



## SUPPLEMENTARY SUBMISSION

### AUSTRALIAN BROADCASTING CORPORATION, COMMERCIAL RADIO AUSTRALIA, COMMUNITY BROADCASTING ASSOCIATION OF AUSTRALIA AND SPECIAL BROADCASTING SERVICE

1. The Australian Broadcasting Corporation (**ABC**), Commercial Radio Australia (**CRA**), Community Broadcasting Association of Australia (**CBAA**) and Special Broadcasting Service (**SBS**), (together, **Broadcasters**) make this supplementary submission to the Environment and Communications References Committee (**Committee**) in relation to its inquiry into the current regulatory arrangements in dealing with the simultaneous transmission of radio programs using the broadcasting services bands and the internet (**Inquiry**).
  2. This supplementary submission is made further to the Broadcasters' initial submission of 10 May 2013 (**Initial Submission**) and should be read in conjunction with that submission. It is intended to further assist the Committee in dealing with some of the issues raised in the stakeholder submissions, and in directing the Committee to issues that are central to the Inquiry.
- A. The issue before the Committee is simply whether to update a 10 year old determination to reflect the current use of technology by broadcast media consumers**
3. The issue before the Committee is a simple one. The Broadcasters ask that the Minister immediately makes a determination in the terms set out in Paragraph 12 of the Initial Submission. This determination will reinstate the status quo as understood and applied by broadcasters over a long period, without dispute by PPCA or any other organisation.
  4. The new determination will simply update the previous determination, made by Minister Alston over 10 years ago, to reflect the current use of technology by media consumers and the trend towards platform neutrality of regulation. It is a straight forward way of ensuring that Australian media consumers continue to be able to access broadcast programs on devices of their choice.
  5. The Broadcasters' proposed course of action requires no amendment to the *Copyright Act 1992* (**Copyright Act**), the *Broadcasting Services Act 1992* (**BSA**) or any other piece of legislation. In particular:

- a. the Broadcasters' recommendation does not require any legislative amendment of the definition of *broadcasting service*. That definition, along with all other definitions and legislative provisions, will remain unaffected by the new Ministerial determination;
- b. the Broadcasters' proposed course of action does not involve any consideration of other elements of the Copyright Act, such as the statutory caps which apply to the ABC and the commercial and community radio industries.<sup>1</sup> These statutory caps have been considered extensively in other reviews and in litigation. In 2011, the High Court unanimously held that the statutory caps were constitutional and should be maintained.<sup>2</sup> It is not appropriate to re-open this complex issue in this Inquiry. To do so will serve only to distract the Committee from the core issue of the treatment of simulcasts of broadcasts over the internet.

**B. The subject matter of this Inquiry is distinct from that of other inquiries**

6. The ALRC inquiry into Copyright and the Digital Economy commenced in June 2012 and addresses a wide range of copyright related issues. This is the proper place for consideration of broader issues relating to copyright, such as those raised by the PPCA.
7. This Inquiry relates to the much narrower issue of whether the status quo accepted by many broadcasters and the music industry should be changed via a new interpretation of a 10 year old determination. The Broadcasters' position is that an updated determination, reflecting the previous status quo, should be issued immediately.
8. This is not an issue that should be delayed pending the outcome of much wider reviews of the regulatory framework governing copyright. Instead, it should be addressed as quickly as possible, so that broadcasters may continue to provide the services that consumers have enjoyed for the past 10 years, namely the ability to access broadcast programs of their choice over the internet in accordance with the objectives of the BSA. In particular, the BSA requires that Parliament legislates in a way that will "*readily accommodate technological change*"<sup>3</sup> and will "*encourage*

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<sup>1</sup> Sections 152(8) and 152(11) of the Copyright Act.

<sup>2</sup> *Phonographic Performance Company of Australia Limited v Commonwealth of Australia* [2012] HCA 8.

<sup>3</sup> Section 4(2)(b), BSA.

*the development of broadcasting technologies ... and the provision of services made practicable by those technologies to the Australian community”<sup>4</sup>.*

9. The ALRC inquiry enables some of the broader issues raised by stakeholders, which are not relevant to this Inquiry, to be addressed. These issues should not form part of this Inquiry and should not prevent the Committee from making the recommendation proposed by the Broadcasters.

**C. The subject matter of this Inquiry is distinct from that of previous litigation**

10. Any suggestion that the issues raised under this Inquiry may be addressed in litigation is misguided. The substantive litigation in question has ended. An application seeking leave to appeal to the High Court has been lodged by CRA but no appeal has been made. Currently, an appeal to the High Court is not permitted. Further, the litigation did not involve the ABC, CBAA or the SBS, all of whom have an equally strong interest in the Committee’s findings.
11. The litigation brought by the PPCA against CRA was highly technical and related only to the interpretation of the 10 year old determination made by Minister Alston. The Court was not able to consider whether a new updated determination might be appropriate for reasons of policy, practicality and public interest. This is the task that now faces the Committee under this Inquiry.
12. The Broadcasters ask the Committee not to revisit the issues considered by the Court, as those issues were limited and technical. Rather, the Committee should consider the policy issues surrounding the consequences that flow from the Court’s decision, particularly the loss of broadcast copyright in programs simulcast over the internet, and the effect on broadcasters and legislators of regulating identical program content under two separate regimes.<sup>5</sup>

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<sup>4</sup> Section 4(2)(c), BSA.

<sup>5</sup> See Initial Submission.