



Media, Entertainment & Arts Alliance | Genuine Article.



Submission to the Inquiry into the *Copyright Legislation Amendment (Fair Pay for Radio Play) Bill 2023*
November 2023

The Media, Entertainment & Arts Alliance (MEAA) is the largest and most established union and industry advocate for workers in the creative and cultural industries, with a history going back more than 110 years. Our members include people working in television, radio, theatre, film, journalists, actors, and musicians. Genuine Article (GA) is an advocacy group made up of music industry leaders, lawyers, and academics. These two parties come together to speak on behalf of **working musicians** and welcome the opportunity to respond to the Senate Legal & Constitutional Affairs Committee's Inquiry into the *Copyright Legislation Amendment (Fair Pay for Radio Play) Bill 2023*.

MEAA/GA recognises that this Bill represents contrasting demands from peak bodies representing producers of sound recordings and those representing commercial radio and the ABC. MEAA/GA also recognise the validity of claims from both sides of the argument regarding so-called 'Radio Caps'. For example, the limitations on licence fees are a legislative anomaly that places the value of sound recordings significantly lower than the value of the musical works. On the other side of the argument, a substantial increase in licence fees needs to be weighed up against the effect that such an action will have on local and regional radio as well as the current requirements to play Australian content on those platforms.¹

During the second reading of this Bill, most of the Senators who spoke recognised an inherent issue with the way artists and performers are remunerated for the secondary uses of their recorded performances. Senator Cadell paid special attention to the opportunity such a Bill presents to shine a light on problems facing workers in the music industry. Senator Hanson-Young praised the Albanese government for recognising artists as workers and Senator Thorpe spoke about the gross imbalance in the way different 'workers' are remunerated.

We thank the Senators for their consideration of the musicians and singers (**the workers**) who perform the music - featured artists and non-featured performers (so called 'session musicians') who work their whole lives to develop their craft and try to build sustainable careers.² In this submission we wish to highlight how fairness, equity, and transparency in the remuneration of musicians can be addressed by this inquiry. ***Fair Pay for Radio Play* must encompass all notions of fair remuneration, including those of the musicians**, and we wish to focus on this by explaining how Australia could do this by adopting the current world's best practice of *Equitable Remuneration*.

¹ Rod Davies, 'What's a Fair Price to Pay for Music? In Australia, Musicians Aren't Getting Paid as Much as Overseas Artists for Songs Played on the Radio', *The Conversation*, 20 June 2023.

² For a comprehensive account of the issues facing Australian performers regarding radio royalties see Rod Davies, 'Out of sight Out of mind: Rights for non-featured performers in the Australian recording industry' (2023) 34(1) *Australian Intellectual Property Journal*, In print.

Equitable Remuneration

Equitable Remuneration (**ER**), often referred to as Neighbouring Rights, represents a foundational principle advocating for the fair and just compensation of musicians who have made significant contributions to successful audio recordings. This concept bears a resemblance to the well-established actors' strike within the United States, which pertains to ensuring extended compensation for individuals involved in the film and television industry when their work is subject to reruns. Similarly, ER seeks to ensure that musicians receive appropriate compensation when their recordings are publicly performed, be it on radio or in various entertainment venues.

The principle of ER serves a dual purpose: it not only establishes a stable income stream for musicians but also acknowledges their essential role as contributors to the music industry. Consequently, it is of paramount importance that this concept be integrated into the ongoing legislative deliberations concerning the *Fair Pay for Radio Play* initiative currently being considered by the government.

The rights of performers, broadcasters, and phonogram producers are embodied in the World Intellectual Property Organisation (*WIPO Performances and Phonograms Treaty (WPPT)*) of 1996, which provides for the artist/ performer/ worker to receive equitable remuneration from the broadcast, rebroadcast and continuing communication to the public of their work. This is articulated in Article 15(1) of the *WPPT*. Sixteen years ago, when acceding to the *WPPT*, Australia, alongside only China, India³ and New Zealand of the 111 signatories, elected not to apply Article 15(1).⁴ This decision, which denied performers the right to receive ER from the broadcast and communication to the public of the recordings on which they perform, hit and continues to hit Australia's homegrown talent directly in the pocket, and for some, significantly so.

The knock-on effect of Australia's failure to incorporate performers' ER right into law, was that the United Kingdom (**UK**) took the decision in 2013 to cease paying Australian performers from UK broadcasts, a right legally afforded to the UK by the *WPPT* due to its reciprocity rules. Prior to 2013, the UK via Phonographic Performance Limited (PPL), paid royalties on sound recordings to Australian artists that were played in their territory. This was even though Australia did not reciprocate by paying UK performers when their recordings were played in Australia. The UK's *Copyright and Performances (Application to Other Countries) Order 2013*⁵ designated Australia a non-qualifying country in terms of sound recording royalty arrangements, an order that was written into the *UK Copyright Act*.⁶ PPL amended its definition of qualifying countries to be "any country that has been designated by the UK Government as providing reciprocal protection to performers or is treated by PPL as such a country"⁷ and ceased paying Australian performers the money it collects.

Therefore, by virtue of Australia's failure to adopt Article 15(1), it not only severely impacts Australian performers' ability to earn from domestic radio and public performance, but it also turns the UK tap off

³ India have recently undertaken to remunerate performers; Likhitha Prasanna, 'With Stronger Laws, Musicians Are Now Making a Run for Their Royalties' *Times of India* (Web Page, 25 March 2023)

⁴ The United States is, at the time of writing, considering a significant bill in Congress that would expand performers' royalties beyond the current digital and subscription radio revenue streams; *American Music Fairness Act of 2023*, HR 791, 118th Congress (2023).

⁵ *Copyright and Performances (Application to Other Countries) Order 2013* (SI 2013/536).

⁶ *Copyright, Designs and Patents Act 1988* (UK) s 206(1)(b)(ba)(bb)(c), s 208; Note the 2013 Order (www.legislation.gov.uk/ukxi/2013/536/made) was updated in 2016 (www.legislation.gov.uk/ukxi/2016/1219) by an Order that specifically lists Australia as a non-qualifying country (10(1)(a)) and outlines the possible consequences for a country that makes a declaration in regard to 15(3) of the *WPPT* (10(4)(c) and 10(5)).

⁷ PPL, *Schedule 3 - Performer Qualification* (31 December 2019), s 4.1, <www.ppluk.com/wp-content/uploads/Governance/Schedule-3-Performer-Qualification-June-2015.pdf>.

completely.⁸ The following is a case study demonstrating the loss of earnings to Australian performers since the UK tap was turned off (information is de-identified and supplied by *Good Neighbour*).

Case Study

Table 1 details Neighbouring rights income for two of the performers who contributed to the sound recording of a song released in January 2012. The two performers represented in the table are the guest performer (Other-Featured performer) who received 33% of the 'performer share' and a session musician (non-featured performer). The figures detail a full year of airplay up to December 2012 and the two subsequent years after the UK ended its reciprocal deal with Australia. There is also a five-year estimate of earnings lost as a result. These figures consider the assumption that commercial airplay of a recording drops off over time, and thus have been calculated conservatively using a decrease in earnings of 50% annually over five years.

Pay Period	Performer	Earnings GBP	Earnings AUD	Over 5 years AUD (approx.)	Conversion to 2023 AUD (approx.)
Contracted Featured Performer	Dec 2012	66% of earnings shown for Other Featured below			
Other Featured	Dec 2012	£45,759	\$76,000	\$109,000	\$140,000
	Dec 2013	£51.88			
	Dec 2014	£0.24			
Non-Featured	Dec 2012	£15,000	\$25,000	\$48,437	\$62,172
	Dec 2013	£17.78			
	Dec 2014	£0.01			

Table 1. actual earnings from Neighbouring rights royalties in the UK before and after the UK ended its reciprocal relationship with Australia.

The Other-Featured artist received £45,759 in the first year of the song's release. After the UK tap was 'turned off' that amount was reduced to £51.88 the following year and £0.24 in 2014. The Non-Featured performer received £15,000 in the first year of release and £17.78 and £0.01 after 2012. This money was derived from *UK airplay*. Australian airplay paid the non-featured performer zero and continues to do so. The five-year loss of earnings for these performers from the UK alone is approximately \$140K and \$62K respectively. This is money derived from music licenses that does not reach the performers as it should.

It is also important to note that **these figures are for the UK only** and that many other territories such as Sweden, Switzerland and Canada⁹, also refuse to reciprocate Neighbouring rights with Australia as a consequence of our lack of protection to performers.

The global pandemic has resulted in a catastrophic drop-off in income for Australia's performers, and the situation we have described only exacerbates the problem. Australian performers have had to use up their savings and dip into their super just to survive. Meanwhile many UK session musicians made more than £50K per annum (approximately A\$90K) during their lockdowns from Neighbouring Rights alone while their fellow Australian session musicians received zero dollars from the continuing use of their work because Australia has not incorporated Article 15(1) into Australian law.

⁸ Rod Davies, 'Australia Is One of Few Countries That Doesn't Pay Session Musicians Ongoing Royalties. Our Music Industry Suffers as a Result' *The Conversation* (Web Page, 27 June 2022).

⁹ Canada pays on the commissioning territory only.

Equitable Remuneration provides a fair system for artists to be remunerated. It is a non-assignable right, which means the income cannot be assumed by labels as recoupment for their expenses. It provides a secure income stream and shifts the power balance back slightly towards the performer(s). Record labels have historically wielded their commercial power over artists. The performer versus the label is a tale as old as time, and the performer rarely comes out on top.

The Australian distributor of revenue from radio licences (Phonographic Performance Company of Australia) has three shareholders who are also the three largest multi-national record companies operating in this territory – Sony Music, Universal Music, and Warner Music. There is a perceived (some might say 'obvious') conflict of interest that needs to be interrogated to determine how the current system remunerates musicians and exactly where the licence fees go. Before considering new laws that would aim to grow the royalty revenue pool, we must ensure that musicians that are not currently being supported by license fees, are protected, and remunerated according to world's best practice. This issue is absent from the *Fair Pay for Radio Play* campaign.

The *Fair Pay for Radio Play Bill 2023* has emerged at the same time as sound recording royalties are being debated in the US Senate and the *EU-Australia Free Trade Agreement*, where the European Commission has called on both parties to "provide a right in order to ensure that a single equitable remuneration is paid by the user to the performers and producers of phonograms, if a phonogram published for commercial purposes, or a reproduction of such phonograms, is used for broadcasting or communication to the public".¹⁰

We contend that a legislative change such as the repeal of subsections 152(8) to 152(11) of the *Copyright Act 1968* (Cth) should not proceed without first considering the anomalies in the legislation that currently affect musicians directly. Australia is lagging the rest of the world regarding ER, and if we want our creative industries and practice to be "future focused, technology enabled, networked and globally recognised, including through reciprocal exchange, export and cultural diplomacy"¹¹ we must get our copyright, IP and royalty payments systems up-to-date and future ready. What good is more 'export income' when the reciprocal distribution systems in place to remunerate featured and non-featured performers do not work as they should?

We propose the incorporation of Article 15(1) into domestic law before tackling the issue of Radio Caps. This will bring the rights of performers in Australia in line with the rights of performers the world-over and in turn ensure that the UK is legally obligated to turn the Neighbouring Rights tap back on for Australian performers.

We also propose a Parliamentary inquiry into the Australian recording industry to get a comprehensive understanding of the interests of each of the parties and the trail of revenue from licence fees to our home-grown artists and performers.

We submit this argument to the committee to raise the voices of all Australian musicians and to work with government to achieve these goals for the future of Australian performers.

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¹⁰ European Commission, *Chapter [XX] Intellectual Property* (13 June 2018), art X.10(1)

¹¹ Commonwealth of Australia, *Revive: A Place for Every Story, a Story for Every Place – Australia's Cultural Policy for the Next Five Years* (9 February 2023), 19