that Perram J applied the *Century Insurance* test, ground 2 should still fail. That follows because that test is, in fact, consistent with what is required by r 10.43. The appellant's submission to the contrary is premised on an anachronistic and erroneous historical analysis. Before addressing the history, however, two basic points should be emphasised.

49. *First*, the phrase "*prima facie case*" has long been recognised as inherently ambiguous.[38] As the primary judge observed, its meaning depends on the context in which it is used: PJ[30] (CAB 45). To import into r 10.43 the meaning used in the context of assessing a "*no case*" submission made at the conclusion of the prosecution's case at trial makes no sense, because an application for leave to serve out of the jurisdiction is made at a time
30 when the applicant has not had the opportunity to obtain documents and information

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[38] *R v Governor of Brixton Prison; Ex parte Armah* [1968] AC 192 at 229–230 (Lord Reid) ("*That phrase is not self-explanatory ... I would hope that a less ambiguous phrase will be used especially in any future legislation*"); *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (2015, 5th ed) [21-350] ("*There has been great diversity of opinion about what 'prima facie case' means. Nearly every judge who has attempted to define the expression has done so in somewhat different terms.*")

from the respondent (let alone fully to present its case). Much more analogous is the "*prima facie* case" used in the context of an application for an interlocutory injunction. In that context, to demonstrate a "*prima facie* case" it will be sufficient if there is a "*sufficient likelihood of success to justify in the circumstances*"[39] the interlocutory injunction sought. The *Century Insurance* test is similar: Does the material show that a sufficient controversy exists to justify the Court's processes being used to resolve it?

50. *Secondly*, contrary to the appellant's submissions, r 10.43 cannot be construed as if time stopped in the 1970s. The rule forms part of a complete revision of the Federal Court Rules in 2011. At that time, the authoritative decision on the meaning of "*prima facie*
10 *case*" in former O 8 r 3(2)(c) of the *Federal Court Rules 1979* (Cth) (**1979 FCA Rules**) was the Full Federal Court's decision in *Ho v Akai*. That endorsed both the *Merpro Montassa* and *Century Insurance* tests as descriptions of the "*prima facie* case" standard. The drafters of the 2011 Rules relevantly copied O 8 r 3(2)(c) in r 10.43(4)(c). In the context of carefully considered court rules made by the Judges of the Federal Court, the presumption from re-enactment[40] strongly supports the conclusion that "*prima facie* case" in r 10.43 was intended to have the meaning given to it in *Ho v Akai*.

51. Further, the 2011 Rules gave effect to Australia's accession to the Hague Service Convention in 2010,[41] which allows for the service of judicial documents in other contracting States. That convention exemplifies developments in international
20 commerce which have quelled the traditional concern that service outside of the jurisdiction involves an "*exorbitant*" exercise of jurisdiction requiring careful scrutiny.[42] The appellant's submission (AS[40], [43]) that r 10.43 in the 2011 Rules should be construed by reference to authorities from the 1970s that were outmoded when those Rules were made should be rejected.

52. In any event, the antecedents to r 10.43 support the broader formulation in *Ho v Akai*. The appellant traces the expression "*prima facie* case" in r 10.43 to the 1979 FCA Rules and from there to Pt 10 r 2(2)(b) of the *Supreme Court Rules 1970* (NSW) (**1970 NSW Rules**) and asserts that it was first introduced in those rules to impose a more stringent

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39 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [65] (Gummow and Hayne JJ).

40 *Director of Public Prosecutions Reference No 1 of 2019* (2021) 95 ALJR 741 at [16] (Kiefel CJ, Keane and Gleeson JJ), [51] (Gageler, Gordon and Steward JJ), [66] (Edelman J).

41 *Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters* (The Hague, 15 November 1965) [2010] ATS 23. Australia acceded to the Convention on 15 March 2010, and the Convention entered into force for Australia on 1 November 2010. There are currently 78 State parties to that Convention.

42 See *Agar v Hyde* (2000) 201 CLR 552 at [42]-[43] (Gaudron, McHugh, Gummow and Hayne JJ); *Abela v Baadarani* [2013] 1 WLR 2043, [53] (Lord Sumption JSC; Lord Neuberger PSC and Lords Reed and Carnwath JJSC agreeing); *Tiger Yacht* (2019) 268 FCR 548 at [87]–[95] (the Court).

requirement on service out: AS[32]-[34]. However, contrary to AS[34], immediately prior to the adoption of the 1970 NSW Rules, a plaintiff at common law did not need leave to serve out of the jurisdiction.[43] In equity, leave to serve out was required.[44] Although the relevant procedural rule did not, in terms, require the demonstration of a "*prima facie* case", that had long been understood as a requirement of leave.[45]

53. The 1970 NSW Rules adopted the practice in equity. There is nothing to suggest that the introduction to the rule of the "*prima facie* case" requirement did anything more than reflect pre-existing equitable practice: *cf* AS[35]. The leading practitioner work, quoted approvingly in *Agar v Hyde*,[46] endorsed the view that to establish a "*prima facie* case" it would be sufficient for the solicitor to state a belief that the client would be able to prove the facts alleged in the statement of claim, and the Court would then look to decide whether the statement of claim disclosed a probable cause of action.[47] The requirement was not principally concerned with the sufficiency of the plaintiff's evidence, but the legal sufficiency of the plaintiff's cause of action. However, if the defendant could clearly show that the plaintiff had no case on the facts, service would be set aside.[48] Authority on an analogous requirement in s 5 of the *Arrest on Mesne Process Act 1902* (NSW) was to similar effect.[49]

54. Contrary to AS[36], Sheppard J's decision in *Stanley Kerr Holdings Pty Ltd v Gibor Textile Enterprises Ltd*[50] says nothing about the "*prima facie* case" requirement. Sheppard J did not even discuss the requirement. The case concerned what needed to be shown to establish that the proceeding had the relevant jurisdictional nexus with NSW.[51]

55. Accordingly, at the time the 1979 FCA Rules were introduced, there was no authority in favour of the proposition that the "*prima facie* case" requirement was to be understood

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[43] However, if the defendant did not appear, leave was necessary to proceed to judgment, and it could only be granted in respect of a cause of action which arose, or a breach of contract made, within the jurisdiction: see *Common Law Procedure Act 1899* (NSW), s 18(4). AS[34(a)] incorrectly refers to the position prior to the amendments made by the *Supreme Court Procedure Act 1957* (NSW), s 13 and Sch 1.

[44] Section 30 of the *Equity Act 1901* (NSW) specified 11 jurisdictional bases for service out: *cf* AS[34(b)]. The procedure for service out was stated in r 90 of the *Consolidated Equity Rules 1902* (NSW).

[45] *Agar v Hyde* (2000) 201 CLR 552 at [44] (Gaudron, McHugh, Gummow and Hayne JJ). See also *Great Australian Gold Mining Co v Martin* (1877) 5 Ch D 1 at 12 (James LJ); *Société Générale de Paris v* ***Dreyfus Bros*** (1887) 37 Ch D 215 at 226 (Lopes LJ); *Badische Anilin und Soda Fabrik v Henry Johnson & Co* [1896] 1 Ch 25 at 28 (Lindley LJ; AL Smith and Rigby LJJ agreeing).

[46] Stuckey and Irwin, *Parker's Practice in Equity (NSW)* (2nd ed, 1949), quoted at (2000) 201 CLR 552, [44] (Gaudron, McHugh, Gummow and Hayne JJ).

[47] The language of a "probable cause of action" was similar to the "probability of success" formula then used in some of the cases concerning interlocutory injunctions: see, eg, *Preston v Luck* (1884) 27 Ch D 497 at 506 (Cotton LJ).

[48] *Dreyfus Bros* (1887) 37 Ch D 215 at 223 (Cotton LJ), 225–226 (Lindley LJ), 227 (Lopes LJ)

[49] *Kenney v Calvert (No 1)* [1963] NSWR 160 at 164. The marginal notes to the 1970 NSW Rules show that the language of "prima facie case" was drawn from the *Arrest on Mesne Process Act 1902* (NSW).

[50] [1978] 2 NSWLR 372.

[51] *Contender 1 Ltd v LEP International Pty Ltd* (1988) 63 ALJR 26 at 27–28 (Wilson, Dawson, Toohey and Gaudron JJ).

with reference to a "no case" submission: cf AS[37]–[38]. Far from showing the *Century Insurance* test to be incorrect, the pre-1979 history supports such a test. Consistent with the equitable history of the requirement, the discretionary nature of service out of the jurisdiction, and the analogy with the granting of an interlocutory injunction, it will suffice for a Court to be satisfied that there is a sufficient controversy on the material presented to justify the use of the Court's processes to resolve it. Accordingly, even if the FC applied that wider test (which is denied), it would not have involved error.

(iii) Courts below did not err in finding prima facie case of "collection in Australia"

56. The appellant's submissions on ground 2 collapse to a challenge to the concurrent findings of fact by the primary judge and the FC that it was a reasonably open inference, on the evidence before the Court, that the appellant collected the personal information the subject of the proceeding in Australia through the use of cookies: PJ[174]–[175] (CAB 91); FC[135]–[143] (CAB 152-154). There is no basis to disturb those findings.[52]

57. Contrary to AS[48], the findings were not solely based on the 2013 Data Use Policy. The chain of reasoning had the following links: FC[135]–[143] (CAB 152-154).

58. *First*, it is an unchallenged finding — based on Appendix 1 to the Data Processing Agreement[53] and the Statement of Rights and Responsibilities[54] — that it was reasonably open to infer that the appellant (not Facebook Ireland) installed, operated and removed cookies on Australian users' devices: FC[36]–[38], [137] (CAB 123-124, 152). *Secondly*, the Data Processing Agreement stated (quoted at FC[36] (CAB 123)) that the purposes of the cookies included "*the provision [of] an information society service explicitly requested by Facebook users, security, facilitating user log in, enhancing the efficiency of Facebook services and localisation of content*".[55] The Statement of Rights and Responsibilities and the 2013 Data Use Policy told users that cookies and other similar technologies were used to, inter alia, "*store information about you and your use of Facebook*" and to "*deliver, understand and improve advertising*".[56] Under the Data Processing Agreement, one of the appellant's tasks was "*[t]argeting advertisements and to assess their effectiveness*".[57] *Thirdly*, given the explicitly stated

[52] *Dart Industries Inc v Décor Corporation Pty Ltd* (1993) 179 CLR 101 at 121 (Mason CJ, Deane, Dawson and Toohey JJ; McHugh J agreeing); *Flanagan v Handcock* (2001) 181 ALR 184 at [1] (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

[53] Exhibit SJH-1 tab 11, pp 289-291 (RFM 57-59).

[54] Exhibit SJH-1 tab 6.4.2 (RFM 15), tab 6.4.3 (RFM 23). The 2013 and 2015 Data Use Policies were incorporated into the contracts with users through the 2013 and 2015 Statements of Rights and Responsibilities: PJ[114] (CAB 72).

[55] Exhibit SJH-1 tab 11, p 291 (RFM 59).

[56] Exhibit SJH-1 tab 6.6.2, p 189, cl V (RFM 41).

[57] Exhibit SJH-1 tab 11, p 290 (RFM 58).

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purposes of the cookies, it was to be inferred that the cookies collected personal information from users: FC[140] (CAB 153). The cookies could not otherwise fulfil their purposes of providing the "*information society service explicitly requested by Facebook users*" and the provision and targeting of advertising. It follows that it was an available inference that the appellant used cookies to collect personal information from Australian users. *Fourthly*, it was inferred, and the appellant did not dispute, that the appellant performed its services, including the targeting of advertisements, in respect of users whose personal information was provided to *This Is Your Digital Life*, and therefore collected the personal information the subject of the proceeding: FC[141]
10 (CAB 154). The fact that the cookies were installed on Australian users' devices led to the conclusion that the collection occurred in Australia: FC[142] (CAB 154). The EM supports this: "*The collection of personal information 'in Australia' under paragraph 5B(3)(c) includes the collection of personal information from an individual who is physically within the borders of Australia … by an overseas entity*".[58]

(iv) Notice of contention Grounds 2 and 3

59. Grounds 2 and 3 of the Notice of Contention only arise if the Court accepts the appellant's arguments in relation to ground 2.

60. ***Ground 2***: It was reasonably open to infer that the appellant collected the personal information the subject of the proceeding in Australia by reason of the fact that, pursuant
20 to the Data Processing Agreement, the appellant obtained a complete copy of the "*personal data generated, shared and uploaded by the registered users of the Facebook platform*".[59] Under that Agreement, the appellant was a "*data importer*" importing the data from Facebook Ireland. Given the integrated nature of the Facebook service, it is open to infer that one of the purposes of data being collected from Australian users was to allow the appellant to provide the Facebook service in North America. It is accordingly reasonably open to infer that the appellant collected all of the personal information the subject of the proceeding from Facebook Ireland. The issue on this argument is whether the collection occurred in Australia. The Commissioner submits that the phrase "*collected … by the organisation in Australia*" in s 5B(3)(c) is
30 sufficiently broad to capture the circumstance where an organisation collects personal information from Australians through the use of an intermediary. Although the intermediary may be the "*direct*" collector of the information, the organisation's

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[58] Explanatory Memorandum to *Privacy (Enhancing Privacy Protection) Bill 2012* (Cth), Item 6.
[59] Exhibit SJH-1 tab 11, p 289 (RFM 57).

purpose of collecting the information from Australians is sufficient to characterise the collection as being "*by the organisation in Australia*". Neither the trial judge nor the FC found it necessary to address this argument: see FC[118], [153] (CAB 147, 157).

61. ***Ground 3***: Further, or in the alternative, the primary judge was correct (PJ[196] (CAB 97)) to conclude that it was reasonably open to infer that the appellant "*held*" the personal information in Australia through its use of cookies. In the FC, Perram J did not accept this argument because he concluded that it could not be inferred that the appellant could be in control of the *devices* of Australian users: FC[161] (CAB 159). With respect, his Honour overlooked that it was not necessary for the appellant to be in control of the devices; it was sufficient if it had control over the cookies themselves. "*Holds*" is defined in s 6 of the Act: "*an entity holds personal information if the entity has possession or control of a record that contains the personal information*". Pursuant to s 18A of the ***Acts Interpretation Act*** *1901* (Cth), "*held*" is to be given a corresponding meaning. "*Record*" is defined to include a document or electronic or other device: s 6. Pursuant to s 2B of the *Acts Interpretation Act*, a document means "*any record of information*". The cookies installed on Australian users' devices by the appellant were a record containing the personal information, and they were clearly located in Australia. The appellant installed, managed and removed the cookies. While users may have had an ability to delete the cookies, such that the appellant's control was not exclusive, deletion was likely to affect users' ability to use Facebook.[60] In the circumstances, the appellant had a sufficient degree of practical power over the cookies to constitute "*control*". The Full Court ought to have concluded that there was a *prima facie* case that the appellant held the personal information in Australia.

PART VI ESTIMATE

62. The Commissioner estimates she will need 2.5 hours to present her argument.

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Dated 2 December 2022

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60 Exhibit SJH-1 tab 6.6.2, p 189 (RFM 41).

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

ANNEXURE TO THE FIRST RESPONDENT'S SUBMISSIONS

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

Commonwealth		Provision(s)	Version
1.	*Acts Interpretation Act 1901* (Cth)	ss 2B, 6, 18A	Current (Compilation No. 36, 20 December 2018 – present)
2.	*Competition and Consumer Act 2010* (Cth)	s 5(1)(g)	Current (Compilation No. 140, 1 July 2022 – present)
3.	*Federal Court Rules 1979* (Cth)	O 8 r 3	F2006C00227, 5 May 2006 – 31 July 2006
4.	*Federal Court Rules 2011* (Cth)	r 10.43	Current (Compilation No. 7, 2 May 2019 – present)

Commonwealth		Provision(s)	Version
5.	*Privacy Act 1988* (Cth)	ss 2A, 5B, 6, 13G, Sch 1, Australian Privacy Principles 6 and 11	Compilation No. 78, 1 July 2018 – 5 November 2018
State		**Provision(s)**	**Version**
6.	*Arrest on Mesne Process Act 1902* (NSW)	s 5	No. 24 of 1902 (31 July 1902 – 1 July 1957)
7.	*Common Law Procedure Act 1899* (NSW)	s 18	No. 21 of 1899 (as at 1970; repealed by *Supreme Court Act 1970* (NSW))
8.	*Consolidated Equity Rules 1902* (NSW)	s 90	As made (No. 31 of 1902)
9.	*Equity Act 1901* (NSW)	s 30	No. 24 of 1901 (as at 1966)
10.	*Supreme Court Rules 1970* (NSW)	Pt 10 r 2	As made (No. 52 of 1970)