

**IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY**

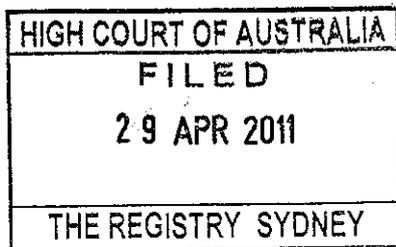
**No. S23 of 2010**

**BETWEEN:**

**PHONOGRAPHIC PERFORMANCE  
COMPANY OF AUSTRALIA LIMITED  
ACN 000 680 704  
First Plaintiff**

**EMI MUSIC AUSTRALIA PTY LIMITED  
ACN 000 070 235  
Second Plaintiff**

**SONY MUSIC ENTERTAINMENT  
(AUSTRALIA) PTY LIMITED  
ACN 107 133 184  
Third Plaintiff**



**UNIVERSAL MUSIC AUSTRALIA PTY LIMITED  
ACN 000 158 592  
Fourth Plaintiff**

**WARNER MUSIC AUSTRALIA PTY LIMITED  
ACN 000 815 565  
Fifth Plaintiff**

**J ALBERT & SON PTY LTD  
ACN 000 026 513  
Sixth Plaintiff**

**AND**

**COMMONWEALTH OF AUSTRALIA  
First Defendant**

**AUSTRALIAN BROADCASTING CORPORATION  
Second Defendant**

**COMMERCIAL RADIO AUSTRALIA LIMITED  
ACN 059 731 467  
Third Defendant**

**PLAINTIFFS' REPLY**

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## **PART I: CERTIFICATION**

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1. This reply is in a form suitable for publication on the internet.

## **PART II: PLAINTIFFS' REPLY**

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2. The defendants or some of them contend that<sup>1</sup>:
  - A. The plaintiffs can only succeed if they challenge the validity of the provisions of the 1968 Act “which address the 1911 Act”, namely ss.5, 6, 8, 207 and/or 220.
  - B. The 1911 Act did not create a broadcast right; accordingly there is no property in the constitutional sense.
  - C. The broadcasters acquire no proprietary right and *Tape Manufacturers* applies.
  - 10 D. The caps are within the scope of “permissible adjustment” under s.51(xviii) of “competing rights” in the “common interest” and/or that s.51(xxxi) has no application to s.51(xviii).
  - E. The plaintiffs have not shown a lack of just terms.
  - F. The impugned laws should be read down rather than severed.

### **A. The continuation of pre-existing rights in sound recordings**

3. The defendants complain that the plaintiffs challenge only ss.109 and 152, being the sections which in their terms impinge upon the property rights in question. They suggest that any challenge should have been made to the validity of ss.5, 6, 8, 207 and/or 220 of the 1968 Act. Although the defendants now speak with one voice on this issue, none of them had pleaded that the plaintiffs’ challenge was misdirected because any acquisition was effected by these sections (simply to refer to the sections – as for example the Commonwealth did in its Amended Defence at para 37.1<sup>2</sup> – is not to raise the issue). It is thus not surprising that neither the questions stated, nor the plaintiffs’ primary submissions, addresses the issue in terms. However, as it has now been raised, the plaintiffs are content to deal with it.<sup>3</sup>
4. When dealing with the constitutional guarantee in s.51(xxxi), “[q]uestions of substance and of degree, rather than merely of form, are involved”.<sup>4</sup> Where a new statutory regime replaces an existing regime there can be grandfathering of existing vested rights, or a range of transitional provisions to preserve and/or recreate existing rights and bring them within the new statutory scheme. Indeed, it is permissible, for the purposes of s.51(xxxi), to repeal one statute creating property rights and to replace it with another, so long as there is no acquisition of property without provision of just terms. Transitional provisions can translate the old rights into the language of the new regime, so that “existing works are brought under the provisions of the [new] law”.<sup>5</sup> In doing so, Parliament can modernise the language, use different drafting conventions, or a different form and structure, incorporate the effect of judicial decisions under the previous law, while preserving the substance of the vested rights.
5. An example of a re-creation of statutory rights and liabilities is found in s.1401 of the *Corporations Act 2001* (Cth), as discussed in *Forge v ASIC* (2006) 228 CLR 45 at [103]-

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<sup>1</sup> Commonwealth’s submissions (Cth) [12]-[13] & [15]-[19]; CRA’s submissions (CRA) [9], [10], [26]; ABC’s submissions (ABC) [7], [19]-[23] & [68].

<sup>2</sup> SCB p44.

<sup>3</sup> This is not the first time that questions stated do not fully articulate the issues in dispute in light of the way submissions develop, cf *ICM Agriculture v Commonwealth* (2009) 240 CLR 140 at [8].

<sup>4</sup> *Smith v ANL Ltd* (2000) 204 CLR 493 at [22] per Gaudron and Gummow JJ.

<sup>5</sup> Second Reading Speech by Mr Bowen, Hansard, 16 May 1968, BD 3/1404.

[115]. Similarly, it would be permissible to repeal and re-make the relevant Torrens title law applying in the ACT or the Northern Territory, so long as there was no acquisition of property, in substance, without just terms. It would then be artificial to say that insofar as there was an acquisition of property without just terms concerning some such property – for example if the law had the effect of transferring the benefit of long-term leaseholds – then the new Act was invalid to the extent it dealt with that type of property. That would leave two statutory schemes, where only one statutory scheme could operate coherently.

6. The present case is analogous. A new statutory scheme was established to deal with copyright. The scheme involved repatriation of this area of the law. Existing rights were maintained but brought within the structure of the new scheme.
7. Pre-existing rights were brought within the operation of the new scheme by way of (relevantly) ss.5, 6, 8, 89, 207 and 220: see the plaintiffs’ primary submissions at [36]-[45]. Sections 207 and 220 – contained within Part XI which is headed “Transitional Provisions” – presuppose that there are relevant rights to be preserved. The Attorney-General’s second reading speeches for both the 1967 Bill and the 1968 Bill confirm that, apart from the introduction of the caps, the new Act was intended to preserve and continue the vested rights which are presently in question.<sup>6</sup>
8. The relevant acquisition of which the plaintiffs complain relates to the grant to broadcasters of a statutory licence to broadcast sound recordings in s.109 of the 1968 Act, subject only to the capped liability to compensate pursuant to s.152. Put another way, the complaint is that s.109 creates a defence to what would have otherwise been a right to claim for infringement in circumstances where no just right to compensation is provided for that defence in light of the caps in s.152.
9. It is artificial and formalistic to suggest that the 1911 Act (and 1912 Act) might still apply, though only to 1911 Act sound recordings.<sup>7</sup> It would mean, for example, that disputes about remuneration for sound recordings made after 1 May 1969 would be determined by the Copyright Tribunal pursuant to s.152, but such disputes about pre-existing sound recordings would fall to be determined by an arbitration under s.13A of the 1912 Act. That would be so in circumstances where the Parliament had made plain that s.152 was meant to cover the field in relation to determination of such issues, as is addressed in the plaintiffs’ primary submissions at [164].
10. The complaint is not that the legislative scheme has been repatriated and remade – that would be a formal complaint, not a substantive one. The failure in the legal scheme is on the limitation put on the new right to compensation.
11. The issue raised by the defendants is in truth one going to severance and reading down – namely, if there is a constitutional difficulty with the manner in which 1911 Act sound recordings are dealt with, which parts of the 1968 Act are invalid? Section 15A of the *Acts Interpretation Act* is relevant here. The 1968 Act exceeds legislative power not insofar as it repatriated and remade the scheme, but insofar as it does so on terms which provide for acquisition of property other than on just terms.
12. To read down ss.5, 6, 8, and 220 so as to not apply the 1968 Act to pre-existing sound recordings is far more dramatic surgery than to sever ss.152(8)-(11) and (19)-(21), as the plaintiffs submit should occur. It cannot be said that the likely intention of the Parliament

<sup>6</sup> Ibid at BD 3/1404; Second Reading Speech by Mr Bowen, Hansard, 18 May 1967, BD 2/1233 and 1227.

<sup>7</sup> i.e. the effect of the ABC’s contention at [68].

was that if the caps in s.152 were held to be impermissible, then the whole scheme would fail insofar as it applied to pre-existing sound recordings. The argument to the contrary directly contradicts the clear words of s.5(1) of the 1968 Act.

13. The defendants also make submissions that appear to contend that there are benefits under the 1968 Act (presumably, as at 1 May 1969) which substantively countervail the burdens of ss.109 and 152.<sup>8</sup>

a. It is suggested that there was some benefit in clarifying whether copyright in sound recordings extended to a broadcast right. Yet that issue had already been resolved by litigation. In any case, either it arose under the 1911 Act or it did not.

10 b. Under the 1911 Act copyright subsisted for 50 years from the making of the original plate, whereas under the 1968 Act the 50 year term started from the end of the calendar year when it was first made. This change was not material.

c. In 2004 there was also an extension of the term of copyright of 20 years. This issue was dealt with at paragraphs [42] and [159] of the plaintiffs' primary submissions. The change, made decades after the 1968 Act commenced, was unrelated to the caps but was solely for the purpose of the US Free Trade Agreement. Had the 1911 Act and 1912 Act continued in force, no doubt the term of copyright under those Acts too would have been extended.<sup>9</sup>

20 d. The Commonwealth refers to the change enabling exclusive licences to be binding even on purchasers for value without notice. This change did not materially alter the value of the relevant rights.

e. The Commonwealth refers to certain new defences introduced to infringement claims in ss.104-107. These were not to the benefit of holders of copyright in sound recordings.

f. CRA notes at [50] that the 1968 Act was expressed to bind the Crown. That change is immaterial to the issues here, given that the ABC was already obliged to pay royalties under the regime of the 1911 Act, and did so.<sup>10</sup>

30 14. Even if such "benefits" are relevant, any other benefits that the defendants claim were conferred by the 1968 Act were relevant to all copyright. They were not trade-offs for imposition of the caps on copyright in sound recordings. They do not stand in lieu of just terms in relation to those caps.

15. The Commonwealth also argues at [58] that s.55 of the 1968 Act provided a cap similar to that in ss.109 and 152. The plaintiffs addressed this point at [144] of their primary submissions. The central difference is that the royalty payable under s.55 could be altered following a recommendation or determination of the Copyright Tribunal.<sup>11</sup> Further, that right was subject to a substantively similar regime under the 1911 Act.

## **B. Performance right in records under the 1911 Act**

16. The Commonwealth and CRA (but not the ABC) contend that there was no performance right in records under the 1911 Act. They say that none was intended and *Cawardine* was

<sup>8</sup> Cth [53]-[56]; CRA [47]-[50] & [63]; ABC [24].

<sup>9</sup> Contrary to Cth [55].

<sup>10</sup> Note SC [228]-[230], SCB p128-129.

<sup>11</sup> As made, s.58 enabled the Attorney-General to request the Copyright Tribunal to hold an inquiry if the royalty payable under s.55 was not equitable, and to make regulations varying the royalty after taking the Tribunal's report into account. The *Copyright Amendment Act 1989* (No 32 of 1989) amended s.55 to provide for the payment of a "prescribed royalty", being an amount as agreed between the manufacturer and the owner of copyright in the work, the "equitable amount" of royalty as determined by the Tribunal, or failing any agreement or determination, a default rate of 6.25% of the retail selling price of the record.

wrongly decided. From that they say that the property said by the plaintiffs to have been acquired did not exist.<sup>12</sup> The plaintiffs addressed some of these issues at [20]-[31] and [46]-[69] of the plaintiffs' primary submissions. In the face of a direct challenge to *Cawardine* they add the following.

17. The starting point is the words of the 1911 Act. Section 19(1) provided that “[C]opyright shall subsist in records (etc) in like manner as if such contrivances were musical works ...”. The analysis by Maugham J in *Cawardine*, where his Lordship disposed of substantially the arguments raised by the Commonwealth and CRA here<sup>13</sup>, is compelling and with respect correct. As his Lordship said, “[T]he phrase is not ... apt to describe a mere right to prevent the reproduction in a physical form of the record and a right to sell a record.”<sup>14</sup>
18. As his Lordship points out, if the record was of an existing literary, dramatic or musical work, then copyrights other than the record's copyright would also inhere in the record.<sup>15</sup> The concept of co-existing copyrights admixed in one collocation was well-known (eg translations).<sup>16</sup> The words of the 1911 Act created co-existing copyrights<sup>17</sup> that may have had differing terms.<sup>18</sup> Separate copyrights in different records of the same work would enjoy parallel protection, each along with the work reproduced.<sup>19</sup> The record copyright did not derogate from any copyright in a pre-existing musical work; it is clear from his Lordship's conclusion that this means that it continued to subsist so that, for example, the permission of the musical work's copyright owner would still be needed to reproduce<sup>20</sup> or perform the contrivance.<sup>21</sup> All these support his Lordship's reasoning.
19. The Commonwealth at [24] and CRA at [29], calling in aid also the 7<sup>th</sup> and 8<sup>th</sup> editions of *Copinger*, repeat an argument put by the restaurant company in *Cawardine*<sup>22</sup>, that “it is difficult to see how the record... can be performed.” To appreciate that may doubtless require a little flexibility of thought; but Maugham J was capable of it; and once one gives weight to the words “in like manner as if [they] were musical works” it becomes clear that the Parliament contemplated it. Moreover, the Commonwealth's and CRA's arguments conflate the copyright in something (a musical work, a record) with the physical embodiment of it. Even in 1911, that distinction was clear.
20. The decision in *Cawardine* has remained unchallenged in Australia and the UK for some eighty years. Broadcasting interests had ample opportunity to seek to overturn the decision but chose not to. There is no proper basis now to overturn what has been settled law for so long.
21. Otherwise, the Commonwealth and/or CRA make the following points, which may be answered as follows:
- a. The contention that records had a performance right was criticised by the Owen Royal Commission.<sup>23</sup> First, the criticism was not as marked as the Commonwealth and CRA suggest.<sup>24</sup> Secondly, it was allied to a policy view that the right ought not to

<sup>12</sup> Cth [15], [21]-[24]; CRA [26] [28]-[31].

<sup>13</sup> *Cawardine* at 456-461, esp. at 460, BD 1/593.

<sup>14</sup> *Ibid* at 460, BD 1/593.

<sup>15</sup> *Ibid* at 497, BD 1/590.

<sup>16</sup> “The conception of co-existing copyrights is a familiar one in copyright law,” *Cawardine* at 459, BD 1/592.

<sup>17</sup> *Cawardine* at 458 BD1/591.

<sup>18</sup> *Cawardine* at 459 BD1/592.

<sup>19</sup> *Cawardine* at 459 BD1/592.

<sup>20</sup> Subject to sub-ss. 19 (2)-(8).

<sup>21</sup> *Cawardine* at 459, BD 1/592. These concepts are similar to those now embodied in ss. 113 and 23 of the 1968 Act (cf *PPCA v Federation of Australian Commercial Television Stations* (1998) 195 CLR 158).

<sup>22</sup> *Cawardine* at 454 recording the arguments of counsel for *Cawardine*: “.. a record cannot be ‘performed’ ...”. BD 1/ 587.

<sup>23</sup> Cth [25]; CRA [28].

<sup>24</sup> The Owen Report at p 40 says that “it is not for the Commission to determine points of law” and that “the Commission is by no means satisfied” that the claim of the record companies has been made out, BD 1/127. The Report incorrectly says that *APRA v 3DB Broadcasting* [1929] VLR 107 supports that view; in fact as pointed out by Maugham J in *Cawardine* at 462, BD 1/595, the opposite is the case.

exist.<sup>25</sup> Thirdly, *Cawardine* was pending and had not been decided.<sup>26</sup> Fourthly, it is immaterial.

- b. The right was not claimed for 20 or so years. This is immaterial. Many such issues lie untested, possibly for decades. See for example the construction of s.26 of the 1968 Act (*Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1997) 191 CLR 140); of s. 23 of the Act (*PPCA v Federation of Australian Commercial Television Stations* (1998) 195 CLR 158); and of s.25(4) of the Act (*Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273), all between 30 and 40 years after the enactment of the relevant provision.
- 10 c. The right was not tested in litigation.<sup>27</sup> The correctness of *Cawardine* is also supported by opinions obtained independently by the ABC and the Australian Federation of Commercial Broadcasting Stations well before 1968<sup>28</sup>. This no doubt informed the apparent decision by those bodies not to challenge *Cawardine* in litigation at any time between 1934 and 1968. But again it is immaterial.
- d. The right was not a “sole right”, contrary to *Cawardine*.<sup>29</sup> This argument is conceptually allied to the argument that one cannot perform a record. Once one appreciates that one can simultaneously perform both the record and the musical work, one appreciates that the “sole” right to perform each can co-exist.
- 20 e. Other references in s.19 of the 1911 Act – to making records – drive away from the construction in *Cawardine*.<sup>30</sup> The Commonwealth misreads sub-ss 19(2)-(8): they deal only with the special topic of imposing a licence in certain circumstances on the owner of copyright in musical works; as they deal only with that topic they are only concerned with the exercise of the reproduction right in such works by the making of records.
- f. The right was not sought by the record manufacturers before the Gorrell Committee.<sup>31</sup> As to Parliamentary intention and the use of extrinsic materials, first, as Maugham J observed in *Cawardine*, s.19 was a result of compromise.<sup>32</sup> It is frequently not useful in such circumstances to look into the *travaux préparatoires*.<sup>33</sup> But the position put by the record companies in 1909 was far more nuanced than the Commonwealth or CRA suggest. Ultimately Mr Drummond Robertson sought “copyright protection ... on the same lines as ... the cinematograph”.<sup>34</sup> There is no doubt that the latter protection as sought<sup>35</sup>, and as granted<sup>36</sup>, included a public performance right.
- 30 g. The future (apparently after *Cawardine*) of the right was “uncertain” and other countries did not provide for it.<sup>37</sup> Each of these is immaterial to the proper construction of s.19.
- h. Not all broadcasts may have been public performances.<sup>38</sup> “Public” in this context has now been revealed to be considerably wider than *Mellor* would suggest: *APRA v*

<sup>25</sup> Owen Report p 41 BD1/128.

<sup>26</sup> Owen Report p 41 BD 1/128.

<sup>27</sup> CRA [30].

<sup>28</sup> Opinion of Sir Robert Garran KC dated 15 October 1934, BD 3/1585-1599 (see esp BD 3/1597-1598); Joint Opinion of Sir Garfield Barwick and G.B. Thomas dated 17 September 1954, BD 3/1511-1537 (see esp BD 3/1531).

<sup>29</sup> Cth [26]; CRA [17].

<sup>30</sup> Cth [28].

<sup>31</sup> CRA [28].

<sup>32</sup> *Cawardine*, per Maugham J at 456, BD 1/589.

<sup>33</sup> See *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at [32].

<sup>34</sup> *Minutes of Evidence taken before the Law of Copyright Committee, 1910*, BD 1/325.

<sup>35</sup> Article 14 of the Berlin Convention, BD 1/295-296.

<sup>36</sup> 1911 Act, s.35(1), definition of “dramatic work” and s.1(2)(a).

<sup>37</sup> CRA [31].

<sup>38</sup> CRA [29] referring to *Mellor v ABC* [1940] AC 491.

**C. No proprietary right acquired – the effect of *Tape Manufacturers***

22. The defendants contend that there is no acquisition because there is no transfer of an exclusive right over property to the putative acquirer. The defendants all seek to rely on *Tape Manufacturers*, and submit that that decision is not inconsistent with the subsequent case law. Yet CRA at [76] – more candidly than the other two defendants – goes on to concede that the statements made in the judgments there “predate the decision in *Mutual Pools*, and may state the effect of s.51(xxxi) too narrowly to the extent that they insist on somebody acquiring ‘an interest in property’ in all cases (although ... three members of the majority in *ICM* used that form of words)”.
23. From *Mutual Pools* onwards, members of this Court have come to accept a broader view of what type of transfer of benefit suffices to establish that a law effects an acquisition (as opposed merely to effecting a taking). The defendants do not seem to deny that a broadcaster engaging ss.109 and 152 would be taking a tangible benefit from the use of the property by broadcasting it. That brings the matter immediately within the statements in, inter alia, *Mutual Pools* and *ICM Agriculture* that “there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property.”<sup>39</sup>
24. The view that the type of benefit that is acquired must be capable of being characterised as proprietary of itself – and not be merely a reduction in a right with a correlative increase in freedom from suit for infringement of copyright – cannot stand together with this Court’s decisions in *Georgiadis* and *Smith v ANL*. Those cases did not even involve complete extinguishment of rights. The legislation considered in the former denied the plaintiff “his right to recover damages for non-economic loss and deprived him of his entitlement to full recovery of economic loss, but did not extinguish the whole of the rights comprising his common law cause of action”.<sup>40</sup> And the legislation in the latter merely imposed a 6-month transitional limitation period.
25. To confine or limit pursuit of a chose in action confers no proprietary interest on the person liable to suit (leaving aside cases where the subject of the cause itself concerned an item of property). It simply reduces, limits or removes the contingent liability of that person to being subject to some court order, usually for the payment of money. Further, neither the person’s liability to suit, nor the reduction/limitation of that liability, is tradeable. As Gleeson CJ observed in *Smith v ANL* at [7]<sup>41</sup>:
- Once it is accepted, as the authorities establish, that a chose in action is a species of property to which s 51(xxxi) applies, and that the constitutional guarantee is not to be narrowly confined, then modification of a right to bring an action, in circumstances where a corresponding advantage accrues to the party against whom action may be brought, would ordinarily involve an acquisition of property.
26. This new context was recognised in the joint judgment in *Chaffey* at [21] and [24]. There is no warrant for seeking to limit the significance of those passages in the ways suggested by the defendants.
27. A further example may also illustrate the problems with the suggestion that a mere increase

<sup>39</sup> *Mutual Pools & Staff v Commonwealth* (1994) 179 CLR 155 per Deane and Gaudron JJ at 185 (emphasis added); *ICM Agriculture v Commonwealth* (2009) 240 CLR 140 per French CJ, Gummow and Crennan JJ at [82]; Hayne, Kiefel and Bell JJ at [147]; Heydon J at [190].

<sup>40</sup> To quote Gaudron and Gummow JJ in *Smith v ANL* (2000) 204 CLR 493 at [22].

<sup>41</sup> (2000) 204 CLR 493 at [7].

in freedom is insufficient to complete an acquisition. If a federal statute provided that lessor-owners of farms could place their own stock on their farms in circumstances of drought, that would create a reduction in rights of the lessee farmers (with respect to quiet possession) and create a correlative immunity in the lessors. It would also substantially undermine the value of the leasehold property interest held by the lessees, to the benefit of the lessors. It is difficult to see why s.51(xxxi) should not speak to the situation.

- 10 28. The ABC argues at [28] that in “the case of copyright ... any diminution in the rights necessarily reflected a correlative enhancement of restoration of the liberty of action of others”, referring, it seems, to its discussion at [11]-[14] about statute modifying common law rights in copyright. The abolition of real property rights would also restore a liberty of freedom of movement to the public at large. This cannot be to the point.
29. *Tape Manufacturers* is in any event distinguishable from this case for the two reasons given in the plaintiffs’ primary submissions at [103]-[105]. First, the right of the broadcasters here is a conditional legal right, in contrast to the unconditional nature of both the immunity and the levy in *Tape Manufacturers*. The point was not “irrelevant to the Court’s analysis”, as the Commonwealth asserts at [34]. Properly understood, the fact that the levy there in question was not a payment “in respect of a right granted” to the payer of the levy was essential to the conclusion of Mason CJ, Brennan, Gaudron and Deane JJ at 497 and at 500 that there was no acquisition.
- 20 30. Secondly, here broadcasters do gain a proprietary interest, being the new copyright in what is broadcast. The ABC submits that “that conferral of a right is not linked in any way to the immunity created by s.109”.<sup>42</sup> That is incorrect. Without the statutory licence given by s.109, and in the absence of agreement, then the broadcaster would not be able to broadcast relevant sound recordings such as to obtain its own further copyright interest. It may be that there is no precise correspondence between what was lost and what is gained – nor need there be.<sup>43</sup>

#### **D. The permissible adjustment and incompatibility arguments**

- 30 31. The defendants mix together arguments of inherent susceptibility to variation, adjustment of competing rights, and incongruity. Some reliance is sought to be placed upon the “attempt to balance competing rights” in the 1911 Act.<sup>44</sup> But this can hardly suffice. A great deal of legislation involves compromising between different interests.<sup>45</sup> Once enacted, it is the law, and if it creates stable and durable property rights, then property is created and cannot be acquired other than on just terms.
- 40 32. The same answer applies to the Commonwealth’s detailing of the controversies that erupted from time to time between broadcasting and recording interests (at [37]-[62]). The controversy re-emerged in the 1960s, and led to a different political resolution (cf CRA at [43]). That was open to the Parliament prospectively, just as it may adjust the law relating to future potential causes of action. But it may not do so retrospectively. Contrary to CRA’s submission at [71]-[72], a reduction of an existing intellectual property right is not relevantly prospective merely because that reduction only operates in the future. The same might be said of an existing cause of action not yet sued upon, as in *Smith v ANL*, or of the farming example given above.

<sup>42</sup> ABC [36]; see similarly CRA [78(b)].

<sup>43</sup> *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1; *Newcrest Mining v Commonwealth* (1997) 190 CLR 513 at 634 per Gummow J.

<sup>44</sup> CRA [24].

<sup>45</sup> *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at [32]; *APLA v Legal Services Commissioner* (2005) 225 CLR 322 at [424] per Hayne J.

33. The Commonwealth submits at [41] that the possibility of adjustment of rights was inherent in the 1911 and 1912 Acts because the language of “subject to this Act” is employed. Yet that is hardly a distinguishing feature of this legislative scheme. After all, the “[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute”.<sup>46</sup>
34. The Commonwealth makes a related argument at [62] that the rights in question were inherently susceptible to variation from the beginning by a legislature because they were “created by a Parliament not subject to a provision like s.51(xxxi)”. On the same logic, presumably the Commonwealth is authorised to acquire any property created by State statutes – such as all realty held under Torrens title.
35. The Commonwealth asserts that the history up to 1968 shows that the caps were imposed to overcome distortion, anomaly or unintended consequences in the working of the particular scheme.<sup>47</sup> It is an assertion unsupported by argument.
36. The ABC contradicts itself on its position with respect to s.51(xxxi). At [44] it concedes that s.51(xxxi) might apply to some laws under s.51(xviii), such as a law “to nullify existing causes of action for infringement of copyright”. Yet at [47] it submits that “the power to make laws which extinguish or modify existing copyrights is also an inherent aspect of the legislative power”, as though that of itself established incongruity (see also [15]-[16]).
37. All these points – and related ones made by CRA and ABC – point to the real logic of the defendants’ arguments: the rights in question were merely created by statute, and statute is always capable of being changed. Yet all statutory rights are susceptible of repeal, because any legislative power contains within it the power to repeal.<sup>48</sup> And any common law or equitable right is also susceptible to being overridden by statute. But that does not mean all powers are therefore not subject to s.51(xxxi).
38. The defendants submit that technological development may call for continuing regulation of intellectual property rights.<sup>49</sup> That may be so, but this cannot be used as some vague and general purpose pretext for modifying private property rights. No technological change had impelled the imposition of either cap.
39. It is in the very nature of much intellectual property that it is created in areas of research and innovation. The fundamental purpose of intellectual property rights is to reward creativity, enterprise and to encourage – even promote – technological development and change. Much money, time, intellectual effort and skill may be devoted to researching new pharmaceuticals, designing a better motor engine, or training in fine arts, in reliance upon the ability to exploit intellectual property rights created as a result. Such rights counterbalance the comparatively high risk of such projects by creating a significant reward. The point of intellectual property rights is that they are stable, durable, valuable property rights that may impart stable and consistent returns or income to an otherwise economically high risk and volatile endeavour. The notion of regulating technological development is thus not incongruous with the requirement of just terms for subsisting exclusive intellectual property rights. There is no incongruity between the granting of intellectual property rights per se and the provision of just terms: see plaintiffs’ primary submissions at [113]-[115].

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<sup>46</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69].

<sup>47</sup> Cth [51], referring to *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 237.

<sup>48</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [12]-[14] and [57].

<sup>49</sup> Cth [38], [39] & [60]; ABC [47]; CRA [84].

## E. Just Terms

40. The defendants assert that just terms have been provided or that the plaintiffs have not discharged their burden of proving a lack of just terms.<sup>50</sup> Yet it is notable that none of the defendants have attempted to challenge the logic of *Johnston Fear & Kingham & the Offset Printing Company Pty Limited v Commonwealth* (1943) 67 CLR 314.
41. CRA at [94] asserts that "...it would be a mistake to equate that possible result [that the Tribunal will not be able to award an amount which it thinks represents the true value of the broadcast right] with an absence of just terms...". Yet a limit upon damages that might be awarded for economic loss with respect to a claim in negligence would not affect all claimants. That does not alter the fact that it may represent an acquisition of property on other than just terms.
42. Looking to the legal rights, duties, liabilities created by the 1968 Act, the caps impose a strict legal limit on the remuneration payable. That goes to the central economic value of the rights and cannot simply be brushed aside as being of no consequence. Those caps do not amount "to a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property, fair and just as between him and the government of the country".<sup>51</sup>
43. The defendants all rely on the history of payments prior to the commencement of the 1968 Act. Yet, as the plaintiffs put in chief at [155]-[157], the future in the relevant markets was not reliably predictable as at 1 May 1969, and there have been many instances where the Copyright Tribunal has set rates at levels significantly higher than previous payments. What was known prior to the 1968 Act was that the commercial radio stations were paying APRA royalties of approximately 1.7% of revenue for the exercise of the co-existing right.<sup>52</sup> Whatever may be the detail of commercial negotiations spanning some 75 years, there is a fundamental difference between equitable remuneration, on the one hand, and remuneration subject to a fixed and inflexible cap on the other. In the present context, it is plain that the latter is inconsistent with just terms.
44. CRA submits at [95]-[96] that any acquisition occurred on 1 May 1969, and that "concept of just terms does not involve any entitlement to benefit from future increases in the value of the property that is acquired". That is too narrow a view of when the acquisition occurred. In any case, given the long term nature of intellectual property rights, the possibility of future increases in value cannot be excluded from a proper assessment of value.
45. The defendants suggest that the caps were inserted merely to counter the possible creation of a copyright in sound recordings in the United States.<sup>53</sup> But, as the Commonwealth concedes at [49], by the mid-1960s "the prospect of an amendment (in the foreseeable future) to US law to create a copyright of that kind in sound recordings was becoming increasingly remote". In fact, the amendment never eventuated. As noted in the plaintiffs' primary submissions at [151], the evidence suggests the concerns of the broadcasters were much broader than the defendants suggest, including as to the possibility of record manufacturers seeking and obtaining royalties as high as 7.5% of revenue.
46. The Commonwealth submits at [70]-[71] that the *WEA Records* decision of the Tribunal illustrates that even in 1983 the 1% cap had no practical effect. Although the reasons of the

<sup>50</sup> Cth [18] & [66]; ABC [7(b)].

<sup>51</sup> Cf CRA [93], citing Dixon J in *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 290.

<sup>52</sup> Letter dated 22 September 1967 from the Federation of Australian Commercial Broadcasters to the Hon. Nigel Bowen, BD 3/1246.

<sup>53</sup> Cth [50], CRA [40].

Tribunal do not address squarely the significance of the cap, it is far from clear that it had no effect on its reasoning, and there is every reason to infer that it did in establishing the realm of its discretion. The Tribunal, acting properly, could hardly have failed to take it into account.

47. The ABC at [56] says that before concluding the operation of its cap prevented just terms, “it would be necessary to consider a number of matters relevant to what would be an appropriate amount to pay pursuant to s.152”, which it then lists. Those very matters illustrate the arbitrariness of the cap. That the ABC’s 0.5¢ cap is indexed by reference to population does not assist in overcoming its arbitrary nature,<sup>54</sup> including by reason of the fact that it is not indexed for inflation, the effect of which would be to increase the cap to 5¢ per person, an increase of more than 900%.<sup>55</sup>

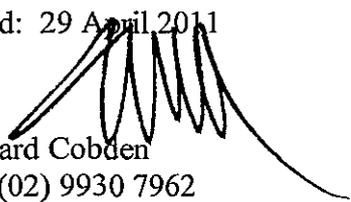
#### **F. Reading down and severance**

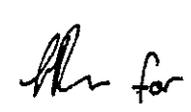
48. The Commonwealth and CRA say that in the event of any invalidity ss.109 and 152 should be read down to exclude 1911 Act sound recordings. The ABC, on the other hand, agrees at [64] that this “is not appropriate, for the reasons [the plaintiffs] give” at [163(a)] of their primary submissions.

49. The purpose of s.109 and 152 was that a broadcaster could obtain a Copyright Tribunal determination, satisfaction of which would stand in complete satisfaction of any claim by any owner of the broadcast copyright in a sound recording. Reading down the provisions in the manner suggested would be contrary to that legislative intention. The caps are, however, severable. The provisions in the 1967 Bill were framed without the caps, and the Attorney-General commented in the second reading speech<sup>56</sup> that the caps were introduced into the existing scheme for “special circumstances” then existing, and were regarded as susceptible of amendment and were certainly not central to the remainder of the scheme.<sup>57</sup> A similar cap was thought to be severable in *Johnston Fear & Kingham v Commonwealth*.<sup>58</sup> However, if the caps cannot be severed from the balance of the sections, then the appropriate result is that s.152 is invalid (rendering also s.109 inutile).

50. Finally, as to costs: the central issues in this case go to whether there is any invalidity in the 1968 Act due to conflict with s.51(xxxi). If such invalidity is found then the plaintiffs should have their costs, regardless of which of the possible consequences is found to exist.

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<sup>54</sup> Cf ABC [52]; Cth [75].

<sup>55</sup> This figure is based upon a calculation performed using the inflation-effect calculator on the website of the Reserve Bank of Australia: see <http://www.rba.gov.au/calculator/annualDecimal.htm>.

<sup>56</sup> Second Reading Speech by Mr Bowen, Hansard, 16 May 1968, BD 3/1403.

<sup>57</sup> As evidenced by cl.153 of the 1968 Bill.

<sup>58</sup> (1943) 67 CLR 314.



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