Chapter 7 – Public inquiry and arguments over performing rights

The Royal Commission on Performing Rights

The Commission

The Royal Commission on Performing Rights heard evidence from 23 September 1932 until 20 March 1933 – a protracted inquiry, as the Commissioner noted in his closing remarks. The inquiry held 67 sittings, heard evidence from 60 witnesses and registered 169 exhibits. The number of parties represented, and the complexity of evidence, slowed proceedings. A shoestring budget also retarded progress.

In the midst of Depression, the Government could spare little money for public inquiries. The Royal Commissioner, Sir William Langer Owen, a retired judge of the NSW Supreme Court offered his services free of charge (an offer gratefully accepted by Latham), and conducted proceedings without the assistance of fellow commissioners. He received administrative assistance from a Commission secretary and invaluable help from a giant from Australia’s vanished days of independent copyright law-making – John Keating. Latham shrewdly appointed Keating, the key parliamentary figure in the preparation of the 1905 Copyright Act, and now a venerable member of the Melbourne Bar, as Counsel Assisting the Royal Commission.

The Commission conducted proceedings on government premises, occupying the seventh floor of the Commonwealth Bank building in Sydney. Despite its straitened circumstances, the Commission functioned as a model of efficiency. The transcripts of evidence indicate that Owen marshalled the evidence with skill and courtesy and both he and Keating traversed the complicated and deceptive terrain of performing rights with clear sight and sure feet.

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1 Justice Owen also waived his travel allowance for NSW travel, as his NSW judge’s pass covered train fares in the State. He asked that if his daily expenses for travel outside NSW were smaller than his daily allowance, he only be reimbursed for the amount actually spent.
Both men were well fitted for the task before them. During hearings, Keating showed, as he did in the Senate copyright debates in 1905 and 1912, humour, penetrating mind, a gift for advocacy and prodigious knowledge of copyright history. Owen, a tall man distinguished by a handlebar moustache, helped found the NSW Bar in 1896. An upright, courteous individual, the father of Sir William Owen, a High Court judge between 1961 and 1972, he displayed high intellect and strong moral purpose.

Looking down on Martin Place from Owen’s rooms, the pair discussed the evidence in the early morning and late at night, as Owen said in closing remarks, and reached conclusions that prepared the ground for the creation, nearly 40 years later, of the Australian Copyright Tribunal. Keating began proceedings on 23 September 1932. He explained that while the inquiry would provide APRA and the commercial users of music the opportunity to explain fully their differences over the terms of use, both he and the Commissioner would adopt the principle that the public’s interest in hearing public performances of music must not be unreasonably curtailed. Writing to the Attorney General three days later, Owen said that Keating’s address “was very able, very impartial, and gave great satisfaction to all who were present.”

Owen went on to explain that he had ordered that the first part of proceedings would concentrate on relations between the national broadcasting stations2 (the ABC) and APRA. To enable the parties to prepare their cases, evidence and information, he adjourned proceedings to 4 October. He then proposed to examine APRA’s relations with the B Class broadcasters. To avoid expense and delay, the Commission hoped to collect as much of its evidence as possible in Sydney, but Owen indicated that he would be prepared to hear evidence in Melbourne and any other capital city if necessary.

The barristers for the main contending parties filled the Commission’s hearing room in the Commonwealth Bank Building for most days of proceedings. With so much at stake, and the ever-present possibility of one interest group attacking or implicating another, the various counsel, even when not presenting evidence, rarely left their listening posts for more than a few days. The seniority of the lawyers filing in each day before Owen indicated plainly to the Commissioner the deadly commercial intent of their hirers.

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2 Still also known as the ‘A Class’ stations.
The King’s Counsel Horace Markell and Reginald Bonney, leaders of the Sydney Bar and later judges, represented, respectively, APRA and the record manufacturers, the two factions resisting government intervention in the war over performing rights. APRA engaged Frank Kitto, the future High Court judge, as Markell’s junior. The B Class broadcasting stations hired gifted though relatively junior lawyers to represent them – first Clive Evatt (made KC in 1935) and then Richard Cook, described by Owen during proceedings as “one of the most able young men we have at the Bar”.

In 1955, Cook the son of Australia’s sixth minister Joseph Cook, became a judge of the NSW Industrial Relations Commission. Mr H P Williams, the General Manager of the ABC, though not a lawyer, represented his organisation, as Owen said in his Report, “with marked ability”.

**Breakdown of negotiations over radio ban**

When the Royal Commission resumed proceedings in October 1932, Williams, on behalf of the ABC, and Markell, for APRA, addressed Owen over several days. Outside events then suddenly interrupted the program of hearings foreshadowed by Owen in August. Negotiations over the terms on which B Class stations could use gramophone records broke down, with the result that the radio ban, in force for a year, now seemed destined to continue indefinitely.

The commercial broadcasters were now highly alarmed. They were deprived for the foreseeable future of access to the latest record releases, and theoretically, the use of all records in their stock manufactured by the three record companies. Relying on importing records of mostly inferior quality from foreign suppliers unaffiliated with EMI, the stations expressed doubts about their continued financial viability. Owen reacted immediately to the failure of negotiations. He asked Bonney to explain why the associated manufacturers considered

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3 Markell joined the District Court bench in 1935 and Bonney the Supreme Court in 1940.

4 Owen made this statement during Markell’s closing address. He said that Cook “gave one of the most able addresses I have ever had the pleasure of listening to, certainly for one of his years of the profession.” In his own final address, Bonney said that “we, too, feel that Mr Cook’s address to this Commission was an outstanding contribution, and as adversaries … we should like to offer our humble tribute to the masterly manner in which Mr Cook got a grip of the proceedings, and to his masterly conduct of them all through.” Cook replaced Evatt at short notice, and, as Bonney said, “came into this Commission under very difficult circumstances indeed.”
that they were entitled prohibit the playing of their records on radio and received an unequivocal response. The record companies, said Bonney, considered that under the Copyright Act and Patents Act, they could impose any conditions they saw fit on the public performance of their records.

Owen and Keating were agitated. A Royal Commission intended to investigate commercial and legal issues surrounding APRA’s exercise of the performing right could now not avoid investigation the legality of the radio ban. Although Bonney at first did not specifically claim a performing right on behalf of his clients, Owen and Keating drew an obvious conclusion: if the record companies believed that they could control the public performance of records under copyright legislation, they must infer from their copyright in records manufactured a derivative right to perform the records in public.

Adding to their difficulties, the two men knew that affiliated manufacturers in Britain and Europe were considering, or already implementing, similar bans. Leaving aside the effect on the unity of the Berne Union of international acceptance of a manufacturers’ performing right in records, such a right, if implemented, might derange the system of copyright payments that APRA laboured for nearly a decade to enforce. The commercial users of music, still reluctant to pay APRA’s performance fee, would be horrified at the thought of a second performance fee, and APRA itself could be expected to swiftly take up cudgels against the manufacturers if the new right undermined its profits.

In short, chaos in the commercial world regulated by the Copyright Act threatened. In the end, APRA reacted with indifference to the claim for the manufacturers’ performing right. In October 1932, however, neither Owen nor Keating could guess at how the protagonists with whom they were soon to contend would react over time to the copyright implications of the radio ban. Owen responded to the uncertainty by contacting Latham, while Keating drafted additional terms of reference for the Commission to inquire into relations between the producers and commercial users of records.

The gramophone companies lion

Latham gained Cabinet’s approval for the proposed new commission, and wasted no time getting in touch with the former Prime Minister,
Stanley Bruce, now Minister-without-Portfolio in London. What information could he provide on the nature and extent of the claim for a performing made in Britain by record manufacturers? Bruce cabled his reply within 24 hours. The gramophone companies had labelled records to prohibit the BBC from playing their records without permission. They had declared their intention to charge fees for the public performance of records and “performances other than broadcasting [were] now the chief concern.”

Significantly, the Performing Right Society had claimed, in the October edition of the Performing Right Gazette, the exclusive right to control the public performance of copyright music in any format or by any means, including records and broadcasting. The BBC, said Bruce in his telegram, “do not admit copyright but think Companies may have a claim in equity, as unrestricted use would kill the sale of records.”

Joe Tipping, the copyright law specialist in Latham’s department, and an observer at the Commission hearings, wrote to Keating a few days later enclosing a copy of Bruce’s communication. He explained that Thompson v Warner Bros, a 1929 English High Court case cited by Bruce, established that the law permitted “only one performing right”.

For Tipping the meaning of the case for the Royal Commission seemed clear. “On this decision, the gramophone companies have no right to claim performing fees under the Copyright Act and a conflict between them and APRA is certain.” Though Markell, APRA’s senior counsel at the Royal Commission hearings, “was inclined to treat the gramophone companies proposals as no concern of APRA”, claims for fees for playing records “must ultimately cause a fight between the record manufacturers and APRA.”

Tipping shared his opinion that the radio ban unmasked the real power in the business of supplying and using copyright music. The proposed agreement between the associated manufacturers and B Class stations – now discarded by the record companies – “shows how serious the matter is for those Stations”. APRA, he said, “is a lamb altogether

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5 The Prime Minister, Joe Lyons, sent Bruce to London partly to ensure that he did not become a threat to his position. Bruce led the Australian delegation to the Ottawa Convention and in 1933 accepted the position of High Commissioner to London.

6 The BBC was negotiating an agreement with the gramophone companies that would restrict it to playing records for 14 hours a week and require it to acknowledge the provenance of records played.
compared to the gramophone companies lion.” Tipping informed Keating that he felt little optimism about the possibility of government resolving commercial impasses created by either the APRA lamb or gramophone company lion.

The latter constituted “another monopoly – the same as the music publishers have their monopoly”. Unfortunately, the Commonwealth’s powers to legislate against monopolies were “nil” and the Government could only overcome the deficit in constitutional power by seeking constitutional amendment. Tipping closed his letter with welcome practical news. The Governor General had signed the new commission containing the additional terms of reference. The Royal Commission could inquire into issues arising between the record companies and the radio broadcasters and the basis on which the manufacturers claimed fees for, and imposed conditions on, the public performance of their records.7

Position of the main parties

Now empowered to investigate the legal questions arising between the associated manufacturers and the commercial broadcasters, Owen and Keating resumed their inquiry. The motives of the parties involved in the inquiry were clearer and as hearings continued, their intentions became unmistakable. A week after the close of proceedings, when Owen retired to his home in Bellevue Hill to write his report, and Keating to Selborne Chambers in Melbourne, the latter wrote to the Attorney General enclosing a memorandum summarising his observations of the material disclosed, and suggesting legislative reforms.

7 The new commission added two terms of reference to the two original terms of reference. The commission asked Owen to inquire and report upon –

(c) any questions that have arisen or may arise between persons interested in the manufacture, use or sale of any mechanical contrivances by means of which any musical or other work may be mechanically performed, whether so interested under or by virtue of the Copyright Act 1912 or otherwise, and persons interested or concerned in using such contrivances for the purpose of mechanically performing such musical or other works in public, whether as persons authorizing or controlling such performance, or as persons on whose premises such performance takes place, or otherwise; and

(d) the rates, methods and conditions of payment (if any) to the persons interested as aforesaid in the manufacture, use or sale of such contrivances by the persons interested or concerned as aforesaid in using such contrivances for the purpose of mechanically performing such musical or other works in public.
A single paragraph in his letter candidly outlined the motives of the two most powerful commercial entities represented at the Commission. Keating told Latham that:

In reading the enclosed Memorandum it should be remembered that the general attitude of Counsel for A.P.R.A. and Counsel for the Associated Manufacturers throughout the Inquiry might be summed up as if they said: “We want to be left alone. There is no need for any legislation to solve present or future problems adverted to here. Leave them to us to settle by private negotiation. The public in general is not interested in, nor affected by, these ‘problems’. The Federal Parliament may have the power to legislate regarding them. But it can only do so by conflicting with International Convention and the British Copyright Act of 1911, thus excluding Australia from the International Copyright Union and from the Inter-Imperial Copyright System.”

The commercial users of music, as the evidence before Owen soon revealed, were united by an opposing aspiration. They, led by the ABC and the commercial broadcasters, whose complaints were most responsible for the creation of the Royal Commission, wanted the Copyright Act to establish procedures for the mandatory arbitration of licensing disputes, preferably by a dedicated tribunal.

The polarity of opinions expressed by APRA and the associated manufacturers on the one hand, and the users of commercial music on the other, should not have surprised Owen or Keating. The Copyright Act gave APRA, as assignee of musical copyright, all that it could ask for – the unlimited capacity to enforce the performing right. Compulsory arbitration, the institution of a tribunal, each represented a potential roadblock on the journey to the creation of an efficient and lucrative system for remunerating the use of copyright musical works.

The gramophone companies did not benefit so directly from copyright legislation. But if left alone to pursue their objectives through the ordinary business channels of negotiation and ultimatum they could confidently expect to control the public performance of their records. They disliked the idea of compulsory arbitration because adjudication required that they surrender control of dispute resolution to an independent authority. After 30 years of extraordinary economic growth they felt no wish to allow third parties to intrude into disputes they could settle on their own terms.

As became clear when Reginald Bonney, the companies’ senior counsel, expounded his arguments, the associated manufacturers saw no need for conciliation. Their profit statements did not justify Tipping’s
description of them as a “lion” but their parent EMI was a true giant whose revenues, profits and assertiveness imbued its Australian subsidiaries with the unshakeable belief that in commercial disputes they must enforce their will by compulsion.

The radio ban duplicated an embargo imposed by the British gramophone industry (on the BBC’s playing of music), and Bonney repeated the justification given in Britain for prohibition. Copyright in a recording, he said, entailed a right of public performance, and nothing prevented the record companies from enforcing the right to stop broadcasters from playing their recordings. If the Royal Commission proposed to recommend any amendment to the copyright legislation, it should be to explicitly recognise the manufacturers’ performing right.

The stunned Royal Commissioner, and the various representatives of commercial music users assembled before him saw the matter differently. Owen asserted that his commission did not authorise him to recommend legislation to recognise the performing right for which Bonney argued. Throughout proceedings, he remained fixed on the idea that only the creation of a quasi-judicial forum for determining disputes would bring order and some harmony to relations between the various parties presenting their arguments to him.

As for the users, they cried out to Owen for deliverance from the cruel ordinances of copyright law – or at least their amelioration. From the middle of the 1920s, motivated by outrage and economic exigency, they fought APRA with degrees of resolve and prevarication, and always unsuccessfully. For them – the radio broadcasters, cinematograph exhibitors, owners of entertainment venues and miscellaneous other users of commercial music – the Royal Commission represented a welcome opportunity to expose APRA’s perceived venality, and obtain protection from what they saw as its ceaselessly growing imposts.

For the commercial radio stations, the Commission presented an opportunity on two fronts. They had no wish to pay more to APRA, and argued pointedly that they could not afford to pay much in performing right fees. But they wanted above all to bring to Owen’s notice the evils of the radio ban, and discredit the record companies’ legal justifications for the embargo under patent and copyright law.

**Outline of proceedings**

All the categories of music user accepted that they could not persuade Owen to recommend abolition of the performing right. But they were
agreed on one general action that might check APRA’s appetite for revenue: the creation of a third party adjudicator to whom the parties must refer unresolved licensing disputes. Owen and Keating accepted the necessity for such an adjudicator and working out how an arbitral tribunal might work in practice became a primary focus of their attention.

After hearing Williams for the ABC, and Markell for APRA, in October 1932 and then part of November, Owen took evidence from Evatt for the B Class stations and Bonney for the record companies. Over December and into the New Year he heard from an extensive list of witnesses, including Bluett the secretary for the NSW Local Government Association, APRA’s active opponent since the mid 1920s. In February and March 1933, he invited the biggest commercial concerns represented at the Commission – APRA and the record companies on one side, and the users of music, the radio broadcasters, and to a lesser extent, the cinema exhibitors, on the other – to address him again.

As Keating told Latham in his letter, APRA and the gramophone industry wanted government inaction. With art and industry, they pressed their arguments against official intrusion into the relations between the providers and users of commercial music. Owen, however, listened more sympathetically as the broadcasters conjured a vision of a primitive commercial world in which APRA and the record companies roamed free like angry dinosaurs, ready to consume any business that stood in their paths.

Though the hostility between the users and controllers of commercial music became apparent early in proceedings, the specific enmities of different parties emerged more slowly. Predictably, APRA attracted criticism from many quarters. The cinematograph exhibitors and other user groups, such as the Local Government Association of NSW, were outraged by the ever-growing size of annual copyright fees and joined in a concentrated attack on APRA’s licensing policy. But the most cogent criticism came from H P Williams, General Manager and counsel for the ABC.

**The ABC**

Williams told Owen that compared to the levies fixed for the B Class radio stations, the licence fees paid by the ABC to APRA were ridiculously high. In 1931, the year before the Royal Commission
began, the amount of total annual copyright royalty paid by to APRA by the ABC's predecessor was more than nine times greater than total fees paid by the commercial stations. Why, said Williams, should the ABC pay rates inflated to capitalise on the boon of government revenue allocations?

Williams also attacked the argument that in setting broadcasting fees, APRA was entitled to take into consideration the effect of the gramophone and broadcasting on sales of sheet music. As he said, “mechanical presentation is but a stage in the march of progress and therefore permits of no retrospective compensation.” The real motives of APRA, he suggested, could be discerned from its policy of taxing government (represented by the ABC) more heavily than any other user of commercial music.

APRA, he implied, made a mercenary decision to take advantage of the ABC because it, as a public utility, stood in the position of a willing buyer. It accepted the legal obligation to pay licence fees and would not fight to the death over the amount. APRA taxed the ABC most heavily because it could, not because the ABC placed the greatest value on commercial music, or because the music supplied commanded, by some other measure, a higher price. Williams said:

*My Commission stoutly contests the suggestion that because a licence fee is paid by listeners for the services from its stations, this permits the holders of copyrights to make an inequitable charge … I respectfully submit that here again we find the attitude of APRA influenced not by concern for the composer and author, but the by an intensive effort to constitute a new source of revenue for the music houses and publishers.*

After Williams’ address, the B Class stations told Owen simply that they, unlike the ABC, could not afford to pay higher fees. But they were not primarily concerned with the depredations of APRA. They concentrated mostly on questions raised by the record companies and they could hardly afford to do otherwise. For concentrated vitriol, no speeches by other barristers at the hearings matched those of Reginald Schofield Bonney, the counsel for the associated manufacturers, as he attacked the motives and usefulness of the commercial radio stations.

**“A noisome weed”**

Bonney expressed the antagonism of the manufacturers in polite sentences that disclosed intensity of feeling and destructive intent. As his argument unfolded the real wish of his clients became clear.
Attributing falling sales to the repeated playing of recorded music, and fearing that broadcasting might fatally undermine profits, the associated manufacturers wanted the commercial stations banned. Bonney never directly voiced this radical aspiration, and instead emphasised the wisdom of licensing a single national broadcaster – like the BBC – to supply radio programming to the nation.

He left his listeners in no doubt that the gramophone companies considered commercial broadcasting a threat to their existence, and the radio ban a rational response to the reckless conduct of the B Class stations. He tried particularly hard to show that unlike the ABC, the commercial broadcasters did not serve the public interest. They were motivated by profit alone and cared little for the sensibilities of their audience, which endured advertisements every three or so minutes.

The national broadcaster, said Bonney catered to all levels of public demand. It satisfied the public’s demand for music and its diverse programming, including broadcasts of Test cricket, catered to a wider variety of tastes than did the programming of all the B Class stations. Yes, he responded to Owen, a certain amount of commercial broadcasting did provide welcome publicity for the latest record releases. But B Class broadcasters had long since passed the “saturation” point at which broadcasting began to exercise a negative effect on record sales. Music played over and over on the radio meant listeners became sick of songs long before they wanted to buy the recording. Commercial broadcasting, said Bonney, “has grown up not as a handsome plant but as a noisome weed.”

As to the effects of the radio ban on commercial broadcasting, the record companies were not perturbed by the possibility of driving some stations out of business and depriving their listeners of music. “Of course my contention is,” said Bonney, “to put it in all its bluntness simply that there is no need to come to terms.” Bonney called the claim of broadcasters that the ban would drive some to extinction pure speculation. The evidence of one station manager, he said, showed that the previous year had been a successful one for the industry, 10 new stations had come into existence since the ban, and two stations had increased the price of advertising to cash in on demand.

While Bonney made no apology for the radio ban or its possible effects, he pointed out that it hardly constituted as frightening a threat to the B class stations as they pretended. When the commercial
broadcasters pushed for the holding of a Royal Commission at the beginning of 1932, a few months after imposition of the ban, they did not mention their dispute with the record companies, or the ban itself. Instead, they focused on APRA, asking the Government for a public inquiry into the activities of APRA and the musical performing right.

The public, said Bonney, would not be disturbed if the ban drove some stations to the wall. Before the ban, he observed, recorded music was “broadcast morning, noon and night, with the result that people were getting rather sickened of music as home entertainment.” Owen responded bluntly. “I think the opinions as to there being too much music on the air depends very much on the state of the liver of the man giving evidence. It is a matter of opinion.”

The Royal Commissioner seemed unimpressed by Bonney’s other arguments. Nothing suggested that the Government wished to undo the policy of the 1920s, which called for the co-existence of commercial and public radio to diversify programming and extend broadcasting into all parts of the country. Whether or not commercial broadcasters intended to benefit the public he considered beside the point. They provided a public benefit, whatever their motivation, and their owners supplied funds, that government could not, for creating a truly national broadcasting system.

That broadcasting undermined record sales Owen thought debatable: one factor in the decline of sales could be the unwillingness of consumers to spend on records during a period of severe economic depression. As to the relative merits of ABC programming compared with that of the commercial stations, if radio advertising offended Bonney’s sensibilities, Owen did not propose to waste any time debating questions of taste that were irrelevant to the biggest question before him.

**The gramophone companies oppose a tribunal**

On behalf of the associated manufacturers, Bonney rejected the idea of a tribunal to resolve copyright disputes. The “rights of property and rights of private contract,” he said, “should only be interfered with in extreme cases.” The radio ban did not invite government intervention: “why,” he asked Owen, “should Parliament be asked to

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8 To which point Bonney responded that the public had spent £7 million on radio licences since 1925 and continued in large numbers to buy radio sets at the considerable cost of £27 10s per receiver.
intercede in what is purely a business dispute, a business difference between two parties?"

Certainly not, he suggested, on public interest grounds:

_Does the public interest demand that all the weight and power of Federal legislation should be brought to bear to save a few stations a few pounds? Surely the public interest does not demand that? All that public interest demands is that the public shall have a reasonable broadcasting service._

Could, Bonney asked, a copyright tribunal understand the intricacies of commercial disputes? Left alone, would the parties not reach agreement more efficiently? As Bonney pointed out, “I have had some experience of arbitration and I may say that I could scarcely imagine a better way of sending the parties into liquidation.” The record companies opposed the concept of an arbitrator setting down the terms on which their records could be used by broadcasters.

Arbitration, Bonney implied, offered a blunt instrument. His clients anticipated that arbitral or tribunal rulings in particular disputes would establish precedents that would be applied, with unfortunate results, to others. For example, an arbitrator or tribunal might decide that the terms of an arbitrated settlement fixing conditions of use by a public broadcaster should apply equally to commercial broadcasters. His clients, said Bonney, considered third party involvement in commercial disputes anathema:

_Any interference or control of that sort with a business is in itself an evil; it is a bad thing and should be avoided if possible; and it is a cause of action which in the case of a business which is struggling its hardest to make both ends meet — and it is not making both ends meet — which may make all the difference between that business continuing and it being scared out of existence. One has to take that view of government interference._

Owen did not share Bonney’s pessimism. He considered the case for legislation to be simple and compelling and paraphrased the arguments of Richard Cook, counsel for the B Class stations:

_There should be some tribunal to determine the conditions if the parties cannot agree and there ought to be some machinery provided by the legislature whereby, if the tribunal determines the conditions, the B Class stations should be allowed to_

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9 The money saved referred to the cost of importing records from non-EMI sources.
broadcast your records providing they could show that they had offered to fulfil the conditions laid down by the tribunal.

**Rationale for the radio ban – the mechanical performance right**

Finally, Bonney and Owen turned to the vital legal question – on what basis did the associated manufacturers claim they were entitled to enforce a radio ban? Under the patents and copyright legislation, said Bonney. The former allegedly gave a right to control the use of a thing manufactured under patent, the second a right to control the performance of records. At the outset, Owen made clear that his commission did not ask him to – and nor could he – determine justiciable legal issues. At the same time, he could not ignore the question and pretend that the recording industry’s bold claim for a new right did not promise mischief for users and regulators alike.

The claim for the mechanical performing right seems to have arisen directly from the British recording industry’s frustration at the seemingly disastrous effect of radio broadcasting on record sales. The record companies knew that banning the use of records by broadcasters under patent legislation entailed risk. Under section 87 of the Patents Act, a broadcaster “unfairly prejudiced” by the ban could sue for revocation of the patent (in this case to manufacture a record) and the Government could readily amend the legislation to prohibit the withholding of supply.

By contrast, the declaration of a public performance right in records offered attractive possibilities as the gramophone companies fought to bring the radio industry to heel. If not opposed by government, the claimed right allowed record companies the choice of exercising potent alternatives: they could either ban radio stations from playing records, or allow them to play the records subject to whatever conditions they wished to impose, including the charging of public performance fees.

When pressed by Owen on the question of the mechanical performing right, Bonney willingly confirmed the Commissioner’s worst fears. His clients were not prepared to say that the radio ban technically involved a ban of the public performance of records but they did assert the right to control such performances. On what basis, asked Owen? Because, replied Bonney, section 19 of the British Copyright Act (which provided for a compulsory licence to record works) created copyright in records “as if such contrivances were musical works”, and under
section 1 of the Act, copyright included the right of public performance. If, under the Act, copyright in a record subsisted “as if” it were a musical work, then the copyright in a record comprehended the performing right that attached directly to musical works.

Bonney gave short shrift to the objection, raised earlier by Markell and Cook, and repeated by Owen, that the compulsory licence permitted a licensee only to record a work and control subsequent reproductions of the recording. According to the argument, the definition, in section 1(2) of copyright as the ‘sole right’ to produce or reproduce a work for various purposes, applied only to the owners of works – the owners of records made under compulsory licence were excluded. The makers of records and those reproducing records under compulsory licence could replicate their recordings, but not control their use for any other purpose. Bonney called the argument “the height of absurdity”.

If, said Bonney, the Act regarded an original or licensed recording “as if” it were a musical work then the maker of the recordings, whether directly authorised or recording under compulsory licence, held the sole right to multiply the recordings for any of the purposes of copyright, including public performance. Owen then responded with the question that had exercised his mind for months.

He agreed that the record company could be said to possess an implicit performance right. As he said, “in one sense you have the right of performance; you can yourselves perform or can give a licence to others to perform.” What interested him, he indicated to Bonney, was the “right to charge for performance”. A right to control the public performance of a thing included the right to demand fees for the licence to perform.

According to the Royal Commissioner, a record company could prevent the piracy of records, but not charge performance fees. Owen justified his position by referring to the language of the compulsory licence in section 19. The licence referred to the making of records “by means of which the work may be mechanically performed”. In the Commissioner’s view, the mechanical act of playing a record did not constitute performance. As he said, the “performance of the work and the use of the contrivance are two entirely different things.”

Bonney expressed the opposite view: “I submit firstly,” he said, “that the word ‘perform’ has exactly the same meaning as the word ‘play’.” Before the Gorrell Committee in 1909, he said, a number of witnesses, chief among them John Drummond Robertson of the Gramophone
Company (who contended strongly for the performing right in records) referred to the words interchangeably.

The Act treated a record as if it were a musical work, thereby vesting, as Bonney reiterated, the public performance right in the owner of the record. The playing of a gramophone record in public was the mechanical analogue of the live acoustic performance of a musical work. Thus playing a record involved performance no less than a concert given by musicians. As Bonney pointed out, the definition of ‘performance’ in the Act referred to “any acoustic representation of a work’. This definition, he concluded, “is sufficient for my purpose.”

For Owen, the consequences of Bonney’s arguments succeeding before the courts raised a frightening prospect: two performing right fees, increased costs and probably commercial warfare. He emphasised that the Gorrell Committee had accepted the necessity for record makers to receive sufficient legal protection to allow them to prevent or attack the piracy of records. Reading section 19 in light of the Gorrell Report, he thought that legislators in 1911 intended copyright in records to comprise twin rights – the first to reproduce recordings and the second to prevent unauthorised reproduction. Bonney contended that the second right implied a performance right.

Commissioner and counsel engaged in a sharp exchange that indicated Owen’s high mindedness and a certain naivety that Bonney gently disparaged.

Mr Bonney

What is the idea of protecting a person against the performance of a pirated article if he has no right whatever in the performance of the original?

The Commissioner

Because it is a wicked use of a pirated article. The man has robbed you of an article which you made at great expense.

Mr Bonney

Such legislation against wickedness in general is very rare. I submit they had in mind the protection of a right which is hurt by what is being done.
The Commissioner  
*What injury is it to you, if by skill you have produced a record?*

Mr Bonney  
*If I have no right of public performance it does not do me any injury for a pirate to perform 100 pirated works.*

The Commissioner  
*Yes, it does, because people buy the pirated ones instead of yours. Your object is to keep up your sales not to collect fees for performances.*

**Paying to listen**

Owen’s last point brought the discussion back to the nub of the question that preoccupied him. Was the law of copyright intended to establish a gigantic industrial system for imposing and collecting revenue or did it have a more limited purpose clearly founded in the doctrine of authors’ rights? Any observer who listened to the his comments throughout the hearings, particularly those addressed to Keating, could guess that Bonney’s reply filled him with foreboding.

Bonney said of the broadcasting of recorded music: “it becomes necessary to ask whether in fairness the public who gets its enjoyment of those records through a new channel should not be called upon to pay.” The record companies must get return on investment. “There is no escape from that proposition,” said Bonney. “And if the sources of revenue that have accrued to them [the companies] in the past are cut off, then they must look for new avenues of revenue.”

Pressed by Owen, who rejected the idea of imposing imposts on the public for the privilege of listening to music, he insisted that the commercial users of records should be obliged to pay public performance fees:

*The person who uses that record in public for his own profit, who could not otherwise obtain that profit, should pay for it; does not justice require that those who have provided him with those means should be entitled to charge for it?*

Bonney reprised the arguments made 20 years before by Drummond Robertson during the British copyright debates of 1909 and 1911. The record companies produced records at great expense, bringing the benefits of performances by the best artists to private and public
audiences. Did not justice demand that anyone who benefited commercially from playing records should pay a price to the record company that made the benefit possible? Was not the technology that made the dissemination of works possible as valuable as the works themselves?

The record manufacturer, said Bonney, deserved to receive more than the revenue received from the sale of chattels. If the owners of musical works were entitled to remuneration for the various uses of the work, then the manufacturers of records were entitled to claim a similar entitlement. Bonney declared:

*In each case one has a thing of value, a thing of value for the purpose of public performance; and if in the one case remuneration is fair because a thing of value is put in the hands of the user, then in the other case I submit it is equally fair that the originator or manufacturer of that thing of value should be entitled to charge in the same way for that public performance, the use of that in public by the broadcaster or whoever the user may be.*

Bonney’s case proceeded with certainty and logic. The transcript of evidence shows that when he summarised his argument in the form of a rhetorical question, the Commissioner’s reply disconcerted him:

**Mr Bonney**

*If the performance of that [a recording] in public is of value to the public, why should not it be paid for? Is there any logical possible answer to that question?*

**The Commissioner**

*There is one answer that affects my mind to some extent, and that is since 1909 when you say that evidence was given up till 1933 it has never been suggested that they [the record companies] had such a right.*

**Mr Bonney**

*It has never been suggested that they have any such right?*

**The Commissioner**

*No.*

**Mr Bonney**

*Your Honour will pardon me.*
Later, Owen asked Bonney:

If it [the public performance right] is of such great value to you and you are so much entitled to this protection, one would have expected, would not one, that it would have been asserted?

To this query, Bonney made no meaningful response. The belated discovery of a mechanical performing right could not affect in principle its legitimacy. But Owen identified an uncomfortable truth: the gramophone industry adduced the existence of the right in order to place the broadcasting ban on a more secure legal footing, then realised that it could also be relied on to claim performance fees.

Owen wrote in his report that, “in England this claim to a performing right is being or is to be insisted upon against all users in public, whether broadcasters or not, and apparently the same claim is being made on the Continent.” To Bonney, he observed that the British High Court and the Victorian Supreme Court rejected the proposition that a mechanical performing right existed alongside the musical performing right. Having tossed dialectical gelignite at the Royal Commissioner, Bonney was sanguine: as he said, the industry in Britain had begun two test cases, and the courts would determine the question.

It mattered little to the record companies if Owen agreed that the arguments for the right were correct. They did not expect the legislature to move quickly in their favour. What counted was that they could present defensible legal arguments to support the radio ban while they prepared to persuade the courts to recognise the right. Owen devoted little more than a page of his report to discussing the question of the mechanical performing right, but as the transcripts of evidence showed, he felt alarm at the possibility of users paying two performance fees.

In his report he affirmed that copyright in a record vested in the manufacturer then asked, “was it intended that, by a grant of ‘Copyright’, he should also be given a right of performance of the work incorporated in his record?” His answer indicated clearly his own position. It would, he said, “apparently lead to extraordinary results if Section 19 has given that right to the maker.” But the Commissioner refused to make any more definite statement on the merits of the

10 Thompson v Warner Bros (1929) Ch Div; Australasian Performing Right Association v 3DB Broadcasting Company (1929) VSC.
record companies’ claim. His final words on the subject made clear that the legislature, not courts, should determine the question:

*The Commission is informed that litigation is pending in Great Britain in which this question will arise for decision, but the Commission considers that legislation by the Commonwealth Parliament is necessary in order to make the legal position clear.*

“A dragon, devastating the countryside”

Described by Joe Tipping, copyright expert at the Attorney General’s Department, as “a lamb altogether next to the gramophone lion”, APRA, in the figurative sense, more closely resembled a dragon at the Royal Commission. Purcell, barrister for the Cinematograph Exhibitors Association, told the Commissioner that APRA began operations as the “watchdog of copyright holders’ rights” but now, “instead of being the watchdog … has become a dragon, devastating the countryside.” Its chief counsel, Horace Markell, breathed fire on its behalf, and, as Keating reported later to Latham, staked a simple position identical to that sketched by Bonney: leave us alone to enforce our commercial will.

Like the gramophone companies, APRA rejected the idea, embraced by the users of musical copyright, of a copyright tribunal. Like the recording industry, APRA preferred to settle disputes by exercising superior – usually overwhelming – bargaining power. If opponents were recalcitrant, it could rely on reserves of money and patience to win battles in the courts. It wielded the performing right like a magic wand, and though many complained, few dared to resist the obligation to pay performance fees.

Markell presented APRA’s position at the Royal Commission with a masterly combination of boldness, evasion and guile. His response to probing about the disparity between fees paid by the ABC and the commercial radio stations illustrated his skill to perfection. Yes, the licence fees paid by the ABC dwarfed those collected from the B stations. But no, the ABC rates were not too high: rather, the commercial stations paid far too little. Why the disparity? Because, frankly, government organisations met their legal obligations, negotiated agreements on realistic terms and paid on demand.

Commercial organisations, by contrast, willingly avoided legal obligations if they could. To secure their compliance meant time and effort. For this reason, Markell told Owen, APRA had at first been satisfied with obtaining from the B Class stations nominal payments that represented a tiny fraction of their total advertising revenues. It
now intended to demand much higher fees that represented the real value of copyright music to the stations.

On the subject of a tribunal, Markell proved equally forthright. The institution of a tribunal, or the passing of legislative amendments providing for compulsory arbitration might “encourage the spirit of reasonableness’ but ‘that is a very doubtful point.” The history of conciliation in Australia after the passing of the arbitration legislation had “not been what one had hoped, but rather it ranged the parties on opposite sides.” According to Markell, sometimes “when you range people on opposite sides of a table you raise a spirit of antagonism.” If there was to be a tribunal, however, it must be an institution of last resort, adopting flexible procedure and presided over by a member of the judiciary, preferably a member of the High Court.

Markell became less direct when the Commissioner asked him to respond to the complaints made by users about APRA. APRA could not deliver the transparency of process that critics demanded. Any requirement to provide a comprehensive list of authors and composers on whose behalf the Association collected fees imposed an impossible burden: through its association with other performing right societies around the world, APRA’s repertoire comprised millions of works.

To provide accurate statements of distributions to authors or composers was also too difficult. APRA remitted the great bulk of money collected in Australia to the Performing Right Society in Britain and it could not compel its British cousin to provide distribution information. In any case, distributions were often based on the records of music use, such as submitted broadcaster playlists, and users often made inaccurate attributions. Accordingly, a large sum of money collected could not be immediately distributed and must instead be held in a general trust fund.

As to the criticism that APRA worked in the interests of music publishers not the creators of music, Markell pointed out that the authors and composers constituted half the membership of the board of the PRS. In other performing right societies, said Markell, the author predominated. Though publishers monopolised APRA’s board, the miniscule number of music creators in Australia meant that the publishers of foreign authors and composers must necessarily dominate the Association. About 99 per cent of music played in Australia originated abroad and it was only through foreign publishers, or their
local representatives, that APRA could hope to remunerate the originators of the music.

**APRA’s objections to the proposed tribunal and method of determining fees**

Markell demurred at proposals that aimed to impose restraints on the use of the performing right. Compulsory arbitration to fix conditions for playing music he called bad in principle. Parties should be left to themselves to strike commercial bargains and government should not interfere with the contractual process. In any case, said Markell, legislation would be ultra vires: Australia had failed to ratify the Rome Conference amendments within the scheduled period, and the Berne Convention minus the Rome revisions did not permit legislative restriction of the performing right. Additionally the British Copyright Act of 1911, adopted in the Australian legislation, did not contemplate restriction.

Markell’s submissions are chiefly interesting for the light they shed on APRA’s approach to valuing licensed music, and its pragmatic emphasis on optimising returns from its most pliable licensee, namely government. His arguments against legislation are of less relevance, though they seem to reinforce the contention of contemporary critics that exclusive collecting societies tend to exhibit the classic behavioural patterns of the monopolist: dislike of scrutiny or accountability, solitary focus on maximising returns and the arbitrary fixing of price.

Markell summed up APRA’s approach in his explanation of the different approaches taken by his clients to the ABC and the B Class stations. For APRA, the key difference between the two lay in the fact that the Commonwealth funded the national broadcaster using a fixed percentage of revenue collected from listeners’ fees. As Markell implied, in APRA’s eyes, secure government funding meant continuing capacity – and willingness – to pay at a higher rate.

The B Class stations, he said, were “in business for profit, therefore we make them a very much smaller charge than if they were subsidised by the Government.” The ABC, APRA found far more amenable:

*When we are dealing with the Government we have not to bother about whether it is paying its way; we simply say ‘We are entitled to this’, and the Government says ‘Yes, we want to use your music.’ It is a matter of plain business; but that is not the case with the B Class stations, where the position is that we have erred on the side of charging them too little.*
On the subject of fixing licence fees, Markell explained that APRA adopted a purely pragmatic approach: it took the most money from the most secure source and spent little time on trying to determine criteria to objectively determine the value of copyright music. He said:

*Our revenue from the sale of phonograph records and sheet music is very small; as our remuneration from those sources is so small, that factor has to be taken into consideration in saying what is a reasonable payment in the case of broadcasting. I think that is a fair way to put it.*

But trying to objectively value music involved “a very difficult inquiry … [i]t is almost impossible to arrive at it.” On this point, the Commissioner agreed. Owen told Markell that he recognised that in valuing an intangible, “[t]here are one thousand and one things to consider.” His solution to the difficulty prefigured the approach adopted by the modern Australian Copyright Tribunal – the “first thing I would look to,” he said, “is what the parties have done.” Negotiated agreement, Owen seemed to suggest, implied some element of free consent and therefore fairness – thus, how could a tribunal determine a fair licence fee “except by what they [the parties] agreed to take”.

Seizing his opportunity, Markell observed that “any fee must be arbitrary.” To try to establish valuation criteria was unnecessary. “As I said in the first instance,” he pointed out, “the actual question of reasonableness in the fee is not of very great importance.” Markell posed a rhetorical query:

*Is there any reason under these circumstances to upset the primary rule which I think everybody will admit is best in the long run, that is, to leave the parties to do what they think is a reasonable thing under the circumstances?’*

Turning to APRA’s method of charging the B Class stations on a per item basis, Markell and the Commissioner found themselves in accord:

Mr Markell  

*It does seem to be a very fair scheme, and though all things in this inquiry, as far as paying a fee is concerned, must be on an arbitrary basis because there is no standard comparison …*

The Commissioner  

*Music has no value excepting of an arbitrary nature; you cannot assess its value except in an arbitrary way.*
However, Markell carefully enunciated the need for principle over arbitrariness if a particular factor could be interpreted in APRA’s favour. The most important principle to recognise, in the age of broadcasting, was that size of audience dictated size of licence fee. “Once it is established,” he said, “that the principle of a larger audience means possibly more compensation, and that is a larger amount, then it is only a question of how much.”

Though not likely to provide insight into the philosophical question of a musical work’s intrinsic value, the principle of audience size made sense if applied to the commercial broadcasters. They relied on audience share to attract advertisers and it could be argued that the value they placed on licensed music grew as their share of listeners increased.

The principle could not so easily applied to the ABC, which paid APRA much more in licence fees than the commercial broadcasters. Markell could not enlighten Owen as to why its larger national audience implied the official broadcaster, providing a service without regard to commercial considerations, should pay higher fees. He simply said: “we are entitled to an increased charge anyway because it reaches a greater number of people, that is as far as I can put it your Honour.”

Returning to his theme that fixing a licence fee could not be done without some resort to arbitrary calculation, Markell suggested both that both the ABC and commercial broadcasters should be required to pay APRA fees equivalent to 10 per cent of annual listeners’ licence payments. He did not bother to explain why 10 per cent represented fair remuneration, arguing only that as both broadcasters and the public craved copyright music, both should be prepared to pay a sizeable toll for the privilege of hearing that music.

“I submit,” he said, “that the public has no right to use our property without paying reasonable fees.” Markell considered it axiomatic that “[i]f you wish to have the music you want, you must be prepared to pay a reasonable price for it.” In any case, “I am not sure that the public objects to paying this amount.” The case for payment by broadcasters followed more directly. The industry, and the social phenomenon, of broadcasting would not have been possible without the supply of
copyright music, and broadcasters must pay a proper price for using what was for them an indispensable commodity.

**The commercial radio stations**

Of all the commercial users of music represented at the Commission, the B Class commercial stations most cogently pressed the case for the users of copyright music. Owen, as he observed to Markell towards the end of hearings, regarded the submissions of their barrister, Richard Cook, a replacement at short notice for the stations’ first counsel, Clive Evatt, as a tour de force.

Cook delivered a sustained attack on the practices and arguments of, first, APRA, and next, the gramophone companies. He enunciated a single theme: a tribunal must be established to ensure that users could avoid commercial oppression. Only an independent arbitrator could prevent the suppliers of music from misusing their bargaining power to insist on conditions that restricted the supply, and increased the cost, of music delivered to the public.

Perhaps the outstanding virtue of Cook’s address lay in his simple appeal for consideration of a neglected interest group – the public. He did not discuss at length how copyright music might be valued or the terms on which it should be licensed. Instead he emphasised that the public wanted music and the B Class stations supplied the public need in the most populated and the remotest parts of the country.

If APRA, through high prices, or the associated manufacturers, through the radio ban, restricted supply, the public suffered as much as his clients. Cook suggested symbiosis in the needs of the everyday listener and commercial radio stations:

*When one takes these factors into consideration I submit it can be claimed with certainty that there is a public interest in any question which affect the life blood of the industry, that is music, and in view of that the desirability of the legislature’s intervention arises.*

Artfully, he insinuated that the suppliers of commercial music had each become a public menace. The need for a tribunal, he said, became clear “when one finds that you have a combination controlling an essential commodity and that that combination is dealing with an industry that is of public importance.” The associated manufacturers displayed the worst attributes of monopolists. While the gramophone companies pretended that they imposed the radio ban to defeat ruinous
competition from broadcasters, in truth, they intended prohibition to
maximise profits and drive radio stations out of business.

Cook proposed that the Government legislate to make arbitration of
copyright licensing disputes compulsory once attempts at negotiation
were exhausted. The principle of arbitration as a last resort greatly
impressed Owen, who repeatedly made clear his opinion that any
tribunal must be regarded as the last – rather than first – step taken
towards determining rates. According to Cook, for an arbitral system to
work, parties must first expect to try to resolve commercial disputes by
negotiation. Under his proposed scheme, if they could not reach
agreement they should try to appoint an arbitrator to hear evidence and
make a ruling. If they could not agree an arbitrator, the Minister should
be empowered to constitute an arbitral tribunal. The ruling of an
arbitrator or tribunal so appointed would be a “common rule” binding
on the parties.

Above all, he said, the public interest in access to the plentiful supply of
commercial music must be maintained. The B Class stations were
the people’s voice. Cook told Owen that the oppressive commercial
conduct of both APRA and the record manufacturers showed why
the Commissioner should reject their arguments in favour of
absolute freedom of negotiation. Only the possibility of recourse to an
arbitral tribunal, said Cook, would restore harmony to the world of
commercial music.

Cook also attacked Bonney’s arguments for the mechanical performing
right. If the copyright legislation described copyright as a ‘sole’ right,
then either the author or the record manufacturer owned copyright but
not both. The legislature undoubtedly intended the author (or assign) to
be the ‘sole’ owner of copyright. Under section 19 of the British Act,
copyright in records subsisted “as if” records were musical works, but
for one purpose only: to enable the record manufacturer to sue
counterfeiters for pirating records. The recommendations of the
Gorrell Committee, the transcripts of its proceedings, and the
parliamentary debates leading to the passing of the British Act, showed
that legislators intended to confer a purely defensive copyright – the
right to prevent unauthorised reproductions of records.

Support for APRA

John Keating, counsel assisting the Commission, now 61 years of age,
seemed to enjoy reprising his old Parliamentary role as an arbiter of
copyright destinies. As he did in the Senate in 1905, he began his final address to the Royal Commission by delivering a long and learned history of the copyright law. He then reached his starting premise: the musical performing right could not be impeached. APRA, as assignee, enjoyed the right absolutely. Only Parliament could abolish the performing right and so long as Parliament respected the long provenance of the right in British law, or considered itself bound by the Berne Convention, it would take no such step.

Keating concluded that APRA’s rates seemed reasonable. He said, “I do not think there is anything in the evidence that has come before your Honour on the part of any witness which supports an objection to the quantum of APRA’s charges.” Owen replied that he considered it, “impossible to say on the present state of the evidence and [it] would be most unjust to say that their charges were extortionate or anything of that kind, but they do make certain charges which certain users object to very strongly, and give their reasons.”

Keating went on to endorse APRA’s function as the mediator of collective rights:

There is nothing, therefore, on the face of it to say that an organisation like APRA in Australia or the PRS in England is an organization which should not exist; it may serve a very useful purpose … it would be practically impossible for the persons whom the law gives rights under the Copyright Acts to be adequately protected and their rights adequately guarded were it not for some such combination.

Necessity for controls over performing right

Keating openly acknowledged that an unfettered right, such as the performing right, or a putative right, like the mechanical performing right, when combined with commercial strength, offered to its holder great temptation: the possibility of rapid enrichment gained at possibly ruinous cost to those who asked to be licensed to exercise the right.

Parliament must, suggested Keating, introduce controls to ensure that the holder of performing rights could not wield those rights like an absolute monarch but must instead submit, where necessary, to the injunctions of civil authority. If created, said Keating, a copyright tribunal would most likely bring the APRA wars to an end, and restrain the record manufacturers, if they secured common law recognition of the mechanical performing right.
But how could Parliament introduce controls? APRA claimed that international law and the policy of the British Copyright Act prohibited the Government from placing any limitations on the performing right. Treaty obligations, according to the collecting society, provided the strongest argument against government action. While the Rome Conference amended the Berne Convention to allow legislatures to impose restrictions on the broadcasting right, Australia had not yet ratified the Rome amendments, and the expiry date for ratification had passed.

The unamended Berne Convention, which admitted no limitation on the performing right, bound Australia. When passing the 1911 Copyright Act, the British legislature implemented the 1908 Berlin Conference amendments to the Berne Convention, intending that the performing right should apply without restriction. Only the compulsory recording licence imposed a restriction on the operation of an exclusive right, in this case the right to make a recording. According to APRA, unless Australia intended to endanger what Keating called “international comity” and “inter-imperial comity” on copyright questions, it could take no action to restrict the performing right.

Hearing these arguments, Owen expressed his concern about recommending any action that could be considered in breach of international law or offensive to the spirit of the Berne Union or the intent of the British Copyright Act. His counsel, however, did not share his fears. Keating told Owen of his certainty that Parliament could legislate to restrict the application of the performing right. He expressed confidence that he could turn APRA’s arguments over the requirements of international law, and legislative policy, on their head, and prove that Australia could pass laws to restrict the exercise of the performing right.

Keating made his case with subtlety and ingenuity. APRA, he said, reasoned from the correct premise. The Commonwealth must respect authors’ rights. Whether Australia was, by elapse of time, debarred from ratifying the Rome Conference amendments, he did not know, though he did not think so. If Australia did, in the future, ratify the amendments, then the legislature could impose legislative restrictions on the broadcasting right without difficulty.

Australia, said Keating, must certainly avoid legislative action that curtailed authors’ rights. But, he went on, no treaty obligation, or legal policy, stood in the way of legislation that imposed limits on the
assignees, or licensees, of authors. The Berne Convention and the British Copyright Act recognised the assignability of copyright. APRA, the assignee of composers and authors, possessed in full the legal title to the musical performing right. However, the Convention and the British Copyright Act were intended to benefit authors and creators not their assigns or licensees.

As Keating pointed out, the Berlin Revision Conference in 1908 amended the Berne Convention to excise references to the author’s “lawful representatives” or publishers. The new Article 4, which replaced the old Article 2 omitted references to personal representatives and in Article 6, which replaced Article 3, “publishers were swept off the map, and the privileges of the Convention were confined to authors.”

The Convention, said Keating, “is intended for authors and authors only. It is not for the assignees, not for their lawful representatives even; it originally was, but it is not now.” In his view, a plain reading of Article 4:

leaves it impossible to avoid or escape the inference that the Berlin Convention Article 4 as it stands today has no application whatever to such a body as APRA or to any merger or combination or persons or bodies corporate or unincorporated, such as the associated manufacturers. They have been outside the scope of the Conventions since 1908.

**Power to create a tribunal and nature of tribunal**

As assignee, APRA could exercise the exclusive rights and enforce its copyright, but it possessed “no standing under the Convention”. The Association, said Keating, had legal standing “in general law as the assignee or as the attorney” of authors, “but not under the [British Copyright] Act”. While the Convention constrained the Government from passing legislation that restricted the rights of authors, it in no way prevented the creation of a tribunal that would regulate APRA’s conduct. Rights conferred on the author through the legislative implementation of treaty obligations were inviolable, unless treaty amendment permitted qualification. However, once assigned, the rights were no longer unassailable. If the assignee exercised rights contrary to

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11 Keating said of Article 6, “Nothing could more clearly demonstrate the deliberate intent of the Convention at Berlin in 1908 to restrict the privileges and benefits of the Convention to authors and authors alone.”
the public interest, the legislature could impose restrictions in the public interest.

The Commonwealth could, said Keating, legislate to create a copyright tribunal, and it should do so. But the tribunal should function as the forum of last resort. The parties to a dispute ought to be encouraged to resolve differences by ordinary commercial means and only after making best efforts to reach agreement should they refer the dispute for determination by an independent referee.

The tribunal should therefore be an occasional forum convened by a senior judge as circumstances demanded, and conducted with the minimum of procedural formality. The principle of “no discrimination” would apply to tribunal determinations. In other words, rates and conditions determined by the tribunal would apply to the whole class of users not simply to the party to proceedings. If the tribunal determined licence conditions to apply to one radio station, other stations could demand from APRA similar licences.

**APRA’s reporting obligations**

With these conclusions, Owen enthusiastically agreed. He gave more cautious assent to Keating’s succeeding propositions. APRA, declared Keating, appeared to conduct itself honourably, but it held a monopoly over musical performing rights, and any monopolist could abuse its power. The tribunal could force APRA to accept licensing conditions that reflected ordinary standards of reasonableness. But any individual or organisation lacking means would by necessity shun tribunal proceedings and be forced to accept whatever licence APRA offered.

It was crucial, therefore, to expose APRA’s fees and distributions to public scrutiny. Parliament, Keating declared, should be asked to pass legislation requiring APRA to report annually on its sources of income and distributions. Critics of APRA told the Commission that they did not object to paying reasonable licence fees if they could be assured that the payments reached the individual composers of music. But they disliked charges seemingly calculated by reference to a single yardstick, the need to increase the revenues of publishers. Let APRA demonstrate in annual reports that it benefited the originators, said Keating. Additionally, APRA should be compelled to indemnify the subjects of mistaken copyright infringement claims.

Keating rejected the argument that APRA could not supply meaningful distribution reports since it remitted most funds collected to the
Performing Right Society. Reporting income and the tiny proportion of receipts distributed in Australia would impose discipline on APRA and the Australian precedent might encourage other jurisdictions, including the United Kingdom, to require their performing right societies to publish similar statements. In the foreseeable future, APRA could simply ask the PRS for lists of distributions made from income collected in Australia.

**Keating on the gramophone companies**

Keating spoke with less certainty about the associated manufacturers. He declared himself perplexed by, “the indefinite policy and course of conduct of the gramophone manufacturers”. Bonney claimed a mechanical performance right for the manufacturers, and justified the claim at length, but he would not say unequivocally that the record companies intended to rely on the right to enforce the radio ban. On the other hand, they would not say definitely that they asserted the right to withhold supply of records under patents legislation. Nor would they predict for how long they intended to maintain the ban.

At any rate, said Keating, the “position is a very serious one so far as Australia is concerned.” The ban threatened the future of B Class broadcasters. While he could think of no definite recommendation, something needed to be done. He suggested the Government should not be shy about tackling the record companies. In 1911, they acquired copyright in records in “a peculiar way” and the compulsory recording licence in no way placed them on an equal footing with authors as the intended beneficiaries of exclusive rights.

Until successfully contested, said Keating, the 1929 Chancery case *Thompson v Warner Bros* stood as authority for the principle that copyright legislation conferred no performing right on the manufacturers of gramophone records. They could not justify the ban on the basis that the broadcasters infringed their performing right in records. Relying on patents law to maintain the ban was only slightly less problematic. If the Government saw “any disposition on the part of the manufacturers to abuse the concessions and privileges’ of patents law, it should respond as it ‘in its wisdom thinks fit’.”

As Keating and Owen agreed, a tribunal determining licensing conditions would not assist the radio broadcasters affected by the radio ban. The jurisdiction of the proposed tribunal could not extend to deciding questions of law, including the legality of the radio ban.
Keating then issued a veiled warning to the associated manufacturers. He suggested that if the radio ban continued, the Commonwealth could attack their conduct under the *Australian Industries Preservation Act 1906* — “an Act against monopolies” as Keating called it.

**The question of the public interest**

Keating ended his address by suggesting that copyright policy makers should consult the public interest when making policy. In the present instance, the “public interest is increasing because the demand on the part of the public is being stimulated by the very activities of the radio broadcasting stations.” What the public needed should be the measure of how government determined policy. To hear music over the radio, the public depended on APRA and the broadcasters to reach agreement. “So the public is vitally interested in all relations between those two huge bodies.” The public “[is] vitally interested in seeing that they work together harmoniously” and the simple objective of government must be to bring accord to their relations.

The Royal Commissioner adopted a more pragmatic view:

*The whole question to my mind is to what extent should the conflict between those rights of public demand, assuming the public interest is there, to what extent and in what way should these differences be adjusted.*

Owen’s approach more truly anticipated the attitude of future copyright policy makers, who (despite contrary declarations) allowed political considerations, rather than abstractions such as the public interest, to guide policy formation. He declared himself attentive to the needs of APRA. “Any method,” he said, “of unjustly dealing with the controllers of this extraordinary asset [music copyright] is greatly to be deprecated, there is no question about that.”

Owen’s sympathy for APRA did not result from political calculation. Like most officers of government institutions, he reflexively favoured the interests of property. The social and economic effects of APRA’s stranglehold on the performing right did not much concern him. For the Royal Commissioner, an upstanding and highly conscientious man, a property right sanctioned by treaty, and adopted by the imperial legislature, must be right in principle. As custodian of the right, APRA, which in any case appeared to conduct its affairs reasonably, should be treated with primary consideration.
Owen, however, took no part of his commission lightly. He told Keating that the whole question of the performing right “impresses my mind at the moment and makes me anxious and troubled.” The Commissioner was sensitive to the public’s need for music. He referred Keating to an article in the April 1931 edition of the *Journal of Radio Law*, which examined the discussion of the rights of the public at the Rome Conference. In the article, the author, Dr W Hoffman referred to the subordination of private to public (or ‘State’) interest:

*Thus the right of the individual and the right of the public strongly conflict with each other in broadcasting and, at the Conference of Rome, M. Giannini had to employ all his skill to succeed in bringing together the divergent interests in the compromise formula of Article 11 bis of which the Committee’s report justly said, “The subcommittee wished thus to harmonise the rights of the author with the general interests of the State, to which individual interests should particularly submit themselves.”*\(^\text{12}\)

Keating responded that the suppliers and users of commercial music “ought to be brought together, and the public is vitally interested in seeing that they work together harmoniously.” Owen acknowledged the point. The best the Commission could do was to recommend certain actions to allow the Government to better regulate performing rights.

And, as both men agreed, the most efficacious way of producing commercial harmony, at least in the case of the musical performing right, was to create a tribunal. The tribunal should headed by a judge and constituted occasionally, on demand, as a last resort. It should be able to determine licensing terms in a flexible, efficient and relatively informal manner and create precedents to guide future commercial relations.

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\(^{12}\) Dr W Hoffman article on Rome Convention in *Journal of Radio Law*, April 1931.