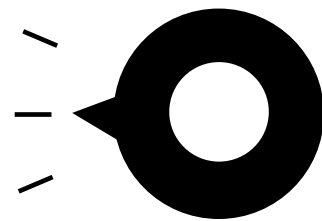




In the early 1980s, a catchy flute riff helped to propel Men at Work's *Down Under* to the top of pop charts across the globe. But nearly 30 years later, as a legal battle over the tune's origin came to a head, the very success of the song was to have tragic implications. By **David Leser.**



THE BIGGEST HIT

TWELVE YEARS AGO, IN THE RAPTURE OF the 2000 Olympics closing ceremony, you could almost feel the elation sweeping the globe when Men at Work's Greg Ham offered up his immortal flute riff on *Down Under* to a television audience of nearly four billion, and a capacity crowd of 110,000 mostly dancing souls inside Sydney's Olympic Stadium.

On that golden millennial night, Ham stood centre stage, a bright pixie of a man with silken blond hair, black jacket and sunglasses, bending to the wind and giving us the melody we had all come to regard – without suspicion – as part of our unofficial national anthem.

As singer/songwriter Colin Hay laid a gentle hand on his friend's shoulder, Ham cut loose with the sequence of notes he'd once dreamed up – or thought he had – in a haze of marijuana smoke 21 years earlier. It was his tongue-in-cheek tilt at an Irish Australian-style tune that went A A A B B B A F# A F#, followed by a descending scale, and then another 11-note flourish, F# F# F# F# G G G F# D F# D.

It looked as if the flautist was on top of the world as he and Hay were eventually joined on stage by a roll-call of Australian icons. But Ham's life had already begun to unravel, though nothing like it would in the period leading up to his death by heart attack in April this year.

About 18 months before his death, just as the Federal Court was ruling that his delightful flute phrase – a pattern of notes in five bars of a 93-bar song – had been lifted from an old children's song, Ham had fallen at The Cotton Mill, his two-storey studio in Melbourne's inner-city Carlton, and cracked his teeth.

Since the court case had begun in a blaze of international publicity in 2008, Ham had stopped receiving ever-diminishing recording royalties for *Down Under* and was reportedly too broke to have his teeth fixed. He had taken to the bottle again, was wrestling with old drug addictions – or so some of his colleagues and friends suspected – and had been forced to sell his studio to buy a smaller property around the corner.

Embarrassed to be seen in public, mortified by the allegations of musical theft, Ham had become increasingly unwell and depressed. He had separated, albeit on good terms, from his wife, Linda Wostry, 12 years earlier and had also suffered the loss of his father and sister. He continued to see his two adored children, Camille and Max, occasionally had old mates over for dinner – lamb shanks, stews, bread-and-butter puddings, all the home-made fare he loved to serve – but his reclusiveness had become conspicuous and worrying.

On April 19, his phone kept ringing off the hook at his home in Canning Street, North Carlton, prompting one of his friends to race to the nearby pharmacy on Rathdowne Street to sound the alarm. “The cats haven't been fed and the phone is going to voicemail,” the friend told pharmacist David Nolte in an agitated state.

Nolte, who had known Ham for nearly 30 years, drove with the other man to the musician's house to find one of the back-door windows smashed. “I didn't know whether it was an aggravated burglary or not, so I let myself in and went looking for him,” Nolte says now.

“Greg, mate, are you there?” Nolte called out, walking from the main room into the bedroom. He then took three steps into the front room to be confronted by Ham's body in a sitting position against the wall.

“The Lord is my Shepherd, I shall not want. He makes me lie down in green pastures ...,” Nolte whispered to himself. And then speaking aloud to his 58-year-old friend, “I'm sorry, mate, to have found you like this. I'll see you in the next life.”

IT WAS A SAX BREAK, NOT A FLUTE SOLO, THAT first launched Melbourne-born Gregory Norman Ham into the upper atmosphere of musical fame. Ham had been a classically trained music teacher and multi-instrumentalist before joining Men at Work in mid-1979, seven years after meeting Scottish-born Colin Hay through a mutual friend, comedian and actor Kym Gyngell. By the end of 1980, Men at Work's joyous blend of pop, rock and reggae was selling out venues across Melbourne and the band released its first independent single, the inconsequential *Keypunch*

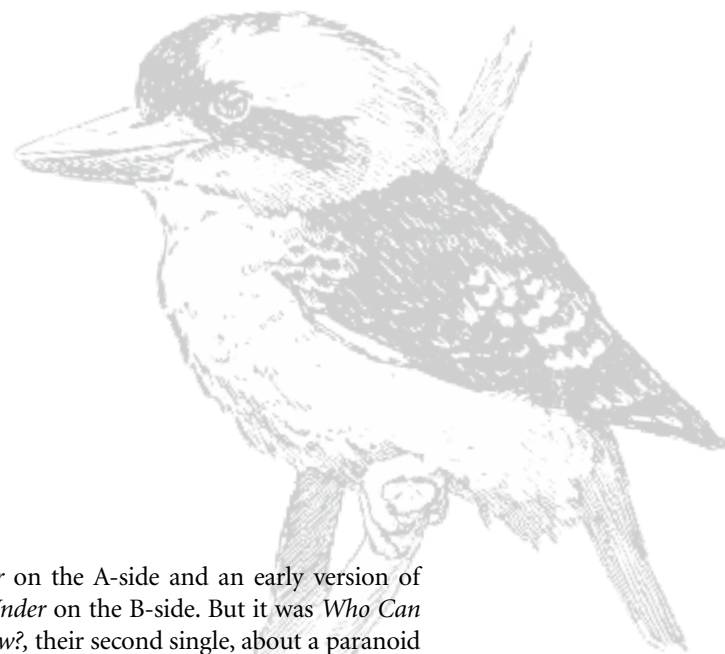
Operator on the A-side and an early version of *Down Under* on the B-side. But it was *Who Can It Be Now?*, their second single, about a paranoid recluse, that first ambushed Radioland, particularly the blowsy, boogying notes that came surging out of Ham's tenor sax. “[That] solo ... was the rehearsal take,” Colin Hay would say. “We kept it. That was the one.”

In August 1981, *Who Can It Be Now?* reached the top of the Australian charts before climbing to No. 1 on the US Billboard. While still pausing for breath in the US top 10, lightning struck a second time when the band released its next single, a reworked version of *Down Under*. At once a celebration and parody of all things Australian, the lyrics were lifted by a hypnotically catchy ska/reggae beat and an indelible flute riff from Ham. The song became an international sensation.

By January 1983, Men at Work had pulled off the extraordinary feat of having a No. 1 album (*Business as Usual*) and a No. 1 song (*Down Under*) in both the US and Britain simultaneously, something previously achieved by only the Beatles, Monkees, Rod Stewart and Simon & Garfunkel. *Business as Usual* would end up selling an estimated 15 million copies worldwide, and spend 15 weeks at No. 1 in the US. That same year, the band would become the first Australian act to win a Grammy Award for Best New Artist.

“They kicked the doors open in America,” says Rick Grossman, bass player with the Hoodoo Gurus. “When I went to the US with the Divinyls in the early '80s, Men at Work were everywhere and Greg and Colin's heads were spinning.”

Men in white: (opposite) a still shot during the making of the 1982 film clip for *Down Under*.



Midnight Oil's drummer, Rob Hirst, remembers it, too, as a rare moment when all eyes suddenly focused internationally on the Australian music scene. "Men at Work's two singles were a big part of that," he says. "They were so distinctly Australian and their attitude to success was dismissive and irreverent. That was one of their great appeals."

Down Under would, of course, emerge as one of the most iconic Australian songs of all time, the soundtrack to John Bertrand's historic Australia II victory in the 1983 America's Cup, the parade-of-honour choice for Australian athletes after a gold-medal win, an orchestral feature

Men at Work's new version of *Down Under* was released. On her death she left her song to the Girl Guides, who subsequently bequeathed it to the State Library of South Australia.

Norman Lurie, managing director of Larrikin Music Publishing, which bought the rights to *Kookaburra* from the library in 1990 for the sum of \$6100, was also unaware of any likeness. He was out for dinner the night *Spicks and Specks* lit a firestorm in the Australian music industry. The following day his phone ran hot.

"A number of people contacted me, including some of our songwriters," he says now. "I was

formance of songs, was asked to suspend 50 per cent of its payments for *Down Under*.

In early 2008 – some 26 years after *Down Under* had been released, 20 years after Marion Sinclair had died and 18 years after Larrikin Music Publishing had bought the rights to *Kookaburra* – Larrikin sued for copyright infringement, demanding 40 to 60 per cent of future royalties for *Down Under* and a similar percentage backdated to 2002. At the same time, EMI sued Larrikin for making "unjustifiable threats" of copyright infringement, a claim that was rejected two years later by the Federal Court.

It was the start of one of the most bitter, divisive and – for Greg Ham and Colin Hay – heart-breaking episodes in Australian musical history.



MUSIC HAS ALWAYS BEEN AN ACT OF HOMAGE and a plundering of the past. Handel is said to have stolen shamelessly from the French cantatas. Schubert experimented with the forms and textures of Mozart and Haydn, and throughout Mendelssohn's brilliant career Bach was never far away.

In jazz there's barely a musician who doesn't quote from the bebop language of Charlie Parker and Dizzy Gillespie. Similarly, in rock'n'roll, when Keith Richards inducted Chuck Berry into the Hall of Fame 26 years ago, the Rolling Stones guitarist said, "I lifted every lick he ever played."

Led Zeppelin was possibly the greatest cover band of all time, given the number of old bluesmen they blatantly stole from ... or paid due deference to.

George Harrison was found guilty in 1976 of subconsciously plagiarising the Chiffons' *He's So Fine* for his worldwide hit *My Sweet Lord*, but, after a bitter legal contest, the ex-Beatle remained unapologetic. "I don't feel guilty or bad about it," he said. "In fact [*My Sweet Lord*] saved many a heroin addict's life. I know the *motive* behind writing the song in the first place, and its effect far exceeded the legal hassle."

The entire history of pop music is, in fact, one of grand larceny.

"We all steal a lot," Paul Kelly openly acknowledged to a television interviewer many years ago. "If you borrow something it's quite obvious. If you steal something, a good thief will hide it, or absorb it somehow."

According to Rob Hirst, co-writer of some of Midnight Oil's most memorable songs, this is what musicians do. They end up ploughing old fields. "When you grow up with Dylan, the Beatles, the Doors, Cream, the Rolling Stones and Led Zeppelin, all you can hope to do is put your own personality on something," he says. "Nothing is original. We are all standing in the footsteps of giants."

Marion Sinclair was no musical giant, but her arresting four-bar composition was a hit, particularly with children, and would end up being parodied relentlessly in schoolyards over succeeding decades.

Larrikin's decision to sue for copyright infringement, therefore, pitted two of Australia's most iconic tunes against one another in what was to become a series of mind-numbing legal examinations.

Was *Kookaburra* written in the same key as *Down Under*? No, it was in F major, whereas Men at Work's song was in B minor.

Were the harmonies, tempos, rhythms, structures, styles and genres the same? No. *Kookaburra* was a four-part round, a children's song, designed

in two Qantas advertisements, and the song that closes *Crocodile Dundee in Los Angeles*.

Various cover versions also emerged over the years, including a Jewish wedding composition, a Lithuanian protest tune and a Cantonese song called (in English) *Just Don't Care*.

Nobody thought twice about *Down Under*'s genetic material until September 2007 when Adam Hills, host of the ABC music quiz show *Spicks and Specks*, asked what appeared to be an innocent question: "Name the nursery rhyme this riff has been based on, as well as the man playing it."

The contestants needed a second chance before New Zealand-born former *Play School* presenter Jay Laga'aia answered, "*Kookaburra Sits in the Old Gum Tree*." It was the song written in 1934 by Victorian schoolteacher Marion Sinclair, who'd rushed home one day from a Sunday church service after seeing a vision of a kookaburra. The song went on to win a Girl Guides song competition that year and became a favourite campfire ditty around the world.

Marion Sinclair later wrote an unpublished biography, *Kookaburra*, in which she claimed her song was less a composition than a recollection of "snatches of songs sung in rounds" at a Victorian jamboree. It was also possibly a light-fingered borrowing of a traditional Welsh folk song called *Wele ti'n eustedd aderyn du?* ("See you there, that blackbird sitting?"), except that the bird had changed feathers and adopted a raucous laugh.

Marion Sinclair died in 1988, seven years after

"I never actually gave any thought to what Greg was playing ...

I never thought to myself, 'Oh, he's playing Kookaburra.' Ever."

shocked. It absolutely hadn't occurred to me [that the two songs were related]. It was just one of those mysteries ... like walking down the same street every day and [passing] over a crack and not seeing it."

After the shock subsided, Larrikin decided to take action. Since 1990, the company had been pursuing international publishers for unauthorised use of Sinclair's *Kookaburra* song. Many had considered it to be in the public domain. "This is what publishers do on a daily basis," Lurie tells GOOD WEEKEND. "Particularly now there is an enormous amount of sampling that takes place in pop music. And so it is very common to sit down on both sides to work out a share."

Larrikin took aim at Men at Work's recording company, Sony BMG Music Entertainment (Australia) Ltd, and publishers, EMI Songs Australia, with a flurry of lawyers' letters pointing out the similarities.

Shortly afterwards, the Australasian Performing Rights Association (APRA), the industry body responsible for collecting fees for public per-

Songlines: (above) Greg Ham (left) and Colin Hay (middle) rehearse for the opening of Stadium Australia in 1999; (below) *Business as Usual* sold more than 15 million copies worldwide.



to be performed with all the phrases fitting on top of each other. *Down Under* was essentially a rock anthem influenced by ska and reggae.

Was Greg Ham's famous flute riff actually part of the song? Not originally. Colin Hay and former Men at Work lead guitarist Ron Strykert had composed the song in 1978, and only the following year, after joining the band, had Ham added the flute notes during a jam session.

Were those flute phrases easy to detect? Not at all. That's why no one heard a resemblance for nearly 30 years.

Under the provisions of the Australian Copyright Act (1968), however, this was not what mattered most. What mattered most was that there was "objective similarity" between the two works, as well as "causal connection".

And what the court found – both in preliminary hearings and at the subsequent appeal – was that when the component parts of the respective songs were broken down, 50 per cent of *Kookaburra*, that is, two bars of the four-bar round, had been reproduced in five out of 93 bars in *Down Under*.

Small though the number of notes was, the pattern was the same, and the aural similarities unmistakable – especially after the judge had heard numerous renditions of the two songs in court, including from Colin Hay on guitar.

"I always thought right from the start they were liable," says Red Symons, former Skyhooks guitarist and Melbourne radio personality. "We are not talking about justice. We are talking about the rules, and their song comprised someone else's copyright."

Perhaps it didn't help that the 1982 video of *Down Under* had shown Greg Ham sitting in the fork of a tree playing a flute with a toy koala hanging from a branch. Was this a nod to the kookaburra? Not intentionally. According to one of the video-makers, Ham had been planning to play the flute while strolling through the mangroves opposite the Cronulla sandhills. Only when the tide came in did he climb the tree – a mangrove not a gumtree.

Certainly it didn't help that since 2002, Colin Hay had occasionally taken to singing the words of *Kookaburra* during live performances of *Down Under* ... just where the flute line was supposed to come in. Hay said he'd been unaware of any reference to *Kookaburra* when he'd first recorded the song, but that, yes, in recent years he'd come to appreciate the resemblance and had merely been paying tribute to an old children's favourite.

"I never actually gave any thought to what Greg was playing as far as the melody of the flute," he told the court. "It was always the flute part, but I never thought to myself, 'Oh, he's playing *Kookaburra*.' Ever."

Greg Ham was never called to testify, but portions of his affidavit were tendered to the court in which he said he'd been aware of *Kookaburra* since primary school. When he came up with his flute phrases for *Down Under*, he said he'd been looking for "an Australian cliché" to complement the "tongue in cheek" nature of the song. He never identified *Kookaburra* as the source of this cliché, but his absence from court seemed to count against him and, by extension, Colin Hay.

In his Federal Court judgment of February 4, 2010, Justice Peter Jacobson said, "It is open to me to infer that Mr Ham deliberately reproduced a part of *Kookaburra*, an iconic Australian melody, for the purpose and intention of evoking an Australian flavour in the flute riff."

It was an excoriating comment from the judge and a devastating moment in Greg Ham's life. "It has destroyed so much of [the] song," he told *The Age* soon after. "It will be the way the song

is remembered, and I hate that. I'm terribly disappointed that that's the way I'm going to be remembered."

Colin Hay said after the judgment, "I'll go to my grave knowing *Down Under* is an original piece of work. In over 20 years no one noticed the reference to *Kookaburra*. Marion Sinclair never made any claim that we had appropriated any part of her song, and she was alive when *Down Under* was a hit."

AT GREG HAM'S FUNERAL NEARLY three months ago, hundreds gathered in the Fitzroy Town Hall to remember a man who had brought much joy and humour to countless people's lives. Between the strains of Wilbur Wilde's haunting sax rendition of Jules Massenet's *Meditation* and a recording of Sammy Davis jnr's *Please Don't Talk About Me When I'm Gone*, Ham was eulogised for his "golden heart", his "gentle and encouraging" ways as a father, his "instinctive" musical skills, his promotion of young talent and his great patience and ability as a teacher.

"No one disliked him," says one friend who was present but declined to be named. "He didn't have a bad bone in his body."

Colin Hay was overseas and unable to attend, but he sent a version of an old Men at Work song recorded on his iPhone the night before:

*I'm blue for you, blue for you/
I don't know what to do.*

Two weeks earlier, Hay had issued a statement saying, "We shared countless, unbelievably memorable times together, from stumbling through Richmond after playing the Cricketers Arms, to helicoptering into New York City, to appearing on *Saturday Night Live*, or flying through dust storms in Arizona, above the Grand Canyon, or getting lost, driving aimlessly through the Gippsland countryside. We played in a band and conquered the world together. I love him very much. He's a beautiful man."

Shortly afterwards, the singer-songwriter broke down on ABC radio while decrying the court ruling. "It had a big impact on [Greg]," Hay said. "He was angry about it. He was embarrassed about it."

The anger was shared, not just within the music industry, but around the country.

"A lot of us were outraged," says Ham's childhood friend Gareth Morse. "[Greg's flute line] was a salute to another iconic part of Australian musical history. His motivation wasn't to steal, it was to pay homage."

Melbourne writer Anson Cameron parlayed his indignation into an uproarious short (fictional) story called *Song of the Lyrebird* in which "Lionel Pavelich", managing director of "Lurid Music", sues a musician from the "Exotic Jujubes" for writing a song called "*Because of Oz*", lifted from a nursery rhyme called "*Ulladulla Lullaby*". Both tunes share the same chorus: "... *Tooralai ooralii hoompty pumpoo; oh hoompty hoompty woosa wazzang.*" Despite these similarities, a "feted composer" in Cameron's story tells the court that "the two songs are not only unrelated, they are on different evolutionary branches."

"Musicology," the composer snarls, "is mere vivisection ... it kills the thing it explores. [Don't] listen to those who deconstruct a song to discover its lineage. There are recurring tropes in all music. Who can say who begat whom? Composition is an orgy."

Anson Cameron's story was a harmless but well-aimed arrow at the heart of Larrikin's reputation. Not so the treatment meted out to Warren Fahey.

Warren Fahey's name had been synonymous with Larrikin since establishing the company in

Battle royalty:
Greg Ham in July 2010; he was devastated by the court's decision.



“It has destroyed so much of [the] song. I’m terribly disappointed that that’s the way I’m going to be remembered.”

1974 as a folk label for mainly Australian artists. In 1988, he sold the company to the giant American-owned Music Sales Corporation, headed in Australia by Norman Lurie.

Warren Fahey says he would never have taken legal action and that on several occasions he warned Lurie that it would harm the reputation of the label. “I thought that would be a very poor show and produce a very poor outcome,” he says. Instead, Fahey called for *Kookaburra* to be gifted to the nation, an idea Lurie thought – then and now – “very amusing” and without “any credence”.

Fahey was protective of Larrikin’s reputation, believing that litigation would harm the brand he’d spent years nurturing. He was not wrong.

“You lowlife piece of shit,” wrote one correspondent to Fahey. “I hope you choke on the blood money you screwed out of Men at Work. You will forever be remembered as the human garbage that destroyed one of Australia’s iconic bands through greed and opportunism.”

And another: “Dear parasite. May your name live in infamy as the one who directly contributed to the death of one of Australia’s great artists. I hope you die in a fire.”

THERE IS NO SUGGESTION HERE THAT Larrikin’s actions caused the death of Greg Ham. In fact, Ham’s slide into ill health and depression had begun years prior to the court case. What the litigation did, though, was make a bad situation worse. “It pulled the rug from under him,” says one who knew him well.

Warren Fahey ended up receiving hundreds of hateful messages and responded to each by restating he was no longer in charge of Larrikin.

Lurie is now retired, and his job has been filled by Mark Callaghan who, like Fahey, is a well-known musician and highly regarded in the industry. “All I’ve tried to do since I came on board [18 months ago] is to try to settle this,” Callaghan says wearily, “but it doesn’t seem to have happened. It is still before the courts for a variety of reasons.”

“Certainly, I feel dreadful about the whole thing. I don’t think anyone in our firm expected it to go as far as it has. I was certainly advised when I took this role that it would be done and finished before I came on board. But it just keeps going on.”

Under Norman Lurie, Larrikin demanded up to 60 per cent of all future royalties from *Down Under*, as well as the same amount backdated to 2002.

Justice Jacobson rejected the claim, saying, “I consider the figures put forward by Larrikin to be excessive, overreaching and unrealistic.” He ordered that five per cent be paid, although, according to Norman Lurie, “not one dollar” has come to

Larrikin since the ruling. “This is anything but resolved,” he says.

EMI (which has just been bought by Sony/ATV) declines to comment on the case, as does Colin Hay, who initially agreed to be interviewed by GOOD WEEKEND but reversed his decision. Inquiries to APRA have also been met with a “no comment”, as have approaches to Adam Hills and the former ABC’s *Spicks and Specks* team, all of whom are known to be deeply distressed by the chain of events their program unleashed.

Norman Lurie believes Colin Hay should have been advised by EMI to settle out of court. “We somehow managed to sit down and discuss it with [APRA and Sony] and reach a fair and equitable settlement, but the answer from EMI was no,” Lurie says. “It was really quite appalling.”

Not as appalling, according to many critics, as the “opportunistic greed” that drove Larrikin’s actions and the implications this now has for past and future creative endeavour, particularly with the advent of sampling and remixing.

One music-industry source who declined to be named says Lurie is a “wonderful man” who only did what music publishers do as a matter of course – assert copyright ownership on behalf of their commercial property. “This was in many ways a run-of-the-mill sampling case,” he says. “A piece of melody that someone owns copyright on turned up in someone else’s track. The owners of the original piece of music [Larrikin] sought a fee. This happens every day in the music industry.”

“People who view this as opportunistic greed do not understand the mechanics of the music industry and copyright industry. It’s never about punishing the musicians. It’s about two corporations battling over their economic rights.”

Despite denying Men at Work’s appeal, the Federal Court’s Justice Emmett noted he, too, felt “some disquiet” about the original court’s findings. “If, as I have concluded, the relevant versions of *Down Under* involve an infringement of copyright many years after the death of Ms Sinclair ... then some of the underlying concepts of modern copyright may require rethinking,” he said.

“One may wonder whether the framers of the [18th-century] Statute of Anne and its descendants would have regarded the taking of the melody of *Kookaburra* ... as infringement rather than as fair use.”

Norman Lurie says he is sorry for the pain this has caused, but knows in his heart of hearts he did the right thing. “At the end of the day there’s only one person who has to look at my face in the mirror when I’m shaving, and that’s me.”

He points out that Larrikin never targeted Greg Ham, but rather, principally, the publishers, EMI. “I was alarmed that people connected the dots [after Ham’s death], because as far as I was concerned the case really had nothing to do with him.”

Of course, in Greg Ham’s mind it had everything to do with him. A lifetime ago a gifted young musician entered the dreamspace every artist hopes to inhabit, only to be told almost three decades later it wasn’t his dream at all. **GW**