

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD1802 of 2008

BETWEEN

ROADSHOW FILMS PTY LTD (ACN 100 746 870) AND ORS

Applicants

and

IINET LIMITED (ACN 068 628 937)

Respondent

RESPONDENT'S OUTLINE OF FINAL SUBMISSIONS

CHAPTER TWO

THE TRIAL AND THE EVIDENCE

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2-A. INTRODUCTION

2-1. This chapter addresses the technical and lay evidence in the proceeding and responds to the applicants' extreme and unwarranted submissions regarding the credit of Mr Malone and Mr Dalby.

2-B. MR CARSON'S EVIDENCE

Introduction

2-2. In the course of cross-examination, Mr Carson gave evidence regarding a number of important technical matters that exposed a number of deficiencies in the applicants' approach to the assessment of whether iiNet has authorised the infringement of copyright.

2-3. As a result of the oral evidence given by Mr Carson in cross-examination and the applicants' decision not to press the direct infringement claim,¹ the respondent's independent witness Dr Caloyannides was not required to be called.

An IP address identifies a router

2-4. The key element in the AFACT notifications is the provision of IP (Internet Protocol) addresses. IP addresses allow communications travelling via the Internet Protocol to reach the desired destination. Mr Carson agreed that IP addresses could be categorised as two separate classes, public IP addresses and private IP addresses.²

2-5. In the case of a notional family, with a mother, father and two children living together in the same house, Mr Carson agreed that each of the two computers used by the family would be assigned private IP addresses by the wireless router. The wireless router itself would be assigned a public IP address by the carriage service provider.³ In many circumstances, the public IP address would be able to "seen" by other

¹ Paras 67A to 67F of the further amended statement of claim JCB Vol A1 tab 2 pp 16-17.

² Carson XXN T 410.39-40.

³ Carson XXN T 410.39-42 to 411.10.

Internet users; this could occur with certain uses of BitTorrent.⁴ In such a situation, other Internet users could view the public IP address allocated by the carriage service provider to the router in the household (either as a dynamic or a static IP address)⁵ but would not know which of the two computers inside the household was involved in the communication.⁶ Further, the person responsible for such a communication could be:

- (a) the mother;
- (b) the father;
- (c) the eldest child;
- (d) the youngest child;
- (e) anybody else visiting the household who used the computers;
- (f) anybody else (legitimately or even illegitimately), inside the household who used the computers; and
- (g) anybody accessing the wireless network from outside the household (such person not using either of the two computers in the household).⁷

2-6. Importantly, Mr Carson confirmed that a person outside the household, looking at the IP address allocated in the above example simply could not be sure which individual (in terms of a particular person operating a particular computer) was responsible for any particular communication involving the public IP address.⁸

2-7. It follows that in the case of any IP address in the AFACT notices, iiNet simply does not know, and is not able to know, which individual committed the primary infringement or even whether they were known or unknown to the account holder.

⁴ Carson XXN T 411.14-26.

⁵ Carson XXN T 411.28-34.

⁶ Carson XXN T 412.12-16.

⁷ Carson XXN T 412.18-38.

⁸ Carson XXN T 413.22-27.

This has ramifications in respect of the authorisation and safe harbour issues in the proceeding.

Problems with wireless routers

2-8. In relation to wireless routers, Mr Carson confirmed that he was aware of the problem of Internet users deliberately logging onto wireless routers in order to obtain free Internet access using another person's account.⁹ Mr Carson indicated that he was aware of police investigations that involved the investigation of unauthorised use of wireless routers and had personally been involved in investigations of that kind.¹⁰

An IP address is only the first point in an investigation

2-9. Perhaps one of the most important issues raised in the cross-examination of Mr Carson was the use of IP addresses in various investigations.¹¹ It is useful to set out the relevant portion of the transcript to fully appreciate the significance of Mr Carson's statements.

Thank you. Now, in paragraph 40 you refer to a number of investigations requiring the analysis of major traffic, and that's investigations that you've been involved in. Correct?---Correct.

And you say that you can't recall an investigation where you failed to find the direct source of communication, or the person attached to the relevant communication, through the initial use of an IP address. And is that a reference to the IP address being a starting point for what those in...---That's correct. Using the IP is the first point of the investigation.

Yes. And so moving on then to paragraph 41, where you state in relation to some online criminal investigations, you've been involved in providing the IP address to the relevant ISP that was identified by way of the IP address. And pausing there, that's because ISPs have ranges of IP addresses allocated to them which is a publicly available resource. Correct?---That's true.

And so when you've provided that IP address and requested details of the account holder linked to that IP address, and that information has been provided, that's allowed the investigation to move to the next phase. Now, pausing there, the provision of that information by the ISP in the

⁹ Carson XXN T 412.28-38.

¹⁰ Carson XXN T 412.40-43

¹¹ This evidence should be viewed in the context of Mr Carson's current and previous experience, including his experience in the NSW police force.

circumstances you're describing here has been, by reason of some avenue, available to the New South Wales Police Force or the AFP to compel the ISP to produce that information. Correct?---Correct.

So when you said, just in paragraph 39, that was the initial use of the IP address, you got the IP address by the external viewing, and the next step was to go to the – or work with the New South Wales or Federal Police, use their coercive powers, or perhaps the assistance of the coercive powers of the court, and then go on to the ISP and then the ISPs under that compulsion have been able to link you to – or to allow the investigation to move to the next phase?---That's correct.

And that you say then, even in circumstances where you could not necessarily link the IP address to the account holder, that information has led you to the next part of the inquiry, which is to contact the account holder and seek further information about other users of the computer. Now, those are further phases of the investigations and inquiries that you're describing?---Correct.

*And elsewhere, I think, in your first report and perhaps, yes, and also in paragraph 39(b), for example – well, I'll take you to paragraph 39(b) is an example that you've used about the investigation in the case *Foxtel Management v The Mob Shop Pty Limited*, where you say, as you say, you were retained by the copyright owner and that Anton Pillars were executed on an ISP in Perth, and that ISP produced in response the identification and IP addresses network customer information. Is this what happened in that case, that there was a large amount of evidence presented to the Federal Court, including evidence from you, to obtain an Anton Pillar order---Mm.*

That that Anton Pillar order and associated orders were made, which if anyone needs to see them are visible on the court's website. Correct?---Correct.

And that there was an order on Westnet, which had been identified as the ISP those many years ago, through a particular address at a particular time through which a connection had been made. And that order compelled Westnet to reveal on the spot the telephone number to which that IP address had been allocated on that particular date. Correct?---That's correct.

And that material was then served on Telstra, I think, in other capital city, to compel them immediately to reveal the address for that landline. Correct?---That's my understanding, yes.

Yes. And then that information was – that address was filled in and an Anton Pillar was executed in a operation of which you were a part?---Correct.

*And you understand, do you not, as the later judgment of *Siopis J* will show, that there was some time later a lengthy trial at which there was evidence given, including evidence by you?---Correct.*

And that one respondent at least put up a number of arguments, although they ultimately lost them. Are you aware of that?---I am aware, yes.

That the judge reserved for some time and then gave judgment?---Correct.

And so when you say in paragraph 40 that investigations have pressed on from the initial use of an IP address, or that there have – investigations have moved on to the next phase from the initial provision of an IP address, those investigations can have many, many more steps and involve many other complications-?---This is true.

Thank you. And the next phase of an investigation, just using general terms rather than focusing on a particular one, would involve, for example, interviewing the account holder or persons living at the premises identified by the information supplied?---Correct.

And perhaps conducting a forensic analysis in some circumstances of the computers to determine whether particular material is present?---Yes, correct.

And that's something you've commonly done, although with the benefit of Anton Pillar orders?---Yes.

So you would expect it to be unusual if you knocked on the door and said, "Can I forensically analyse your computers," that somebody would let you--- Yes, they would possibly not let me. They would need to be compelled, I found.

Yes. And the investigation in these next or later phases would also generally include gathering other evidence, if the person was resistant, to determine that the person was in fact responsible for the actions the subject of the investigation?---Correct.

And that some of those things at least are reasoned because one can't say that the IP address per se identifies a particular person using a particular computer?---No, it doesn't.

And you need to conduct further investigations in order to obtain that information?---That's correct.¹² [Emphasis added]

2-10. At this stage, it is useful to summarise the above:

- (a) an IP address does not identify a particular person using a particular computer;¹³

¹² Carson XXN T 414.8-416.14.

¹³ Carson XXN T 413.22-27 ; Carson XXN T 416.9-11.

- (b) identification of an IP address is only the first part of any investigation into the identity of the person actually responsible for the act;¹⁴
- (c) in order to identify the actual person responsible for the infringement, investigations can have “many, many more steps and involve many other complications”;¹⁵
- (d) the investigation in these later phases would generally include gathering other evidence to determine whether the person was in fact responsible for the actions the subject of the investigation;¹⁶
- (e) in Mr Carson’s experience, both the account holder and the ISP would often need to be compelled under a Court order or other form of coercion.¹⁷

Applicants do not address “second phase of investigation”

2-11. Even more telling was when Mr Carson was directed to paragraph 97 of the applicants’ particulars to the further amended statement of claim:

And just before – thank you – and just before I ask you to look at that, I just want to refresh your memory of the things I just asked you. That if one only has the IP address, and if the circumstances are of the kind that I described to you, that you would need to conduct further investigations, at least to obtain the following information to identify the particular person responsible for doing something. You would need to conduct a further investigation to be sure you have the right person?---Correct.

*And to work out what they had done?---Correct.*¹⁸[Emphasis added]

2-12. And following the lunch break:

Now, Mr Carson, I asked you to look at that little list of activities in paragraphs (a) to (f) of paragraph 97. And you would agree that, would you not, that none of those steps – we can take them one by one if necessary – would be the next phase of an investigation, as you’ve used that phrase in your affidavit?---Not in my experience.

¹⁴ Carson XXN T 414.12-16.

¹⁵ Carson XXN T 414.31-416.14.

¹⁶ Carson XXN T 416.5-7.

¹⁷ Carson XXN T 414.44-415.21, 416.1-3,

¹⁸ Carson XXN T 416.24-45.

No, thank you. And, indeed, some of them, say paragraph (f), disconnecting, suspending or terminating, might in fact be the last phase in an investigation?---It might be.¹⁹ [Emphasis added]

2-13. Later in re-examination, Mr Carson stated the matters referred to in paragraph 97 of the applicants' particulars were not steps that were relevant to the type of investigation he would conduct or steps that he could take in the investigative process.²⁰ This did not improve the applicants' position on this issue, it made it worse. The re-examination confirmed that paragraph 97 of the applicants' particulars does not address the many additional steps and other complications inherent in iiNet implementing a scheme in accordance with the applicants' demands. Nothing in re-examination clarified or altered Mr Carson's previous evidence that an IP address does not of itself identify an individual (whether responsible for the infringement or not).

iiNet's facilities are the same as other large Australian carriage service providers

2-14. Mr Carson confirmed that generally speaking, large Australian carriage service providers provide "*facilities or services for making or facilitating the making of communications*" and in that respect, iiNet's facilities are no different from those other ISPs.²¹

2-15. Mr Carson also confirmed that iiNet satisfied the technical conditions in Item 2 of s 116AH(1) of the Act which are prerequisites for iiNet's reliance on the safe harbour provisions.²²

Internet access services (or transmission services) and hosting services are completely different

2-16. Mr Carson agreed that one can distinguish transmission based services and hosting services offered by ISPs. In the case of transmission services, the relevant copyright material or hyperlinks thereto are not stored on carriage service provider's network or

¹⁹ Carson XXN T 417.34-42.

²⁰ Carson RXN T 514.23-43.

²¹ Carson XXN T 418.10-23, 419.8-27.

²² Carson XXN T 418.30 to 419.6.

system.²³ The carriage service provider cannot access the relevant copyright material,²⁴ review the relevant copyright material,²⁵ disable access to the relevant copyright material²⁶ or take down the relevant copyright material.²⁷ Further, in the case of transmission based activity, any notification of a communication over an ISP's network is notification of an alleged event that occurred in the past that is no longer on its network and is unable to be independently confirmed by the ISP.²⁸ In this regard, it does not make sense to think of a carriage service provider offering transmission based services "taking down" infringing material.²⁹ In the case of carriage service providers that host websites and content or provide links thereto they are able to directly access the infringing website, directly review the infringing website, directly disable access to the infringing content or directly take down the infringing website.³⁰ This evidence is helpful for an informed understanding of the differences between *Cooper* and the present case. The significance of these differences is addressed in Chapter 5 below.

- 2-17. In the re-examination of Mr Carson, the applicants attempted to qualify the above statements by Mr Carson in respect of category D activities.³¹ However, Mr Carson's evidence merely confirmed the obvious, namely, that in the case of category D activities, the infringing content is not in the same location as the infringing website.³² This is evident from the definition of category D activities in the Act; the infringing website (providing links to infringing content) is hosted on the carriage service provider's system. As such, the website is able to be accessed, reviewed and disabled by the carriage service provider – indeed this was exactly the situation in *Cooper*. While the hyperlinks may refer to content elsewhere, the carriage service provider is able to click on the hyperlinks and view the content (eg when notified of an alleged

²³ Carson XXN T 421.25-31.

²⁴ Carson XXN T 421.30-31.

²⁵ Carson XXN T 421.25-28.

²⁶ Carson XXN T 421.33.

²⁷ Carson XXN T 421.35-40.

²⁸ Carson XXN T 421.25-32.

²⁹ Carson XXN T 421.35-37.

³⁰ Carson XXN T 421.35-40.

³¹ Carson RXN T 517.4-25.

³² Carson RXN T 517.7-30.

infringement). If the content is infringing, direct action can be taken by the carriage service provider against the website it is hosting (as per *Cooper*). Consequently, it follows that there is no relevant³³ difference between category C and D activities.

Access to the Internet - disconnection and reconnection

2-18. Mr Carson also gave evidence on disconnections and reconnections when using ADSL services.³⁴ Mr Carson agreed that in the ordinary usage of the Internet, a user's connection to the Internet may be temporarily interrupted for short periods of time and from the point of view of the user who is browsing the Internet with their browser open, that may well happen without them knowing.³⁵ Mr Carson agreed that it is common for users to leave their computer on, even when they are not using them and that there may well be interruptions to their connection.³⁶ The disconnection could be due to a number of factors, such as issues with user's equipment, the carriage service provider's network, power outages and the networks of other carriers such as Telstra.³⁷ In the case of a dynamic IP address, any reconnections would be likely to be to different IP addresses (although in some cases, it may be to the same IP address).³⁸

DNS Lookups

2-19. Mr Carson gave evidence on DNS (Domain Name Server) lookups.³⁹ Mr Carson indicated that forward DNS lookups were more important than reverse DNS lookups in terms of the functionality of the Internet and that reverse DNS lookups could be unreliable. This is relevant to evidence adduced by the applicants that attempted to link Mr Malone and Mr Dalby to primary infringements.⁴⁰ This evidence was

³³ Relevant in the context of the issues in this proceeding.

³⁴ Carson XXN T 506.41 to 507.47.

³⁵ Carson XXN T 506.40 to 507.3.

³⁶ Carson XXN T 507.5-10.

³⁷ Carson XXN T 507.15-26.

³⁸ Carson XXN T 507.28-29

³⁹ Carson XXN T 508.43-510.18.

⁴⁰ Williams #8 para 8-9, JCB Vol A2 tab 37 pp 2-3.

answered by Mr Malone,⁴¹ he was not challenged on this point and iiNet understands it is not pursued by the applicants.

2-C. IINET'S EVIDENCE

2-20. iiNet relies on affidavits of its Chief Executive Officer, Michael Malone,⁴² its Chief Regulatory Officer, Stephen Dalby,⁴³ and its Chief Financial Officer, David Buckingham.⁴⁴ The applicants did not cross-examine Mr Buckingham and consequently, no aspect of his evidence has been challenged by the applicants.⁴⁵

Mr Malone

2-21. Mr Malone gave evidence of the establishment and development of iiNet as an ISP⁴⁶. He identified the wide range of different activities for which Australians use the Internet⁴⁷ and noted the Australian Bureau of Statistics data regarding household and business use of the Internet.⁴⁸ Mr Malone described the wide range of services offered by iiNet including ADSL and naked DSL broadband services, PSTN and VOIP telephony services.⁴⁹

Freezone content services

2-22. Mr Malone described the diverse range of licensed content made available to its subscribers to be streamed or downloaded on a quota free basis through its Freezone service located at <http://www.iinet.net.au/freezone/#>.⁵⁰ A large amount and a wide

⁴¹ Malone #3 paras 17-19 pp 4-5.

⁴² Affidavits sworn 7 August 2009 JCB Vol A2 tab 30, 25 August 2009 JCB Vol A2 tab 33 and Affidavit sworn 13 October 2009.

⁴³ Affidavit sworn 7 August 2009 JCB Vol A2 tab 31.

⁴⁴ Affidavit sworn 7 August 2009 JCB Vol A2 tab 29.

⁴⁵ Other than paras 28 to 31 that were not read. T 1033.22-27.

⁴⁶ Malone #1 paras 24 – 30 JCB Vol A2 tab 30 pp 8-9.

⁴⁷ Malone #1 para 33 JCB Vol A2 tab 30 p 11.

⁴⁸ Malone #1 para 35 JCB Vol A2 tab 30 pp 11-12; Ex MMM-1 pp 11 – 21 JCB Vol B6 tab 89.

⁴⁹ Malone #1 paras 37 – 43 JCB Vol A2 tab 30 pp 12-16.

⁵⁰ Malone #1 paras 44 – 66 JCB Vol A2 tab 30 pp 16-20 ; Malone XXN T 836.16-17 (para 65 as submission only).

range of content is available via Freezone including films, sport, television programs, games, music and online radio stations.⁵¹

- 2-23. Mr Malone gave evidence that in order to provide this content, iiNet has entered into arrangements with major suppliers and distributors of licensed content including Apple Pty Limited, Premier Media Group Pty Ltd, Australian Broadcasting Corporation, Ninemsn Pty Limited, Western Australian Symphony Orchestra Pty Ltd, Quickflix Limited, Loco TV Pty Ltd, IMG Media Australia Pty Ltd and the University of Western Australia⁵².

Freezone Films

- 2-24. iiNet subscribers are able to download films and television from the online Apple iTunes store via Freezone. Subscribers are also able to rent films from iTunes, and watch previews of films online. When a subscriber downloads a film or TV episode from iTunes the subscriber can load that film or episode on up to 5 different computers. If one of those devices is a mobile device, eg. a laptop, iPod or iPhone, then the user can play the content on a television (just as with a DVD).⁵³

Freezone Sport

- 2-25. iiNet subscribers are able to watch various sporting events and programs via Freezone such as United Kingdom premier league soccer, rugby competitions such as Investec Super 14s, the Air New Zealand Cup and the ABSA Currie Cup, Formula Drift motor racing, 4 x 4 Western Australia, LocoTV EPW Wrestling, LocoTV Fishing, Perth Racing and golfing documentaries "Overcoming the Majors".⁵⁴

Freezone Television

- 2-26. iiNet subscribers are able to download or watch television programs via Freezone from Apple iTunes, ABC iView, Macquarie Digital, NASA Television, Cruizin',

⁵¹ Malone #1 paras 44, 45 JCB Vol A2 tab 30 p 16. See also screenshots at Ex 12.

⁵² Malone #1 para 58 JCB Vol A2 tab 30 p 18. The Joint Agreement with Apple Pty Ltd is Ex N.

⁵³ Malone #1 paras 47, 48 JCB Vol A2 tab 30 p 16. Screen shots of the Freezone movies web pages appear at Exhibit MMM-1 1 JCB Vol B6 tab 89 pp 101-102.

⁵⁴ Malone #1 paras 49,50 JCB Vol A2 tab 30 p 17.

Riding WA, West Australian Symphony Orchestra, Perth International Arts Festival and Loco TV.⁵⁵

Freezone Games

2-27. iiNet subscribers are able to access via Freezone various demonstration games, previews and/or other content from 3FL (iiNet's gaming brand), Gamershell and Microsoft's Xbox.⁵⁶

Freezone Music

2-28. iiNet subscribers are able to access via Freezone music from Apple iTunes, the West Australian Symphony Orchestra and the Perth International Arts Festival, as well as the radio stations referred to below.⁵⁷

Freezone Radio

2-29. iiNet subscribers are able to listen via Freezone to over 70 online radio stations.⁵⁸

Use of Freezone by subscribers

2-30. Mr Malone's evidence indicates that a large number of subscribers use the Freezone service. By way of example, on 23 June 2008, approximately 49,637 iiNet subscribers downloaded content from Apple iTunes through the Freezone Service and on 24 June 2008, approximately 47,171 iiNet Subscribers downloaded content from Apple iTunes through the Freezone Service.⁵⁹

⁵⁵ Malone #1 paras 51, 52 JCB Vol A2 tab 30 p 17.

⁵⁶ Malone #1 paras 53, 54 JCB Vol A2 tab 30 p 17.

⁵⁷ Malone #1 paras 55, 56 JCB Vol A2 tab 30 p 17.

⁵⁸ Malone #1 para 57 JCB Vol A2 tab 30 p 18.

⁵⁹ Malone #1 para 66 JCB Vol A2 tab 30 pp19,20. A copy of emails setting out the results of analysis conducted regarding Freezone appears at pages 155 to 158 of Exhibit MMM-1 JCB Vol B6 tab 89. A copy of a spreadsheet entitled "Extract of TIA Information" containing statistics on the use of Freezone by iiNet subscribers for June 2009 appears at pages 36 to 37 of Conf Ex MMM-2 JCB Vol B7 tab 90.

Quotas, bandwidth and Freezone

- 2-31. Mr Malone described how iiNet subscribers automatically receive quota-free access to the Freezone content at no additional charge when they sign up with iiNet. Content downloaded or streamed through Freezone is not counted towards iiNet subscribers' monthly quota.⁶⁰ iiNet takes a number of different steps to actively encourage subscribers to use this content by promoting it on its website⁶¹ and through newsletters⁶² and media releases.⁶³
- 2-32. Except for Freezone activity, almost any Internet activity (such as viewing a webpage) contributes to the use of bandwidth which is counted against a subscriber's quota.⁶⁴ If a subscriber exceeds his or her quota, the account is "shaped" which means that the speed at which that subscriber can download data is drastically reduced⁶⁵ It follows that there is therefore a strong incentive on subscribers not to exceed their quota. Moreover, if a subscriber exceeds quota and the account is then shaped, then for the remainder of the month that subscriber is still able to download or stream content on Freezone at normal speeds.⁶⁶
- 2-33. In relation to the applicants contentions (that iiNet's marketing of Freezone is "in truth" promoting the use of customers' quota for the purposes of downloading content otherwise than through the Freezone service⁶⁷) Mr Malone stated during cross-examination:

⁶⁰ For example, if an iiNet subscriber downloads three motion pictures from Apple iTunes, streams an English Premier League soccer match and the watches some television programs on ABC iView, none of the bandwidth used by the iiNet subscriber is counted against the subscriber's quota: Malone #1 para 60; JCB Vol A2 tab 30 p 18.

⁶¹ Malone #1 paras 45, 64(b) JCB Vol A2 tab 30 pp 17, 19, 20; Ex MMM-1 pp 66, 101-126, 143-146 JCB Vol B6 tab 89; Ex 13.

⁶² Malone #1 para 64(a) JCB Vol A2 tab 30 p 19; Ex MMM-1 pp 128-142 JCB Vol B6 tab 89.

⁶³ Malone #1 para 64(c) JCB Vol A2 tab 30 p 19; Ex MMM-1 pp 147-154 JCB Vol B6 tab 89; Malone XXN T 859.4-17.

⁶⁴ Malone #1, para 74 JCB Vol A2 tab 30 p 21.

⁶⁵ For example, it might take from 15 to 30 minutes to download 1 Gigabyte of data at normal connection speeds. When an account is shaped however, it would take 30 to 40 hours to download that data: Malone #1 para 118 JCB Vol A2 tab 30 pp 30-31 ; Malone XXN T 838.25-29.

⁶⁶ Malone #1 para 61 JCB Vol A2 tab 30 p 18.

⁶⁷ ACS 494, 494.

And they've got all the download they'd otherwise paid for, to illegally download, haven't they?---But they have a finite number of hours in their day, so by watching an ABC episode of Dr Who, they are now watching something that is legal, legitimate and provided for them by iiNet on attractive terms. That's an alternative to downloading something illegal.

But you promote as a benefit of Freezone as freeing up customer's quota for, amongst other things, downloading, don't you?---Yes, but not all downloading is downloading of illegitimate material or movies, there's plenty of other things to download on the internet.⁶⁸

- 2-34. Mr Malone confirmed that no rightsholder to his knowledge had ever suggested that the Freezone might encourage copyright infringement.⁶⁹ iiNet has been leading the industry in making content available legally through Freezone. iiNet was the first Australian ISP to offer quota free access to Apple iTunes and ABC's iView service.⁷⁰ Upon the announcement of iiNet's inclusion of ABC's iView service into Freezone on 23 July 2008, ABC's Director of Innovation welcomed the new relationship with iiNet that allows ABC viewers free access to the ABC's new internet television service.⁷¹ Mr Malone's evidence was that due to factors such as the financial benefits to subscribers, fast speeds, reliable streaming and the promotion of Freezone by iiNet, the Freezone encourages subscribers to download and stream legitimate content. Indeed, the Freezone service benefits iiNet, content owners and subscribers.⁷²

Customer Relationship Agreement

- 2-35. Mr Malone described the process by which a person subscribes to iiNet's services⁷³ and the terms of the Customer Relationship Agreement (**CRA**)⁷⁴ between iiNet and the subscriber. Since about 2005, that agreement has provided that in using iiNet services, a subscriber must:

⁶⁸ Malone XXN T 860.32-41.

⁶⁹ Malone RXN T 930.27-45, 931.9-16.

⁷⁰ Ex MMM-1 JCB Vol B6 tab 89 pp 129, 131.

⁷¹ Ex FF, iiNet Media Release "It's Free ABC for iiNet Customers", 23 July 2008.

⁷² Malone #1 para 65 JCB Vol A2 tab 30 p 19 (submission only).

⁷³ Malone #1 paras 78 – 98, 100 JCB Vol A2 tab 30 pp 22-25.

⁷⁴ Malone #1 paras 68 – 72, 95 (para 65 submission only) JCB Vol A2 tab 30 pp 20-21 and 24-25; Ex MMM-1 pp 159 – 414 (Current version pp 228 – 343) JCB Vol B6 tab 89, Conf Ex MMM-2 pp 71 – 199 JCB Vol B6 tab 90.

- (a) comply with all laws;⁷⁵ and
- (b) not use or attempt to use the service to commit an offence or infringe another person's rights⁷⁶ or for illegal purposes or practices.⁷⁷

2-36. iiNet publishes a page on its website warning subscribers that the *"hosting or posting of illegal or copyright material using an iiNet service constitutes a breach of iiNet contractual obligation under the Customer Relationship Agreement Sec 4.1 & 4.2. Such a breach of contract may result in the suspension or termination of service without notice to the subscriber."*⁷⁸

2-37. The CRA also prescribes the purposes for which iiNet may collect, use and disclose the Personal Information⁷⁹ of a subscriber.⁸⁰ Those purposes do not include investigation of allegations of copyright infringement made by third parties.

iiNet Call Centres

2-38. Mr Malone described the operation of iiNet's Customer Service Representatives (CSRs) and call centres. In 2008, the iiNet call centres processed over 3 million transactions and employed approximately 520 CSRs.⁸¹ CSRs provide assistance to iiNet subscribers across a large range of sales, billing, hardware, software and network issues.⁸² They receive extensive training, including to the effect that *"Troubleshooting for [peer-to-peer] is pretty much a non-issue, the topic is completely unsupported"*⁸³ and *"Because of the recent implications with file sharing,*

⁷⁵ CRA clause 4.1, Ex MMM-1 p 231 JCB Vol B6 tab 89.

⁷⁶ CRA clause 4.2(a), Ex MMM-1 p 232 JCB Vol B6 tab 89.

⁷⁷ CRA clause 4.2(e), Ex MMM-1 p 232 JCB Vol B6 tab 89.

⁷⁸ Malone #1 para 200 JCB Vol A2 tab 30 p 51; Ex MMM-1 p 415 JCB Vol B6 tab 89; Malone XXN 868.35-42.

⁷⁹ Defined as "information or opinion about you from which your identity is apparent or can reasonably be ascertained and includes your name, current and previous addresses, service number, date of birth, email address, bank account or credit card details, occupation, driver's licence number and your Credit Information and Credit Rating": CRA clause 21.1, Ex MMM-1 p 249 JCB Vol B6 tab 89.

⁸⁰ CRA clause 12.3, Ex MMM-1 p 239 JCB Vol B6 tab 89. For example debt collection see Malone XXN T 752.25-40.

⁸¹ Malone #1 para 108 JCB Vol A2 tab 30 p 27, Conf Ex MMM-2 p 204 JCB Vol B6 tab 90.

⁸² Malone #1 para 110 JCB Vol A2 tab 30 p 27.

⁸³ Malone #1 paras 113 – 114 JCB Vol A2 tab 30 p 28.

*it is very important to figure out what it is they are downloading. If it is illegal or even sounds like it, stay away. Troubleshooting file sharing networks and programs is unsupported.*⁸⁴

Technical facilities

2-39. Mr Malone also described the technical facilities provided by iiNet⁸⁵ which establishes beyond question that it provides facilities for making, or facilitating the making of, a communication within the meaning of s 112E of the Act and facilities for transmitting, routing or providing connections for material, including copyright material, within the meaning of s 116AC of the Act. There appears to be no challenge to this.

Relationships with law enforcement agencies

2-40. iiNet works closely with law enforcement agencies including the Australian Federal Police and the Australian Security Intelligence Organisation.⁸⁶ It matches IP addresses to customer information on a daily basis in response to requests from agencies of this type.⁸⁷ iiNet's internal procedures ensure that requests for information from such bodies comply with the necessary statutory provisions, such as s 178 of the *Telecommunications (Interception and Access) Act* 1979, which provides for an exception to the application of ss 276, 277 and 278 of the Telco Act.⁸⁸ iiNet is reimbursed for complying with these requests for information (notably, not something the applicants have offered to iiNet for enforcing their rights).

⁸⁴ Malone #1 para 116 JCB Vol A2 tab 30 pp 29-30; Malone XXN T 869.6-26.

⁸⁵ Malone #1 paras 136 – 167 JCB Vol A2 tab 30 pp 35-41.

⁸⁶ Malone #1 paras 175 – 184 JCB Vol A2 tab 30 pp 43-45 (noting that para 172 was admitted as a submission only).

⁸⁷ Malone XXN T 722.35-45.

⁸⁸ Ex MMM-1 pp 467 and following, particularly pp 472 - 476 JCB Vol B6 tab 89.

No relationship with BitTorrent

2-41. Mr Malone gave evidence that iiNet has no relationship or connection with BitTorrent Inc or the BitTorrent program.⁸⁹ It did not create, and does not promote any BitTorrent client software.⁹⁰

Uses of the BitTorrent protocol

2-42. Mr Malone described some of the legitimate (non-infringing) content that relies on the BitTorrent protocol for distribution.⁹¹

2-43. BitTorrent is particularly suited to the transmission or streaming of large files,⁹² such as online games and video content. As a result, it has been used by many companies seeking to distribute content over the Internet, including⁹³:

- (a) “World of Warcraft” is a Massive Multi-Player Online Role Playing Game, a virtual fantasy world, where more than 11 million players from around the world meet and play with and against each other. The game itself and all updates are distributed using BitTorrent.⁹⁴
- (b) Aeria Games and IAHGames (Distributors of EA Sports Fifa Online 2 and many more) use BitTorrent to distribute the games, patches and updates.⁹⁵
- (c) Joost is an Internet Television service.⁹⁶ Joost distributes a range of movies and TV shows using the BitTorrent protocol.⁹⁷

⁸⁹ This can be contrasted with some of the applicants, who have had a direct relationship with BitTorrent Inc.

⁹⁰ Malone #1 paras 189 – 190 JCB Vol A2 tab 30 p 49.

⁹¹ Malone #1 paras 185 – 187 JCB Vol A2 tab 30 pp 45-49. Malone XXN T 659.40-46.

⁹² Ex 1 tab 12 and 13.

⁹³ Malone #1 para 187 JCB Vol A2 tab 30 pp46-47.

⁹⁴ Ex MMM-1 p 499 JCB Vol B7 tab 89.

⁹⁵ Ex MMM-1 pp 500-501 JCB Vol B7 tab 89.

⁹⁶ Ex MMM-1 pp 502-503 JCB Vol B7 tab 89.

⁹⁷ Ex MMM-1 pp 510-520 JCB Vol B7 tab 89.

- (d) The BitTorrent Inc company operated the Torrent Entertainment Network; it said it had the rights to more than 3,000 movies, 1,000 games and 1,000 music videos from 34 participating content providers.⁹⁸
- (e) Linux is an operating system, an alternative to Microsoft Windows.⁹⁹ Debian and Ubuntu Linux are distributed using the BitTorrent protocol. As Mr Malone pointed out in cross-examination, updates are generally effected by a fresh download of the entire operating system.¹⁰⁰
- (f) NASA's application "Visible Earth" makes large detailed satellite images available to the public and uses BitTorrent for distribution.¹⁰¹
- (g) LegalTorrents is a site that distributes open-licensed (Creative Commons) digital media and art¹⁰².
- (h) The online encyclopaedia "Wikipedia" located at the link "en.wikipedia.org/" can be downloaded in its entirety, via the BitTorrent protocol.¹⁰³
- (i) Amazon Web Services' S3 online storage service can use either BitTorrent or HTTP for moving objects in or out of the storage space.¹⁰⁴

Actions taken regarding alleged copyright infringement and analogous issues

2-44. Mr Malone describes how in 2005, at around the same time the safe harbours provisions were introduced into the Act, iiNet took a number of different steps in order to effect its safe harbour compliance policies. These included:

- (a) attendance by iiNet representatives at presentations by the IIA in respect of the safe harbour regime;¹⁰⁵

⁹⁸ Ex MMM-1 pp 504-506 JCB Vol B7 tab 89.

⁹⁹ Ex MMM-1 pp 507-509 JCB Vol B7 tab 89.

¹⁰⁰ Malone XXN T 830.1-19.

¹⁰¹ Ex MMM-1 p 520 JCB Vol B7 tab 89.

¹⁰² Ex MMM-1 p 521 JCB Vol B7 tab 89.

¹⁰³ Ex MMM-1 pp 522-523 JCB Vol B7 tab 89.

¹⁰⁴ Ex MMM-1 pp 524-527 JCB Vol B7 tab 89.

¹⁰⁵ Malone #1 paras 206 to 207 JCB Vol A2 tab 30 p 52; Ex MMM-1 pp 639 to 653 JCB Vol B6 tab 89.

- (b) review by iiNet representatives of safe harbour compliance checklist entitled “Checklist for Opting into Safe Harbour Scheme” provided to iiNet by the IIA;¹⁰⁶
- (c) obtaining advice from the IIA regarding the treatment of non-compliant notifications from the US;¹⁰⁷
- (d) development of a document entitled “IIA ICH and Safe Harbour Guide” which was forwarded to him and approved;¹⁰⁸
- (e) publishing of a notice on iiNet’s website setting out the contact details of the designated representative appointed pursuant to Reg 20C of the Regulations;¹⁰⁹
- (f) publishing a notice on iiNet’s website to the effect that the hosting or posting of illegal or copyright material using an iiNet service constitutes a contractual breach of iiNet’s Customer Relationship Agreement and that such a breach may result in the suspension or termination of service without notice;¹¹⁰
- (g) instructing an external law firm to conduct a substantive review re-drafting of the Customer Relationship Agreement which included amendments to the sections regarding subscribers’ use of iiNet’s services, termination and suspension provisions (the very provisions, the applicants seek to rely on);¹¹¹
- (h) discussion of implementation of the safe harbour compliance measures at internal meetings;¹¹² and

¹⁰⁶ Malone #1 para 208 JCB Vol A2 tab 30 ; Ex MMM-1 pp 654 to 671 JCB Vol B6 tab 89.

¹⁰⁷ Malone #1 para 222 JCB Vol A2 tab 30 pp 54-55.

¹⁰⁸ Malone #1 para 210 JCB Vol A2 tab 30 p 53; Ex MMM-1 pp 677 to 683 JCB Vol B6 tab 89. Malone XXN T 815.1-6, Malone RXN T 925.1-29

¹⁰⁹ Malone #1 paras 200 to 208, 211 to 214 JCB Vol A2 tab 30 pp 51-52, 53; MMM-1 pp 415 and 693 to 695 JCB Vol B6 tab 89.

¹¹⁰ Malone #1 paras 200 and 214 JCB Vol A2 tab 30 pp 51,53; Ex MMM-1 pp. 415 and 693 to 695 JCB Vol B6 tab 89. Malone XXN 868.35-42.

¹¹¹ Malone #1 paras 69 to 72 JCB Vol A2 tab 30 pp 20-21; Ex MMM-1 p 228 to 414 JCB Vol B6 tab 89.

¹¹² Malone #1 para 212 JCB Vol A2 tab 30 p 53.

- (i) continued review of support related emails and correspondence by iiNet employees including in relation to copyright infringement issues.¹¹³

2-45. iiNet's evidence shows examples of iiNet's compliance with requests from copyright owners under the safe harbour regime, including taking action in relation to take-down notices in respect of categories other than category A activities.¹¹⁴ It also shows the problems that iiNet faces in dealing with up to 350 non-compliant emails a day from content owners,¹¹⁵ including some of the applicants in this proceeding, in circumstances where around 96% of emails received by iiNet are required to be filtered as spam.¹¹⁶

Bandwidth and costs

2-46. Mr Malone described the arrangements through which iiNet secures the provision of bandwidth in order to provide Internet access to its subscribers.¹¹⁷ Securing bandwidth is one of iiNet's largest variable expenses. If too many subscribers use their full quota of bandwidth, the network will become congested, requiring iiNet to pay more for bandwidth. For this reason, iiNet's costs are reduced, and its profits increased, if subscribers do not use all of quota allocated to them and do not download data from overseas locations.¹¹⁸ It is therefore not correct to assume that it is in iiNet's interest for subscribers to download large amounts of infringing content via BitTorrent. The contrary is the case.

Innovation

2-47. Mr Malone set out a number of examples of iiNet's innovation:

- (a) iiNet was one of the first non-Telstra ISPs to install Digital Subscriber Line Access Multiplexers (referred to as **DSLAMs**) in Telstra's telephone

¹¹³ Malone #1 paras 215 to 217 JCB Vol A2 tab 30 pp 53-54; Confidential Ex MMM-2 pp 816 to 830 JCB Vol B6 tab 90.

¹¹⁴ Malone #1 paras 215 to 217 JCB Vol A2 tab 30 pp53-54; Ex MMM-2 pp 816 to 830 JCB Vol B6 tab 89.

¹¹⁵ Malone #1 paras 218 to 225 JCB Vol A2 tab 30 pp54-55; Ex MMM-1 pp 696 to 802 JCB Vol B6 tab 89; Ex MMM-5. Also see generally, Malone #2 JCB Vol A2 tab 33.

¹¹⁶ Malone #1 paras 130 to 133 JCB Vol A2 tab 30 pp33-34; Ex MMM-1 p 458 JCB Vol B6 tab 89.

¹¹⁷ Malone #1 paras 234 – 239 JCB Vol A2 tab 30 pp58-60 JCB Vol A2 tab 30 pp 58-60.

¹¹⁸ Malone #1 paras 237 – 238 JCB Vol A2 tab 30 pp 59-60. Malone XXN T 701.13-702.22.

exchanges for the purpose of setting up iiNet's own telecommunication network. iiNet currently has DSLAMs operational in more than 300 exchanges across the country. iiNet's Australian ADSL2+ coverage extends to over 4,000,000 households.

- (b) iiNet was the first ISP in Australia to provide a Voice Over Internet Protocol (VOIP) service that was of a quality comparable to a standard or Public Switched Telephone Network service.
- (c) iiNet was the first ISP in Australia to offer a national "Naked" DSL Internet access service.

Cost and complexity of notice and disconnection regime

2-48. Mr Malone's second affidavit identified what would be required for iiNet to implement a regime of warning and disconnection of subscribers in response to allegations of copyright infringement.¹¹⁹ An automated process would be required as iiNet receives in excess of 5,000 IP addresses per week in copyright infringement notices.¹²⁰ However, because they are not all in the same format, it is not clear that such automation could be easily achieved.¹²¹ It would be necessary to create a system whereby sufficient information concerning the allegations is communicated to the relevant subscribers, acknowledgement of receipt by subscribers is secured and cross-checking for earlier notifications in respect of the same subscribers is undertaken. There are a large number of choices to be made in the design of such a system such as the number of warnings that should be given, whether there should be a "grace period", whether all alleged infringers should be treated alike or graded according to severity, each of which adds complexity to the design of the system making it impossible to estimate the cost of establishing it.¹²²

2-49. iiNet would also need to implement and maintain additional customer support capability as the implementation of such a regime would lead to queries and

¹¹⁹ Assuming, contrary to iiNet's position, that this is not proscribed by the Telco Act.

¹²⁰ Including notices from AFACT and from the USA.

¹²¹ Malone XXN T 769.23.

¹²² Malone #2 paras 5-20 JCB Vol A2 tab 33 pp 2-7 (paras 10, 12, 15-19 submission only).

complaints from subscribers.¹²³ The issues involved are such that more senior personnel would need to be involved in the handling of such queries and complaints. Based on past experience with dissatisfied customers, it is likely that such a regime would lead to complaints to the Telecommunications Industry Ombudsman (**TIO**) and to litigation. iiNet is routinely required to re-instate disconnected customers¹²⁴ pending resolution of TIO complaints. iiNet is required to bear the costs of complaints to the TIO, regardless of the outcome.

2-50. Mr Malone gave evidence that the steps described above would increase iiNet's costs and reduce its revenues in circumstances where its competitors are not so constrained. In light of the following factors:

- (a) the allegations of copyright infringement are not proved;
- (b) iiNet is unable to determine the responsibility of the subscriber for the alleged improper conduct of an unidentified user;
- (c) disconnection of Internet access will cause significant personal and/or commercial disruption,

the implementation of such a regime is not justifiable.¹²⁵

2-51. The applicants did not call any evidence to challenge Mr Malone's evidence in this respect.

Reverse DNS lookups

2-52. Mr Malone's third affidavit responded to the matters raised in Williams #8. He was not cross-examined on any aspect of this affidavit.

2-53. Mr Malone commenced by describing his familiarity with many technical issues relating to domain names, partly due to the fact that he was a founding board member

¹²³ Malone #2 paras 21-26 JCB Vol A2 tab 33 pp 7-9 (second line para 22 submission only).

¹²⁴ For example for unpaid bills.

¹²⁵ Malone #2 para 10 JCB Vol A2 tab 33 p 4, admitted as submission only.

and Chairman of .au Domain Administration Ltd (AUDA)¹²⁶. Mr Malone described the issues associated with conducting a reverse DNS lookup (i.e. the process of resolving an IP address to a domain name).¹²⁷

2-54. Mr Malone set out the results of analysis based on data referred to by Mr Williams in Williams#8:

- (a) Mr Malone confirmed that based on analysis conducted in relation to the IP address¹²⁸ and domain referred to in paragraph 8 of Williams#8, the IP address identified by DtecNet was not a static IP address but a dynamic IP address allocated to two different customer accounts¹²⁹.
- (b) Mr Malone confirmed that based on analysis conducted in relation to the IP address¹³⁰ and domain set out in paragraph 16 of Williams #8, the IP address — which is a sub-domain of “inet.net.au”¹³¹ — was assigned to a primary school between 2000 and 2004¹³². The reverse DNS lookup data for this IP address still reverts to the old primary school domain¹³³ — the primary school is not the current account holder.
- (c) Mr Malone confirmed that based on analysis conducted in relation to the IP address¹³⁴ and domain set out in paragraph 18 of Williams #8, the subscriber that was using this IP address at the time of the alleged infringements did not appear to be related to the individual that was identified by the applicants.¹³⁵

¹²⁶ Malone #3 para 6.

¹²⁷ Malone #3 paras 15 and 16 (submission only).

¹²⁸ Confidential Ex MMM-6 pp 1-10.

¹²⁹ Malone #3 para 19 (submission only).

¹³⁰ Confidential Ex MMM-6 pp 11-25.

¹³¹ Malone #3 paras 21 and 23 (last line of para 23 not admitted).

¹³² Malone #3 para 23 (last line of para 23 not admitted).

¹³³ Malone #3 para 23 (last line of para 23 not admitted).

¹³⁴ Confidential Ex MMM-6 pp 26-34.

¹³⁵ Malone #3 para 27.

Mr Dalby***Background***

2-55. Mr Dalby is iiNet's Chief Regulatory Officer and responsible for:¹³⁶

- (a) managing the relationship between iiNet and other organisations operating in the telecommunications industry, the ACCC and the government;
- (b) giving guidance to iiNet's Finance Department, including the Compliance Team, in relation to management of risk and liability including with respect to copyright infringement;
- (c) management of TIO issues;
- (d) liaison with the Internet Industry Association; and
- (e) copyright issues, including dealing with AFACT correspondence.

Industry discussions - MIPI, IIA

2-56. From 2007, an industry body called Music Industry Piracy Investigations (**MIPI**) began corresponding with ISPs including in relation to an industry code of practice that would include a notice and disconnection policy in response to copyright infringement on the Internet. In April 2007, the IIA wrote to MIPI, the Australian Recording Industry Association (**ARIA**) and AFACT communicating the IIA Board's concerns in relation to the proposed notice and disconnection policy.¹³⁷

Industry submission

2-57. Mr Dalby participated in the preparation of a submission on Internet piracy to be provided to the Federal Government. That submission (presented in April 2008 on behalf of iiNet, Telstra, Optus, Internode, Unwired, Westnet, Verizon and Google) said:

¹³⁶ Dalby para 13 JCB Vol A2 tab 31 pp 4-5.

¹³⁷ Dalby paras 29 to 31 JCB Vol A2 tab 31 pp 12-15 (para 30(f) not admitted).

- (a) ISPs will and do co-operate in any actions taken directly by rights holders against file sharers;
- (b) ISPs do not approve, condone or authorise any person engaging in copyright infringement by any means;
- (c) ISPs have repeat infringer policies in place in which a “repeat infringer” is a person found to be an infringer by an Australian Court;
- (d) ISPs propose a streamlined preliminary discovery process in the Federal Court or Federal Magistrates Court whereby the application for discovery by a rights holder be made according to a pre-agreed protocol in return for which the ISPs would not oppose the application and that it may be possible to further streamline the process by filing pre-agreed consent orders.¹³⁸

Correspondence between rights owners, ISPs and IIA

2-58. Mr Dalby exhibited various items of correspondence between rights owners, ISPs and the IIA from 2007 and 2008. Of particular interest is the letter dated 25 June 2008 from A. Robert Pisano, President and Chief Operating Officer of the Motion Picture Association to Mr Coroneos, the Chief Executive of the IIA, thanking Mr Coroneos for meeting with him, suggesting that methods short of termination of subscribers were appropriate and indicating that the MPA, through AFACT, was ready to “partner with each Australian ISP to implement a “graduated response” program and encouraging Mr Coroneos to work closely with Ms Pecotic of AFACT in this regard. The letter concluded with an “open invitation to visit [the MPA] in LA”.¹³⁹ Mr Dalby dealt with the AFACT correspondence directed to iiNet against this background.¹⁴⁰

AFACT communications in 2008

2-59. Mr Dalby did not see the AFACT letters of 2 May and 17 June 2008 until some time later but Mr Parkinson of iiNet brought the 2 July 2008 letter to his attention and

¹³⁸ Dalby paras 17, 32-33 JCB Vol A2 tab 31 pp 15,16 Ex SJD-1 pp 63-190 JCB Vol B8 tab 91.

¹³⁹ Ex SJD-1 p 229 JCB Vol B8 tab 91.

¹⁴⁰ Dalby para 45 JCB Vol A2 tab 31 p 17 (admitted as submission only).

Mr Dalby decided that he would take control of the issue.¹⁴¹ He did not understand that AFACT was threatening legal proceedings or that it was a letter of demand but rather it was of a similar nature to notifications of alleged copyright infringement that iiNet had received in the past. For this reason, Mr Dalby did not seek legal advice in relation to it.¹⁴²

- 2-60. Mr Dalby's affidavit set out his concerns arising from the AFACT correspondence and his discussions with Mr Parkinson on the issue.¹⁴³ One particular concern of Mr Dalby's was that a regime of disconnecting subscribers would lead to TIO complaints.¹⁴⁴ Because of these concerns, Mr Dalby decided that iiNet was not in a position to take any direct action against subscribers based on the AFACT letter.¹⁴⁵
- 2-61. In response to the ongoing correspondence from AFACT, Mr Dalby directed that copies of the letters be given to the police and was informed that it was not likely that the police would take any action.¹⁴⁶ Mr Dalby continued to supervise Mr Parkinson in relation to further responses to the ongoing AFACT correspondence.¹⁴⁷
- 2-62. Mr Dalby identifies that approximately 44% of the Identified Films are available for purchase and download from Apple iTunes in iiNet's Freezone.¹⁴⁸ Approximately 69% of the Identified Films are available for legal hire (not download) via the Quickflix service.¹⁴⁹ As Freezone activity is not counted against a subscriber's bandwidth quota, and the consequence of exceeding one's quota is the shaping of the account to extremely slow speeds, iiNet strongly encourages subscribers to obtain licensed versions of the Identified Films through Apple iTunes rather than downloading them via BitTorrent.

¹⁴¹ Dalby para 48 JCB Vol A2 tab 31 p 18. Dalby XXN T 935.12-13, 937.35-36.

¹⁴² Dalby para 51 JCB Vol A2 tab 31 pp 18-19.

¹⁴³ Dalby paras 50 - 57, 59 - 65, 68-81, JCB Vol A2 tab 31 pp 18-27.

¹⁴⁴ Dalby paras 82-86 JCB Vol A2 tab 31 p 27-28. Dalby XXN T 1023.7-1024.28 (paras 84 and 85 submission only and evidence of Mr Dalby's believe at the time).

¹⁴⁵ Dalby para 88 JCB Vol A2 tab 31 p 2 (para 88 submission only and evidence of Mr Dalby's believe at the time).

¹⁴⁶ Dalby XXN T 993.35-994.13.

¹⁴⁷ Dalby paras 98-103 JCB Vol A2 tab 31 pp 30-32 (words said by Mr Parkinson not admitted).

¹⁴⁸ Dalby para 129 JCB Vol A2 tab 31 p 39; Ex SJD-2.

¹⁴⁹ Dalby para 141 JCB Vol A2 tab 31 p 44; Ex SJD-3.

Mr Buckingham***Background***

- 2-63. Mr Buckingham is the Chief Financial Officer of iiNet and its Company Secretary. The Compliance Team which deals with liaison with law enforcement agencies and copyright issues reports to Mr Buckingham but executive responsibility for these issues is shared with Mr Dalby.¹⁵⁰ Mr Buckingham has responsibility for enterprise risk management.¹⁵¹ As Mr Buckingham was not cross-examined by the applicants, his evidence has not been challenged.
- 2-64. Mr Buckingham described iiNet's business, its financial position and its position relative to its competitors.¹⁵² Much of the detail of this evidence is obviously commercially sensitive to iiNet and is included in a confidential exhibit.¹⁵³

Customer numbers compared to plans

- 2-65. Mr Buckingham describes how as a general proposition, iiNet's subscriber numbers can be viewed as a bell curve "*skewed towards the lower to middle end quota plans*".¹⁵⁴ In other words as a general proposition, "*iiNet has more subscribers on its lower to middle end plans.*"¹⁵⁵ Tellingly, only about 1% of iiNet's LSS residential subscribers take the highest quota plan Home 7.¹⁵⁶ Mr Buckingham described how most subscribers use less than half of their allocated quota.¹⁵⁷
- 2-66. Mr Buckingham's evidence is contrary to the applicants' characterisation of iiNet's business; namely, that iiNet's primary aim is to have all subscribers on the largest plan possible. Instead, Mr Buckingham's evidence is consistent with Mr Malone's comments during cross-examination after it was suggested to him that "*iiNet's*

¹⁵⁰ Buckingham paras 19-24 JCB Vol A2 tab 29 pp 5-6.

¹⁵¹ Buckingham para 12 JCB Vol A2 tab 29 pp 3.

¹⁵² Buckingham JCB Vol A2 tab 29.

¹⁵³ Buckingham Conf Schedule JCB Vol B6 tab 88.

¹⁵⁴ Buckingham para 92 JCB Vol A2 tab 29 p 20.

¹⁵⁵ Buckingham para 92 JCB Vol A2 tab 29 p 20.

¹⁵⁶ Buckingham para 92 JCB Vol A2 tab 29 p 20

¹⁵⁷ Buckingham para 93 JCB Vol A2 tab 29 p 20.

objective is to sell as much quota as possible". In response to that suggestion, Mr Malone stated *"the primary objective is to get customers online and to right size them to the plan that best suits their needs."*¹⁵⁸ The evidence of Mr Buckingham supports this statement and the applicants' contentions with respect to iiNet's business model should be rejected.

Bandwidth and costs

2-67. In its oral opening, the applicants submitted that *"there will be no issue that iiNet made profits from the substantial uses of bandwidth by its own customers related to those copyright infringing activities"*.¹⁵⁹ *"Unauthorised copyright infringing activity, more bandwidth, more money for iiNet."*¹⁶⁰

2-68. iiNet's broadband plans come with an allocated download quota; as such, iiNet sells the right to use quota on a subscription basis. Any activity conducted using an Internet account such as viewing a webpage contributes to the use of bandwidth which is counted and compared against the quota.¹⁶¹ Mr Buckingham indicated that *"as a general rule, as bandwidth usage increases the cost of iiNet providing that additional bandwidth increases."*¹⁶² In fact, *"one of the significant variable costs to iiNet in running its business is the cost of acquiring bandwidth from telecommunications customers so that iiNet can provide internet access and other services to its customers."*¹⁶³ The ability of iiNet to derive a profit from its business largely depends upon the control or reduction of variable costs including the network costs of providing bandwidth.¹⁶⁴ Consequently, *"an increase in average usage of bandwidth is reflected in increased cost in the purchase of bandwidth (for subsequent periods)."*¹⁶⁵ It is at about 50% of the usage of a subscribers' quota, and above, that iiNet's margin starts being eroded *"by the attributed cost of providing that bandwidth*

¹⁵⁸ Malone XXN T 842.5-7.

¹⁵⁹ AOS T 3.44-46.

¹⁶⁰ AOS T 9.23-24.

¹⁶¹ Malone #1 para 74 JCB Vol A2 tab 30 p 22.

¹⁶² Buckingham para 60 JCB Vol A2 tab 29 p 15.

¹⁶³ Buckingham para 80 JCB Vol A2 tab 29 p 18.

¹⁶⁴ Buckingham para 61 JCB Vol A2 tab 29 p 15.

¹⁶⁵ Buckingham para 85 JCB Vol A2 tab 29 p 19.

and by other costs".¹⁶⁶ This highlights the importance to iiNet's business of ensuring bandwidth usage by its customers is low relative to their plan quota, and also objectively low.

- 2-69. This is further evidence that it is not in iiNet's interest for subscribers to download infringing material via BitTorrent and is contrary to the applicants contentions set out above. It is again worth noting that Mr Buckingham's evidence has not been challenged by the applicants.

Customer profile

- 2-70. In its opening outline, the applicants contended that iiNet encouraged its customers to upgrade their plans "*Up is good, down less good*".¹⁶⁷ However, Mr Buckingham's evidence demonstrates that iiNet customers on the plans with the highest subscriber fees, being Home 6 and Home 7 plan customers "*are not the ideal customers by reason of the potential significantly higher costs if they use the full amount of their quota*".¹⁶⁸
- 2-71. Indeed iiNet's pricing reflects this position. Mr Buckingham's evidence shows that in November 2008, a major competitor was offering a product with a much larger quota plan than any of iiNet's existing plans at a significantly lower price than iiNet's Home 7 plan.¹⁶⁹ In contrast, iiNet's plans at the lower end of quota "*are very comparable to equivalent products from competitors*".¹⁷⁰

Churn

- 2-72. Mr Buckingham confirmed that iiNet is extremely sensitive to churn – the loss of subscribers to other ISPs. The most important goal in iiNet's strategic plan is to

¹⁶⁶ Buckingham para 97 JCB Vol A2 tab 29 p 21.

¹⁶⁷ AOS T 8.37.

¹⁶⁸ Buckingham para 87 JCB Vol A2 tab 29 pp 19-20, Confidential Schedule para 3 JCB Vol B6 tab 88 p 1.

¹⁶⁹ Buckingham para 111 JCB Vol A2 tab 29 p 24.

¹⁷⁰ Buckingham para 111 JCB Vol A2 tab 29 p 24.

reduce churn.¹⁷¹ It is therefore an entirely reasonable factor for iiNet to consider in the context of possible responses to AFACT's demands.

Investment

- 2-73. iiNet's evidence shows the extent to which it has invested in telecommunications infrastructure and online technology.¹⁷²
- 2-74. iiNet has spent significant amounts of money in creating or leasing the infrastructure that is used by Australian households and businesses to access the Internet and estimates of this expenditure are in confidential schedules in the evidence.¹⁷³
- 2-75. One of iiNet's significant long-term investments has been building its own telecommunications structure. iiNet has spent tens of millions of dollars building its fibre and DSLAM network; and tens of millions of dollars on renting backhaul fibre from other operators to support that network.¹⁷⁴
- 2-76. One of the significant variable costs to iiNet in running its business is the cost of acquiring bandwidth from telecommunications carriers so that iiNet can provide Internet access and other services to its customers.¹⁷⁵ The total annual cost of iiNet's bandwidth (excluding Westnet) is in the tens of millions of dollars.¹⁷⁶
- 2-77. iiNet has also invested in its Freezone service. The costs of providing this service include the costs of acquiring the rights to provide access to content and technical and infrastructure costs (including staff time to manage the Freezone from a technical perspective and the cost of staff time to procure the content and manage the relationships with the content providers).¹⁷⁷ The cost of acquisition of rights to

¹⁷¹ Buckingham paras 98-99 JCB Vol A2 tab 29 p 21.

¹⁷² Buckingham paras 53(1), 54, 70 JCB Vol A2 tab 29 pp 12, 13, 17; Malone #1 para 32(d) JCB Vol A2 tab 30 p 10.

¹⁷³ Buckingham para 79 JCB Vol A2 tab 29 p 17. Due to the confidential nature of many of these figures, exact amounts are not included in these submissions.

¹⁷⁴ Buckingham Conf Ex DB-2, paras 10, 11 JCB Vol B6 tab 88 pp 2-3.

¹⁷⁵ Buckingham para 80 JCB Vol A2 tab 29 p 17.

¹⁷⁶ Buckingham Conf Ex DB-2, para 15 JCB Vol B6 tab 88 p 6.

¹⁷⁷ Buckingham para 78 JCB Vol A2 tab 29 p 17.

provide access to such content is in the high hundreds of thousands of dollars per year.¹⁷⁸

2-D. OTHER EVIDENCE

Introduction

2-78. In the interests of focussing on the key issues, iiNet has not sought to summarise the cross-examination of each of the applicants' witnesses. Other evidentiary matters raised during the cross-examination of the applicants' witnesses that are relevant to the issues in the case are discussed, where appropriate, in Chapters 3 to 8.

Cross-examination of Mr Williams

General overview

2-79. Mr Williams swore a number of affidavits in the proceeding,¹⁷⁹ most of which exhibited a large amount of documentary evidence, including in the form of large A3 spreadsheets incorporating highlighted tables referred to as "repeat infringer bundles, namely Ex MJW-1, Ex MJW-8 and Ex MJW-10."¹⁸⁰

2-80. If anything, the voluminous so-called "repeat infringer bundles" exhibited to Mr Williams' affidavits including Ex MJW-10 (an exhibit to Williams#7¹⁸¹) demonstrate the immense amount of work, time, cost and effort that is required in order to set out, review and analyse the allegations in the data served with the AFACT notices. Moreover, the very different legal interpretations of such data (ie the number and nature of alleged infringements) that emerged during cross-examination of Mr Williams¹⁸² serves to highlight the extremely difficult judgments an ISP in iiNet's position would be required to make in the course of implementing any sort of regime

¹⁷⁸ Buckingham Conf Ex DB-2, para 9, JCB Vol B6 tab 88 p 2.

¹⁷⁹ Williams #1 JCB Vol A2 tab 23; Williams #2 JCB Vol A2 tab 27; Williams #6 Vol A2 tab 32; Williams #7 JCB Vol A2 tab 36; Williams #8 Vol A2 tab 37.

¹⁸⁰ Williams Ex MJW-1 JCB Vol B3 tab 1; Williams Ex MJW-8 JCB Vol B4 tab 1; Williams Ex MJW-10 JCB Vol B3 tab 58.

¹⁸¹ Ex MJW-10 is derived from data supplied by DtecNet, with the information produced by iiNet pursuant to the 15 June 2009 orders regarding the login history and session events of the 20 sample iiNet customers: Williams #7 para 1 JCB Vol A2 tab 36 p1.

¹⁸² Williams FXXN T 540.45.541.42.

to deal with such notifications. The issues raised in cross-examination relating to the number and nature of infringements are exactly the kinds of issues iiNet would need to discuss with subscribers and other industry bodies such as the Telecommunications Industry Ombudsman when subscribers or other persons contacted iiNet to query or dispute the allegations in the notices.

Williams #8

- 2-81. In his eighth affidavit, Mr Williams caused various internet and domain name searches to be conducted in relation to IP addresses and peer hostnames from the data collected by DtecNet.¹⁸³ Based on the analysis set out in Malone #3 (which was not challenged by the applicants in any respect), of the six domain names identified by Mr Williams¹⁸⁴, three had no apparent relationship to the recorded account holder. In particular, the IP address set out in paragraph 8 of Mr Williams affidavit, was in fact dynamically assigned to two residential subscribers, both completely unrelated to the entity initially identified by Mr Williams.¹⁸⁵ Consequently, the assumption made by Mr Williams (that relying on the reverse DNS lookup process to identify the hostname associated with an IP address in the AFACT notices is reliable) is incorrect; in the case of a static IP address, this data depends upon the account holder to which the IP address is allocated updating the reverse DNS data¹⁸⁶.
- 2-82. In the course of cross-examination, Mr Lokkegaard¹⁸⁷, Mr Herps¹⁸⁸ and Mr Carson¹⁸⁹ confirmed the likelihood of inaccuracy using reverse DNS lookups.
- 2-83. The analysis of Mr Williams' eighth affidavit set out in the third affidavit of Mr Malone (discussed below), demonstrates the inherent danger faced by ISPs if they take allegations of copyright from third parties at face value. Mistakes can be made by both humans and robots; as such, any allegation needs to be tested, and to the

¹⁸³ Williams #8 para 3,5 JCB Vol A2 tab 37 pp1,2.

¹⁸⁴ Williams #8 JCB Vol A2 tab 37.

¹⁸⁵ Malone #3 paras 17-19, pp4,5.

¹⁸⁶ Malone #3 para 10 p3.

¹⁸⁷ Lokkegaard XXN T 378.28-32.

¹⁸⁸ Herps XXN T 336.16-28.

¹⁸⁹ Carson XXN T 508.43-510.18.

extent possible confirmed, before the ISP can rely on the information provided by a third party. Such testing and confirmation may require “secondary investigations” described by Mr Carson¹⁹⁰ which ISPs are simply not in a position to undertake due to physical, commercial and regulatory limitations. However, if such investigations are not conducted and completely innocent account holders are terminated, this would have serious commercial and legal consequences for the ISP. It would also result in extremely serious personal, commercial, financial and legal consequences for the innocent account holder (not to mention any other person relying on Internet access through the account holders’ (ex)connection). The applicants ignore this issue,¹⁹¹ but it has direct implications regarding reasonableness of any actions taken by carriage service providers to terminate subscribers’ Internet access accounts.

2-E. SUPPLEMENTARY MATTERS

Jones v Dunkel

2-84. The applicants appear to place significance on the absence of an affidavit from Mr Parkinson.¹⁹² It is not clear why this might be so. Mr Parkinson reported directly to Mr Buckingham, who has provided an affidavit, and in respect of the issues relevant to this proceeding, he was supervised by Mr Dalby who has also provided an affidavit. Mr Dalby’s evidence, summarised above, makes it clear that he, Mr Dalby, was responsible for iiNet’s response to the AFACT correspondence.

2-85. Any submission that a *Jones v Dunkel* inference should be drawn in relation to evidence that Mr Parkinson might have given should be rejected in light of the ruling of a unanimous Full Federal Court in *Apand Pty Ltd v The Kettle Chip Company Pty Ltd*¹⁹³ cited with approval in Heydon, *Cross on Evidence*, 7th Aust. ed., (2004) at p.42 in support of the proposition that “nor does the rule [in *Jones v Dunkel*] operate where junior decision-makers are not called so long as the senior decision-makers have been.”

¹⁹⁰ See para 2-11 above.

¹⁹¹ As the applicants would not be responsible for implementing such a regime, is it presumable a case of “out of sight, out of mind”.

¹⁹² AS 132, ACS 209.

¹⁹³ (1994) 52 FCR 474 at 490D-E per Lockhart, Gummow and Lee JJ.

- 2-86. The applicants appear to wax and wane on the subject of Mr Parkinson. In addition to criticising iiNet for failing to call Mr Parkinson, they are critical of Mr Malone for the appointment of Mr Parkinson, a credit manager with no particular technical ability, to the role of copyright compliance officer.¹⁹⁴ In line with the principles identified above, the applicants cannot simultaneously complain that a relevant decision maker is sufficiently important that his absence attracts the inference (notwithstanding the presence of two of his superiors) yet suggest that he was not sufficiently important.
- 2-87. The applicants also criticise iiNet for not calling “any person from within its staff who professed to have any close familiarity with relevant technical matters”.¹⁹⁵ Any such criticism is unwarranted. There was no evidence from the applicants requiring a response from such a witness. The matters relied upon by iiNet in its defence of the proceeding are appropriately addressed by its senior executives, Messrs Malone, Dalby and Buckingham. Indeed, under cross-examination, Mr Malone informed the Court of his relevant technical expertise:

What inquiries did you make as to those difficulties in order to be able to give that evidence?---I'm a programmer by background so I relied upon my own experience in that respect.

But when it came to working out the degree of difficulty of – I withdraw that. When it came to the question of presenting to his Honour evidence on behalf of iiNet as to the degree of difficulty which would be involved in writing a program for sending, on an automated basis, copyright infringement notices, you consulted, of those 60 programmers, none; correct?---Yes, that's correct.

You chose to consult none of the persons who are involved in the day-to-day business of maintaining or writing programs relating to the automatic sending of notices in relation to billing; that is right, isn't it?---Yes.

But the managing director took it upon himself to indicate – in the form of yourself – the suggested difficulty in writing a program in relation to copyright infringement notices; that is the size of it, isn't it?---Yes, it was my affidavit.

And - - -?---If I clarify, I wrote our original billing system and worked on it for more than 10 years.

¹⁹⁴ Malone XXN T 729.25-32, 39-40.

¹⁹⁵ ACS 208.

*Mm?---So I have, I would suggest, a reasonable degree of expertise in this area.*¹⁹⁶

- 2-88. Moreover, the applicants' position on Mr Malone's technical experience is entirely inconsistent; indeed, the applicants seek to rely on much of Mr Malone's evidence.¹⁹⁷
- 2-89. The applicants also criticise iiNet for not calling evidence from any person from Westnet "*having regard to the fact that Westnet had a policy in place for notifying customers of allegations of copyright infringement*".¹⁹⁸ However, this criticism is equally misplaced. The applicants have not made any claim against Westnet. It is not up to iiNet to submit evidence supporting the applicants' case. It was not for iiNet to attempt to predict every proposition that might be advanced by the applicants during the hearing involving a technical or other question and to have a technical or other witness present to respond to such issues. That is not what *Jones v Dunkel* is concerned with. It is not how litigation is conducted.
- 2-90. Given the applicants' criticisms of iiNet, it is worthwhile to examine the applicants' position in this respect. The applicants did not themselves call any representative from any of the other ISPs whose policies were exhibited by the applicants and whose conduct in relation to allegations of copyright infringement the applicants seek to rely upon.¹⁹⁹ Nor have the applicants called any witnesses to give evidence from other Australian ISPs (including iiNet's competitors such as BigPond (Telstra), Optus, Internode and Unwired (Channel 7's wholly owned subsidiary²⁰⁰) to support any aspect of the applicants' case. Such witnesses could presumably shed light on both the technical issues the applicants appear to be so concerned about and also reply to the evidence in Malone #2. In particular, one would have thought that as the wholly owned subsidiary to the thirty-fourth applicant (Seven Network (Operations) Limited), Unwired would be more than happy to give evidence that would support the applicants' case. And yet, the applicants have declined to call any witness from

¹⁹⁶ Malone XXN T 759.1-40.

¹⁹⁷ ACS 199.

¹⁹⁸ ACS 210.

¹⁹⁹ Malone XXN T 766-775.

²⁰⁰ Seven Network (Operations) Limited is of course the 34th applicant in the present proceeding. To say that it runs with the hares and hunts with the hounds would be charitable at the very least.

Unwired or any other ISP. In such circumstances, the applicants' attacks against iiNet are unwarranted.

Commercial Union Assurance Co. of Aust Ltd v Ferrcom Pty Ltd

2-91. The applicants' appeal to *Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418-419 in relation to Mr Dalby and the iiNet repeat infringers policy should be rejected.

2-92. In *Ferrcom* Handley JA said:

As I have already said the insured made no attempt to prove that it could and would have obtained cover for this mobile crane without the endorsement by pursuing the course that Mr Hughes said would alone have achieved that result.

In my opinion the Court should not draw inferences favourable to the insured on these matters when no attempt was made to prove them by direct evidence and in particular when no relevant questions were asked of Mr Ferrarese. Rather it seems appropriate to apply the principles of Jones v Dunkel (1959) 101 CLR 298.

2-93. Here, there is proof by direct evidence of the policy. It came from Mr Malone. iiNet does not suggest that Court draws any inferences. The evidence is there. *Ferrcom* does not apply.

2-F. CREDIT

Mr Malone

Overview

2-94. The applicants' intemperate attack on the credit of Mr Malone should be rejected.

2-95. The Court properly asked,²⁰¹ during the final oral address for the applicants, that the applicants identify specific instances in the evidence that are relied upon for their allegation against Mr Malone that he was not a truthful witness.²⁰² It is, with respect, appropriate to require counsel who assert rank dishonesty on the part of a managing

²⁰¹ AOS T 1125.45.

²⁰² The allegation is made repeatedly, including in ACS Schedule A, 1 and 51.

director of a listed public company to justify that assertion by clear demonstration. The applicants' response does not come up to the mark, or close to it.

- 2-96. On the contrary, Mr Malone should be accepted as a witness who responsibly gave honest evidence on the topics about which he was examined.
- 2-97. The submissions made below address in detail, and answer, the applicants' contentions about the credit of Mr Malone. Three important considerations should be kept in mind throughout:
- (a) the litany of adverse descriptors of Mr Malone's evidence in the applicants' submissions²⁰³ suggests (and a consideration of the evidence reveals) serious and mistaken overstatement by the applicants in their attack upon Mr Malone;
 - (b) notwithstanding the applicants' sweeping statements to the effect that Mr Malone's evidence was not reliable, not credible, partisan and disingenuous, "*the applicants rely on much of his evidence*".²⁰⁴ That fact strongly suggests that Mr Malone was simply giving straightforward and honest answers, which if they are perceived to help the applicants' case are gratefully adopted (but never with the courtesy of indicating what is implicit in that adoption, namely the reliability of the answers) – but if they are perceived to work against the applicants' case they are denounced as unreliable or, worse, untruthful; and
 - (c) even the applicants accept that "*an adverse finding on Mr Malone's credit is not essential to the applicants' case*".²⁰⁵ Accordingly, the vitriol is not only wrong, it is pointless.
- 2-98. In many respects, the applicants' harsh commentary on the effect of Mr Malone's evidence, including his credit and character, has the same quality of exaggeration as other aspects of the applicants' case.

²⁰³ Apparent in ACS 198-199 and throughout ACS Schedule A, 1-51.

²⁰⁴ ACS 199.

²⁰⁵ ACS 199.

- 2-99. A key example is the use now made by the applicants of Mr Malone's evidence that he considered that the AFACT Notifications contained "*evidence which was compelling and ought to be tested*".²⁰⁶ Mr Malone went on, in the very next answer, to explain the way in which he accepted the suggestion that it was "*compelling evidence*" – that is "*I didn't know what AFACT's collection methods were, but believed that they should be reviewed by an independent third party to take them to the next step*".²⁰⁷ On a fair assessment of the evidence, it is clear that what Mr Malone said is that the information provided by AFACT was of a quality sufficient to justify "*independent third party*" review (such as assessment by a court or by law enforcement authorities) so that proper consideration could be given to taking further action in reliance on the information.²⁰⁸
- 2-100. Mr Malone (who is, of course, not a lawyer) clearly did not use or adopt the phrase "*compelling evidence*" in a legalistic sense, to mean that it was now beyond argument that the facts asserted by AFACT were true. However, the applicants strip the words "*compelling evidence*" from their context in the cross-examination and treat the words, in their submissions, for all intents and purposes as a concession that there was no doubt attending iiNet's consideration of the allegations made by AFACT. That characterisation is not a fair statement of the effect of the evidence.
- 2-101. A second important example is the inaccurate and overstated criticism of Mr Malone in respect of his direction to Westnet staff on 30 October 2008, which is addressed below.

Response to Schedule A

- 2-102. The collection of overstated adverse conclusions about Mr Malone's credit in para 1 of Schedule A²⁰⁹ of the applicants' submissions are not borne out by the material that follows in Schedule A.²¹⁰ The Court will recall, and even a cursory review of the transcript of cross-examination demonstrates, that on numerous occasions Mr Malone

²⁰⁶ Malone XXN T705.01-04. The submissions in Chapter 5 address this evidence in additional detail.

²⁰⁷ Malone XXN T705.05-08.

²⁰⁸ Malone XXN T705-706.

²⁰⁹ ACS Schedule A.

²¹⁰ ACS Schedule A

readily answered questions in an efficient, direct and straightforward manner. He regularly accepted propositions put to him, including about matters obviously regarded by the applicants as adverse to iiNet's case. There was no persistent advocacy and no untruthfulness on the part of Mr Malone.

2-103. In para 2 of Schedule A,²¹¹ if the applicants intend more than another rhetorical flourish by the submission that "*in many respects Mr Malone is iiNet*", that contention is incorrect. iiNet is far from a private company operating as the alter ego of the managing director; rather, it is a listed public company the management of which falls to a Board of directors and an executive team which are, on the evidence, as involved as one would expect in the policy and operations of iiNet.²¹² The allegation of persistent advocacy of iiNet's cause is simply unsustainable upon any balanced consideration of Mr Malone's three days in cross-examination.

2-104. The applicants submit in para 3 of Schedule A²¹³ that "*Mr Malone, like iiNet itself, has been compromised by his extreme views on the role and responsibilities of an ISP*". There is no evidence that any views held by Mr Malone are "*extreme*". On the contrary, the Court may infer that almost every other ISP operating in Australia appears to take a similar approach to copyright work that is accessible through their networks. In any event, it is hardly a point to bring to bear against Mr Malone as a matter going to his credit. Mr Malone has made a series of considered business decisions about the best interests of iiNet (in accordance with his duties as a director) that he repeated in the witness box and, in the face of hostile cross-examination, that he defended as the best approach for iiNet. That was not a badge of partisanship, but rather the honest defence of an honestly held belief.

2-105. The evidence is that there is ongoing debate in the industry about the appropriate balance to be struck between the interests of rights owners, ISPs and internet users.²¹⁴ Criticism of Mr Malone for having an opinion about that topic has more than a touch

²¹¹ ACS Schedule A

²¹² Malone #1 paras 21-23 JCB Vol A2 tab 30 pp5-8.

²¹³ ACS Schedule A

²¹⁴ Malone XXN T 818.14-46. On the other side of that coin see, for example, Mr Williams' submissions to the government urging a different 'balance': *Access to Details of ISP Customers Suspected of Infringing Copyright*, 30 March 2006.

of unreality. Despite the unsupported repeated submissions of the applicants about the persistent advocacy by Mr Malone at the expense of a truthful answer, there are no examples of evidence by him of that character.

- 2-106. The sweeping adverse conclusions advanced by the applicants in para 4 of Schedule A²¹⁵ are also not fair conclusions to draw from Mr Malone's evidence, and they were not put to Mr Malone in cross-examination in that form.
- 2-107. The allegation in para 5 of Schedule A²¹⁶ is a clumsy overstatement that is not supported by evidence and was not put to Mr Malone. It should be rejected. To the extent that the submission is intended to assert an abuse of process by the respondent's witnesses or lawyers, it is baseless.
- 2-108. In para 6 of Schedule A²¹⁷, there is a suggestion that Mr Malone was an insufficiently informed and knowledgeable witness. On the contrary, he is the founder of iiNet and has been its managing director for some 16 years.²¹⁸ His background includes relevant tertiary qualifications and many years of experience as a computer programmer, including (for example) writing the programs for iiNet's original billing system and maintaining it for more than 10 years.²¹⁹
- 2-109. The applicants are also generally critical of what they say was an "*absence of appropriate witnesses*" in iiNet's case.²²⁰ The criticism is not warranted. iiNet read affidavits prepared by its managing director, chief regulatory officer and chief financial officer. Those senior executives are the individuals directly responsible for the decisions and conduct of iiNet relevant to the determination of these proceedings. A comprehensive documentary record of the company's communications has been placed before the Court, about which two of those executives were extensively examined. There is no absence of appropriate witnesses in iiNet's case.

²¹⁵ ACS Schedule A

²¹⁶ ACS Schedule A

²¹⁷ ACS Schedule A

²¹⁸ Malone #1 paras 1-4 JCB Vol A2 tab 30 pp5-8.

²¹⁹ Malone #1 para 6 JCB Vol A2 tab 30 pp2-3.; T 759.

²²⁰ ACS Schedule A, 6.

2-110. In any event, the applicants' criticism has no consequences. That is, if the applicants had wished to pursue the criticism in a forensically relevant way, it was open to them to formulate inferences said to arise against iiNet's case. iiNet would then have been in a position to respond directly to a specific contention. The fact that that was not done is appropriate, since no inferences arise against iiNet's case by reason of the absence of any witness.

Westnet

2-111. The documentary record shows that on 17 September 2008, Mr Bader told Mr Malone that he had heard that a customer of one of iiNet's subsidiaries, Westnet, had received an email from Westnet that "*was simply a forward from the MPA (or someone, US)*" and wondered whether Westnet and iiNet positions – referring, clearly enough, to positions on copyright notices – should be aligned at some point.²²¹ The associated chain of emails demonstrates that Mr Malone then pursued that topic with Mr Cain, the chief operations officer of Westnet. Significantly, Mr Cain explained that "*We are not seeking a response from customer it is merely a heads up*".²²²

2-112. During the day on 18 September 2008, Mr Parkinson sent an email to Mr Malone and the two relevant Westnet employees, Mr Cain and Mr Ariti, in which he indicated that there had been agreement that the question how each business deals with copyright notices would be discussed upon the return of Mr Ariti (from holidays) at the end of October 2008.²²³

2-113. During the morning of 30 October 2008, Mr Malone raised with Mr Cain and Mr Ariti the question of "*Westnet's position on the AFACT notices*".²²⁴ The reference in the email to "*AFACT*" appears to have been intended to refer to copyright notices generally, since so far as Mr Malone is aware, Westnet never received any notices

²²¹ Ex A2, tab 99, IIN.002.0001.4975.

²²² Ex A2, tab 99, IIN.002.0001.4973 (Mr Cain's email dated 18 September 2008 at 08.33). The evidence shows that Westnet did not keep a record of the emails sent to customers on the customer account and "*no further action (beyond the forwarding of the email) is taken*": Ex A2, tab 99, IIN.002.0001.4973 (Mr Hutchinson's email dated 17 September 2008 at 6.09 pm).

²²³ Ex A2, tab 99, IIN.002.0001.4972 (Mr Parkinson's email dated 18 September 2008 at 13.02).

²²⁴ Ex A2, tab 96.

from AFACT itself.²²⁵ The short chain of emails on 30 October 2008 shows that Mr Malone had identified that Westnet passed on copyright notices to some of its customers, which was inconsistent with iiNet's policy of not passing on the notices to customers but instead referring AFACT's claims to the police.²²⁶ Mr Ariti accepted the direction to change Westnet's approach and make it consistent with iiNet's approach.²²⁷

2-114. Accordingly, the insinuation in the second sentence in para 10 of Schedule A²²⁸ is apt to create the mistaken impression that the change in the Westnet approach was something done after the commencement of the proceedings. The proceedings were commenced on 20 November 2008, some three weeks after Mr Malone's emails referred to above. Of course, it was never put to Mr Malone in cross-examination that the commencement of the proceedings caused the change in policy and it is clear from the evidence that it was not the cause.

2-115. Mr Malone put the emails into appropriate context in his oral evidence. He said:²²⁹

When we took over Westnet in May, we asked for two things. iiNet got control of the cheque book, so all finance – financial requests had to be signed off by iiNet, and Westnet would henceforth operate under iiNet policy. Now, that meant hundreds of policies and ways of approaching business were changed over the following few months. This was one of them. I was forever regularly tripping over policies where there were slight differences in the way that Westnet operated and the way that iiNet operated. I didn't go in each policy and say, when did you start doing it this way, or why have you started doing it this way. In each case, when I saw a policy that was not operating the same, I said, guys, you need to operate under the iiNet policy from this point forward. Now, that applied more to HR policies, for instance, than it did to technical policies.

2-116. On the basis of that evidence about Westnet, the applicants launch a series of inadequately based attacks on Mr Malone's credit.

²²⁵ Malone XXN T 635.05 and T635.21. This is borne out by the evidence from Mr Gane that the only ISPs to which AFACT sent notices were Optus, iiNet, Internode and Exetel: Gane XXN T 292.40-43.

²²⁶ Ex A2, tab 96, IIN.002.0001.3310.

²²⁷ Ex A2, tab 96, IIN.002.0001.3309. It may be observed that the email chain in Ex A2, tab 96 is also good evidence of the existence and operation of iiNet's policy in respect of such infringements as may be identified in the AFACT Notifications.

²²⁸ ACS Schedule A

²²⁹ Malone XXN T 647.36-.46.

2-117. The Court would not conclude that Mr Malone “*decided not to tell the Court about the policy*” of Westnet,²³⁰ but rather readily accept Mr Malone’s evidence that he did not present (let alone deliberately present) a misleading impression to the Court.²³¹ As Mr Malone suggested, the operation of the Westnet policy was not relevant to the topic dealt with in his affidavit,²³² which is the difficult consequences if iiNet were required to implement a regime by which AFACT notices were acted on by iiNet by taking a series of steps to notify customers of the allegation, dealing with their responses and considering whether to suspend or terminate their accounts. It is not unreasonable for Mr Malone to have considered that the conduct and experience of Westnet, by simply sending on some other (non-AFACT) copyright infringement notices to customers and doing nothing more, was not a relevant comparison for the kind of steps envisaged by the applicants in answer to the AFACT notices and dealt with in the affidavit.

2-118. In para 13 and following of Schedule A²³³, the applicants pursue a submission that Mr Malone obfuscated when asked about his knowledge of how long the Westnet policy had been in existence. In fact, he gave direct, straightforward and transparently honest evidence on this topic. The fact that the applicants were unsuccessful in their attempt to elicit information that really interested them (namely, how long the Westnet policy had been in place) was a consequence of Mr Malone simply not knowing that information, not any attempt by him to hide or misstate it.²³⁴ Mr Malone gave the consistent answer that he knew about the policy when it was raised with him in September and October 2008, but he did not know and had not made inquiry how long before that date the Westnet policy had been operational.²³⁵ When one considers the explanation Mr Malone gave at T 647.36 (extracted above), it is perfectly

²³⁰ ACS Schedule A, 10.

²³¹ Malone XXN T 641.17.

²³² Malone XXN T 41.19.

²³³ ACS Schedule A

²³⁴ The applicants could, of course, have pursued some other means of gathering evidence about the Westnet policy, on the basis of those emails, which formed part of the discovery provided to the applicants a considerable time ago.

²³⁵ Malone XXN T 637.31-.45 and T 647.22-.29.

understandable that Mr Malone did not chase every policy rabbit down every hole as he managed the process of integrating two large businesses.

2-119. Furthermore, the suggestion in para 18 of Schedule A²³⁶ that the Westnet policy appears to have been in place since some time before April 2006 is not a fair reading of the evidence. The applicants refer to the date “14 April 2006”, which appears on the last page of the relevant chain of emails.²³⁷ But that date is merely the timestamp of an alleged infringement of copyright by someone using the Westnet network – and it is apparent from an earlier page in the email chain (IIN.002.0001.4976) that that copyright notice has been reproduced as an example of such notices on the “WestnetWiki”, an information database maintained by Westnet for staff training purposes. Those facts were revealed in re-examination of Mr Malone²³⁸, but they are ignored by the applicants. In other words, the date 14 April 2006 has nothing to do with the date of any copyright notice sent to a Westnet customer and cannot properly be relied upon to indicate how long the Westnet policy had been in place.

2-120. In paragraphs 19 to 30 of Schedule A²³⁹, the applicants attempt to elevate the cross-examination of Mr Malone about the Westnet policy to a more general suggestion that Mr Malone was either exaggerating or being dishonest in his evidence that it would be a material burden upon iiNet to implement various procedures within the company (on the hypothesis that iiNet was required to act on the AFACT notifications as the applicants wish). Most of those submissions are answered by a fair appreciation of the evidence Mr Malone actually gave about the Westnet policy, which has been described above. Four particular additional submissions are dealt with below.

2-121. First, the applicants make an unsupported guess, from an inadequate foundation in the documents, that Mr Ariti and Mr Cain considered that Westnet’s policy was not burdensome.²⁴⁰ Mr Malone said in evidence that the Westnet process was partly

²³⁶ ACS Schedule A

²³⁷ Ex A2, tab 99, IIN.002.0001.4978.

²³⁸ Malone RXN T 920-921.

²³⁹ ACS Schedule A

²⁴⁰ ACS Schedule A, para 22.

automated and party relied on human intervention.²⁴¹ There is no reliable evidence one way or the other about the difficulty or resources required by Westnet to take the action it took on the copyright notices. But, more importantly for present purposes, Mr Malone's oral evidence about the topic was in no way inconsistent with his description of the steps that would be required to be taken by iiNet in the event that it was required to act on AFACT notifications.²⁴²

2-122. Secondly, the applicants point to Mr Malone's evidence that Westnet sent on to their customers a "*small percentage*" of the copyright infringement notices they received, when in fact he did not know the percentage, and then submit that the evidence shows that Mr Malone was prepared to say whatever it took to advance iiNet's case.²⁴³ The Court should reject that submission. Mr Malone made it clear that he *believed* that the percentage of copyright notices passed on by Westnet was small, but he readily agreed that he did not have any *direct evidence* that the percentage was in fact small and acknowledged that he should have been more careful in giving that evidence.²⁴⁴ Mr Malone's reference to the absence of direct evidence is consistent with the documentary record, which indicates that Westnet did not record against customer accounts occasions when it sent copyright notices to customers.²⁴⁵ But it was not suggested to Mr Malone that his belief was not genuine, or that he was being dishonest when he said he believed that the percentage was small, and the Court should not so find.

2-123. Further, a ready acceptance that an answer was not given with as much care as it might have been is not the mark of an advocate, let alone a dishonest advocate. That answer is not a black mark against Mr Malone's credit, but rather evidence that shows a frank willingness to correct himself and a desire to give careful and accurate answers to the questions asked of him during examination.

²⁴¹ Malone XXN T 636.

²⁴² Malone #2 JCB Vol A2 tab 333 generally.

²⁴³ ACS Schedule A, 26.

²⁴⁴ Malone XXN T 642.08.

²⁴⁵ Ex A2, tab 99, IIN.002.0001.4973 (Mr Hutchinson's email dated 17 September 2008 at 6.09 pm).

- 2-124. Thirdly, contrary to the submission in para 29 of Schedule A²⁴⁶, Mr Malone did not believe, and did not seek to obscure a belief, that iiNet would never forward warning notices to its customers. As Mr Malone repeatedly made clear, he is perfectly prepared to send out such warning notices as might be required by Court order or some other lawful authority.
- 2-125. Fourthly, the applicants' submission in para 30 of Schedule A²⁴⁷ (that "*not trivial*" was the highest that Mr Malone could put the degree of difficulty in dealing with the AFACT notices in the way suggested by the applicants) should not be accepted. There were no material inroads made by the cross-examiner in Mr Malone's evidence in his second affidavit that there would be very material business consequences if the suggested steps were required to be taken by iiNet in answer to the AFACT notifications.

Other submissions of the applicants concerning Mr Malone

- 2-126. In paras 31-50 of Schedule A²⁴⁸, the applicants collect a series of other submissions advanced against Mr Malone's credit. They should all be rejected, but it is not necessary to deal with every one expressly.
- 2-127. Mr Malone's evidence about iiNet's repeat infringer policy is said by the applicants to be "absurd" and to have amounted to "high farce".²⁴⁹ The palpable inconsistency of the applicants' submissions appears not to have been noticed. The applicants are perfectly content to tax Mr Malone by reference to the "Westnet policy" for dealing with copyright infringement notices, without pausing to identify or describe a written and adopted document identifying that policy. But then the applicants say, inconsistently, that it is absurd for Mr Malone to give evidence that the company had a policy, that he and others knew and applied it, but that it was not written down.²⁵⁰ Mr Malone's evidence was neither absurd nor incorrect, and further support for the

²⁴⁶ ACS Schedule A

²⁴⁷ ACS Schedule A

²⁴⁸ ACS Schedule A

²⁴⁹ ACS Schedule A, paras 34-35.

²⁵⁰ As to which, see Malone XXN T 789-790.

existence of iiNet's policy is the very fact that Westnet was required to fall in behind iiNet's policy in October 2008.

2-128. The applicants' submissions in para 36 of Schedule A²⁵¹ are, again, significantly overstated. Mr Malone readily accepted that the reference in a posting he made to a Whirlpool forum on 13 December 2008 that iiNet had a "*written*" policy for repeat infringers is not consistent with the facts as he knows them today.²⁵² But his evidence was that at the time he believed that iiNet's policy was written and that it had been reviewed by solicitors.²⁵³ There is no reason to doubt that Mr Malone gave honest evidence about his belief at the time, and at the same time frankly acknowledged that he now knows that there was not a written policy at that time. It is quite wrong for the applicants to submit (in para 36 of Schedule A²⁵⁴) that Mr Malone effectively admitted that "*he had embellished the situation*" – what he accepted was that the statement in the Whirlpool forum, which he now accepts to be inaccurate, had the (objective) effect of embellishing the situation.²⁵⁵ On any fair assessment of the evidence, he was certainly not accepting that he had consciously embellished the position.

2-129. The applicants' submissions about Mr Malone's consideration of the Telco Act are ill-founded, unjustifiably strident and unfair. It was never put to Mr Malone in cross-examination that he knew that Mr Dalby did not have the Telco Act in his mind when Mr Dalby sent responses to AFACT in July 2008.²⁵⁶ It is, therefore, entirely unfair to accuse Mr Malone of giving untruthful evidence on the basis of that contention. That submission, and the remaining miscellaneous submissions in Schedule A, should be rejected.

²⁵¹ ACS Schedule A

²⁵² Malone XXN T 813.40.

²⁵³ Malone XXN T 813.40 and 814.15.

²⁵⁴ ACS Schedule A

²⁵⁵ Malone XXN T 815.

²⁵⁶ And there was no application to recall Mr Malone for further cross-examination after Mr Dalby had given his oral evidence.

Mr Dalby

Overview

2-130. The applicants' attack upon the credit of Mr Dalby should also be rejected.

2-131. The general observations made above in respect of the applicants' submissions on the credit of Mr Malone also apply to the submissions made about Mr Dalby. In particular, the applicants advance two of the same propositions "*but with additional force, in relation to Mr Dalby*",²⁵⁷ namely:

- (a) notwithstanding the applicants' submissions that Mr Dalby's evidence was "*very unsatisfactory*" and that he was "*evasive*", "*disingenuous*" and an "*unreliable witness*",²⁵⁸ the applicants again acknowledge that "*the applicants rely on much of his evidence*".²⁵⁹ As submitted in respect of Mr Malone, that fact strongly suggests that Mr Dalby was simply giving straightforward and honest answers, which if they are perceived to help the applicants case are gratefully adopted, but if they are perceived to work against the applicants' case they are denounced as unreliable; and
- (b) the applicants accept that an adverse finding on Mr Dalby's credit is not essential to the applicants' case.²⁶⁰

2-132. Mr Dalby should also be accepted as a witness who responsibly gave honest evidence on the topics about which he was examined.

2-133. Putting aside the unsupported sweeping assault on Mr Dalby's credit in paras 2-6 of Schedule B²⁶¹, the applicants' submissions against the credit of Mr Dalby concern three topics:

²⁵⁷ ACS para 199.

²⁵⁸ ACS Schedule B, para 1.

²⁵⁹ ACS para 199.

²⁶⁰ ACS para 199

²⁶¹ ACS Schedule B.

- (a) an allegation that he gave an incomplete and misleading account of his conduct after receiving the AFACT notices in July 2008;²⁶²
- (b) a supposedly “*exaggerated*”²⁶³ “*pretence*”²⁶⁴ about difficulties he had in understanding the detail of the AFACT notices; and
- (c) an apparent contention by the applicants that it stands against Mr Dalby’s credit that he said that Telco Act difficulties were not in his mind at the time he prepared correspondence to AFACT in August 2008.²⁶⁵

Those topics will be dealt with in reverse order.

Telco Act

2-134. There is no arguable basis upon which Mr Dalby’s answers at T 1018 (and thereabouts) reflect adversely on Mr Dalby’s credit. On the contrary, that evidence demonstrates his straightforward, honest approach to answering questions.

2-135. It need hardly be said, except to underline the error in the applicants’ inclusion of paras 22-26 in a schedule about ‘credit’²⁶⁶, that the point iiNet makes about the operation of the Telco Act in answer to the applicants’ claim in these proceedings does not turn on (and is not affected by) what any particular witness thought of the point, or when they thought of it.

Difficulties in understanding the AFACT notices

2-136. In paragraphs 12-21 of Schedule B²⁶⁷, the applicants pursue another serious but mistaken allegation against Mr Dalby. It is suggested that he created a “*smokescreen*”, a false and misleading “*construct*”, in that he suggested in his evidence that there were matters contained in the AFACT notifications that he did not understand or that were not clear. The Court should reject the applicants’ suggestion.

²⁶² ACS Schedule B, paras 8-11.

²⁶³ ACS para 348.

²⁶⁴ ACS Schedule B, paras 12-21.

²⁶⁵ ACS Schedule B, paras 22-26. The evidence itself is at Dalby XXN T 1018.

²⁶⁶ ACS Schedule B.

²⁶⁷ ACS Schedule B.

- 2-137. A moment of balanced reflection on Mr Dalby's evidence reveals the measured nature of Mr Dalby's statement in paragraph 55 of his affidavit that "*the meaning of some of the terminology used in the spreadsheet was unclear and it contained some information that I did not understand*".²⁶⁸ Unlike the applicants' credit submissions, Mr Dalby neither overstated nor inaccurately stated his state of mind. And contrary to the applicants' submission, that lack of clarity about aspects of the AFACT notices was never made the centrepiece of Mr Dalby's evidence and has never been the centrepiece of iiNet's case in these proceedings.
- 2-138. In any event, it is hard to imagine that any person seeing the AFACT spreadsheet for the first time (or even a second and third time) would form an opinion any different from that expressed by Mr Dalby. Many of the column headings in the spreadsheet are technical terms that call for further explanation, either in their meaning or their application to the other information in the spreadsheet or both. Mr Dalby's evidence in that regard is obviously reasonable and should be accepted.
- 2-139. There is also an element of unfairness to Mr Dalby in the applicants' submissions, not for the first time. When Mr Dalby was cross-examined about the sub-paragraphs of paragraph 57 of his affidavit, in which he identifies six terms that were not clear to him, he was not cross-examined about all of them.²⁶⁹ In other words, in respect of some of the sub-paragraphs his evidence that he thought the information unclear was not challenged – yet now the submission is made that his professed difficulty with some of the terms was all subterfuge or "*simply untrue*".²⁷⁰
- 2-140. The effect of Mr Dalby's written and oral evidence is that upon his original receipt of the AFACT correspondence in early July 2008, he was concerned about a series of matters included within the correspondence and attached schedule that he did not understand and that were not explained to him by AFACT. That concern was accurately reflected in the observations to that effect in the first letter he drafted.²⁷¹ However, he formed a view later in July, based a number of different considerations,

²⁶⁸ Dalby para 55_JCB_Vol A2 tab 31 p 20.

²⁶⁹ Dalby XXN T 981-990.

²⁷⁰ ACS Schedule B, para 14.

²⁷¹ Which was ultimately sent on 25 July 2008; Dalby XXN T1008.18-.19 and Ex SJD-1, p 289.

that iiNet could not and would not act on the AFACT notifications – a view which was manifested in a subsequent letter to AFACT dated 12 August 2008²⁷² and accurately reflected in his affidavit.²⁷³ That did not mean, however, that he had closed his mind to the idea of further communication with AFACT.²⁷⁴

Account of conduct after receiving AFACT notices

2-141. The applicants' submissions in paras 8-11 of Schedule B²⁷⁵ attempt a forensic sleight-of-hand. By, ironically, their own selective neglect of the contents of Mr Dalby's affidavit and exhibits, the applicants structure an unfair submission that Mr Dalby's affidavit is misleading by reason of the alleged omission from it of various relevant matters. The submissions in paras 8-11 should be rejected.

2-142. In para 8 of Schedule B²⁷⁶, the applicants advance the proposition that Mr Dalby's affidavit was incomplete by reference to two central contentions, each of which the applicants' footnote to the evidence.

2-143. The first contention is that Mr Dalby swore an affidavit that was liable to give a misleading impression to the Court. The footnote refers to T 1007.16 - 1008.04. During that part of his cross-examination, Mr Dalby agreed that he did not set out anything in his affidavit to the effect that it did not matter what additional information AFACT provided, so far as he was concerned iiNet was not going to act on the notices.²⁷⁷ It does not follow from that oral evidence that the affidavit was liable to give a misleading impression to the Court because:

- (a) It is clear from Mr Parkinson's email to Mr Gane on 25 July 2008,²⁷⁸ which of course is an exhibit to the affidavit and referred to in it, that it did not matter what additional information AFACT provided, so far as Mr Dalby was concerned iiNet was not going to act on the notices. That letter, drafted jointly

²⁷² Ex SJD-1, p 294 JCB Vol B8 tab 91.

²⁷³ A topic which is addressed in more detail below.

²⁷⁴ Dalby XXN T 1006.24-27

²⁷⁵ ACS Schedule B.

²⁷⁶ ACS Schedule B.

²⁷⁷ Dalby XXN T 1007.45

²⁷⁸ Ex SJD-1, p 289 JCB Vol B8 tab 91.

by Mr Dalby and Mr Parkinson,²⁷⁹ states in an unqualified fashion that iiNet is “unable to comply with AFACT’s requirements in any way”.²⁸⁰ The letter does not say that if further information is provided, action may be taken by iiNet in accordance with AFACT’s wishes. The letter does not ask for further information to be sent to iiNet – rather, it directs AFACT to the appropriate authorities, namely the WA Computer Crime Squad.

- (b) It is very clearly the effect of Mr Dalby’s affidavit evidence that the rejection of the demands made by AFACT was a straightforward decision for him. Mr Dalby says so expressly in para 88: “*there were a lot of issues that made compliance with AFACT’s demands unreasonable or impossible*”.²⁸¹ Even if it is not expressed in so many words in the affidavit, it is clearly implicit that it did not matter what additional information AFACT provided, so far as Mr Dalby was concerned iiNet was not going to act on the notices. It is to exalt form over substance for the applicants to take the point that the affidavit did not provide that evidence expressly in the form of words put to Mr Dalby. The substance of the matter put to Mr Dalby is in the affidavit, which is not materially incomplete.
- (c) Finally, and in any event, fairness to Mr Dalby requires the submission to be made that in fact Mr Dalby’s affidavit did contain (in the form in which it was sworn) words to the effect of the proposition put to Mr Dalby. Mr Dalby was not invited at the relevant point in his cross-examination to go through his affidavit to check its text. Had he done so, no doubt he would have read the second paragraph attributed to him in the conversation he had with Mr Parkinson recorded in paragraph 91²⁸² (which was objected to by the applicants and rejected by the Court).

2-144. The second contention in para 8 of Schedule B is that in Mr Dalby’s affidavit “*there is no mention of the involvement of any other person in the process*” of preparation of

²⁷⁹ Dalby para 95 JCB Vol A2 tab 31 p 30.

²⁸⁰ Ex SJD-1, p 289 JCB Vol B8 tab 91.

²⁸¹ Dalby para 88 JCB Vol A2 tab 31 p 28.

²⁸² Dalby para 91 JCB Vol A2 tab 31 p 29.

the response to the AFACT notices. The applicants' footnote refers to T 935.45-46. At that point in the transcript, Mr Dalby was being asked questions in the nature of an "encapsulated summary" of paragraphs 47 through to 95 of his affidavit.²⁸³ Mr Dalby simply agreed, in a straightforward and honest way, with the proposition put to him. That answer was merely the ready agreement of a witness that certain paragraphs of an affidavit selected by a cross-examiner did not contain certain words.

2-145. No wider point against Mr Dalby, let alone against his credit, can properly be made. That is so because when the second contention is tested against other parts of Mr Dalby's affidavit, it is shown to be obviously incorrect. In other words, in parts of his affidavit that were not referred to by the cross-examiner, Mr Dalby expressly refers to the direct or indirect involvement of other persons in relation to the process of responding to the AFACT notifications. The section of Mr Dalby's affidavit headed "*AFACT communications in 2008*", from paragraphs 34 to 42²⁸⁴ expressly deals with that topic. The correspondence and other documents exhibited to the affidavit and referred to in those paragraphs (Exhibit SJD-1, pp 191-231²⁸⁵) bear out an open and honest record of Mr Dalby's interaction with a selection of other people about the AFACT notices – including the identification by name and the attachment of documents to and from Ms Bean at Optus, Ms Perrier at Telstra, Mr Coroneos at the IIA, and the diss_connect list. On top of all that, significantly, Mr Dalby states in paragraph 45 of this affidavit that "*it was against the above background that the letters from AFACT discussed below came to my attention and were dealt with by me*".²⁸⁶

2-146. Accordingly, the Court should reject the applicants' contention in paragraph 9 of Schedule B²⁸⁷ that it was only in cross-examination that Mr Dalby revealed "*the complete position*". There is, in reality, no material exclusion by Mr Dalby from his description of the process of his consideration of responses to AFACT. A careful

²⁸³ Dalby XXN T 935.39

²⁸⁴ Dalby paras 34-42 JCB Vol A2 tab 31 pp 16-17.

²⁸⁵ Ex SJD-1, pp 191-231 JCB Vol B8 tab 91.

²⁸⁶ Dalby para 45 JCB Vol A2 tab 31 p 17

²⁸⁷ ACS Schedule B.

comparison of the assertions in sub-paragraphs of paragraph 9 of Schedule B²⁸⁸ with what is actually in Mr Dalby's affidavit and exhibit demonstrates how inaccurate and overstated the applicants' attack on Mr Dalby's credit is, since the substance of everything alleged to be a significant omission is in fact in the affidavit or its attachments. In particular:

- (a) as to paras 9(a)-(d)²⁸⁹, many of the documents referred to in Mr Dalby's affidavit²⁹⁰ and contained in Exhibit SJD-1²⁹¹ constitute communications (and reflect, often expressly, conversations) between members of the diss_connect group in relation to AFACT notifications, in the period between May and August 2008;²⁹²
- (b) as to para 9(e),²⁹³ the draft "*strawman letter*" is referred to in Mr Dalby's affidavit and a copy is exhibited to it;²⁹⁴
- (c) as to para 9(f)²⁹⁵, Mr Dalby said in para 45 of his affidavit that the draft strawman letter was part of the background with which he prepared the response to AFACT;
- (d) as to 9(g)²⁹⁶, a copy of the article referred to is actually reproduced in SJD-1, pp 214-220;
- (e) as to 9(h)²⁹⁷, the facts concerning Mr Linton's blog are immaterial and the fact that Mr Dalby does not discuss that matter in his affidavit has no effect upon his credit.

²⁸⁸ ACS Schedule B.

²⁸⁹ ACS Schedule B.

²⁹⁰ Dalby JCB Vol A2 tab 31

²⁹¹ Ex SJD-1 JCB Vol B8 tab 91.

²⁹² Ex SJD-1, pp 191, 192-193, 197, 206, 211, 226-229, 231 JCB Vol B8 tab 91.

²⁹³ ACS Schedule B.

²⁹⁴ Dalby para 39 JCB Vol A2 tab 31 p 16, SJD-1, pp 211-213 JCB Vol B8 tab 91.

²⁹⁵ ACS Schedule B.

²⁹⁶ ACS Schedule B.

²⁹⁷ ACS Schedule B.

2-147. Accordingly, the fragile artifice of the applicants' adverse submissions about the effect of Mr Dalby's evidence is exposed. Far from posing a "*critical credit issue for Mr Dalby*",²⁹⁸ or demonstrating a misleading account of his response to AFACT,²⁹⁹ Mr Dalby's affidavit is shown to be complete and accurate in all material respects.

2-148. For those reasons, the unbalanced attack on Mr Dalby's credit should be rejected.

²⁹⁸ ACS Schedule B, para 10.

²⁹⁹ ACS Schedule B, para 11.