

# In the Loop

The Hicks Oakley Chessell Williams Newsletter

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WILLIAMS  
Lawyers & Notary

## Will the “copyright police” soon be after you?

### Should Internet Service Providers (ISP) be required to police their networks for copyright infringers?

The answer is a resounding “yes” if you ask the Australian Federation Against Copyright Theft (AFACT).

AFACT, along with 33 television and movie studios from both Australia and abroad, were the Plaintiffs in the landmark decision of Roadshow Films Pty Ltd & Ors v iiNet Ltd [2010] FCA 24 (commonly referred to as AFACT v iiNet) handed down in the Federal Court in February 2010.

It was alleged that the Defendant, Perth based ISP iiNet, authorised thousands of illegal downloads by their broadband internet subscribers over a 59 week period. Those subscribers allegedly downloaded copyright protected video files using iiNet’s internet service and BitTorrent (a peer-to-peer file sharing program).

The Plaintiffs argued iiNet were authorising copyright infringement because they:

- had contractual obligations to prevent copyright infringement (in the form of customer relationship agreements); and
- had the technical capacity to prevent the infringing; and
- refused to take any action upon receiving notices that some of their subscribers were infringing copyright.

In their defence, iiNet argued that:

- it was “unreasonable and burdensome” to act on all of the notices received; and
- they prohibited such conduct in their customer relationship agreements and on their website.

In February 2010, Judge Cowdroy found iiNet did not authorise the infringements for 3 reasons:

1. The copyright infringement was a direct result of use of the BitTorrent program and not the use of the internet (and iiNet did not create or control BitTorrent); and
2. iiNet did not have a relevant power to control the infringement; and
3. iiNet did not “sanction, approve or countenance” the infringement.

AFACT’s appeal to the Federal Court was heard in August 2010. We await the decision.

Presuming the Plaintiff’s appeal is dismissed, this decision will set a precedent that ISPs are not responsible for what their subscribers do with their services. Accordingly, movie studios and record labels, who have been the biggest losers from this decision, must look to going after the individuals who are infringing their copyright directly, rather than placing that onus on the ISPs.

If however the appeal is upheld, the landscape of copyright infringement prosecutions will change considerably. Not only will a hefty burden be placed on ISPs to act as the “copyright police”, but those subscribers who use programs such as BitTorrent had better sit up and take notice if they want to avoid the possibility of significant penalties.

As this decision is expected to have global significance, movie and studio executives from Hollywood to Bollywood will be keeping a very close eye on the outcome of this appeal.

*David Levesque*  
Trainee Lawyer

## Seminar - Thursday 14 October 6.30pm - 8.00pm

Hicks Oakley Chessell Williams and Rogerson Kenny, Business Accountants, present:

### “ideas, names & images - are you protected?”

Speakers: **Tony Oakley**, Partner, Accredited Specialist, Business Law  
**Brett Kenny**, Partner, CPA, FCA  
**Harvey Bowlt**, Senior Lawyer, Accredited Specialist, Business Law

Place: The Central Conference Centre, 1 Ricketts Rd (cnr Forster Rd) Mount Waverley Vic 3149

Cost: \$40.00 per person including GST tax invoice supplied upon receipt Proceeds to World Wildlife Fund Charity

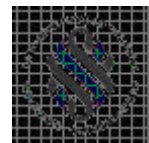
Register: [www.rogersonkenny.com.au/semnar\\_registration](http://www.rogersonkenny.com.au/semnar_registration)

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## Getting the most out of a Security of Payment Scheme

The *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**) is very useful legislation to those operating in the building and construction industry as it provides a statutory right to progress payments. But, as usual, the devil is in the detail and claimants must adhere to strict timelines and processes to benefit from this statutory payment scheme.

### Scope of the Act

The Act applies to construction work and related goods and services performed within Victoria under a construction contract. A construction contract is broadly defined under the Act and includes arrangements that may be less than an otherwise legally enforceable contract. The Act only applies to domestic building work in limited circumstances.

Notably, the provision of the Act cannot be excluded from a construction contract.

### Making a Payment Claim

A payment claim is a claim for a progress payment for work done or

supplies made under the Act including single, final and milestone payments. If a date on which a claim for a progress payment can be made is not specified under a contract, a payment claim can be made every 20 business days after the first day of works are carried out.

To be a valid payment claim under the Act, a payment claim must:

- identify the construction work or related goods and services;
- indicate the claimed amount due and payable; and
- state that it is made under the Act (This is a payment claim under the *Building and Construction Industry Security of Payment Act 2002* (Vic)).

A payment claim may include claimable variations but not excluded amounts.

### Responding to a Payment Claim

If a valid payment claim has been served on a respondent, it should serve the claimant with a payment schedule setting out what payment it proposes to make (**Scheduled**

**Amount**). A payment schedule must be served within 10 business days of receiving the payment claim or sooner if the contract prescribes a shorter period.

### Tough consequences

If a respondent fails to pay the Scheduled Amount or fails to provide a payment schedule on time, the claimant is entitled to issue a proceeding for recovery of the debt from a court. Most importantly, the respondent is restrained from bringing any cross-claim against the claimant or raising any defence. In addition, the claimant can also suspend works and exercise a lien over any unfixed plant or materials.

As an alternative to a court order, claimants can apply for adjudication to enforce an entitlement to progress payments. Time limits apply to accessing the adjudication process.

For a free audit of your invoices to check that they comply with this Act, please contact the writer.

*Antoinette Daley*  
Lawyer

## A New Code of Conduct for Victorian Civil Dispute Resolution

The way civil disputes are run in Victoria will soon change. The *Civil Procedure Act 2010* (Vic) (**Act**) is due to come into force on 1 June 2011. The Act encourages parties to resolve their dispute without going to court and, if proceedings are commenced, to facilitate the determination of disputes in a more timely and cost-effective way.

The overarching purpose of the Act in relation to civil disputes is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.

Each party must comply with 10 overarching obligations:

1. to act honestly;
2. not to make any claim or make a response to any claim in a civil proceeding that is frivolous or vexatious;
3. to only take steps to resolve or determine the dispute;
4. to cooperate in the conduct of civil proceeding;
5. not to mislead or deceive;
6. to use reasonable endeavours to resolve the dispute;
7. to narrow the issues in dispute;
8. to ensure costs are reasonable and proportionate;
9. to minimise delay; and
10. to disclose the existence of critical documents.

If a party contravenes an overarching obligation, the court may make any order it considers appropriate in the interest of justice including, but not limited to, a costs order against the contravening party.

The Act makes it mandatory for disputing parties to

take reasonable steps to resolve a dispute by agreement or, in the event of litigation, to clarify and narrow the issues in dispute.

Failure to exchange appropriate pre-litigation correspondence, information and documents critical to the resolution of a dispute may result in the court making a costs order against a party or against a party's representative.

If a dispute proceeds to litigation, a party must certify that they have read and understood the overarching obligations and the paramount duty. In addition, a party's legal practitioner must certify that each allegation, denial and admission of fact contained in the document has a proper basis.

The Act clarifies the inherent power of the court to manage civil cases, including in relation to discovery. The court may make any order or give any direction that it considers appropriate, including limiting or modifying the discovery process. The court may refer parties to appropriate dispute resolution (**ADR**) without their consent.

With the introduction of the Act, the Victorian Government makes it clear that it expects a cultural shift in the way civil disputes are determined. The Act aims to encourage civil litigants and their lawyers to resolve disputes in a fair, fast and cost-effective manner or, at least, to narrow the scope of issues that will be presented to courts.

*Matthew Hicks*  
Partner  
Accredited Specialist - Commercial Litigation



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