

ABC Submission on the Copyright Legislation Amendment (Fair Pay for Radio Play) Bill 2023

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Executive Summary

The ABC objects to the Bill for the following reasons:

- The proposed change to section 152 of the *Copyright Act 1968 (Cth)* will make it harder for the ABC to achieve its remit under the *Australian Broadcasting Corporation Act 1983 (Cth)*. The removal of the ABC's cap will impact the services and activities provided by the ABC as the ABC has a fixed budget of allocated public funds.
- It is in the public interest for public broadcasters to have access to music repertoire at a manageable and fixed price to ensure all Australians have equitable access to content; a cap achieves that purpose. Further, the radio cap should be extended to all the ABC's public, audio digital services.
- The Parliament should not amend one provision of the *Copyright Act* in isolation without consideration of making attendant amendments to others including s105, s107, s109, S110C, s111A, s111B, and s248H of the Act.
- The proposal to delete the radio cap should not be made in isolation, without updating and modernising other provisions in the *Copyright Act* including section 107 otherwise the impact on the ABC would be significant.
- As current copyright and media reforms are being considered by the Department of Communications and the Attorney General which will drive consensus through debate and submission on the wider issues, this should not be pre-empted by a proposal to delete the proposed sub-sections of s152 in isolation of those reforms.
- Sound recordings should not be equated to musical works or performances by Australian artists in the context of *Copyright Act* reform.
- The lifting of the radio cap will not give rise to proper free market negotiations due to the necessity to engage with one collecting society, and there is a risk of Copyright Tribunal proceedings which are costly and inefficient.
- The Government should consider other policy levers if the purpose of this Bill is to put dollars directly into the pockets of Australian artists.

1. Introduction

The Australian Broadcasting Corporation (ABC) welcomes the opportunity to respond to the Senate Legal and Constitutional Affairs Committee: [Copyright Legislation Amendment \(Fair Pay for Radio Play\) Bill 2023 – Parliament of Australia \(aph.gov.au\)](https://aph.gov.au/legislation/summaries/bills/2023/2023-0001). The Parliament of Australia website states in its invitation for submissions:

The bill would amend the *Copyright Act 1968* to remove provisions that prevent radio broadcasters from paying more than one per cent of their gross earnings in licence fees for the broadcast of sound recordings. In practice, it would allow the relevant copyright collecting society to participate in free market negotiations with radio broadcasters for licences that reflect the value of the works being licensed.

The Bill does more than that. It also proposes to remove the radio cap in respect of the ABC by removing the provision which states that the ABC shall pay no more than 1/2 cent per head of Australian population in sub-section 152(11) of the *Copyright Act*.

The ABC recognises that the radio cap has not been revisited since its inception, that the principle of ensuring fair remuneration to artists for radio play is sound and that many aspects of the copyright regime in Australia would benefit from modernisation. However, these issues are complex and nuanced and will not be effectively and adequately addressed by the proposed Bill which isolates a single issue without appropriate consideration of all the necessary context including the interaction with other statutory licences under the *Copyright Act* and the definition of 'broadcast'.

The ABC's radio cap has a long and complicated history and should be considered in the context of the ABC's broader role and contribution to the Australian music sector.

The ABC respects the ambitions of a Bill that supports Australian artists - they are central to the ABC's remit too. However, the ABC opposes the proposed Bill and the lifting of the ABC broadcast radio cap for the reasons set out in this submission.

2. Submissions

2.1 The ABC's Commitment to Australian Music

The ABC is created by statute under the *Australian Broadcasting Corporation Act 1983* (Cth) and its objectives are set out in section 6 - **Charter of the Corporation**:

(1) The functions of the Corporation are:

(a) to provide within Australia innovative and comprehensive broadcasting services of a high standard as part of the Australian broadcasting system of consisting of national, commercial and community sectors and, without limiting the generality of the foregoing, to provide:

(i) broadcasting programs that contribute to a sense of national identity and inform and entertain, and reflect the cultural diversity of, the Australian community; and

(ii) broadcasting programs of an educational nature;

(b) to transmit to countries outside Australia broadcasting programs of news, current affairs, entertainment and cultural enrichment that will:

(i) encourage awareness of Australia and an international understanding of Australian attitudes on world affairs; and

(ii) enable Australian citizens living or travelling outside Australia to obtain information about Australian affairs and Australian attitudes on world affairs: and

(ba) to provide digital media services; and

(c) to encourage and promote the musical, dramatic and other performing arts in Australia.

The ABC cannot achieve any of its functions without the use of music - music is intrinsic to everything the ABC does.

The ABC achieves its responsibilities to promote the musical and performing arts in Australia in a range of ways, but in particular through commitments made and delivered on its music services, available on terrestrial radio, DAB+ and ABC listen:

- triple j
- triple j unearthed
- triple j Hottest
- Double j
- ABC Country
- ABC Classic

- ABC Classic 2
- ABC Jazz
- ABC Kids listen
- ABC Radio (Local)
- Radio National

In addition to its music services, the ABC provides specialist music content to further promote Australian artists. Examples of some of triple j programs that focus exclusively on Australian artists include:

- *Blak Out*, celebrating First Nations' artists, music, and culture curated, presented, and produced by Aboriginal and Torres Strait Islander members of staff featuring an all-Indigenous playlist and guest line-up.
- *Home and Hosed* highlighting new music from around Australia.

And those which have a combined focus on Australian and international artists:

- *Like A Version*, weekly segment featuring studio performances by artists of one of their own songs and a cover broadcast on triple j radio, online and featured on ABC social media platforms.
- *Live at the Wireless*, recordings by triple j of live music from festivals and venues, broadcast weekly on triple j.

Other specialist music content includes:

- *Spicks & Specks*, a music quiz show hosted by Adam Hills, Myf Warhurst, Alan Brough. The program, commissioned for 10 series to date, is available on ABC TV and ABC iview.
- *Rage*, an Australian music video program running since 1987, which is available on ABC TV.
- *Take 5*, a music-focused interview program, is available on ABC TV, ABC iview and ABC listen
- NAIDOC Awards
- Australian Women in Music Awards
- The ABC's *New Year's Eve* program showcases a range of Australian artists
- A range of classical concerts featuring Australian symphony orchestras and ensembles and Australian composers are available to watch on ABC iview.
- Radio National's *The Music Show with Andrew Ford*

Through these programs and services, the ABC identifies new talent and builds profiles of Australian artists. The promotion and support that Australian artists receive can be a major support to their careers.

Beyond the radio cap, the ABC supports Australian music and Australian artists in a number of different ways:

- As a source of funding for the Australian music industry directly through its commission of artists and indirectly through its payment of licence fees.
- By creating initiatives that directly fund, commission and record new Australian music including the Fresh Start and the Classic and Jazz composer commissioning fund. These initiatives provide income streams directly to Australian artists and performers.
- The commissioning of original Australian music for its internal screen productions, as well as screen content commissioned with the external production sector.
- The recording and release of Australian artists sound recordings through its ABC Music labels.
- Revenue is generated for artists where content, for example *Like a Version*, is published on third party platforms.

The ABC paid \$129,895 of its publicly allocated funds this year in respect of the broadcast of sound recordings under the ABC radio cap. However, the annual fee paid under the ABC's radio cap should not be considered in isolation. The ABC also pays licence fees for the use of sound recordings on its other services, including simulcasting and digital services. These licence fees are not subject to a cap. In combination, under its many

licences that cover the ABC's TV, Radio and Online services, the ABC pays millions of dollars per year to use sound recordings on its services. The precise figure is confidential. Consideration should also be given to the fact that the proportionate value of each of the ABC's licences is evolving as audiences move from linear broadcast to digital services.

This together with the value of ABC's support of and investment in Australian music through other licence fees paid to artists via APRA AMCOS and various other mechanisms means that many millions of dollars of its publicly allocated funds go back to artists each year from ABC licence fees and commissions.

The ABC submits the proposed change to section 152 of the *Copyright Act* will make it harder for the ABC to achieve its remit under the *Australian Broadcasting Corporation Act 1983 (Cth)*. The removal of the ABC's cap will impact the services and activities provided by the ABC as the ABC has a fixed budget of allocated public funds.

2.2 History of s152(11) and its Public Interest Policy Objective

For the most part, these sub-sections have been in the *Copyright Act* since 1968 and sub-section 11 remains in the form it was introduced albeit with a name change from the Australian Broadcasting Commission to the Australian Broadcasting Corporation.

It is important to consider the history of the introduction of sub-sections 152(8) - (11) which were to offset the introduction for the first time into the *Copyright Act* of a set of exclusive, monopoly rights over sound recordings. Broadcasters at the time strongly objected to the introduction of such a provision to exclusively control the broadcasting of sound recordings in section 85;¹ this was an exclusive, monopoly right which did not exist (and still does not exist) in other jurisdictions such as the United States of America.

We note Senator Cash stated in her speech:

The simple reason that the caps have been in place for such a long period of time is because they play an important balancing role between competing economic interests.²

We agree with that statement.

When the ABC's radio cap was introduced, it balanced on the one hand the impact of introducing a new set of valuable, exclusive, monopoly rights to the copyright owners of the sound recordings, with the public interest in preserving access to sound recordings on the other. The cap supports a policy objective of ensuring that recorded music continues to be accessible to the public and affordable for the ABC. It was a modest tilt back in favour of free expression having awarded valuable, monopoly rights to the makers of sound recordings. Through the cap, the public interest in access to music by broadcasting was not fettered by the introduction of the monopoly rights. This policy objective was recently re-iterated by the Minister of Communications. She said:

We want all Australians to have equitable access to media services and content, regardless of financial means or location.³

The public interest objective in ensuring that all Australians have free access to music repertoire through a statutory cap continues to be important today particularly given the emergence and dominance of paid subscription music streaming services and the increasing conglomeration of the music industry. The ABC

¹ *Report of the Committee appointed by the Attorney-General of the Commonwealth to consider what alterations are desirable to the Copyright Law of the Commonwealth*, 22 December 1959 (Government Printer, Canberra, 1965) known as the Spicer Report - see paragraphs 232, 237 and 241.

² The Senate Proof Bills Copyright Legislation Amendment (Fair Pay for Radio Play) Bill 2023 Second Reading Speech Wednesday 9 August 2023 Speaker Page 4 Senator Cash at (09:15) [ParlInfo - BILLS : Copyright Legislation Amendment \(Fair Pay for Radio Play\) Bill 2023 : Second Reading \(aph.gov.au\)](#)

³ [Media Policy: Priorities for a New Government Seminar Communications and Media Law Association \(CAML\) and International Institute of Communications \(IIC\) Australian Chapter | Ministers for the Department of Infrastructure](#)

will continue to strive to achieve this public interest policy outcome by continuing to be a platform for the discovery and development of Australian music.

The ABC submits that it is in the public interest for public broadcasters to have access to music repertoire at a manageable and fixed price to ensure all Australians have equitable access to content; a cap achieves that purpose. Further, the radio cap should be extended to all the ABC's public, audio digital services.

2.3 Complexity of the Copyright Act

The Bill proposes to delete sub-sections 152(8) to 152(11).

Particularly, sub-section 152(11) comprises a small part of a sophisticated and complex network of provisions within the *Copyright Act* that provide the ABC with rights to use sound recordings under statutory licences. In this respect, we refer to s152 of the Act, but also s 105 - *Copyright in certain sound recordings not infringed by causing recordings to be heard in public or broadcast*; s107 - *Making a copy of a sound recording for the purpose of broadcasting*, s109 - *Copyright in published sound recording not infringed by broadcast in certain circumstances*, s110C - *Making of a copy of a sound recording or cinematograph film for the purpose of simulcasting*, s111A - *Temporary copy made in the course of communication*, s111B - *Temporary copy of subject-matter as part of a technical process of use*, and s248H - *Copying sound recordings for broadcast*. In practice, there is a complex licensing interdependency built around these provisions that comprise some of the framework the ABC as a public broadcaster relies upon to use sound recordings to fulfil its remit.

Similarly, as noted above, consideration of the licence fee the ABC pays under the radio cap is a small part of a sophisticated and complex network of licences the ABC has entered into to use sound recordings on its services. There would need to be a recalibration of all of the ABC's statutory rights and licensing arrangements.

For these reasons, the ABC submits that the Parliament should not amend one provision of the *Copyright Act* in isolation without consideration of making attendant amendments to others including s105, s107, s109, s110C, s111A, s111B, and s248H of the Act.

2.4 Fitness of Copyright Act for the Digital Age

The Act is not technologically neutral and its technology specificity means it is not fit for purpose in today's digital age. From the perspective of a public broadcaster like ABC which has digital services as part of its remit, the Act has not been updated to reflect the changes in technology and does not adequately reflect and manage the technologies used by the ABC. For example, s107 which permits the ABC to make copies of sound recordings is limited to broadcast purposes despite the ABC having a function to provide digital media services.

The ABC submits that this Bill should not proceed and instead the issue should be taken into account when assessing all of the possible changes that should be made to the *Copyright Act* to reflect the digital age and support public digital media organisations like the ABC to achieve their functions.

The ABC submits that the proposal to delete the radio cap should not be made in isolation, without updating and modernising other provisions in the *Copyright Act* including section 107 otherwise the impact on the ABC would be significant as outlined below at 2.8.

2.5 Current Reform Landscape

Consideration should also be taken of the current reform landscape before considering the Bill.

In this regard the Government extended the so-called 'Alston Determination' by the *Broadcasting Services (Broadcasting Service Definition - Exclusion) Determination 2022* (Cth) as an interim step while a broader based review of the media is to run.⁴ The Minister for Communications has said of her reform objectives:

There is broad consensus that our laws need to be updated for the digital era.

...And, more fundamentally, the regulatory framework wasn't modernised and remained stuck in the analog era.⁵

In conjunction with this review the Attorney General has been reviewing issues in the *Copyright Act* that need to be updated to reflect the digital age. In particular, the Attorney General has recognised that the concept of "broadcast" needs further consideration. See: [Ministerial Roundtable on Copyright | Attorney-General's Department \(ag.gov.au\)](#)

Both these governmental steps will have a significant effect on the definition of "broadcast" in the *Copyright Act* and the sub-sections that are the subject of this Inquiry, but also the other provisions set out above. For that reason, this Bill is premature.

The ABC submits that as current copyright and media reforms are being considered by the Department of Communications and the Attorney General which will drive consensus through debate and submission on the wider issues, this should not be pre-empted by a proposal to delete the proposed sub-sections of s152 in isolation of those reforms.

2.6 Works and Subject Matter Other than Works

It is a mistake to equate sound recordings with musical works and performers protection. Within the *Copyright Act*, they are characterised very differently.

Musical composition and lyrics are classified as "works" in the *Copyright Act* which require originality, in the sense that the composer has applied intellectual skill to create the work.⁶

Whereas "sound recordings" are characterised as "*subject matter other than works*" because they do not require the same test of originality. They are therefore a different species of copyright and "*in general, these subject matters receive a lower level of protection than works*".⁷ The performers, many of whom are listed in the second reading speeches to the Bill⁸, are given a set of protections in Part XIA of the *Copyright Act* which is not the subject of scrutiny here.

It is also controversial to always equate the ownership of copyright in sound recordings with recording artists in our view. In a typical recording deal, copyright in a sound recording is usually owned by a record label, rather than the recording artist. In these deals, the income the artist receives is usually governed by the terms of their contract rather than copyright. The market for copyright in sound recordings is therefore usually controlled by record companies not artists unless the artist is independent and unsigned to a record label.⁹

The ABC submits that sound recordings should not be equated to musical works or performances by Australian artists in the context of *Copyright Act* reform.

⁴ See [Broadcasting Services \("Broadcasting Service" Definition — Exclusion\) Determination 2022 \(legislation.gov.au\)](#)

⁵ [Media Policy: Priorities for a New Government Seminar Communications and Media Law Association \(CAMLA\) and International Institute of Communications \(IIC\) Australian Chapter | Ministers for the Department of Infrastructure](#)

⁶ See Creswell, C & Ricketson S *Law of Intellectual Property: Copyright, Designs and Confidential Information*, Thompson Reuters Westlaw service at [5.40].

⁷ Above at [8.0].

⁸ For example see The Senate Proof Bills Copyright Legislation Amendment (Fair Pay for Radio Play) Bill 2023 Second Reading Speech Wednesday 9 August 2023 Speaker Senator David Pocock, Page 1 (09:02): [ParInfo - BILLS : Copyright Legislation Amendment \(Fair Pay for Radio Play\) Bill 2023 : Second Reading \(aph.gov.au\)](#)

⁹ See Simpson, Shane *Music Business* 3rd edition, Omnibus Press, 2006

2.7 Previous Committee Recommendations

The ABC notes the range of committees referred to in the Explanatory Memorandum to the Bill that have already discussed the position on the radio caps with various perspectives for and against. The most recent referred to in the Explanatory Memorandum¹⁰- the 2019 *Report on the Inquiry into the Australian music industry, House of Representatives Standing Committee on Communications and the Arts* - did not recommend the removal of the ABC's radio cap - see page 18, para 2.54.

2.8 Other likely impacts of lifting the radio cap

If one objective of the Bill is to allow "free market negotiations" as stated on this Senate Inquiry's website¹¹ consideration must be given to whether a "free market" will in fact be achieved through lifting the cap. Negotiating with a collecting society is collective bargaining. It is impossible for the ABC to negotiate a licence with each of the copyright owners for every sound recording it wishes to use on the ABC every day to achieve its broad remit; one of the reasons a public digital media organisation like the ABC is granted a statutory radio cap and other statutory licences is to obtain administrative efficiency. Where the ABC does not have a statutory right, for practical reasons and to reduce administrative costs, the ABC is effectively required to go down the path of licensing that copyright with a collecting society. However, in that respect it cannot be truly said that there is competition in the marketplace to ensure a "free market" price is achieved. This is recognised by the ACCC which has stated:

Collecting societies play a very important role in effectively enforcing the rights of copyright owners and facilitating access to copyright material for the benefit of copyright users. On the other hand, collecting societies may also raise competition concerns as they bring together the rights of parties who might otherwise compete with each other. This is an area of potential tension between copyright law and competition policy..."¹²

If the radio cap is lifted, there is also the potential for Copyright Tribunal proceedings to divert further resources and money of the ABC away from its functions should the parties be unable to reach agreement. The Attorney General has recently received submissions to its Copyright Enforcement Review: [Published responses for Copyright Enforcement Review - Attorney-General's Department - Citizen Space \(ag.gov.au\)](#), including from Commercial Radio Australia who submitted:

CRA has recently been a party to proceedings in the Copyright Tribunal. These proceedings lasted for over 2.5 years, required numerous Tribunal hearings and voluminous evidence, incorporated both an interim and a final decision and were extremely costly and time consuming for the parties.¹³

The ABC does not wish to find itself in the Copyright Tribunal as this would divert resources and money of the ABC away from its functions. The fact of the radio cap removes the possibility that the ABC will be engaged in Copyright Tribunal proceedings.

The ABC submits the lifting of the radio cap will not give rise to proper free market negotiations due to the necessity to engage with one collecting society and there is a risk of Copyright Tribunal proceedings which are costly and inefficient.

2.9 Are there more effective alternative policy measures?

We respect the underlying objective of the Bill to ensure Australian artists are properly rewarded.

¹⁰ See Outline section of Explanatory Memorandum

¹¹ See: [Copyright Legislation Amendment \(Fair Pay for Radio Play\) Bill 2023 - Parliament of Australia \(aph.gov.au\)](#)

¹² Copyright collecting societies, the Copyright Tribunal and the ACCC— a new dynamic Ed Willett, Commissioner 24 May 2007, Canberra:

[Microsoft Word - 20070524_Willett_Copyright_Society.doc \(acc.gov.au\)](#) at page 2. The ACCC is the regulatory authority which authorises collecting societies like PPCA to engage in collective bargaining. See: [Phonographic Performance Company of Australia Ltd - Revocation & Substitution - A91041- A91042 | ACCC](#)

¹³ See: [Commercial Radio & Audio.pdf](#)

The ABC currently pays the full amount of the radio cap to one collecting society and yet it is likely that not all Australian recording artists are members of that collecting society.

As the money from the radio cap goes through a collecting society there are administrative costs that come out before that money is then distributed to its members in accordance with its distribution policy.

This income stream does not go to session musicians, producers and engineers as it does in other jurisdictions such as UK, and Europe.

The ABC submits that the Government should consider other policy levers if the purpose of this Bill is to put dollars directly into the pockets of Australian artists.