

**PHONOGRAPHIC PERFORMANCE COMPANY OF AUSTRALIA LIMITED & ORS v COMMONWEALTH OF AUSTRALIA & ORS (S23/2010)**

Second amended writ of summons: 27 January 2011  
(original filed 17 February 2010)

Date of special case: 3 February 2011

The Phonographic Performance Company of Australia Limited ("PPCA") represents many owners and controllers of sound recordings. It does this by granting licences which authorise the broadcasting of sound recordings in which copyright subsists. The CRA (formerly known as the Federation of Australian Radio Broadcasters) is the industry representative for commercial radio broadcasters. It negotiates industry license agreements for its members' benefit.

EMI Music Australia Pty Limited, Sony Music Entertainment (Australia) Pty Limited, Universal Music Australia Pty Limited, Warner Music Australia Pty Limited and J Albert & Son Pty Limited all make and licence sound recordings in Australia.

Over the past century or so, developments in the law of copyright have followed the advances in technology. Differences have emerged however between the copyright protection afforded by the British legislation (as adopted by Australia) and that which has been adopted by the United States. Legislative reform in Australia resulted in the *Copyright Act 1968 (Cth)* ("the Act") being passed.

Over the years, both public broadcasters (such as the Australian Broadcasting Corporation) and commercial broadcasters have been required to compensate the various record manufacturers (pursuant to a variety of different formulas) for the use of sound recordings in which they either owned or controlled the copyright. Under the current formula, head agreements have been struck between the PPCA and the CRA whereby the PPCA enters into individual licence agreements (known as member licences) with each individual broadcaster. The PPCA then grants a licence to that broadcaster to broadcast sound recordings controlled by its licensors. The aggregate of the licence fees payable to PPCA is expressed as a percentage of the gross revenue of CRA members, currently 0.4%. The ABC however pays 0.5 cents per head of population, an amount unchanged since 1968.

Various sections of the Act still grant the Copyright Tribunal power to determine the remuneration for the use of material in which copyright subsists.

On 20 January 2011 Justice Gummow referred the questions of law set out in the special case into the Full Court for consideration.

The questions stated for the opinion of the Full Court are as follows:

- 1) Are some or all of the provisions in ss 109 and 152 of the Act beyond the legislative competence of Parliament by reason of s

51(xxxi) of the Constitution?

- 2) If so, should some or all of these provisions be read down or severed and, if so, how?
- 3) What order should be made in relation to the costs of the special case?