

FEDERAL COURT OF AUSTRALIA

Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Limited [2010] FCA 29

Citation: Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Limited [2010] FCA 29

Parties: **LARRIKIN MUSIC PUBLISHING PTY LTD (ACN 003 839 432) v EMI SONGS AUSTRALIA PTY LIMITED (ACN 000 063 267), EMI MUSIC PUBLISHING AUSTRALIA PTY LIMITED (ACN 000 040 951), COLIN JAMES HAY and RONALD GRAHAM STRYKERT**

EMI SONGS AUSTRALIA PTY LIMITED (ACN 000 063 267), EMI MUSIC PUBLISHING AUSTRALIA PTY LIMITED (ACN 000 040 951) v LARRIKIN MUSIC PUBLISHING PTY LTD (ACN 003 839 432)

File numbers: NSD 145 of 2008
NSD 340 of 2008

Judge: **JACOBSON J**

Date of judgment: 4 February 2010

Catchwords: **COPYRIGHT** – whether recordings of a musical work infringed copyright in an earlier musical work by reproducing a substantial part of the earlier work – causal connection between works not denied – objective similarity determined by aural and visual comparison of musical elements of the works – emphasis is on quality rather than quantity of what is taken – copied features must be a substantial part of the copyright work, not of the infringing work – overall appearance of infringing work may differ from copyright work.

TRADE PRACTICES – whether respondents misrepresented to collecting societies that there was no infringement in the copyright work and that they were entitled to 100% of royalties from infringing work – continuing representations made by respondents to collecting societies.

RESTITUTION – whether respondents were unjustly enriched at the expense of the applicant – whether mistake of fact or law was made by collecting societies – claim did not fall within recognised categories of restitution.

- Legislation: *Copyright Act 1968* (Cth), ss 13, 36, 115
Fair Trading Act 1989 (NSW)
Trade Practices Act 1974 (Cth), ss 52, 82
- Cases cited: *Aon Risk Services Australia Ltd v Australian National University* (2009) 258 ALR 14 cited
Austin v Columbia Gramophone Co Ltd [1923] Macg CC 398 cited
Australia and New Zealand Banking Group Limited v Westpac Banking Corporation (1988) 164 CLR 662 cited
British Northrop Ltd v Texteam Blackburn Ltd [1974] RPC 57 cited
David Securities Pty Limited v Commonwealth Bank of Australia (1992) 175 CLR 353 cited
Designers Guild Ltd v Russell Williams (Textiles) Ltd (trading as Washington D.C.) [2000] 1 WLR 2416 cited
Drynan v Rostad (1994) 59 CPR (3d) 8 cited
Dyson (Trading as Pharmacy Plus Tumut) v Pharmacy Board of New South Wales (2000) 50 NSWLR 523 cited
Elwood Clothing Pty Ltd (ACN 079 393 696) v Cotton on Clothing Pty Ltd (ACN 052 130 462) (2008) 80 IPR 566
D'Almaine v Boosey (1835) 1 Y. & C. EX. 288 cited
Farah Constructions Pty Limited v Say-Dee Pty Limited (2007) 230 CLR 89 cited
Francis Day & Hunter Ltd v Bron [1963] 1 Ch 587 followed
Grignon v Roussel (1991) 38 CPR (3d) 4 cited
IceTV Pty Ltd v Nine Network Australia Pty Ltd (2009) 254 ALR 386 cited
Inform Design and Construction Pty Ltd v Boutique Homes Melbourne Pty Ltd (2008) 77 IPR 523 cited
Jobbins v Capel Court Corporation Limited (1989) 25 FCR 226 applied
Ladbroke (Football) Ltd v William Hill (Football) Ltd [1964] 1 WLR 273 followed
Lumbers v W Cooks Builders Pty Ltd (in liquidation) (2007) 232 CLR 635 cited
Metricon Homes Pty Ltd (ACN 005 108 752) v Barrett Property Group Pty Ltd (ACN 088 015 267) (2008) 248 ALR 364 cited
MGICA (1992) Ltd (formerly MGICA Ltd) v Kenny & Good Pty Ltd (1996) 140 ALR 313 referred to
Pepsi Seven-Up Bottlers Perth Pty Limited v Federal Commissioner of Taxation (1995) 62 FCR 289 cited
S. W. Hart & Co Proprietary Limited v Edwards Hot Water Systems (1985) 159 CLR 466 followed
Tamawood Ltd v Henley Arch Pty Ltd (2004) 61 IPR 378 cited
University of New South Wales v Moorhouse (1975) 133 CLR 1 cited

Wardley Australia Limited v The State of Western Australia
(1992) 175 CLR 514 distinguished

P. Birks, *An Introduction to the Law of Restitution* (1985)

K. Garnett et al (eds), *Copinger and Skone James on Copyright* (15th ed, 2005)

J.D. Heydon, *Cross on Evidence* (7th Australian edition, 2004)

K. Mason, J.W. Carter and G.J. Tolhurst, *Mason and Carter's Restitution Law in Australia* (2nd edition, 2008)

Date of hearing: 27-30 October 2009

Date of last submissions: 16 November 2009

Place: Sydney

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 345

Counsel for the Applicant: Mr R.L. Lancaster SC with Mr C.D. Wood

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Fourth and Fifth
Respondents: Mr D.K. Catterns QC with Mr C. Dimitriadis and Mr P.A.
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Solicitor for the Third,
Fourth and Fifth
Respondents: DLA Phillips Fox

The Sixth Respondent did not appear.

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

NSD 145 of 2008

**BETWEEN: LARRIKIN MUSIC PUBLISHING PTY LTD (ACN 003 839
432)
Applicant**

**AND: EMI SONGS AUSTRALIA PTY LIMITED (ACN 000 063 267)
Third Respondent**

**EMI MUSIC PUBLISHING AUSTRALIA PTY LIMITED
(ACN 000 040 951)
Fourth Respondent**

**COLIN JAMES HAY
Fifth Respondent**

**RONALD GRAHAM STRYKERT
Sixth Respondent**

JUDGE: JACOBSON J

DATE OF ORDER: 4 FEBRUARY 2010

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The parties bring in short minutes of order to reflect the reasons given in this judgment.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using Federal Law Search on the Court's website.

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

NSD 340 of 2008

**BETWEEN: EMI SONGS AUSTRALIA PTY LIMITED (ACN 000 063 267)
First Applicant**

**EMI MUSIC PUBLISHING AUSTRALIA PTY LIMITED
(ACN 000 040 951)
Second Applicant**

**AND: LARRIKIN MUSIC PUBLISHING PTY LTD (ACN 003 839
432)
Respondent**

JUDGE: JACOBSON J

DATE OF ORDER: 4 FEBRUARY 2010

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The matter be dismissed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using Federal Law Search on the Court's website.

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

NSD 145 of 2008

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432)
Respondent**

JUDGE: JACOBSON J

DATE: 4 FEBRUARY 2010

PLACE: SYDNEY

REASONS FOR JUDGMENT

INTRODUCTION AND OVERVIEW

1 “Kookaburra sits in the old gumtree” (“Kookaburra”) is an iconic Australian round,
written and composed in 1934 by Miss Marion Sinclair. It is a short musical work, being
described and analysed for the purpose of this proceeding as consisting of only four bars.

2 Two of those bars are reproduced in the 1981 recording of another iconic Australian
composition, the pop song “Down Under” performed and recorded by the group Men at
Work. The two bars are a part of the flute riff which was added to Down Under after it was
first composed.

3 The resemblance between the flute riff of Down Under and the two bars of
Kookaburra did not come to the attention of the owner of the copyright in Kookaburra,
Larrikin Music Publishing Pty Ltd (“Larrikin”), until 2007. Larrikin now claims that the 1981
recording of Down Under, as well as an earlier recording of that song and certain other works
to which I will refer later, infringe its copyright in Kookaburra.

4 The flute riff in Down Under does not consist solely of the two bars of Kookaburra.
Indeed, where it first appears in the 1981 recording, immediately after the percussion
introduction, the flute riff contains only the second bar of Kookaburra.

5 The flute riff is then heard at two later points in Down Under. At those points the flute
riff includes the first and second bars of Kookaburra.

6 But what must be borne in mind when considering the question of infringement is
that, on each occasion when the flute riff appears in Down Under, it includes other notes
which were not part of Miss Sinclair’s composition.

7 The effect of the relevant provisions of the *Copyright Act 1968* (Cth) is that copyright
is infringed where a person, without the license of the owner of the copyright, reproduces a
substantial part of the work: see ss 10, 13, 14(1), 31(1)(a) and 36(1).

8 In order for there to be a “reproduction” within the law of copyright, there must be an
objective similarity between the two works and a causal connection between the plaintiff’s

work and that of the defendant: *S. W. Hart & Co Proprietary Limited v Edwards Hot Water Systems* (1985) 159 CLR 466 (“*S. W. Hart*”) at 472.

9 The second element, namely a causal connection between the works, is not disputed by the principal respondents in these proceedings.

10 Thus, there remain two principal issues. The first is whether there is a sufficient degree of objective similarity between the flute riff in *Down Under* and the two bars of *Kookaburra*.

11 The second issue is whether, if I am of the view that there is the requisite similarity, the bars of *Kookaburra* which are reproduced are a substantial part of that work. That question is to be determined by a quantitative and qualitative consideration of the bars which are reproduced.

12 Needless to say, the musical context in which the bars of *Kookaburra* are reproduced in *Down Under* is quite different from the round which was written by Miss Sinclair nearly 50 years earlier.

13 The expert musicologist called by Larrikin, Dr Andrew Ford, agrees that the harmony of *Down Under* is different from *Kookaburra*. He agrees that there are certain other differences, but in his opinion, the melody of the flute riff when it plays the bars from *Kookaburra* is the same as the melody of the first two bars of Miss Sinclair’s round, although “it has a different feel”.

14 Dr Ford considers the first two bars of *Kookaburra* to be “the signature” of that work. The respondents’ expert witness, Mr John Armiger, agrees with that proposition, but it is a matter of debate between the parties as to whether this characteristic is sufficient to make those bars a substantial part of the work.

15 The debate between the expert witnesses involves a discussion of the concept of a musical hook. Mr Ford observes that in popular music, a hook is a short instrumental figure which (with luck) proves to be instantly memorable and recognisable every time the song is played.

16 Dr Ford's evidence proceeds on the basis that the flute riff is the hook of Down
Under, although he recognises that it contains certain other musical elements apart from the
relevant bars of Kookaburra.

17 The effect of Dr Ford's evidence is that the hook of Down Under is an integrated
musical statement in which an essential element is the incorporation of the two bars of
Kookaburra.

18 By contrast, Mr Armiger is of the view that the combination of the other musical
elements with the bars of Kookaburra creates a new musical phrase which distinguishes it
from Kookaburra.

19 The issue of whether there is a sufficient degree of objective similarity between the
works turns very much on the answer to that question. Inextricably involved in the question is
a consideration of the similarity and difference between the musical elements of the two
works including melody, key and tempo.

20 Ultimately the question is one of fact. It is to be determined by the eye and the ear
with the assistance of expert evidence: *Francis Day & Hunter Ltd v Bron* [1963] 1 Ch 587
(*"Francis Day & Hunter"*) at 608, 618.

21 I was assisted by both of the experts. The evidence of Mr Colin Hay who wrote the
lyrics and chords of Down Under was also helpful. He accepts that the flute riff makes a
reference to part of the melody of Kookaburra, although he did not know it when the 1981
recording was made.

22 Mr Greg Ham, who added the flute riff, was not called by the respondents.

THE PARTIES

23 Larrikin is the applicant in the proceeding.

24 The respondents in this proceeding are Mr Colin James Hay and Mr Ronald Graham
Strykert, the composers of Down Under and former members of Men at Work, and EMI

Songs Australia Pty Limited and EMI Music Publishing Australia Pty Limited (“the EMI parties”), the owner and licensee of the copyright in the words and music of Down Under.

25 Mr Strykert did not appear at the hearing.

26 I will refer to Mr Hay and the EMI parties as “the respondents”.

THE ISSUES TO BE DETERMINED

27 On 27 October 2009, I made orders for the determination of five issues. The first, second and third issues address Larrikin’s central claim that the 1981 recording of Down Under, and an earlier version described as the 1979 recording, as well as two Qantas advertisements which incorporate the flute riff of Down Under, involved the reproduction in a material form of a substantial part of Kookaburra.

28 There have been other recordings of Down Under, and the flute riff has been used in other ways, including as the theme song for the film “Finding Nemo”. The parties have agreed that if the 1981 recording reproduces a substantial part of Kookaburra, a large number of other specified recordings and uses will also be taken to have reproduced a substantial part of Kookaburra.

29 The fourth and fifth issues address Larrikin’s claims that the respondents are liable in damages for misleading and deceptive conduct in contravention of the *Trade Practices Act 1974* (Cth) (“TPA”), or, alternatively, have been unjustly enriched at the expense of Larrikin.

30 The order for the determination of these issues was made under O 29 r 2(a) of the *Federal Court Rules*. If they are answered favourably to Larrikin, they leave for determination the question of what percentage interest in the copyright in Down Under ought to be awarded to Larrikin.

31 Ordinarily I would not have permitted the question of the percentage interest to be dealt with later because it seems to me to be closely related to the question of infringement. However, in the circumstances which arose in this case, considerations of case management and the need to preserve the hearing date persuaded me that it was appropriate to make the order.

THE RELEVANT DISCUSSION OF THE LEGAL PRINCIPLES

32 The principles upon which this case turns were succinctly stated by Gibbs CJ in *S. W. Hart* at 472. His Honour observed that the notion of reproduction for the purpose of copyright law involves two elements: the first being resemblance to, and actual use of, the copyright work; and the second being a causal connection between the copyright work and the infringing work.

33 His Honour explained the element of resemblance by quoting the words of Willmer LJ in *Francis Day & Hunter* at 614, namely that what is required is:

a sufficient degree of objective similarity between the two works.

34 Gibbs CJ also explained the second element by quoting from the same passage in *Francis Day & Hunter* in which Willmer LJ stated the requirement as:

some causal connection between the plaintiffs' and the defendants' work.

35 If these two elements are satisfied in the particular case, the question then arises as to whether the "infringer" has copied a substantial part of the copyright work. Gibbs CJ explained this requirement by quoting the words of Lord Reid in *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 ("*Ladbroke v William Hill*") at 276, in particular:

... the question whether he has copied a substantial part depends much more on the quality than on the quantity of what he has taken.

36 Mason and Brennan JJ agreed with the reasons of Gibbs CJ: see 478 and 491. The reasons of Wilson J were to the same effect: see 480-483.

37 Both Gibbs CJ and Wilson J observed that the question as to what amounts to a reproduction of a substantial part cannot be defined more precisely than to say it is a question of fact and degree which depends on the circumstances of each case: at 472 and 482.

38 The passage from the judgment of Gibbs CJ in *S. W. Hart*, in which his Honour encapsulated the notion of reproduction into the elements of objective similarity and causal connection, has been applied in this Court on many occasions: see eg *Tamawood Ltd v Henley Arch Pty Ltd* (2004) 61 IPR 378 at [43]; *Inform Design and Construction Pty Ltd v Boutique Homes Melbourne Pty Ltd* (2008) 77 IPR 523 at [60]; *Metricon Homes Pty Ltd*

(ACN 005 108 752) v *Barrett Property Group Pty Ltd* (ACN 088 015 267) (2008) 248 ALR 364 (“*Metricon Homes v Barrett*”) at [64].

39 Although the issues before the High Court in *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 254 ALR 386 (“*IceTV*”) were different from those which arose in *S. W. Hart*, the effect of their Honours’ reasons for judgment is consistent with the principles stated by Gibbs CJ in the earlier authority.

40 In *IceTV* at [28], French CJ, Crennan and Kiefel JJ emphasised the principle that copyright protects the particular form of expression of the author’s work.

41 The reasons of Gummow, Hayne and Heydon JJ, though expressed in different terms to those of the “co-majority”, seem to be to the same effect: see *IceTV* at [70], [102].

42 Both of the co-majority judgments referred to the need for the “substantial part” to be determined more by the quality than the quantity of what is copied: *IceTV* at [30], [155], [170].

43 Sir Harry Gibbs’ statement of the principles in *S. W. Hart* draws heavily upon what was said by Willmer LJ in *Francis Day & Hunter*. That was a case of alleged infringement of the copyright in a musical work by the reproduction of eight bars of the chorus of an earlier well-known popular song.

44 The plaintiff in *Francis Day & Hunter* failed before the trial judge, Wilberforce J, who nevertheless found that the eight bars of the copyright work constituted a substantial part of the work and that there was a definite or considerable degree of similarity between those bars and the eight bars of the allegedly infringing work.

45 Notwithstanding this, the plaintiff failed at first instance because Wilberforce J accepted the evidence of the composer of the new work that he had not consciously copied Bing Crosby’s recording of the earlier work, “In a Little Spanish Town”. His Lordship also refused to draw the inference that the composer of the new work must have heard Bing Crosby’s recording and unconsciously copied it: *Francis Day & Hunter* at 596-597.

46 The appeal from the decision of Wilberforce J failed because their Lordships considered that it was not open to them to interfere with the trial judge's factual findings, Wilberforce J having properly instructed himself as to the legal principles which underlay the factual findings: at 615 per Willmer LJ; at 628 per Diplock LJ.

47 Although the plaintiff failed in *Francis Day & Hunter*, the case is authority for a number of propositions which are relevant to the present proceedings.

48 The first is that, as already noted, there must be a sufficient degree of objective similarity between the works and a causal connection between them: see 614 per Willmer LJ; 618 per Upjohn LJ; 623-624 per Diplock LJ.

49 In stating this proposition, Upjohn LJ and Diplock LJ recognised that the causal connection which must be established is that the infringer has copied the plaintiff's work: see 618 per Upjohn LJ; 623-624 per Diplock LJ who said that the copyright work must be the source from which the infringing work is derived.

50 This was also recognised by Gibbs CJ in *S. W. Hart* at 472 in quoting the observation of Lord Reid in *Ladbroke v William Hill* that, broadly, reproduction means copying and does not include the case where an author produces a substantially similar result by independent work, without copying.

51 The second proposition is that the question of objective similarity of musical works is not to be determined by a note for note comparison but is to be determined by the eye as well as by the ear: at 608 per Willmer LJ citing *Austin v Columbia Gramophone Co Ltd* [1923] Macg CC 398; cf Upjohn LJ at 618 who said that the question depends to a large degree upon the aural perception of the judge and upon the expert evidence.

52 Third, the reproduction of the copyright work need not be identical with the original, the test is whether the substance of the copyright work is taken: see 611-612 per Willmer LJ citing *Austin v Columbia Gramophone* and the early English authority of *D'Almaine v Boosey* (1835) 1 Y. & C. EX. 288.

53 In that case the Chief Baron recalled an earlier case in which it was said that a mere bar did not constitute a musical phrase but three or four bars might do so. The Chief Baron went on to say at 302:

Now it appears to me that if you take from the composition of an author all those bars consecutively which form the entire air or melody, without any material alteration, it is a piracy; though ... you might take them in a different order or broken by the intersection of others, like words, in such a manner as should not be a piracy. It must depend on whether the air taken is substantially the same with the original.

54 The observations of Wilson J in *S. W. Hart* at 482 are to the same effect. His Honour said that reproduction does not require complete and accurate correspondence to the copyright work; not every reproduction is a perfect reproduction: citing Megarry J in *British Northrop Ltd v Texteam Blackburn Ltd* [1974] RPC 57 at 72. The emphasis is upon quality rather than quantity, which directs attention to the significance of what is taken.

55 The principles which apply to the taking of a “substantial part” were further explained by the High Court in *IceTV*. French CJ, Crennan and Kiefel JJ noted that the principle dates back to the nineteenth century, although the “substantial part” test was expressly introduced into copyright legislation only in 1911: at [31].

56 Nevertheless, their Honours endorsed the emphasis upon the quality of the original work while adding the observation that the modern authorities direct attention to the degree of originality in the expression of the part of the work that is reproduced: at [40]. Their Honours went on to quote the following passage from K. Garnett et al (eds), *Copinger and Skone James on Copyright* (15th ed, 2005) at 385:

the more simple or lacking in substantial originality the copyright work, the greater degree of taking will be needed before the substantial part test is satisfied.

57 Their Honours also pointed out in *IceTV* that the substantial part test reflects the competing policy considerations which underlie the *Copyright Act* by permitting a measure of legitimate appropriation of an original work: at [157] per Gummow, Hayne and Heydon JJ; see also at [28] per French CJ, Crennan and Kiefel JJ.

58 This achieves an appropriate balance between protection of original works and promotion of the public interest in the encouragement of musical works by providing a just reward for the creator, while at the same time maintaining the public interest of ensuring a

robust public domain in which further works are produced: at [71] per Gummow, Hayne and Heydon JJ.

59 But in my view the observations of their Honours in *IceTV* do not suggest that there is a separate doctrine of legitimate appropriation of a copyright work. Rather, the concept of legitimate appropriation is subsumed in the substantial part test. The new work either reproduces a substantial part of the original work or it does not. This is at the heart of the present case.

THE STEPS IN AN ACTION FOR COPYRIGHT INFRINGEMENT

60 The process by which the comparison is undertaken between the competing works involves three steps. The first is to identify the work in suit in which copyright subsists. The second is to identify in the allegedly infringing work the part that is said to have been derived or copied from the copyright work. The third is to determine whether the part taken is a substantial part of the copyright work: *Metricon Homes v Barrett* at [23]; *Elwood Clothing Pty Ltd (ACN 079 393 696) v Cotton on Clothing Pty Ltd (ACN 052 130 462)* (2008) 80 IPR 566 at [41].

61 The comparison is not concerned with deceptive resemblance as in a passing-off action. This is because the copyright owner's complaint in an infringement action is concerned not so much with resemblance between the works but that the infringer has copied a substantial part of the copyright work: *Designers Guild Ltd v Russell Williams (Textiles) Ltd (trading as Washington D.C.)* [2000] 1 WLR 2416 ("*Russell Williams Textiles*") at 2425 per Lord Millett.

62 Thus, the copied features must be a substantial part of the copyright work, but they need not be a substantial part of the infringing work, the overall appearance of which may be very different from the copyright work: *Russell William Textiles* at 2425.

63 The comparison involves an examination of the similarity between the works to see whether they are sufficiently close, numerous or extensive so as to be more likely to be the result of copying than coincidence: *Russell William Textiles* at 2425.

64 That was what Wilberforce J did in *Francis Day & Hunter* when he compared and contrasted the two tunes by considering the structure, notes and melody, harmony and other features of the songs: *Francis Day & Hunter* at 592-596; see also the summary given by Willmer LJ at 609-610.

The concept of a “hook”

65 The concept of a hook in popular music, to which Dr Ford referred in his evidence, is one which has been the subject of comment in Canadian authorities, demonstrating that the concept is well accepted.

66 In *Grignon v Roussel* (1991) 38 CPR (3d) 4 at 16, Denault J referred to the evidence of the plaintiff’s expert witness who said “the hook” is the attractive part of the song which identifies the song, sets it apart from others and sometimes makes it a popular and commercial success.

67 In *Drynan v Rostad* (1994) 59 CPR (3d) 8 at 18, the trial judge said that a hook is defined as that portion of the song that tends to stick in a listener’s mind or memory; it can be a part of the music, a portion of the lyrics or both.

68 The Canadian authorities adopted the approach taken to the notion of reproduction in *Francis Day & Hunter*: see *Grignon v Roussel* at 13-14; *Drynan v Rossad* at 18-19. The Canadian authorities therefore proceeded on the same basis as the High Court of Australia in *S. W. Hart*.

Identification of the musical works

Kookaburra

69 The relevant original work in which copyright subsists is the 1934 version of *Kookaburra* composed by Miss Marion Sinclair and entered by her into a competition conducted by the Girl Guides Association of Victoria. I described the facts and circumstances in which Miss Sinclair composed the work, and the circumstances in which Larrikin came to acquire the copyright in my judgment in *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd* (2009) 179 FCR 169.

70 The work was published in the Girl Guides publication “Three Rounds by Marion Sinclair” in 1934 in the following form:

KOOKABURRA
Round in 4 Parts. M. Sinclair

The image shows a musical score for the song 'Kookaburra' in 4 parts. The title 'KOOKABURRA' is centered at the top, with 'Round in 4 Parts.' below it and 'M. Sinclair' on the right. The score consists of four staves of music, each with a treble clef and a key signature of one flat (F major). The lyrics are written below the notes. The first staff has the lyrics 'Koo...ka...bur...ra sits on an old gum tree--'. The second staff has 'Mer...ry mer...ry king of the Bush is he---'. The third staff has 'Laugh Koo-ka-bur-ra Laugh, Koo-ka-bur-ra'. The fourth staff has 'Gay your life must be.' The music is written in a simple, accessible style suitable for a children's publication.

71 In the “Three Rounds” publication, Kookaburra was transcribed in the key of F major. As noted on the manuscript, the song was composed as a round in four parts; that is, it was intended to be sung by four voices or groups of voices in a way in which all the parts continuously repeat.

Down Under

72 Down Under was written and composed in 1978 by Mr Hay and Mr Strykert. I will refer later to the evolution of the song and the circumstances in which the flute riff came to be added by Mr Ham.

73 Down Under was first published in about 1979 on the B-side to Men at Work’s seven inch single “Key Punch Operator” (“the 1979 recording”). An improvised flute solo by Mr Ham appears on this recording. The reference to Kookaburra appears once in the 1979 recording of Down Under. It embodies the first four bars of Kookaburra in the form shown above (or the first and second bars in Dr Ford’s Example A shown below) at 1:18 into the melody in the manner described by Dr Ford as Example E, to which I will refer below.

74 The 1981 recording of Down Under appeared on the album “Business as Usual”. Mr Ham’s flute riff appears again on the Business as Usual recording. The reference to Kookaburra appears three times in various forms, discussed in detail below.

Dr Ford’s reports

75 Dr Andrew Ford is a composer, writer and broadcaster who has been the resident composer at the Australian National Academy of Music in Melbourne since 2007. Dr Ford compiled three expert reports which were relied upon during the hearing.

76 Dr Ford’s first report contained four relevant musical examples to which reference was made throughout his evidence and the evidence of other witnesses. Example A is a version of Kookaburra transposed in D major as follows:

Example A: 'Kookaburra Sits' undotted melody

Koo-ka-bur-ra sits in the old gum tree... Mer-ry, mer-ry king of the bush is he...

Laugh, koo-ka-bur-ra, laugh, koo-ka-bur-ra, Gay your life must be.

77 Dr Ford’s second example, Example B, was a “dotted” version of Example A which appears in some printed versions of Kookaburra. In that version, the melody of Kookaburra is the same, however the rhythm differs slightly. Example B is not relevant for present purposes.

78 Example C consists of what Mr Ford described as the “basic hook” of Down Under, a descending figure of five notes spanning the first half of a 4/4 bar as follows:

Example C: 'Down Under' basic hook

D C B A G

79 Dr Ford noted in his first report that the “basic hook” recurs throughout Down Under, serving both as an embellishment to the accompaniment and also as one element in a longer, four bar hook. The longer hook first appears at the start of Down Under, and consists of four phrases. The longer hook is first heard in an incomplete form, which was Example D in Dr Ford’s report:

Example D: 'Down Under' extended hook (first appearance)



80 In this example, Dr Ford notes that in bar 1, the flute plays a version of the basic hook (with two extra notes); the second phrase (bar 2) is completely missing and is replaced by a simple rhythmic fill; bar 3 contains the basic hook; and the fourth phrase (bar 4) is the first quotation from Kookaburra, containing the second phrase of Kookaburra.

81 Example E is the full extended hook, as follows:

Example E: 'Down Under' extended hook (subsequent appearances)



82 In this full version, bars 1 and 3 are the basic hook, while bars 2 and 4 are said to be direct quotes from Kookaburra.

83 Where they occur in Down Under, Examples C, D and E are played on the flute.

84 Dr Ford also analysed the structure of the 1981 recording. He broke down the component parts of the song into the following structure:

- 1 bar: Percussive intro
- 4 bars: Hook (Example D – 4th bar contains 2nd phrase of ‘Kookaburra’)
- 8 bars: Verse
- 8 bars: Chorus
- 4 bars: Hook (Example E – 2nd bar contains 1st phrase of ‘Kookaburra’, 4th bar contains 2nd phrase)
- 8 bars: Verse

8 bars: Chorus
8 bars: Instrumental fill
4 bars: Hook (Example E – 2nd bar contains 1st phrase of ‘Kookaburra’, 4th bar contains 2nd phrase)
8 bars: Verse
8 bars: Chorus
8 bars: Chorus
8 bars: Chorus
8 bars: Chorus (fade begins)

Men at Work and the evolution of Down Under

85 Down Under, in the form in which it was recorded on the 1981 recording, evolved over a period of time from its composition in 1978.

86 Initially, Mr Hay composed the lyrics, verses and choruses and chord structure on his acoustic guitar. The percussive bass line was composed by Mr Strykert, who added some guitar embellishments when Mr Hay and Mr Strykert began to play the song on their acoustic guitars live in clubs and pubs around Melbourne in 1978.

87 Mr Hay jotted down the original version in his notebook in about May 1978.

88 Men at Work was formed in 1979. The group started as a trio which included Mr Hay and Mr Strykert with a third person playing drums.

89 Greg Ham joined the group in about the middle of 1979. He is classically trained and can play and read music. He plays a number of instruments including the flute.

90 During 1979 and 1980, Men at Work performed regularly at pubs around Melbourne including The Cricketers Arms. By that time, the group had grown to five musicians. The songs which they performed included Down Under, to which Mr Ham had by then added a flute line.

91 The version of Down Under which Men at Work performed during this period was different from the form in which it was recorded on the 1981 recording. It was close to, though not identical to the 1979 recording, although no two versions of a live performance are identical.

92 In 1979, Men at Work financed the studio recording of a seven inch vinyl single of
Down Under. It was this version which was released in the latter part of 1979 as the “B side”
of another single called Key Punch Operator.

93 As I have said above, the phrases which Dr Ford called Example E occur at 1:18 into
the recording. The first and third phrases contain the basic hook, and the second and fourth
phrases are quotes from the first and second bars of Kookaburra. That is the sole appearance
of Example E on the 1979 recording.

94 The 1981 recording was made after Men at Work had achieved commercial success in
another recording called “Who Can It Be Now” which was produced by an American record
producer, Mr Peter McIan.

95 Mr McIan also produced the 1981 recording of Down Under which was released on a
33 $\frac{1}{3}$ inch long play vinyl album known as “Business as Usual”. Down Under was one of 10
recordings featured on that album.

96 In his production of the 1981 recording, Mr McIan rearranged and shortened Down
Under from the original version. He reduced it to three minutes to make it more suitable as a
pop song. He also substituted Mr Ham’s flute riff for the original bass riff melody
introduction with a view to making the flute the lead solo instrument, as done with the
saxophone introduction to “Who Can It Be Now”.

97 As I said earlier, Mr Ham was not called by the respondents, but portions of his
affidavit were tendered as admissions. The admissions included Mr Ham’s statement that he
was aware of Kookaburra, having heard it at school when he was at primary school in
Australia in the late 1950s. He is “pretty sure” that Kookaburra was part of his school’s song
book.

98 Mr Ham also admitted that his aim in adding the flute to Down Under was to try to
inject some Australian flavour into the song. He said the flute section which he added fitted
rhythmically to Down Under and the percussion/drum section at the start of the song, which
is in fact played on beer bottles with different amounts of water in them.

99 Mr Ham pointed out that the lyrics, vocal melody, chords and bass line were already established when he first heard Down Under. He looked for a complementary part for his instruments, and especially one which fell into the “tongue in cheek” nature of the song. He described the flute line as “an Aussie cliché melody”, or what he thought was an “Irish-Australian style melody”.

100 The Business as Usual album achieved huge commercial success in Australia and internationally. It reached number one on the record album charts in Australia, the United Kingdom and the United States of America in the early 1980s with sales in the millions.

Mr Hay’s Evidence

101 Mr Hay was born in Scotland and immigrated to Australia in June 1967 with his family. When he was about 12 years old, he started playing the guitar. He started performing solo in folk clubs in about 1970 when he was at high school, and later performed at university campuses and at pubs and music festivals.

102 As I said earlier, Mr Hay accepts that he is now aware that the flute line in the 1981 recording (and the 1979 recording) makes a reference to part of the melody of Kookaburra.

103 However, Mr Hay insists that he was unaware of the reference to Kookaburra when the recordings were made. He says he became aware of the reference “some years ago” but he cannot remember how he learned of it. He says he may have learned of it from Mr Ham telling him about it, or possibly from someone else.

104 Men at Work made a video performance of Down Under in 1981 in substantially the same musical and lyrical form as the 1981 recording. The video accompanied the Business as Usual version of Down Under, that is to say the 1981 recording. It was apparently intended to promote the song and the Business as Usual album.

105 I will refer to the video in more detail below, but it is sufficient for present purposes to say that it included a shot of Mr Ham playing the flute riff in the middle of the song, whilst sitting in a tree playing to a koala in a hangman’s noose.

106 Mr Hay denied that he realised at the time the video was made that this portion of the video was a direct reference to Kookaburra. Nevertheless, he now accepts that the flute riff played by Mr Ham while sitting in the tree was a direct musical reference to Kookaburra, although he did not concede that it was an obvious reference.

107 Men at Work split up in about 1985 and Mr Hay has performed as a solo musician since that time. He regularly plays and performs Down Under on his acoustic guitar at concerts and other live performances. Mr Hay is also a vocalist and he sings the words of the song.

108 In his evidence in chief, Mr Hay gave me a rendition of the words and music of Down Under, played on an acoustic guitar. He also played Dr Ford's Examples A, D and E on his guitar. This demonstrated the aural difference between the flute line when played solely on the guitar and the flute line as it is played on the 1981 recording.

109 However, Mr Hay accepted in cross-examination that when he performs Down Under live in concerts, the flute line is often played by other instruments, such as the horn section played by back-up musicians. This was also the case in the recording of Down Under on Mr Hay's solo album, Man at Work, where the flute line was played on a penny whistle.

110 Sometimes Mr Hay is accompanied in concert by his wife Cecilia and her band, Cecilia Noël & the Wild Clams. When that happens, she sometimes plays the flute line on an "air flute". This is a musical portrayal of a flute using only the hands and mouth, with the sound played on another instrument by a member of the band or by the singer "scatting" the relevant notes. Scatting is a technique often used in jazz which involves the improvisation of vocal sounds by a singer instead of words.

111 Mr Hay also accepted that for a period of about two or three years from around 2002, when he performed Down Under at concerts, he sometimes sang the words of Kookaburra at about the middle of Down Under, at the point at which he reached the flute line.

112 Mr Hay accepted, without hesitation, the importance of Down Under in Australian popular music. He said the choruses give the song its "anthemic quality". He has been

playing the song for the last 30 years and was involved with the playing and performance of the song at the closing ceremony of the Sydney Olympic Games.

113 Senior counsel for Larrikin, Mr Lancaster SC, cross-examined Mr Hay in some detail about the Australian themes and qualities which form the basis of Down Under, both on the 1981 recording and in the video to which I referred above.

114 Mr Hay explained that the verses were inspired by the Barry Humphries character, Barry McKenzie, the stereotypical Australian, but that the song is ultimately a celebration of the uniqueness of Australia.

115 This is reflected in the references in the lyrics to things typically Australian such as Vegemite, the “fried out” Kombi and beer.

116 These images are unusually portrayed in the video by showing the “man from Brussels” receiving a very large Vegemite sandwich in an Australian rules handball pass. The man then pours beer for the group from cans coloured blue, which was an unmistakable reference to the well-known, typically Australian brand of beer.

117 The video includes an image of a kangaroo hopping, and, as I have said, Mr Ham plays the flute riff sitting in a tree playing to a koala.

118 Mr Hay accepted that the video was made so as to include musical references to the Australian themes that complement the lyrical references contained in Down Under. He pointed out that the recording of the Business as Usual album happened very quickly, as did the making of the video. He said he did not actually give any thought to what Mr Ham was playing, in particular that it was the melody of Kookaburra.

119 However, as I said earlier, Mr Hay now accepts the reference to Kookaburra in Down Under. He accepted that the melody of Dr Ford’s Example E is identical to Kookaburra except that it is in a different key.

120 Mr Hay told me he has no memory of hearing Kookaburra during his schooling in Scotland or when growing up in Australia.

Dr Ford's oral evidence

121 In Dr Ford's opinion, the first two bars of Kookaburra are its "signature". Although he agreed that it is a signature because of the lyrics, he said it is also the first thing you hear so it is the part of the melody that "sticks in your head".

122 When Marion Sinclair composed Kookaburra for the Victorian Girl Guides in 1934, she notated it in the key of F major. However, the quotation from Kookaburra in Down Under is in D major, although it is set against a background of B minor.

123 It was for this reason that Dr Ford's notation of Kookaburra in Example A was expressed in the key of D major.

124 In Dr Ford's opinion, the fact that Kookaburra was notated in F major in 1934 is not important when a listener comes to compare the differences and similarities between Kookaburra and Down Under.

125 Dr Ford demonstrated this point by singing the bars from Kookaburra. He said that most people do not have perfect pitch and could not recognise the particular key in which he had sung the song. The key, he said, was of no importance, as he could have just as easily picked a different starting note and therefore a different key.

126 Also, Kookaburra was intended to be sung as a round and Miss Sinclair probably made it up in her head and only wrote it down because she had to enter it in a competition. Dr Ford went on to say that when Miss Sinclair wrote the tune down, she had to start somewhere, but the note on which she started was somewhat arbitrary.

127 Dr Ford's evidence was that key can be an element of musical composition, but it is not always so. Classical music, such as Mozart's symphonies, is a notated art, but this is not usually the case with popular music which tends not to be written down until after it has been composed.

128 Dr Ford also pointed out that when Kookaburra is notated in D major, the second bar has a chord of B minor underneath it, which is the key in which Down Under is played.

129 Every major chord has a relative minor. As Dr Ford pointed out, if you take the bottom two notes of the chord of D major, they form the top two notes of the relative minor, which is B minor in the case of D major. Playing Kookaburra in D rather than F major therefore makes it easier to compare Kookaburra to the passages in Down Under, as they are at the same pitch.

130 Dr Ford went on to explain the difference between the sound of Kookaburra, which is in a major key, and the relevant passages of Down Under, which is in a minor key, as follows:

 the melody is identical, but the chord that underpins it is different, and it gives a slightly different feeling ... it's a bit like shining a different light on it.

131 Dr Ford therefore agreed that by changing the underlying harmony from a major to a minor key in Down Under, the impression that one receives from the same notes in the two songs is different.

132 Mr Lancaster asked Dr Ford to comment on a proposition drawn from the respondents' opening, namely, notwithstanding the similarity to the melody in the first two bars of Kookaburra, the different position of those two phrases in Down Under changes their nature; the musical sentences are different.

133 The following exchange then took place:

Q: Do you agree with that?

A: Well, it doesn't change their nature. They're still exactly the same, but we hear them slightly differently, because there's something comes in between. The first and second phrases of Kookaburra become the second and fourth phrases of the hook in Down Under, and so that third phrase, which is the basic what I called the basic hook comes in between them, as a sort of punctuation, so it separates them. They're not next to each other any more. So we do hear them differently, yes.

Q: And does that separation make them different?

A: No, no, no, they're exactly the same phrases, but we hear them differently.

134 Dr Ford adhered to this in cross-examination. He accepted that if Kookaburra is played in F major, the second phrase could not be played in B minor because that is not the relative minor of F major; the whole song would have to be transposed. But in Dr Ford's view, it makes no difference. He reiterated that changing the key from major to minor is "like shining a different coloured light on it" and he said:

The structure of the melody stays, but it has a different feel.

135 He also demonstrated this on the piano and said in cross-examination:

A: I mean, the key itself is not really relevant to an appreciation of the tune or to a recognition of the tune. The tune carries within its structure a kind of musical DNA which enables you to say, Well, that's Kookaburra Sits in the Old Gumtree because and its because the interrelationships of the pitches, rather than the actual specific names of the pitches, which is why you can then transpose it into any key you like and it will be recognisably the same.

Q: And our little again, not wedded to it, no offence if you say no to it our phrase melodic shape, to describe, is relatively apt to describe the interrelationship of the pitches?

A: What you say your use of melodic shape isn't wrong, it's just not precise enough. I mean, it does have the [same] melodic shape. It has the same melodic shape because it's the same melody.

136 Mr Catterns QC, who appeared for the respondents, also put it to Dr Ford that in terms of melodic structure, the separation of the two bars from Kookaburra by an intervening bar containing the basic hook in Down Under conveys something different.

137 Dr Ford did not consider it to be a large difference. He demonstrated this by singing and went on to say that, although the sentence has a different structure and sounds different, the ear connects the two pairs of phrases in Example E with each other because they follow on from each other.

138 Dr Ford conceded that the tempo of Down Under is probably a little bit faster than the tempo at which one would sing Kookaburra, but he did not consider this to be of significance in the comparison.

139 He pointed out that the tempo at which Kookaburra is played is likely to be a function of the age and ability of the school children who sing it and there was probably not a big difference between the tempo at which one would normally sing Kookaburra and the corresponding bars in Down Under.

140 Dr Ford also drew attention to the last two notes of each appearance of the phrases from Kookaburra in Down Under. He said the way you sing the word "tree" in the phrase "Kookaburra sits in the old gum tree" and "he" in the phrase "merry merry king of the bush is he" is to slur those words ("tree-ee" and "he-ee"). He then said that:

when you listen to the Business as Usual recording of Down Under the flute does the

same thing. It slurs those final two notes, as though it's a memory of the song, or a reference to the song[...].

141 He accepted that slurring is a common musical device or technique with both flute and voice.

Mr Armiger's evidence

142 Mr Armiger is a composer, musician and teacher. He is the Head of Screen Music at the Australian Film, Television and Radio School.

143 The thrust of Mr Armiger's affidavit evidence was that the "shared phrases" of Kookaburra and Down Under occupy a different space in the melody of Down Under and perform a different musical function to that in Kookaburra.

144 Mr Armiger described the shared phrases as an answering "lick" which follow naturally from the call, or basic hook in Dr Ford's Example C, which is original and distinctive to Down Under. He said:

We do not hear those shared notes as a melody of their own but as part of a longer melody. Because of this, most listeners would probably be unaware of the correspondence between the two fragments of melody.

145 Mr Armiger also emphasised the re-harmonisation of Kookaburra from a major key to a minor key in Down Under. He described this as a new minor-key harmonic context.

146 In his opinion, the change of key from major to minor alters the mood of the melody. It becomes "whimsical" or "wistful" in Down Under rather than "jolly" or "observational" in Kookaburra.

147 In his affidavit evidence, Mr Armiger took issue with the description of the flute riff as the hook of Down Under. In his opinion the hook of that song is found in the lyrics "I come from a land down under...".

148 However, when Mr Armiger was cross-examined as to the importance of the first two bars of Kookaburra, he agreed that the first bar could be regarded as the signature of the song. He also seemed to accept that the second bar is just as much a signature as well, although I had the impression that his acceptance of that proposition was not unequivocal.

149 Ultimately Mr Armiger agreed that if he heard the melody of the first 22 notes, that is to say the first two bars of Kookaburra, he would pick the tune immediately.

150 In cross-examination, Mr Armiger retreated somewhat from his basic proposition that the separation of the shared phrases alters the musical context of those phrases when they appear in the flute riff in Down Under. He did so in the following exchange:

Q: And the fact that there's a short hook, which has a musical function as a call and a reference to Kookaburra that has a function as an answer, creates integrated musical elements in your view, doesn't it?

A: I think it yes, the call and the response are integrated into a statement, yes.

Q: And many of the notes of that integrated passage have come directly from Kookaburra of course?

A: Yes.

Q: And Kookaburra plays an important, indeed essential function in that flute line in that musical element, doesn't it?

A: Yes.

151 There was some debate between Mr Armiger and Mr Lancaster as to what Mr Lancaster meant by the word "essential" in the passage I have set out, but nothing turns on this.

152 Mr Lancaster asked Mr Armiger about the injection of an "Australian flavour" into Down Under by the introduction of the two bars of Kookaburra into the flute riff. The following exchange is relevant:

Q: Now, if you make the assumption that I've asked you to make, that the flute line was intended to inject an Australian flavour to the song, you would accept, wouldn't you, that when the second bar of example E is played that that conveys an Australian flavour?

A: Yes.

Q: And its Australianness comes from the fact that it is the tune of Kookaburra, doesn't it?

A: Yes. I'm going along with your assumptions with respect, but I mean I think that the I think I might have said in the affidavit, but I think the whole song is very Australian. I think [...] the constant reference is to Australiana and the attitude of the song is Australian. I don't get it I don't think it's the flute. I wouldn't say, Oh, that could be anything, except the flute tells me it's Australian, so - - -

Q: Its Australianness is pretty hard to miss, isn't it?

A: It's very hard to miss.

Q: Yes. [...] References to the quintessentially Australian appear all throughout the song in its lyrics?

A: Yes.

Q: All throughout the song in its video?

A: Yes.

Q: And it wouldn't be any surprise if that same reference to Australianness occurs musically, would it?

A: No.

Q: So on the assumption that I've asked you to make that the flute line [...] was intended to inject an Australian flavour to the song, you would accept, wouldn't you, that the second and fourth bars of example E inject that Australianness - - -?

A: Mm.

Q: - - - in fact; is that right?

A: In fact, yes.

Q: Yes?

A: Along with bars one and three.

Q: Yes. And that particularly looking at bars two and four it does so because that is the tune of Kookaburra?

A: I can agree. I mean, I yes. I'll say yes. Sorry.

Q: Only say it if you mean it, Mr Armiger?

A: Well, you are asking me to make an assumption and I do make that assumption, but somehow its the it could be you could well be right.

153 Mr Armiger's evidence in cross-examination on the topic of the key of Kookaburra was quite similar to that of Dr Ford. Mr Armiger agreed that it does not make any difference what key the song is sung in because the relative pitch remains the same.

154 He agreed that one can move Kookaburra between keys but the song's relative pitch remains the same; this is why the listener finds it easy to perceive that it is the same song.

155 Moreover, Mr Armiger agreed with Dr Ford that recognition of Kookaburra has nothing to do with the key in which it is played. Mr Armiger went on to give the following evidence:

Q: Now, in example E that Dr Ford identified, you would appreciate, I think, that he made the point that the fourth bar, namely, the second phrase taken from Kookaburra, is a minor third lower than the first phrase, namely, the second bar in example E?

A: Yes.

Q: You appreciate that?

A: Yes.

Q: And that stepping down of a minor third from the second to the fourth bar in example E is precisely the same stepping down as occurs between the first and second bars of Kookaburra?

A: Yes.

Q: And that's another feature of objective similarity between the part of Kookaburra used in Down Under and Kookaburra itself?

A: Yes.

156 Mr Armiger agreed in cross-examination that his discussion of the topic of harmony in his affidavit was a reference to the underlying harmony of the flute line, although he said that this was part of the structure of the song.

Whether the 1981 recording reproduces a part of Kookaburra

157 In my opinion, there is a sufficient degree of objective similarity between the bars of Kookaburra which are seen and heard in Down Under to amount to a reproduction of a part of Miss Sinclair's round. The question of whether it is a reproduction of a substantial part of that work is a different question which I will address later.

158 The view which I have reached as to reproduction of a part of Kookaburra follows from my aural comparison of the musical elements, as well as my visual comparison of the notated songs, with particular assistance from the evidence of the experts.

159 Dr Ford was an impressive witness and I was much assisted by his evidence, although ultimately I do not consider that there was much real dispute between his evidence and that of Mr Armiger.

160 The relevant musical elements that I have considered are melody, key, tempo, harmony and structure.

161 But perhaps the clearest illustration of the objective similarity is to be found in Mr Hay's frank admission of a causal connection between the two melodies and the fact that he sang the relevant bars of Kookaburra when performing Down Under at a number of concerts over a period of time from about 2002.

162 The failure to call Mr Ham and the admissions which were tendered from his affidavit reinforce the conclusion I have reached.

Melody

163 The relevant comparison is between:

- the melody of the flute riff when it plays the fourth bar of Dr Ford's Example D, and the second bar of Kookaburra; and
- the melody of the flute riff when it plays the second and fourth bars of Dr Ford's Example E, and the first and second bars of Kookaburra.

164 With the assistance of Dr Ford and Mr Armiger's evidence, as well as that of Mr Hay, I was able to detect a sufficient degree of objective similarity between the melody to meet the test stated in the authorities.

165 Dr Ford said in his first report that "the resemblance is exact" and that the two musical phrases in Down Under "are too long and also contain too much musical information for their appearances to be coincidental".

166 In his oral evidence, Dr Ford described the melodies as identical and he demonstrated this by singing the notes and playing them on the piano.

167 Mr Armiger's evidence was to the same effect. He referred in his report to "the shared phrases" and he agreed with Dr Ford that there is a "resemblance" between the second half of the answering flute melody in Down Under and the first part of the sung melody, that is to say the first two bars, of Kookaburra.

168 Moreover, Mr Hay's evidence seemed to me to answer the question beyond any real doubt. He accepted that the fourth bar of Down Under is a direct reference to Kookaburra. He also played Dr Ford's Examples D and E for me on the guitar and he accepted that the fourth bar of Example D and the second and fourth bars of Example E are "unmistakably" the melody of Kookaburra.

169 This is graphically illustrated by the fact that Mr Hay has on occasions sung the words of Kookaburra where the flute riff would ordinarily be played in Down Under.

170 Further evidence of the requisite degree of objective similarity between the two melodies is to be found in the fact that the second phrase of the quote from Kookaburra in Example E is a minor third lower than the first. Dr Ford and Mr Armiger agreed that this was the same as the way that the two phrases occurred in Kookaburra.

171 There is force in the submission made by Mr Catterns that I have become sensitised to the similarity between the melodies so as to be able to hear the objective similarity between them. However, I do not consider that this overcomes the force of the expert evidence and the conclusion which seems to follow almost inevitably from the frank admissions made by Mr Hay.

172 In any event, the test is that of the ordinary reasonably experienced listener and the comparison is not concerned with deceptive similarity as in a passing-off action: *Francis Day & Hunter* at 610, 623-624; *Russell William Textiles* at 2425.

173 It is true, as Mr Armiger observed, that the shared phrases in the melodies occupy a different space in the full sentence of the melody of Down Under than that which they occupy in Kookaburra. But that seems to me to be a question of musical structure which I will deal with later.

Key

174 The respondents also placed great weight on the pitch of the two melodies. Unlike the version of Kookaburra notated in Dr Ford's Example A which was in the key of D major and commenced on the note 'A', the 1934 version of Kookaburra composed and notated by Miss Sinclair and set out at [70] was in the key of F major and commenced on the note 'C'. It is for this reason that the manuscripts of Kookaburra in the "Three Rounds" publication and in Example A visually appear different.

175 The respondents submit that this change in pitch and key should be given weight in determining whether the quoted passage in Down Under has the same melody as Kookaburra. While they agree that the melodic "shape" is the same in the two musical works, the respondents submit that the melody of the quoted passage in Down Under and the melody of Kookaburra are not identical in the sense that the notes are not the same.

176 It is true that the melody in Down Under does not contain precisely the same notes at the precise pitches of the 1934 version of Kookaburra. However, I accept Dr Ford's evidence that ultimately nothing turns on this. This is because the precise key or pitch is not relevant to an appreciation or recognition of a tune. What is relevant in determining whether a melody is the same is the interrelationships of the pitches within the melody.

177 As Dr Ford says in his second and third reports, the choice of F major by Miss Sinclair in notating Kookaburra was an arbitrary choice, as a key had to be chosen in notating the song. However, the song will tend to be pitched to suit the voices of those singing it, regardless of the key, and ultimately the key of notation is of little consequence. Mr Armiger also agreed that the choice of key was insignificant, as it is the relative pitches within the song which allow the listener to identify the song.

178 I also accept Dr Ford's conclusion that the quoted passages in Down Under are identical to the relevant melodic phrases in Kookaburra. As Dr Ford says, the melodies in the relevant bars do not merely resemble each other, they are note-for-note the same, save that the quoted passages in Down Under contain the phrase at a different pitch to the 1934 version of Kookaburra. As I have said above, this is of no consequence.

Tempo and rythym

179 In Dr Ford's opinion, the fact that the tempo of Kookaburra and the quoted passages in Down Under are "more or less" the same adds to the recognisability of the passage in Down Under.

180 Larrikin concedes that there is no tempo marking on the 1934 manuscript of Kookaburra. However, Mr Lancaster submitted that Dr Ford's opinion was based on the tempo at which one would typically expect the song to be sung or played, and that tempo coincides with the tempo of the flute line in Down Under. This factor, he said, was another feature of objective similarity.

181 In contrast, the respondents submit that the issue of tempo should not be considered, as the 1934 publication by Miss Sinclair did not contain any indication of tempo, and therefore the song was not written to be performed at any particular tempo.

182 The respondents also submit that the rhythm of Down Under should be considered in assessing the similarity between the two musical works. They say that although there is some similarity between the rhythm of Kookaburra and the flute line in Down Under, Mr Armiger's evidence establishes that the underlying rhythm played by the guitar, bass and percussion in Down Under is different. In Mr Armiger's opinion, while Kookaburra has a folk-style, four-four or two-four square rhythm, the accompaniment to Down Under is in more of a reggae style, which places a different emphasis on a different beat.

183 Dr Ford did not directly address the question of rhythm in his report. However, as I have said at [140] above, Dr Ford did describe as "distinctive" the slurring at the end of the first two phrases of Kookaburra's melodic lines (on the words "tree-ee" and "he-ee"). He also indicated that the flute player in Down Under replicates this slur, although:

... without Sinclair's lyric there is no actual need for it. It is, presumably, remembered from singing the song.

184 I do not consider that anything turns on the difference in rhythm between the two songs. As Dr Ford said, it is possible to do a song in lots of different ways. He gave the example of Chet Baker's version of Every Time We Say Goodbye which is not anything like Ella Fitzgerald's version of the same song.

185 I accept Dr Ford's evidence that the tempo of the phrases in Down Under is "more or less" the same as that in which one would sing Kookaburra.

186 I also accept his evidence that the "slur" is a distinctive element of the melody and rhythm of Kookaburra which is replicated in Down Under. The slur may be something of a cliché in popular music but it was not suggested to Dr Ford that it was a mere coincidence in the present case.

Harmony

187 The respondents placed some emphasis on what they called the different melodic shape of Down Under and the different harmony. This was based largely on Mr Armiger's evidence that the melody in Down Under had been re-harmonised from a major key to its relative minor.

188 Mr Armiger agreed in cross-examination that the harmony to which he referred was
“the underlying harmony” of the flute riff.

189 It seems to me that the difference in harmony does not make the phrases from
Kookaburra unrecognisable. The position is aptly covered by Dr Ford’s description that the
change of harmony it is a bit like shining a different light on it.

190 This is supported by the observation of the Lord Chief Baron nearly 200 years ago in
D’Almaine v Boosey (at 302) that the mere adaptation of an air by transferring it from one
instrument to another does not alter the original subject.

191 It is also supported by the Canadian authority of *Grignon v Roussel*. In that case
Denault J found there to be sufficient objective similarity in melodic, harmonic and rhythmic
terms, notwithstanding minor differences resulting from arrangement or substitution of
chords.

Context and structure

192 At the heart of the respondents’ answer to the claim of reproduction was the
submission that the flute riff of Down Under appears in a different structural context to the
relevant bars of Kookaburra.

193 The respondents submitted that the difficulties in recognising Kookaburra when
Down Under is heard reflects the fact that harmony, structure and, to a lesser extent, key
affect how one hears a work.

194 I have dealt with harmony and key, which leaves for consideration only the question
of structure.

195 Larrikin accepts that the 1981 recording of Down Under is a much more layered song
than Miss Sinclair’s round. But the question of structure is not concerned with the structure of
the entirety of the three minute recording. Rather, it turns solely upon the structure of the
flute riff and the separation and punctuation of the bars of Kookaburra by Men at Work’s
distinctive sound in what Dr Ford called “the basic hook”.

196 In my opinion, this question is resolved by Dr Ford's evidence that the separation of
the notes does not make them different, but means that we hear them differently.

197 Mr Armiger's evidence in chief emphasised the separation of the phrases and the
difference in their musical function or context when they appear in Down Under.

198 However, it seems to me that his evidence in cross-examination was consistent with
that of Dr Ford. In particular, he agreed that the call and response are an integrated musical
statement. He also agreed that the notes from Kookaburra play "an important, indeed
essential function" in the flute riff.

199 It follows in my view that the separation of the two phrases from Kookaburra are not
a material difference in Down Under and their separation or punctuation by the basic hook
does not prevent a finding of reproduction.

200 It is true that in *D'Almaine v Boosey* the Lord Chief Baron said that if one does not
take the bars of a composition sequentially, but breaks them up by the "intersection of others"
it may not be an infringement. But this is a question of fact in each case and, as the Lord
Chief Baron observed:

It must depend on whether the air taken is substantially the same with the original.

201 Here, I am satisfied that the melody is the same and the separation or punctuation
does not overcome the conclusion of reproduction. The essential question becomes whether
the reproduction is of a substantial part.

The difficulties in recognising Kookaburra: Spicks and Specks

202 The respondents asked a rhetorical question which sums up their response to the claim
made against them. The question posed by Mr Catterns was: if both Kookaburra and Down
Under are such icons, and the similarities so strong, why did it take so long for anyone to
recognise the connection?

203 The connection was exposed in the television program *Spicks and Specks*, a musical
panel quiz show on the ABC, in 2007. Even then, the musical experts who make up the panel

had some difficulty in answering the question. Mr Catterns relies on this to support his submission that there is no relevant objective similarity.

204 The question which was asked was "... name the Australian nursery rhyme that this riff has been based on". A part of Down Under, including Dr Ford's Example E, was then played. The panel did not answer immediately and the excerpt from Down Under was played again. The host then said "this bit especially" and one of the panel members made the link.

205 Once the first panel member gave the correct answer, the others recognised the connection.

206 It is true that the panel members are not the ordinary reasonably experienced listener and that even they had difficulty in recognising the connection between the songs. But I do not consider that this is sufficient to overcome the conclusion that the relevant degree of objective similarity is made out.

207 What Spicks and Specks does show is that there are difficulties in the recognition of the work, but a sensitised listener can detect the aural resemblance between the bars of Kookaburra and the flute riff of Down Under.

208 For reasons which I have already given, this is sufficient to satisfy the test of objective similarity.

The failure to call Mr Ham

209 Mr Lancaster emphasised the quintessential Australian nature of Down Under which he attributed at least in part to Mr Ham's inclusion of the flute riff.

210 Mr Lancaster described Down Under as an affectionate celebration of, and a witty commentary on, some of the icons of Australian popular culture, with a sharp edge that takes aim at Australian gender stereotypes. He said that this is apparent in the lyrics of Down Under and that it is just as pronounced in the video released with the 1981 recording. He submitted that the same references occur musically.

211 Mr Ham's affidavit contains an admission that his aim in adding the flute line was to try to inject some Australian flavour into the song. Mr Armiger agreed in the passage that I have set out at [152] above that the flute riff of Kookaburra conveys an Australian flavour by reproducing the bars from Kookaburra.

212 But I do not consider that the discussion of Australian flavour plays any real part in the question which I have to address. Copyright protection is not concerned with ideas of Australianness but with the form of the copyright owner's expression.

213 Indeed, there may be some force in Mr Catterns' submission that there is considerable tension between Larrikin's emphasis on the overall Australian flavour of Down Under (which employs many Australian images apart from Kookaburra) and its claim to a percentage interest of 40% to 60% of the work. That is not a question which arises in this part of the proceedings and of course I do not express a concluded view.

214 What seems to me to be important in the present part of the case is the inference that flows from the failure to call Mr Ham. It is trite to say that I can infer that his evidence would not have assisted the respondents' case. But it is also open to me to infer that Mr Ham deliberately reproduced a part of Kookaburra, an iconic Australian melody, for the purpose and with the intention of evoking an Australian flavour in the flute riff.

215 For present purposes it is sufficient to say that Mr Ham's reproduction of the relevant bars of Kookaburra reinforces the finding of objective similarity. That is the real significance of the failure to call him.

216 In my opinion, it is appropriate to draw the inference that Mr Ham deliberately included the bars from Kookaburra in the flute line for the purpose referred to above.

217 However, I accept Mr Hay's evidence that he was not aware of the appropriation of the bars of Kookaburra until about the early part of the last decade.

Is there a reproduction of a substantial part?

218 Dr Ford's evidence was directed to the question of objective similarity and his
comments on the quality of the part taken are limited to his observation that the opening bars
of Kookaburra are the signature of that work.

219 It is true that Mr Armiger accepted that the first two bars of Kookaburra are the
signature of the song. But I do not consider that the description of a part of a work as its
signature is sufficient of itself to give rise to a finding that what has been taken is a
substantial part of the copyright work.

220 In *D'Almaine v Boosey*, the Lord Chief Baron referred to a case in which a witness
had said that a mere bar did not constitute a phrase but three or four bars might do so. Of
course, there can be no precise answer to that question but the emphasis upon the quality of
what is taken introduces a subjective element.

221 If the question before me were limited to determining whether Dr Ford's Example D
is a substantial part, I would have some difficulty in answering it. But here, there is a
reproduction of two bars or phrases of Kookaburra, albeit with the separation and punctuation
of the basic hook.

222 The respondents submitted that the present case falls within the principle referred to
in *IceTV* that the more simple the copyright work the greater degree of taking will be
required.

223 There was no dispute between the parties that the composition of Kookaburra was
original. The respondents submitted that there was no evidence as to the degree of skill
involved in its composition, except that it involved skill in writing the work as a round.

224 That submission should be qualified by Dr Ford's evidence that writing a round is a
"tricky and rather amusing business" because all the phrases have to fit on top of each other.

225 I do not consider that what was taken from Kookaburra in Dr Ford's Example E was
trivial in a qualitative or quantitative sense.

226 It is true that Kookaburra is a short work and that it is not reproduced in Down Under as a round. But it was not suggested by the respondents that Kookaburra is so simple or lacking in substantial originality that a note for note reproduction of the entire work was required to meet the “substantial part” test.

227 Nor could any such submission be sustained. The short answer to the qualitative test is to be found in Mr Hay’s performance of the words of Kookaburra to the tune of the flute riff in Down Under. In my opinion, that was a sufficient illustration that the qualitative test is met.

228 The reproduction did not completely correspond to the phrases of Kookaburra because of the separation to which I have referred. But Mr Hay’s performance of the words of Kookaburra shows that a substantial part was taken.

229 Moreover, although the question of quantity is secondary to that of quality, it is worthwhile noting that two of the four bars or phrases of Kookaburra have been reproduced in Down Under (or 50% of the song).

The Qantas advertisements

230 The Qantas advertisements consist of two thirty second videos, each of which contains a languid orchestral version of a part of Down Under. The advertisements are known as “A380” and “Most Experienced”. They are described in Dr Ford’s third report and were shown during the hearing.

231 The advertisements contain only the second bar of Kookaburra and are similar to Dr Ford’s Example D. The essential question which arises is whether the advertisements reproduce a substantial part of Kookaburra.

232 A further question to be considered is whether certain musical embellishments in the advertisements sufficiently alter the melody so as to overcome the allegation of reproduction.

233 Dr Ford accepted that there is an additional grace note or “glissando” in the advertisements. He said a glissando is a slide in pitch “like a swanee whistle”.

234 The addition of the glissando does not alter the fact that a note-for-note comparison shows a reproduction of the second bar of Kookaburra in the Qantas advertisements.

235 However, the essential question is whether, when considered aurally, there is a sufficient degree of objective similarity to Kookaburra and in particular whether it constitutes a substantial part.

236 I do not consider those questions to be easy to answer. Even with the assistance of the experts, I find it quite difficult to detect the second bar of Kookaburra when it is played in the advertisements.

237 In any event, I do not consider that the quotation of the second bar of Kookaburra constitutes, without more, the reproduction of a substantial part of the song.

238 As I have already said, in my view the question of what constitutes a substantial part does not turn on its description as “the signature”. Nevertheless, it is to be noted that Dr Ford did not say that the second phrase of Kookaburra, taken on its own, was the signature of the piece.

239 Nor in my view does the evidence of Mr Armiger, when carefully considered, endorse the proposition that the second bar alone is the signature of the song.

240 So too, in my opinion, Mr Armiger’s evidence in cross-examination, when read in light of his re-examination, does not establish that the ordinary reasonably experienced listener would recognise the second bar.

241 The inference which arises from the failure of the respondents to call Mr Ham is not sufficient to support a finding that the inclusion of the second bar of Kookaburra by itself amounts to the reproduction of a substantial part.

Conclusions on reproduction

242 For the reasons set out above, it is my opinion that the 1979 recording and the 1981 recording of Down Under reproduce a substantial part of Kookaburra. However, I do not

consider that the Qantas advertisements infringe the copyright in Kookaburra because they do not reproduce a substantial part of the work.

PROPOSED AMENDMENT TO PLEADING

243 At the conclusion of the hearing, Larrikin sought leave to amend its Statement of Claim. Three broad categories of amendment were proposed.

244 The first involved the provision of additional particulars as part of the claim for copyright infringement by the EMI parties.

245 The second category of amendment introduced an alternative claim under ss 52 and 82 of the TPA. The proposed paragraphs falling within this category alleged that each time that the EMI parties granted a licence to exploit Down Under, they represented that they are entitled to authorise the reproduction, communication or adaptation of the whole and any part of Down Under, and that they are entitled to receive all the income derived from such authorisation.

246 The third category involved amendments that introduced a claim in regard to income collected by the Australasian Mechanical Copyright Owners Society (“AMCOS”).

247 The respondents did not oppose the amendments falling within the first category. I therefore granted leave to amend the pleading in respect of those proposed amendments. The respondents opposed the grant of leave to amend the pleadings in respect of the second and third categories of proposed amendments.

248 The respondents opposed the second category of amendment, the Trade Practices amendment, on the ground that it was an entirely new claim and that they may have wished to rely on further evidence or cross-examine witnesses on additional topics had the claim been foreshadowed earlier. Moreover, junior counsel for the respondents, Mr Dimitriadis, queried whether the amendment would require some alteration to the separate question which was the subject of this hearing. I accepted these submissions and denied leave to amend the pleadings in respect of the new Trade Practices claim.

249 This leaves for consideration the third category of amendment, the AMCOS amendment, on which I deferred ruling on the grant of leave.

The AMCOS amendment

250 The effect of the AMCOS amendment would be to introduce a Trade Practices and unjust enrichment claim in relation to AMCOS distributions. AMCOS is a collecting society which collects and distributes mechanical royalties for the reproduction of its members' musical works.

251 The respondents submit that the AMCOS amendment would require consideration of the documents alleged by Larrikin to contain the misrepresentations made by the respondents to AMCOS. The respondents say that they would wish to contend that the documents do not convey the misrepresentations alleged. As with the documents dealt with in the claim regarding distributions made by the Australasian Performing Rights Associations ("APRA") (see below), this would require consideration of what is conveyed by the documents, and in particular what musical works are the subject of the statements made as to title and non-infringement of other copyright works.

252 Moreover, the respondents submit that they would wish to lead evidence as to the appropriate manner in which to interpret licence agreements between the respondents and AMCOS, which evidence is not before the Court.

253 Finally, the respondents point to the fact that the application to amend to add these claims was made late and indeed not until after the close of evidence. They therefore submit that the application to amend should be refused, consistent with the principles set out in High Court's decision in *Aon Risk Services Australia Ltd v Australian National University* (2009) 258 ALR 14.

254 It is true that the amendment application was late. But the factual considerations and legal principles upon which the claim is based are similar to those which underlie the TPA and unjust enrichments claims made in respect of the APRA income.

255 The only ground upon which the respondents submitted that they were irreparably prejudiced by the lateness of the claim was that if it had been made earlier, they would have

wished to bring evidence as to the meaning of the words “owned or controlled” in the AMCOS agreements.

256 For reasons set out below at [312]-[317], I do not consider that any such evidence would have been admissible. I therefore allow the amendment.

257 Further, I note that the AMCOS amendment falls within paragraph (d) of the separate question which I ordered on 27 October 2009 (Order 1).

TRADE PRACTICES CLAIMS

258 As part of its case for infringement, Larrikin claims for past performance income. This claim falls in a different category to the other claims for damages as Larrikin has assigned its performance rights in Kookaburra to APRA, the organisation that collects and distributes licence fees for the public performance and communication of members’ musical works.

259 The past performance of Down Under including the infringing passages did not itself constitute an infringement as APRA authorised the songs to be performed and APRA was the owner of the performance rights. However, Larrikin submits that but for the making of certain representations by the respondents to APRA, APRA would have given a percentage of the performance royalty to Larrikin.

260 Larrikin also claims the income earned as a licence fee (mechanical income) which is paid to the publisher by AMCOS. As a result of the amendments to the Statement of Claim that I have allowed, Larrikin makes a claim for misrepresentation in respect of the AMCOS income. Alternatively, Larrikin submits that as AMCOS has been given a licence rather than an assignment of part of the copyright in Kookaburra, Larrikin is entitled to claim the AMCOS income as part of the general damages that the Court can award or arising from an authorisation of an infringement by the respondents.

261 The EMI parties, Mr Hay and Mr Strykert are members of APRA. The EMI parties are also members of AMCOS.

262 APRA has managed the business of AMCOS pursuant to a management agreement since 1997. Larrikin therefore submits that the making of a representation to AMCOS in the course of its business is the making of a representation to APRA.

263 At the conclusion of the hearing, I made orders by consent in the following terms:

The Court notes that the parties agree that, in the event that the Court determines that the 1981 Recording involved the doing of any act comprised in the copyright, in particular the reproduction in a material form of a substantial part, of Kookaburra and thereby infringed copyright in Kookaburra, then:

- (a) the representations referred to in paragraphs 68(a), 68(b), 73(a) and 73(b) of the Further Amended Statement of Claim, if made, were misleading or deceptive; and
- (b) the applicant has suffered loss and damage.

264 In the relevant paragraphs of the Second Further Amended Statement of Claim (“SFASC”), Larrikin claims that the EMI parties have, in trade and commerce, made the following representations to APRA:

- That EMI Songs or EMI Music is entitled to 100% of the publisher’s share payable by APRA in respect of Down Under (paragraph 68(a) of SFASC); and
- That Down Under does not infringe the copyright in any other work (paragraph 68(b) SFASC).

265 Larrikin also claims that Mr Hay and Mr Strykert have made equivalent representations to APRA in respect of their own entitlements (paragraphs 73(a) and (b) FASC).

266 Moreover, in the amendments to the Statement of Claim that I have allowed, Larrikin submits that the following representation was made to AMCOS in trade and commerce:

- That EMI Songs is entitled to 100% of the mechanical income payable by AMCOS in respect of Down Under (paragraph 68(c) of SFASC).

APRA income

Background

267 Larrikin submits that the respondents misled APRA by stating that they owned the entire interest in Down Under and that Down Under did not infringe copyright. They further

submit that APRA relied on this misrepresentation in paying 100% of the performance income to the respondents.

268 In its claim for misrepresentation, Larrikin relies on the giving of notice by the respondents as to their claimed entitlement under clause 21 of APRA's constitution. Clause 21 relevantly states:

Every member upon his election shall notify to the Association upon forms or in manner prescribed by the Association all works in respect of which he is the composer, author, publisher, or proprietor and shall thereafter so notify to the Association all further works which he has composed, written or published or in which he has acquired an interest as proprietor.

269 The evidence of Ms Sally Elizabeth Howland, the Director of Member Services for APRA and AMCOS, establishes that members inform APRA of their new works by way of title registration via online registration or submission of title index cards. Members must notify APRA of the allocation of percentage shares of fees to be distributed by APRA (or "division of fees") and the full names of all sharers of each musical work.

270 Since 1982, APRA has paid the entire revenue referable to the performance of Down Under to Mr Hay, Mr Strykert and EMI Songs (or its predecessor, April Music Pty Limited). The revenue has been allocated to each of Mr Hay, Mr Strykert and EMI Songs in accordance with confidential percentages notified to APRA in the registration card for Down Under.

271 Clause 6.6 of the APRA distribution rules provides that APRA relies on the notification to it by members of interests in a work in allocating income for the performance of that work. Ms Howland's evidence also establishes that members are able to advise APRA of corrections and amendments to be made to the notification. It was not in dispute that none of the Prescribed Notices from the APRA and AMCOS computer system makes any mention of Kookaburra.

272 In his oral evidence, Mr Hay conceded that, since at least about 2002, he had realised that there was a connection between the flute passage in Down Under and Kookaburra. Larrikin seeks to emphasise that notwithstanding this knowledge, no relevant amendments to the APRA notification were made.

273 Larrikin also relies on of a warranty of non-infringement given by the respondents in APRA's standard form agreement. One instance of the warranty that is relied upon is found in an application form for membership to APRA filled out and signed by Mr Hay which states in relevant part:

I hereby warrant that none of the musical works covered by this authority infringes the copyright in any other work [...].

A similar application form signed by Mr Strykert was also in evidence.

274 Moreover, three copies of APRA's standard form agreement assigning the performance rights in Down Under to APRA were in evidence, signed by Mr Hay and the representatives for EMI Music and EMI Songs. The standard assignment states in clause 5:

5. Warranties

The Member warrants that:

- (a) the Member owns unencumbered the copyright in the Copyright Works and is entitled to assign it in accordance with this agreement;
- (b) the works in respect of which the performing rights are assigned or purported to be assign[ed] do not or will not as the case may be infringe the copyright in any other work; and
- (c) the information to be provided by the Member to APRA under this agreement will be complete and correct.

275 Larrikin argues that by reason of these representations, the EMI respondents have, since about 1982, received all distributable income from APRA in respect of Down Under.

276 Larrikin claims to be a person who has suffered loss or damage by reason of the purported misrepresentations made by the respondents, and therefore makes a claim from the respondents for loss or damage under s 82 of the TPA and the corresponding provisions of the *Fair Trading Act 1989* (NSW).

277 The respondents submit that for three reasons, the alleged misrepresentations do not found any relevant cause of action under the TPA or the *Fair Trading Act*. These reasons are:

1. The flute phrase on which Larrikin bases its claim to an entitlement of part of the income from APRA does not constitute a substantial part of Kookaburra;
2. The respondents have made no representation to APRA (or AMCOS) in relation to any work that includes the flute phrase; and

3. The loss to Larrikin was caused by its own conduct and/or that of third parties, and not by any conduct of the respondents.

278 I will discuss each of these submissions in turn below.

Substantial part

279 For the reasons given in relation to the copyright claim, the respondents submit that none of the performed or recorded versions of Down Under selected by the parties for analysis incorporates a substantial part of Kookaburra.

280 However, by reason of the consent order set out at [263] above and the findings that I have made in relation to the copyright claim, this submission cannot succeed.

No representation

281 The respondents deny that any representation was made to APRA or AMCOS in relation to a rendition of Down Under which contained the flute riff.

282 The respondents submit that the representations made to APRA and AMCOS relate to the original musical work Down Under, as written by Mr Hay and Mr Strykert in 1978, which does not include the flute phrases. They say that, according to Mr Hay's evidence, the composition as it was originally written included the core elements of the bass line and guitar, as accompanied by the lyrics, but without the flute phrases. The evidence established that the flute phrases in the 1979 recording were added by Mr Ham as a member of the band Men at Work.

283 The respondents contend that it is for Larrikin to establish that the alleged representations were made in relation to a particular rendition of Down Under that included the flute riff. They argue that none of the documents relied upon by Larrikin contain any indication that this was done. The standard form agreements with APRA, for instance, are general agreements that do not refer specifically to Down Under. Similarly, the registration card, that reflects the notice given to APRA as to the percentage interests, refers to the work by the title "Down Under" but does not specify which version of the work is referred to.

284 In my opinion, representations were made to APRA and AMCOS in respect of a version of Down Under that contained the flute riff. The evidence establishes that from at least 1982 (that is, after the date on which the 1979 recording was made), the respondents have received income from APRA referable to Down Under. That income includes royalties from the performance of versions of Down Under which include the flute riff. Indeed Mr Hay accepted in cross-examination that the Business as Usual recording of Down Under has been a regular source of income for him since 1982, including through income received from APRA.

285 Without a representation by the respondents, APRA would not have paid the relevant entitlements to the respondents since 1982. I accept that the payments received by the respondents in respect of the performance of Down Under were made by APRA in reliance upon the representations set out in paragraphs 68(a) and (b) and 73(a) and (b) of the SFASC. In accordance with the consent order set out at [263] above, I also accept the representations made by the respondents were misleading and deceptive. For reasons set out below, these representations were continuing representations made to APRA and AMCOS.

Cause of the loss

286 The final argument made by the respondents against Larrikin's claims for misrepresentation is that any loss to Larrikin was caused by its own conduct and/or that of third parties, and not by any misrepresentation by the respondents.

287 The respondents submit that Larrikin was aware of Down Under at all relevant times, yet did not make any claim of entitlement until late 2007. The respondents say that such loss as Larrikin suffered was due to its failure to articulate a claim to income relating to Down Under, and to notify APRA of its entitlement.

288 In the alternative, the respondents claim that any loss that Larrikin has suffered as a result of third parties who made payments to APRA in respect of the performance or communication of Down Under is due to the conduct of those third parties and of APRA.

289 The premise of this submission is that any third party who performed or communicated Down Under (and thereby also performed or communicated a substantial part of Kookaburra) ought to have made two payments: one in respect of the performance or

communication of Down Under, and one in respect of the performance or communication of Kookaburra. The respondents submit that any loss that Larrikin has suffered is due to the failure of those third parties to make a payment to Larrikin, and the failure of APRA to make a corresponding distribution to Larrikin.

290 The submission that any loss to Larrikin was caused by its own conduct amounts to an argument that Larrikin has failed to assert title to its copyright; by not articulating its claim until at least 2007, Larrikin permitted the respondents to receive 100% of the APRA income.

291 Nonetheless, Larrikin's failure to assert an entitlement is not sufficient to prevent recovery of its loss. In my opinion, there is still a sufficient causal nexus between the loss and damage suffered by Larrikin and the misrepresentation made by the respondents. This applies equally to the submission that third parties should have made separate payments to Larrikin. I therefore reject the submission of the respondents that the misrepresentations made were not the cause of any loss suffered by Larrikin in respect to the APRA income.

Limitation period

292 Larrikin submits that the pleaded claim is one of a continuing representation, for which it can claim damages notwithstanding the fact that more than six years have elapsed since the time when the representations were first made: see s 82 of the TPA.

293 In support of this submission, Larrikin relies on the decision of the Full Federal Court in *Jobbins v Capel Court Corporation Limited* (1989) 25 FCR 226 ("*Jobbins*"). In *Jobbins*, a Full Court (Davies, Burchett and Hill JJ) held that where a distinct further act is done in reliance on the original representation, the otherwise statute barred claim can be maintained in respect of the loss suffered by that further act of reliance: at 230-231.

294 *Jobbins* was disapproved by the High Court in *Wardley Australia Limited v The State of Western Australia* (1992) 175 CLR 514, but the disapproval was limited to the question of when the loss begins to run: see the discussion by Lindgren J in *MGICA (1992) Ltd (formerly MGICA Ltd) v Kenny & Good Pty Ltd* (1996) 140 ALR 313 at 375-377. It does not affect what their Honours said in *Jobbins* about continuing representations.

295 In this case, the relevant representations were that the respondents were entitled to 100% of the performance income in Down Under and that Down Under did not infringe copyright. Larrikin relies in particular on the registration card notifying APRA of the percentage interests in Down Under dated 1 November 1982. Larrikin also relies on representations made in assignments to APRA by EMI Songs and EMI Music dated 1 February 2001 and by Mr Hay dated 27 August 2001.

296 It is not in dispute that APRA relies on composers and producers to correctly notify it of the ownership of a song. APRA pays performance income to its members in accordance with its computer records (the Copyright Management System or “CMS”) every six months. In Larrikin’s submission, on each occasion that APRA referred to CMS to pay the relevant performance income to the respondents, a new act was done in reliance on the original representation, and the claim is therefore one of a continuing representation in accordance with the principles established in *Jobbins*.

297 The respondents formally submit that, in the circumstances of this case, Larrikin is unable to maintain its claims based on representations made in agreements or notifications before the six year limitation period. However, the respondents accept for present purposes that I would follow the decision of the Full Court in *Jobbins*. It follows that this issue must be determined adversely to the respondents.

AMCOS income

Background

298 AMCOS is the collecting society responsible for the income attributable to the sale of records and other forms of recording of musical works (“mechanical income”). Unlike APRA, the owner of copyright gives AMCOS an exclusive licence rather than an assignment.

299 Larrikin puts its claim for entitlement to AMCOS income in three ways. First, Larrikin makes a claim for misrepresentation under the TPA and the *Fair Trading Act*, an equivalent claim to that made in respect of the APRA income. This claim arises out of the amendment to the Statement of Claim that I have allowed.

300 Second, Larrikin submits that the AMCOS income can be awarded to it out of the general damages that the Court can award under s 115(2) of the *Copyright Act*. This is so because, they argue, but for the infringement, the CMS maintained by APRA on behalf of AMCOS would have been updated, with the result that a proportion of the income referable to Down Under would have flowed to Larrikin.

301 Third, Larrikin makes an alternative claim of authorisation under s 36(1A) of the *Copyright Act*. Larrikin submits that the act of causing AMCOS to pay 100% of the mechanical income to EMI Songs constituted the authorisation of an act comprised in the copyright (the making of a sound recording).

302 I will consider each of these claims in turn.

TPA claim

303 As I have said at [266] above, Larrikin submits that the EMI parties have represented that EMI Songs is entitled to 100% of the income payable by AMCOS in respect of Down Under.

304 Larrikin relies on clause 19 of the 2006 AMCOS constitution which states:

Each member upon his admission shall notify to the Society upon forms or in manner prescribed by the Society all works in respect of which he is the publisher, or proprietor and shall thereafter so notify to the Secretary all further works which he has published or in which he has acquired an interest. Each member shall also inform the Society of the interest of any other person in any works so notified.

Equivalent clauses were contained in earlier versions of the AMCOS constitution.

305 Also in evidence was a copy of AMCOS's standard Exclusive Licence Agreement. Pursuant to clause 2 of the Agreement, the member grants AMCOS an exclusive license to and to authorise others to do certain acts comprised in the copyright, including the making of records embodying the "works" for sale or rental. "Works" is defined in clause 1.1.1 as:

all present and future musical works and associated lyrics owned or controlled by the Member, other than Production Music Works.

306 Relevantly, clause 8 of the Exclusive Licence Agreement states:

The Member warrants that:

(a) the rights granted under this agreement do not infringe the intellectual

property or other rights of any other person [...].

307 Further, s 5 of the AMCOS distribution rules and the evidence of Ms Howland establish that AMCOS places reliance on member notifications and, in particular, the notified percentage interests, in distributing income to AMCOS members.

308 It is not in dispute that since about 1982, AMCOS has paid 100% of revenue referable to Down Under to the EMI parties pursuant to the notifications given by them.

309 Ms Howland's evidence also establishes that in September 2001, EMI Music carried out an electronic notification and re-registration to APRA on behalf of AMCOS, via the CMS, of particulars of Down Under, including confirming its purported ownership of rights in Down Under, its entitlements to receive income, and the composers and authors of the work.

310 The original notification to AMCOS was not in evidence before me, however Larrikin asks me to infer that EMI Songs or EMI Music notified AMCOS of Down Under and the entitlement to 100% of income from that work in or about 1982. I accept that it is appropriate to draw that inference. As it is not in dispute that one or both of the EMI parties have received income from AMCOS referable to Down Under since about 1982, it must follow that a notification was made to AMCOS on which the payments were based.

311 The respondents' submissions against the claim for misrepresentation are put in the same way as in the claim for APRA income. That is, the respondents submit that there was no substantial part of Kookaburra taken; there has been no relevant representation to AMCOS in relation to any work that includes the flute riff; and the loss to Larrikin was not caused by the conduct of the respondents.

312 The respondents also say that their submissions on the AMCOS income are subject to the meaning of the words "owned or controlled" in the definition of "Works" in the AMCOS agreements, as to which the Court has no evidence to assist it. However, I do not consider that any further evidence would be admissible to interpret the words "owned or controlled".

313 Those words are ordinary English words and are not used in a specialised or trade sense. They therefore bear their ordinary meaning and evidence would not be admissible as to

their meaning: see J.D. Heydon, *Cross on Evidence* (7th Australian edition, 2004) at [11010]; *Pepsi Seven-Up Bottlers Perth Pty Limited v Federal Commissioner of Taxation* (1995) 62 FCR 289 at 298-9; *Dyson (Trading as Pharmacy Plus Tumut) v Pharmacy Board of New South Wales* (2000) 50 NSWLR 523 at [36].

314 That is, the words “owned or controlled” should be interpreted to mean “have as property” or “possess”, and “have command of”. In the context of clause 1.1.1 of the AMCOS agreements, “works” must therefore be interpreted to mean present and future musical works and lyrics which are owned by a Member or controlled in some other way, such as through a licence or other contractual arrangement.

315 For the reasons given in respect to the APRA claim, I reject the submissions of the respondents. It is true that there is no evidence of the original notification given to AMCOS by the respondents. However, as with the APRA claim, the fact that the EMI parties have received 100% of the income from AMCOS in respect of Down Under, including through the sale of records of the 1979 and 1981 recordings, indicates that a representation has been made to AMCOS in respect of a version of Down Under which includes the flute riff.

316 I therefore accept that the EMI parties have misrepresented that EMI Songs is entitled to 100% of the income payable by AMCOS in respect of Down Under, in particular through clause 19 of the AMCOS constitution and through the warranty contained in clause 8 of the Exclusive Licence Agreement.

317 Further, in light of the interpretation that I would give to the words “owned or controlled”, I do not consider that the definition of “works” contained in the AMCOS agreements can assist the respondents in their submissions.

General damages for copyright infringement and authorisation under s 115(2) of the Copyright Act

318 As I have found for Larrikin in the misrepresentation claim above, I do not need to consider this submission in great detail, but I will deal with it briefly.

319 Section 13(2) of the *Copyright Act* provides that for the purposes of that Act, the exclusive right to do an act in relation to a work includes the exclusive right to authorise a person to do an act in relation to that work.

320 However, difficulties arise in making out the claim for authorisation against the EMI parties because I am required to address the mandatory considerations set out in s 36(1A) of the *Copyright Act*. These include the question of whether the EMI parties took any reasonable steps to prevent or avoid the doing of the infringing act: see s 36(1A)(c).

321 The question of whether the EMI parties took any such steps turns on whether they knew or had reason to suspect that the making of a sound recording of Down Under constituted an infringement of copyright in Kookaburra: *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12-13 per Gibbs J.

322 Whilst it is true that Mr Hay may have had such knowledge from about 2002, I am not satisfied that this has been established against the EMI parties.

UNJUST ENRICHMENT

323 In addition to the above claims for the APRA and AMCOS income, Larrikin submits that the respondents have been unjustly enriched at the expense of the applicant. Larrikin claims that APRA has, by mistake, error or otherwise, paid 100% of the performing rights income to the respondents, and as a result the respondents have unjustly received income to which Larrikin is entitled.

324 Larrikin also makes an equivalent claim in respect of the AMCOS income.

325 Larrikin expresses this claim in two alternative ways: first, a claim for money had and received; and second, a claim in the broader doctrines of unjust enrichment.

326 As I have already decided in favour of Larrikin in relation to the APRA and AMCOS income above, it is not necessary to consider the unjust enrichment claim in any detail. However, I will deal with it briefly.

327 It seems to me that the claim based on unjust enrichment cannot succeed for three
essential reasons.

328 First, there was no relevant mistake made by APRA in distributing 100% of the
performance income from Down Under to the respondents. This is because APRA acted in
accordance with its standard distribution procedures and standard agreements with members,
including Larrikin, in making distributions pursuant to notifications received by it. Ms
Howland's evidence establishes that APRA distributes income according to the member
notified percentage shares, not according to who actually owns the copyright.

329 This applies equally to the distribution of the mechanical rights income by AMCOS.

330 To use the law of restitution in order to overcome the effect of these agreements
would be contrary to the warning given by the High Court against seeking to expand the law
to redistribute risks undertaken in contractual arrangements: *Lumbers v W Cooks Builders Pty
Ltd (in liquidation)* (2007) 232 CLR 635 at [47]-[48], [79].

331 Second, the alleged "mistake" is not one which falls within the recognised categories
for which the law permits recovery by way of restitution.

332 Receipt of a payment which has been made under a mistake of fact or law is one of
the categories of case for which the law recognises an obligation to make restitution: *Farah
Constructions Pty Limited v Say-Dee Pty Limited* (2007) 230 CLR 89 at [150]; *David
Securities Pty Limited v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379;
Australia and New Zealand Banking Group Limited v Westpac Banking Corporation (1988)
164 CLR 662 ("ANZ Banking Group") at 673.

333 However, those authorities illustrate the well established proposition that the mistake
for which the law permits recovery is that of the payer. Where the payer's mistake has caused
the payment to the payee, restitution will generally be available against the payee, or the
person who has effectively received the benefit of the payment: *ANZ Banking Group* at 673-
674; see also the discussion in K. Mason, J.W. Carter and G.J. Tolhurst, *Mason and Carter's
Restitution Law in Australia* (2nd edition, 2008) at [401]ff.

334 Here, Larrikin is not the payer seeking to recover moneys paid by it to a third person under a mistake. Accordingly, to order recovery by way of restitution would be an impermissible extension of the law of restitution: *Farah Constructions* at [150].

335 Third, Larrikin's claim to recover under the "broader doctrines of unjust enrichment" is contrary to established authority. In its written submissions, Larrikin relied upon the discussion of the topic of "Restitution Against Unauthorised Recipients" in *Mason and Carter's Restitution Law in Australia* at [304]ff and P. Birks, *An Introduction to the Law of Restitution* (1985).

336 But whether framed as an action for moneys had and received or recovery of moneys which a third party cannot in conscience retain, Larrikin's claim is based solely upon a subjective evaluation of what is unfair or unconscionable. That is not the basis upon which restitution may be ordered: *Farah Constructions* at [150].

CONCLUSION

337 I have come to the view that the 1979 recording and the 1981 recording of Down Under infringe Larrikin's copyright in Kookaburra because both of those recordings reproduce a substantial part of Kookaburra.

338 I am also of the view that Larrikin is entitled to recover damages from the respondents for the infringements under the TPA or the *Fair Trading Act*. It seems to me that once the infringements are accepted, recovery under s 82 of the TPA and the corresponding provisions of the *Fair Trading Act* must follow notwithstanding the defences raised by the respondents.

339 Nevertheless, I would emphasise that the findings I have made do not amount to a finding that the flute riff is a substantial part of Down Under or that it is the "hook" of that song.

340 The question of what percentage of the income of Down Under ought to be paid to Larrikin has not been determined in this part of the proceeding. Whilst the issues which I have determined in this part of the case have a bearing on the question of what is the appropriate percentage, the ultimate determination of that question will depend upon the

application of legal principles and factual considerations that have not been dealt with in this part of the case.

341 The respondents submit that Larrikin's claim to be entitled to 40-60% of the income grossly over-reaches a proper allocation of any such entitlement. That is a matter to be determined in the final part of this proceeding.

ORDERS

342 The orders that I will make will follow from what I have said above. The parties should bring in short minutes to reflect the reasons given in this judgment.

343 Finally, the EMI parties brought a separate proceeding against Larrikin alleging unjustifiable threats of copyright infringement. It seems to me to follow from what I have said that this proceeding should be dismissed.

344 It also seems to me to be appropriate to make orders against Mr Strykert who did not appear at the hearing.

345 I will hear the parties as to costs.

I certify that the preceding three hundred and forty-five (345) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jacobson.

Associate:

Dated: 4 February 2010