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 SEVEN

TELECOMMUNICATIONS ACT 1997

Filed on behalf of the
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7-A. INTRODUCTION

7-1. This chapter addresses the proper construction and effect of the provisions in Part 13 of the *Telecommunications Act* 1997 (Cth) (the "**Telco Act**").

7-2. The respondent submitted in its written opening,[1] and maintains, that on the proper construction of Part 13 of the Telco Act, those provisions supply a complete answer to the applicants' case.

7-3. The issues concerning the effect of the Telco Act arise in the context of consideration of the allegation that iiNet has authorised, within the meaning of s 101(1) of the Act, the doing in Australia of any act comprised in the copyright of the applicants. The applicants claim that there are various steps that iiNet could and should have taken once iiNet had been provided with the allegations in the AFACT Notifications, and that because iiNet did not take those steps it should be found to be liable for authorising the infringement of copyright.[2]

7-4. The proper determination of the applicants' claim raises the question whether those suggested or hypothetical steps are lawful, technically possible and/or reasonable. One of the matters upon which iiNet relies in its answer to the applicants' claim is that it had, and has, obligations to comply with legislation regulating communications passing over its network.[3] Supplementary particulars of that part of the defence were filed and served by iiNet.[4] The supplementary particulars refer to s 276 of the Telco Act, which provides that it is a criminal offence for a carriage service provider (such as iiNet) or its employees to use or disclose certain types of information.

7-5. iiNet contends that s 276, and Part 13 of the Telco Act generally, is a very significant consideration that is directly relevant to the question whether iiNet has authorised the

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[1] RS para 17(c) and Section L (paras 137-170).

[2] Further Amended Statement of Claim, paras 63(d) and 64(c) JCB Vol A1 tab 2 pp 15-16; Applicants' Particulars, paras 75 to 97 (provided as particulars of paras 63 and 64 of the Further Amended Statement of Claim) JCB Vol A1 tab 4 pp 12-20. The suggested or hypothetical steps put forward by the applicants, including in particular in para 97 of the Applicants' Particulars, will be referred to as the "*suggested or hypothetical steps*".

[3] Amended Defence, para 63(o) JCB Vol A1 tab 6 pp 19-20.

[4] Respondent's Supplementary Particulars filed 10 August 2009 JCB Vol A1 tab 9.

infringement of the applicants' copyright. In the circumstances of this case, the operation of s 276 compels the conclusion that iiNet has not authorised any infringement of the applicants' copyright.

7-6. In summary, s 276 of the Telco Act has the effect (whatever else might be said about the factors relevant to the determination of the authorisation issue) that:

(a) iiNet cannot be found to have "*the power to prevent*"[5] an infringement by an iiNet user if the exercise of the power to take the suggested or hypothetical steps would constitute a criminal offence against s 276; and

(b) it would not be "*reasonable*"[6] for iiNet to take the suggested or hypothetical steps because to do so would, or would be likely to, constitute a criminal offence on the part of iiNet and/or its employees against s 276.

7-B. APPLICATION OF PART 13 OF THE TELCO ACT

7-7. The application of the prohibition in s 276 of the Telco Act to iiNet and its employees is straightforward.

7-8. Some aspects of the application of s 276 are not contested by the applicants. The applicants accept that the information provided to iiNet in the AFACT notifications was information that falls within the statutory descriptions in s 276(1)(a)(i), (iii) and (iv) of the Telco Act.[7] However, the applicants suggest that the information supplied by AFACT is not within the description in s 276(1)(b),[8] a submission that should be rejected for reasons addressed in due course below.

7-9. Part 13 of the Telco Act provides for the "*Protection of communications*". The simplified outline of Part 13 is set out in s 270, which explains that carriage service providers (among others) must protect the confidentiality of information that relates to the contents of communications carried by them, the carriage services supplied by them and the affairs or personal particulars of other persons. The disclosure or use of

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[5] Section 101(1A)(a) of the Act.

[6] Section 101(1A)(c) of the Act.

[7] ACS paras 535-536.

[8] ACS paras 538-542.

that protected information is authorised in limited circumstances, for example disclosure or use for purposes relating to the enforcement of the criminal law. An authorised recipient of protected information may only disclose or use the information for an authorised purpose. Certain record-keeping requirements are also imposed by Part 13. The structure of Part 13 – namely, the imposition of a generally expressed prohibition followed by a series of specific, enumerated exceptions – underlines the significance placed by the legislature upon the adequate protection of the privacy and confidentiality of information that comes into the possession of an 'eligible person' under the Telco Act.

7-10. Sections 276(1) and (3) of the Telco Act provide:

276 Primary disclosure/use offence—eligible persons

Current eligible persons

(1) An eligible person must not disclose or use any information or document that:
  (a) relates to:
    (i) the contents or substance of a communication that has been carried by a carrier or carriage service provider; or
    (ii) the contents or substance of a communication that is being carried by a carrier or carriage service provider (including a communication that has been collected or received by such a carrier or provider for carriage by it but has not been delivered by it); or
    (iii) carriage services supplied, or intended to be supplied, to another person by a carrier or carriage service provider; or
    (iv) the affairs or personal particulars (including any unlisted telephone number or any address) of another person; and
  (b) comes to the person's knowledge, or into the person's possession:
    (i) if the person is a carrier or carriage service provider—in connection with the person's business as such a carrier or provider; or
    (ii) if the person is an employee of a carrier or carriage service provider—because the person is employed by the carrier or provider in connection with its business as such a carrier or provider; or
    (iii) if the person is a telecommunications contractor—in connection with the person's business as such a contractor; or
    (iv) if the person is an employee of a telecommunications contractor—because the person is employed by the contractor in connection with its business as such a contractor.

(2) …

Offence

(3) A person who contravenes this section is guilty of an offence punishable on conviction by imprisonment for a term not exceeding 2 years.

Note 1: This section is subject to the exceptions in Division 3 of this Part and in Chapter 4 of the *Telecommunications (Interception and Access) Act 1979*.

Note 2: See also sections 4AA and 4B of the *Crimes Act 1914*.

7-11. The term "*eligible person*" is defined in s 271 and includes a person who is a carriage service provider (s 271(b)) and an employee of a carriage service provider (s 271(d)). It is common ground that iiNet is a carriage service provider within the meaning of the Telco Act and is engaged in the business of providing telecommunications services, including Internet services, to members of the public in Australia.[9] Accordingly, if iiNet or one of its employees engages in the conduct described in s 276, and none of the exceptions in Part 13 apply, a criminal offence is committed.

7-12. It may be noted that s 276(3) provides for punishment on conviction by imprisonment for a term not exceeding 2 years. By operation of s 4B of the *Crimes Act 1914* (Cth), a court sentencing a natural person for the offence may impose, in addition to or instead of imprisonment, a pecuniary penalty of up to 120 penalty units, that is $13,200. By operation of s 4B of the *Crimes Act 1914* (Cth), an offence by a body corporate is punishable by a pecuniary penalty of up to 600 penalty units, that is $66,000 for each offence. The maximum amount of the penalty for each offence takes on a particular significance in circumstances in which the applicants urge the use or disclosure of information provided by AFACT, or the use or disclosure of information otherwise held by iiNet about its customers, on many thousands of occasions.

7-13. The phrase "*must not disclose or use*" in s 276(1) contains ordinary words of wide meaning. To "*disclose*" information or a document means to reveal or communicate it to another person, including making known to a person information that the person to whom the disclosure is made did not previously know.[10] The "*use*" of information or a document is an even broader concept and means, at least in this context, that the information or document plays a part in an action or transaction of the eligible person.[11]

7-14. The inclusion in s 276(1)(a) of the phrase "*relates to*" is also significant. That phrase suggests a very wide range of connections or associations between two things, its

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[9] Further Amended Statement of Claim, para 14 JCB Vol A1 tab 2 p 4; Amended Defence, para 14 JCB Vol A1 tab 6 pp 2-3.

[10] *Nasr v State of New South Wales* [2007] NSWCA 101 at [127] (Campbell JA, with whom Beazley and Hodgson JJA agreed).

11 The relevant meaning in the Oxford English Dictionary provides: "II. 7. a. To make use of (some immaterial thing) as a means or instrument; to employ for a certain end or purpose".

precise operation being determined by the statutory context and purpose of the phrase.[12] The statutory context here is a Part of the Telco Act directed to the protection of communications – the phrase occurs in the general section providing such protection, which is followed by a number of express exceptions for particular types of use and disclosure of information and documents. There is every reason to consider that the legislature used the phrase "*relates to*" in s 276 with the intention that it would have all the width of its ordinary meaning. It requires an interpretation of the section that acknowledges that the protected "*information or document*" may have a very wide range of connections or associations with the subject matter described in subsections (a)(i), (ii), (iii) and (iv).

7-15. A third element of the offence is that the relevant information or document must come to the carriage service provider's knowledge, or into its possession, "*in connection with*" the carriage service provider's business as a carriage service provider (s 276(1)(b)(i) and (ii)). The ordinary meaning of those words describes both information and documents generated by iiNet as it runs its business (such as database and billing system records) and information and documents created by others that come into the carriage service provider's knowledge or possession (such as the AFACT Notifications in this case).

7-16. That construction does not require any process of "*extending the application*" of s 276, as the applicants incorrectly submitted in opening.[13]

7-17. Nor is it the case that the words "*in connection with*" in s 276(1)(b) do not capture information such as AFACT supplied information, as the applicants now contend.[14] Like all statutory language, the words "*in connection with*" must be construed having regard to the context and purpose of the provision in which they appear.[15] But the

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[12] See, among many examples in the authorities, *Seven Network Limited v Australian Competition and Consumer Commission* (2004) 140 FCR 170 at [71] (Sackville and Emmett JJ); *Oceanic Life Ltd v Chief Commissioner of Stamp Duties* [1999] NSWCA 416, (1999) 168 ALR 211 at [56] (Fitzgerald JA).

[13] AS para 244. The suggestion that the ordinary meaning of s 276(1) would involve extending the application of the section falsely implies that there is an existing or established application of the section – but there is no authority for the proposition advanced by the applicants at para 244 that "*information gathered by a third party*" is outside the operation of the section; and that proposition is not consistent with the ordinary meaning of the words used.

[14] ACS para 538.

[15] As the applicants accept in ACS para 539.

words "*in connection with*" are words of wide import.[16] Sometimes those words refer to a connection of *any* kind whatever between two subject matters, but they do not always have that reference.[17] For the reasons set out below, the Court would reject the applicants' suggestion that the information supplied to iiNet by AFACT was somehow not provided "*in connection with*" iiNet's business as a carriage service provider.

The AFACT Notifications

7-18. iiNet contends that it is clear that each AFACT Notifications is a document, and contains information, of the kind referred to in s 276(1)(a)(i), (iii) and (iv) of the Telco Act. It is also clear that each AFACT Notification has come to iiNet's knowledge and into its possession in connection with its business as a carriage service provider (s 276(1)(b)). Accordingly, iiNet and its employees are prohibited from the "*use or disclosure*" of such document or information by s 276.

7-19. The evidence served by the applicants includes copies of letters sent to iiNet by AFACT each week since 2 July 2008. The letters are headed "Notice of Infringement of Copyright" and take a standard form. The author, Mr Neil Gane, states that he is the Director of Operations at AFACT, which is said to be associated with the Motion Picture Association and to represent producers and/or distributors of most of the cinematograph films and television shows commercially released in Australia. The letters state that AFACT is "*currently investigating*" infringement of copyright in movies and television shows in Australia by customers of iiNet through the use of the BitTorrent "*peer-to-peer*" protocol to copy and share the movies and shows.

7-20. Each letter attaches a spreadsheet (printed and on CD or DVD) containing what is said to be "*information relevant to infringing activities of the Identified iiNet Customers*" occurring during an identified seven day period. The information is said to include:

(a) the date and time infringements of copyright took place;

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[16] *Burswood Management Ltd v Attorney General (Cth)* (1990) 23 FCR 144 at 146 (FCA FC).

[17] *C J Redman Constructions Pty Ltd v Tarnap Pty Ltd* [2006] NSWSC 173 at [7] (Campbell J).

(b) the IP address used by the Identified iiNet Customers (a capitalized term in the letter which seems to mean nothing more than customers of iiNet);

(c) the motion picture and television shows in which copyright has been infringed;

(d) the studio controlling the rights to that film or show.

7-21. Each letter asserts that "*in many cases, the spreadsheet indicates that individual customers were involved in multiple infringements of copyright, making them repeat infringers*". AFACT also states that it is "*unaware of any action taken by iiNet to prevent infringements of copyright in movies and television shows occurring on its network" and that "failure to take any action to prevent infringements from occurring, in circumstances where iiNet knows that infringements of copyright are being committed by its customers, or would have reason to suspect that infringements are occurring from the volume and type of the activity involved, may constitute authorization of copyright infringement by iiNet*". The letters state that "*AFACT and its members require iiNet to take the following action*": that is, to prevent the Identified iiNet Customers from continuing to infringe copyright; and take any other action available under iiNet's Customer Relationship Agreement against the Identified iiNet Customers which is appropriate having regard to their conduct to date.

7-22. iiNet submits, and the applicants accept,[18] that each AFACT Notification is a document, and contains information, of the kind referred to in s 276(1)(a)(i), (iii) and (iv) of the Telco Act. In particular:

(a) each AFACT Notification is a document, or contains information, that relates to the contents or substance of a communication that has been carried by a carriage service provider (s 276(1)(a)(i)). The AFACT Notifications purport to identify the transmission of parts of identified films in communications over the iiNet network;

[18] ACS paras 535-536.

(b) each AFACT Notification is a document, or contains information, that relates to the carriage services supplied to another person by iiNet (s 276(1)(a)(iii)); and

(c) each AFACT Notification is a document, or contains information, that relates to the affairs or personal particulars of another person (s 276(1)(a)(iv)) in that it alleges that the persons associated with the IP addresses recorded in the spreadsheets have, in the course of their affairs, downloaded certain identified films at certain times.

7-23. Given the applicants' general agreement with the propositions in the preceding paragraph, which must follow from the ordinary meaning of the words used in the section, it is not necessary to explore in detail the scope of the words in s 276(1)(a). But it may be noted that, having grown out of the previous provision in s 88 of the *Telecommunications Act 1991* (Cth), various extrinsic materials that refer to the effect of s 276(1)(a) make clear that the information within the scope of the provision is considered to include IP addresses associated with internet sessions, the date and time of access to the internet, and related personal information.[19]

7-24. As to s 276(1)(b) of the Telco Act, the applicants suggest a number of differently expressed potential limitations upon the meaning of "*in connection with*" in s 276(1)(b),[20] including to the effect that "*third party information*" such as that obtained by AFACT does not come to iiNet's knowledge, or into iiNet's possession, "*in connection with*" iiNet's business as a carriage service provider. Those contentions need only be stated to be rejected as an unjustifiable narrowing of wide statutory language. Moreover, the fact that the applicants' expression of the suggested narrower meaning is unclear and changing[21] reflects that there is no sound statutory basis or criteria for reading down the words as the applicants contend.

7-25. The essence of the AFACT Notifications is the repeated assertion that iiNet, as it carries on its business, wrongly permits users of iiNet services to make movies

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[19] See, for example, the Explanatory Memorandum to the Telco Act, Vol 1, p 5 and Vol 2, p 3; and more recently confirmation of such a view is expressed in ALRC Report No. 108, *Australian Privacy Law and Practice*, May 2008, Vol 3, p 2381.

[20] ACS paras 539-542.

[21] Compare the second sentence of ACS para 539 to the final sentence of ACS para 541.

available online using BitTorrent. The AFACT Notifications invite iiNet to take some sort of action – that is, to adapt or change the way it carries on the business of providing the service of connecting users to the internet. The information provided in the AFACT Notifications is, therefore, very clearly provided to iiNet "*in connection with*" its business as a carriage service provider. Accordingly, the AFACT Notifications satisfy the statutory description in s 276(1)(b).

7-26. It is clear that the AFACT Notifications call for the use and disclosure by iiNet of the notifications and of the information in the notifications. It is clear that the suggested or hypothetical steps would involve the use and disclosure by iiNet of the notifications and of the information in the notifications. But that is precisely what s 276(1) prohibits.

Information relating to iiNet customers

7-27. The same conclusion must follow in respect of information generated, recorded and/or otherwise held by iiNet relating to its customers.

7-28. As part of its business as a carriage service provider, iiNet comes into possession of, and maintains records of, information and documents that relate to the affairs or personal particulars of other persons, namely subscribers to iiNet services, and information about contents and substance of communications it carries and the carriage services supplied.

7-29. The information and documents that relate to the carriage services supplied to, and/or to the affairs or personal particulars of, iiNet subscribers may include, in respect of a particular account:

(a) (where provided to iiNet by a subscriber) the name and address and other contact details of the account holder or contact person for the account (see, for example, the description of the sign-up process for a new customer set out in Malone # 1 paras 78-100);

(b) the email address of the account holder;

(c) information about the Internet service plan(s) by which the account holder and users of the account use iiNet's facilities and services (see, for example, Malone #1 paras 74-77);

(d) the billing name and address of the account holder;

(e) the charges imposed in respect of the account;

(f) the payment arrangement in respect of the account;

(g) miscellaneous records and notes to an account, for example notes of any calls to the iiNet call centre, correspondence, and other matters; and

(h) records of use by iiNet subscribers of the carriage services provided by iiNet.

7-30. The information and documents referred to above plainly have come to the knowledge and into the possession of iiNet (and those employees who deal with that information as part of the business) in connection with iiNet's business as a carriage service provider, within the meaning of s 276(1)(b) of the Telco Act.

"Disclose or use"

7-31. The issue that then arises is what would actually be involved – that is, what would need to be done by iiNet managers and technical staff – if iiNet were to decide to take the suggested or hypothetical steps put forward by the applicants. The applicants do not appear to deny the proposition that, if it is established that the information in question satisfies s 276(1)(a) and (b), then iiNet would "*disclose or use*" that information were it to take any of the suggested or hypothetical steps.

7-32. That conclusion also must follow from the evidence. A description of the conduct that would be involved in acting on the AFACT Notifications appears, for example, in Malone #2 paras 8-9 and Dalby para 113. iiNet would need to undertake searches and matching processes involving its "*Score*" database, which is the database that records the assignment of iiNet IP addresses, to extract information about the identity of the subscriber for the internet service who used that IP address at the relevant time. That user name would then need to be used in a search of iiNet's "*Rumba*" database, which is a billing system and database containing the contact details, plan details and other

personal particulars of iiNet subscribers. Once the relevant personal details were extracted, they would be used in taking the suggested or hypothetical steps (such as writing to the subscriber, calling the subscriber or, as the applicants allege might sometimes be appropriate, terminating the subscriber's internet access account).

7-33. iiNet contends that if it, or its employees, were to take those suggested or hypothetical steps, that would necessarily involve the use (and probably also the disclosure) by iiNet of documents or information that relate to the affairs or personal particulars of other persons, the contents or substance of communications it has carried and the carriage services it supplies. Again, that is precisely what s 276(1) prohibits.

7-C. THE EXCEPTIONS IN PART 13 OF THE TELCO ACT

7-34. The provisions in Division 3 of Part 13 of the Telco Act provide for a number of specific exceptions to the primary use/disclosure offence in s 276(1). iiNet contends that none of the exceptions in Division 3 of Part 13 would apply to the offences committed, or likely to be committed, if iiNet were to use or disclose either (1) the AFACT Notifications or the information contained in them; or (2) the information held by iiNet about the affairs or personal particulars of other persons, and about the carriage services supplied to those persons.

7-35. In their opening submissions, the applicants raised three exceptions as applicable in the circumstances, namely ss 279, 280 and 289 of the Telco Act.[22] In their closing submissions, the applicants now rely on ss 279, 280, 289 and 290.[23] None of those provisions would provide a defence in the event that iiNet were to take the suggested or hypothetical steps. The provisions raised by the applicants will be considered, in reverse order, below.

Section 290

7-36. Section 290 provides for an exception for limited types of disclosure or use in circumstances where there is implicit consent of the sender and the recipient of a communication. It is necessary to appreciate the limited scope of this exception. The

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[22] AS paras 245 and 251-258.

[23] ACS paras 543-580.

words of s 290(a) replicate the words of s 276(1)(a)(i) – it is clear that the exception in s 290 does not extend to the disclosure or use of information of the varieties described in s 276(1)(a)(iii) and (iv). Accordingly, s 290 could not ever be an answer to iiNet's submissions about the effect of the prohibition in s 276 in the circumstances of this case.

7-37. In any event, even in the area in which it applies, the exception in s 290 only operates where having regard to all the relevant circumstances, it might reasonably be expected that the sender and the recipient of the communication would have consented to the disclosure or use, had they been aware of it. The relevant circumstances include that each user of the iiNet services indicated by an IP address and a time and date stamp has been said by AFACT to have made available copies of movies and thereby infringed the applicants' copyright. It is impossible to imagine – let alone reasonable to expect – that persons who are prepared to misuse iiNet services for making available infringing copies of Hollywood films would have consented to the use by iiNet of the information it has or is provided with about the contents or substance of their communications. Even in the limited area in which it might otherwise have applied, s 290 has no operation in the circumstances of this case.

Section 289

7-38. As to s 289 (which has the heading "*Knowledge or consent of person concerned*"), the circumstances of this case are not within the ordinary meaning of the words of the section. Once again, it is necessary to appreciate the limited scope of this exception. The words of s 289(a) replicate the words of s 276(1)(a)(iv) – it is clear that the exception in s 289 does not extend to the disclosure or use of information of the varieties described in s 276(1)(a)(i) and (iii). Accordingly, as is the position in respect of s 290, s 289 could not ever be an answer to iiNet's submissions about the effect of the prohibition in s 276 in the circumstances of this case.

7-39. In any event, neither of the preconditions to the operation of the exception expressed in s 289(b) would be satisfied in this case.

7-40. The exception applies where the information or document relates to the affairs or personal particulars of another person and the person "*is reasonably likely to have been aware or made aware that information or a document of that kind is usually disclosed, or used, as the case requires, in the circumstances concerned*" (s 289(b)(i)) or that other person "*has consented to the disclosure, or use, as the case requires, in the circumstances concerned*" (s 289(b)(ii)). They will be considered in turn.

Section 289(b)(i)

7-41. iiNet contends that the reference in s 289(b)(i) to a person being "*aware*" of a fact should be taken to mean an actual awareness of that fact. That conclusion follows not just from the natural meaning of the word in the context of the section,[24] but also from a consideration of the terms of s 290, which draws a distinction between circumstances of "*implicit consent*" (as the heading to the section calls it) on the one hand and being "*aware*" on the other hand. Awareness of a fact is evidently intended by the legislature to refer to an actual appreciation of the fact, not an attribution of implicit or constructive appreciation of the fact.

7-42. The question posed by the exception in s 289(b)(i) is whether an iiNet subscriber or user is reasonably likely to have been (actually) aware or made aware that information or a document is usually disclosed or used in the way identified in the suggested or hypothetical actions. That question cannot be answered affirmatively by the Court.

7-43. The applicants erroneously understate the quality of the awareness that must be established in support of their submissions that the exception in s 289(b)(i) applies.[25] In particular, the applicants give the statutory words "*in the circumstances concerned*" no work to do.[26] Even if the customer relationship agreement means what the applicants say it means (which it does not), and even if one assumed that the relevant users of iiNet's services were actually aware of each of those terms (which

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[24] The relevant meaning in the Oxford English Dictionary is "**2.** Informed, cognizant, conscious, sensible." Likewise, the Macquarie Dictionary provides the meaning "**1.** cognisant or conscious".

[25] ACS para 562.

[26] It is, of course, a fundamental rule of statutory construction that the Court must strive to give all words in a statute some meaning and effect: Pearce and Geddes, *Statutory Interpretation in Australia*, 6th Edition, at [2.22] and the authorities there cited.

one cannot), the awareness of which the exception speaks is a specific awareness that "*in the circumstances concerned*" iiNet would usually disclose or use the information it has. It cannot be thought "*reasonably likely*" that any user of iiNet's services would have been aware that if an organisation like AFACT (or some other rights owner or representative of copyright owners) contacted iiNet about infringing activity, that iiNet would "*usually*" act on such information and use it to pursue those whom AFACT or the owners allege infringed copyright.

7-44. Further support for the submissions made above concerning s 289(b)(i) is found in the following considerations:

(a) clause 12 of the CRA deals with the collection, use and disclosure by iiNet of personal information. The initial words of each of clauses 12.1 and 12.2 provide that personal information may be collected and disclosed only for the purposes set out in clause 12.3. Clause 12.3 provides that iiNet may collect, use and disclose personal information for one or more of the nine enumerated purposes. None of those purposes is expressed in words that extend, on their ordinary meaning, to any or all of the suggested or hypothetical steps. Even assuming that iiNet customers had an actual awareness of the terms of the CRA (an assumption that could not realistically be made), that would not have created a reasonable likelihood of actual awareness in the terms required by the exception in s 289(b)(i); and

(b) clauses 1 and 2 of the iiNet privacy policy are relevant. The privacy policy is secondary in the sense that its terms are directed to the limitations upon disclosure of information to other persons (rather than the use of information), but again, even on the assumption that a subscriber were actually aware of the privacy policy, that would not engender a reasonable likelihood of an actual awareness that iiNet usually took the suggested or hypothetical steps.

7-45. Furthermore, and significantly, the applicants' submissions about s 289 proceed on an unstated assumption that person referred to as "*another person*" and "*the other person*" in the section is a person who has, himself or herself, accepted the terms of the CRA. Even if one can conclude that the person who is the operative subscriber

has so acted as to be bound as a matter of contract law to observe the terms of the CRA, that is a long way from the conclusions (i) that the operative subscriber is actually aware of the terms of the CRA; and (ii) that the other users of that subscriber's iiNet service have either consented to the terms of the CRA or are actually aware of those terms. In the context of the issue raised by s 289(b)(i), the Court would have no hesitation in concluding that users of an iiNet service other than the subscriber are far from "*reasonably likely*" to have been aware or made aware that information about their internet activity is usually disclosed or used by iiNet in the circumstances concerned.

7-46. Accordingly, the only reasonable construction of s 289(b)(i) is that it cannot provide a relevant exception to s 276 in the circumstances of this case.

Section 289(b)(ii)

7-47. The applicants' written and oral submissions in support of the availability of the exception in s 289(b)(ii) also do not attend with sufficient care to the words of the statute.[27] In particular:

(a) the exception applies only to one of the three classes of protected information and documents referred to in s 276(1)(a);

(b) the applicants give the statutory words "*in the circumstances concerned*" in s 289(b)(ii) no work to do; and

(c) the applicants' submissions again proceed on a false unstated assumption that the "*other person*" referred to in s 289(b) is always a person who is the operative subscriber and who is bound as a matter of contract law to the terms of the CRA.

7-48. Even if one were to accept for the purposes of argument the unstated assumption referred to above, on a fair reading of the CRA the Court could not conclude that iiNet subscribers have consented to the disclosure or use of information about their "*affairs or personal particulars*" "*in the circumstances concerned*".

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[27] ACS paras 549-561.

7-49. First, the "*circumstances concerned*" in this case are not referred to anywhere in the CRA. The agreement between iiNet and its customers simply does not deal with circumstances in which a third party owner of copyright asserts (by itself or its agent) (i) infringing user activity using an identified IP address at an identified time; and (ii) an obligation on the part of iiNet to investigate, identify and warn or punish the user in respect of that conduct. The CRA does not identify disclosure or use in the circumstances concerned, so the customers cannot be said to have consented to such disclosure or use.

7-50. Secondly, the effect of the applicants' position is that the words "*circumstances concerned*" have no operation or effect. To give the words some operation, they must be taken to require consent to use or disclosure in the particular circumstances at hand before the exception will apply. Where, as here, the circumstances are unusual,[28] the Court would be particularly astute to give content to all the words of the statute and require a clear demonstration that what is said to be "consent" is in truth consent to use or disclosure in the circumstances concerned. That cannot be demonstrated by reference to the terms of the CRA and the applicants do not put forward any other conduct of the customer as an indication of consent.

7-51. Thirdly, the applicants attempt to weave together disparate strands of provisions in the CRA, but the resulting patchwork does not amount to consent to disclosure or use in the circumstances concerned. The applicants appear to invoke nine clauses of the CRA to make good their submission that the consent exception in s 289(b)(ii) applies.[29] Those clauses range from the very broadly expressed (such as clauses 4.1 and 4.2) to the very specific (such as clause 12.3). The applicants contend that the "totality"[30] of those provisions demonstrates the customer's consent in the circumstances concerned, but in truth the applicants' submission relies upon an

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[28] It is impossible to imagine that when a customer who is opening an account ticks the box indicating agreement to the terms of the CRA that he or she had in contemplation a situation where a representative of rights owners would be insisting that iiNet reveal and pursue its customers for the purpose of vindicating those rights.

[29] ACS para 550 refers to clauses 12.3 and 20.1, and picks up by its cross-reference (to para 544, presumably) clauses 4.1, 4.2, 4.4, 12.2, 13.2, 14.2 and 14.4.

[30] ACS para 551.

artificial amalgam of provisions directed to different topics at different levels of generality.

7-52. Fourthly, the particular provisions of the CRA identified and relied upon by the applicants are, in a number of significant respects, misinterpreted and consequently misapplied. Upon the proper construction and application of those provisions, they contradict the applicants' contention. In particular:

(a) Clause 12.3 is not correctly construed by the applicants. It is said to have an operation that is not supported by its terms. The clause identifies a number of specific purposes for which iiNet may collect, use and disclose "*Personal Information*" (a term defined in clause 21.1). Clauses 12.1 and 12.2 are the operative clauses that provide for the circumstances in which iiNet may "*collect*" and "*disclose*" Personal Information for those purposes. Clauses 12.3(c) and (d) are central to the applicants' case on consent, being provisions that are said to provide "*an express power to use such information for the purposes of enforcement of the CRA, including enforcement of the terms relating to ensuring no copyright infringing use*".[31]

(b) Taking those two provisions in turn, as to clause 12.3(c) it is apparent that that provision does not constitute a relevant consent. It is simply an agreement that Personal Information may be deployed for the purpose of "*providing the services you require from us and from iiNet Related Entities*", which is a purpose a long way from the circumstances concerned in this case.

(c) As to clause 12.3(d), the same conclusion must follow. That clause permits the collection, use and disclosure of Personal Information for the purposes of "*administering and managing those services, including billing, account management and debt collection*". The reference to "*those services*" is evidently a reference to the services just referred to in clause 12.3(c), being the "*services you require from us and from iiNet Related Entities*". The applicants submit that "*administering and managing the customer's service and account must include enforcement of the terms of the CRA*". That submission should be

[31] ACS para 552.

rejected. Accepting the construction advanced by the applicants would give clause 12.3(d) a breadth of operation that would make the other sub-clauses of 12.3 entirely redundant and would be inconsistent with the careful and specific enumeration of the permitted purposes in clause 12.3. Such a construction should be avoided.[32] The words "*administering and managing those services, including billing, account management and debt collection*" must refer only to the usual day-to-day functions involved in the administration of iiNet services, being the provision of (relevantly) internet access of a certain quota upon the payment of the applicable subscription amount. Each of the other sub-clauses of clause 12.3 deal with the use by iiNet of information for the purposes and for the protection of iiNet's financial or business interests or for the benefit of iiNet's own business development. The meaning given to clause 12.3(d) must be harmonious with that contractual context. There is not a hint of consent to use or disclosure of Personal Information to advance the interests of, or provide a benefit to, a third party such as the owner of copyright in films made available on the internet.

(d) The express inclusion of "*debt collection*" in clause 12.3(d) indicates that the subscriber consents to the use of his or her Personal Information for the purposes of collection of a debt owed to iiNet. Mr Malone was entirely correct that clause 12.3(d) is directed towards "*the general operations of the business*" including the collection of unpaid subscription amounts from subscribers.[33] The applicants advocate the adoption of a construction of the clause (that is, as consent to use or disclosure for any and all steps said to be the "*enforcement of the terms of the CRA*") by which the contractual tail would wag the dog. Almost any use of Personal Information would be justified if it were open to iiNet to assert it had consent to use it generally to enforce the terms of the CRA. But that construction is manifestly inconsistent with the carefully stated and specific purposes for which such information may be used.

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[32] A contract must be read as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause should be interpreted as to bring them into harmony with the other provisions of the contract: see, for example *North-Eastern Railway v Hastings* [1900] AC 260 at 267; *Chitty*, Vol 1, para 820; see also *North v Marina* [2003] NSWSC 64 at [45] (Campbell J).

[33] Malone XXN T 729; see also T 752.

(e) Another provision of the CRA upon which undue reliance is placed by the applicants is clause 20.1(a), which is said to permit use or disclosure of the relevant information provided in the AFACT Notifications or otherwise known to iiNet.[34] The applicants do not stop to consider whether that relevant information is in fact "*Confidential Information*" within the meaning of the specific definition in clause 21.1, and there must be considerable doubt whether much of the relevant information would fall within the definition. To the extent that it does not, clause 20.1(a) will not arguably operate as consent to the use of disclosure of the relevant information.

(f) The applicants also rely upon clause 4.4 of the CRA as "*further express consent within s 289(a) to the disclosure or use of information relating to the affairs of customers being information as to the use of the service for copyright infringing purposes*".[35] Clause 4.4 does not contain any such "*express consent*" to such use or disclosure. Furthermore, clause 4.4 refers to the interception of communications and monitoring of usage and communications *by iiNet*. The information about the affairs of users of iiNet services provided in the AFACT Notifications is information gathered by DtecNet and provided to iiNet by AFACT. Clause 4.4 simply does not speak to the "*circumstances concerned*" in this case and does not provide a relevant consent.

7-53. Furthermore, as submitted above in the context of s 289(b)(i), the applicants' submissions about s 289 proceed on an unstated assumption that person referred to as "*the other person*" is a person who has, himself or herself, accepted the terms of the CRA. If, as the evidence shows must often be the case, the persons who use an iiNet service are persons other than the subscriber, the question of the application of the exception in s 289(b)(ii) must be determined by asking whether that other person has consented to the disclosure or use by iiNet of the information provided to iiNet about his or her affairs. If there is no reason to suppose that the other person has ever looked at, let alone agreed to, the terms in the CRA (as would surely, in practice, always be

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[34] ACS para 552.

[35] ACS paras 555 and 544.

the case) then the suggestion that those other persons have consented to disclosure or use must be rejected.

7-54. The applicants' submissions about the effect of the cross-examination of Mr Malone and Mr Dalby raise a false issue.[36] The respondent does not accept those criticisms of the witnesses, but what is important to appreciate for present purposes is that whatever Mr Malone and/or Mr Dalby had in mind in July 2008 does not affect the proper construction of s 289 and the proper construction of the CRA.

7-55. For those reasons, even in the limited area in which the exception in s 289 might otherwise apply (namely, in respect of the disclosure or use of information described in s 289(a), reflecting the category in s 276(1)(a)(iv)), use or disclosure of the relevant information by iiNet could not be said to be done with the knowledge or consent of the person concerned. The exception in s 289 does not apply.

Section 280

7-56. As to s 280, and in particular s 280(1)(b), it could not reasonably be said that the disclosure or use of information proposed in the suggested or hypothetical actions in this case "*is required or authorised by or under law*". Although the applicants might wish to contend, or at least to convey the suggestion,[37] that the AFACT Notifications are equivalent to "*take down notices*",[38] such contention or suggestion is wrong. It may well be correct, but does not arise for determination in this case, that taking action in response to a take down notice is within the exception in s 280 (because a carriage service provider is implicitly authorised by the Act to take such action). But whether or not that is correct, it is manifestly clear that taking the suggested or hypothetical steps upon receipt of the AFACT Notifications, or similar demands, is neither permitted nor authorised by or under law.

7-57. The applicants contend in their final submissions that the *Copyright Act 1968* itself authorises or requires use or disclosure of the information provided by AFACT and

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[36] ACS paras 559-561.

[37] AS paras 248 (and footnote 294), 255 (and footnote 299).

[38] See the provisions of the Act referring to "*notification in prescribed form*" in the table in s 116AH(1) of the Act, for "Category B", "Category C" and "Category D" activities of carriage service providers. Those activities are described in ss 116AD, 116AE and 116AF and do not arise in the circumstances of this case.

the information otherwise held by iiNet.[39] The applicants refer in the first instance (ACS para 545-546 and 548) to the operation of s 101 of the Act and submit that the provision either authorises or requires iiNet to use or disclose the relevant information. Section 101 clearly does not do so – it identifies the circumstances in which a person is to be regarded as infringing copyright, but it does not impose any positive statutory duty upon a person to take any particular steps, let alone to take particular steps that are otherwise prohibited by s 276 of the Telco Act. The applicants refer in the second instance (ACS para 547), and more summarily, to the operation of the safe harbour provisions, in particular s 116AH(1) of the Act. It would be odd if provisions in the *Copyright Act 1968* relevant to relief in infringement proceedings constituted a requirement or authorisation to use or disclose information prohibited from use or disclosure by s 276 of the Telco Act. The safe harbour provisions do not do so. They simply provide that if certain conditions are fulfilled by a carriage service provider (expressed in terms which clearly do not themselves authorise or require any particular conduct to have occurred) then certain consequences may follow in terms of relief in infringement proceedings.

7-58. For those reasons, the exception in s 280 does not apply in the circumstances of this case.

Section 279

7-59. As to s 279, the applicants maintain their reliance on the provision, though it is faintly pressed. In iiNet's opening submissions, the point was made that the applicants appeared to misread the section and that s 279 does not provide an exception for a carriage service provider at all. The expression of the applicants' closing submissions implicitly now accepts that limitation.[40] It should follow that the Court would not regard such a limited exception (in which the conduct on the part of iiNet itself is not within the exception) as a reason to reject iiNet's submissions about the operation of s 276 of the Telco Act.

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[39] ACS paras 543-548.

[40] ACS paras 564-567.

7-60. In any event, even in respect of an employee of a carriage service provider, the question would arise whether steps taken by an employee of iiNet to implement or act on the suggested or hypothetical steps involved disclosure or use which is "*made in the performance of the person's duties*" as an employee, within the meaning of s 279(1)(b). It is no part of an iiNet employee's duties to respond to, or act upon, allegations made by AFACT or the applicants that identified IP addresses have been misused. The applicants might say that, if iiNet directed its employees to take the suggested or hypothetical steps, anything done by those employees would not involve personal liability on the part of the employee because complying with directions is the performance of the employee's duty – but that construction of the section, even if it were the better view of the meaning of the exception, would apply only to some employees. On its proper construction, s 279 would not excuse from liability a director of iiNet, or any senior employee who decided to act on third party demands such as those contained in the AFACT Notifications, and of course would not excuse iiNet itself in any event.

A "predicament of its own making"?

7-61. In relation to iiNet's CRA, the applicants belatedly contended in their opening submissions that iiNet should have arranged its affairs so as to have a provision in the CRA providing for express consent by the customer for use of relevant customer information against them (presumably, in response to demands made by AFACT and/or the applicants and/or other third parties).[41] That contention had not previously been pleaded or particularised by the applicants and iiNet contended in opening submissions that it should not be entertained in the proceedings. iiNet maintains that it would have wished to meet such an allegation with evidence about, among other things, the commercial, operational and competitive effect of including such a term in its CRA and it is now too late in the day for that type of expansion of the applicants' case.[42]

7-62. The applicant's contention must, in any event, fail because it does not take into account that the exception in s 289 only applies where the subscriber is reasonably

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[41] AS 260.

[42] *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27, (2009) 258 ALR 14.

likely to be aware of the proposed use, or where the person had consented to such use. The applicants cannot, in effect, redraft the exceptions in Part 13 of the Telco Act such that another exception exists in circumstances where the carriage service provider could have (but did not) amend its CRA to provide for consent in circumstances concerned. The applicants' repeated contentions about the alleged "*inadequacy*"[43] of iiNet's terms and conditions should not be permitted to disguise the fact that the questions posed under s 289 must be answered by reference to the facts of the case, not the facts as the applicants would wish them to be.

"Significance of timing and evidence"

7-63. There is no significance in the matters of "*timing and evidence*" raised argumentatively by the applicants in ACS paras 571-579. That conclusion must follow from the principle that the applicants say they accept in the introductory words to this section of the applicants' submissions, namely that "*the applicants accept that the Court must determine the Telco Act point as a question of law*".[44] If, on the proper construction of Part 13 of the Telco Act, s 276 prohibits the use or disclosure of the relevant information and no exceptions apply, that in itself will compel a conclusion that iiNet did not have the power to prevent the primary infringements, and will compel a conclusion that it would not have been reasonable for iiNet to undertake steps or a course of conduct that would have involved multiple offences under Part 13. It will not be either relevant or significant to inquire what it was that particular officers of iiNet had in mind (at particular times), or what the industry approach generally was to the provisions of the Telco Act. The matters relied upon by the applicants in that regard should be rejected on the basis that they are not material considerations in the determination of the relevant questions raised by the Telco Act.

7-D. CONCLUSION

7-64. For those reasons, the Court would accept that none of the exceptions in Division 3 of Part 13 of the Telco Act would apply or would be likely to apply to circumstances in

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[43] ACS para 568.

[44] ACS para 571.

which iiNet took the suggested or hypothetical steps put forward by the applicants.[45] Accordingly, the prohibition in s 276 was activated and iiNet was constrained by the terms of that prohibition from the use or disclosure of information provided to it by AFACT, or information otherwise held by iiNet. iiNet could not lawfully take the steps for which the applicants contend – the failure to take those steps cannot, therefore, constitute the authorisation of infringement of copyright.

[45] This conclusion is also consistent with *Re Telstra* [2000] FCA 682 (Burchett J).