Opinion on answers by the Department of Broadband, Communications and the Digital Economy and the Attorney-General's Department to questions on notice from the Senate Standing Committees on Environment and Communications

1. Opinion sought

1.1 Commercial Radio Australia (**CRA**) has asked for an opinion in relation to the answers given by the Department of Broadband, Communications and the Digital Economy (**DBCDE**) and the Attorney-General's Department to questions on notice from the Senate Standing Committees on Environment and Communications (**Committee**) in relation to its inquiry into "the effectiveness of current regulatory arrangements in dealing with the simultaneous transmission of radio programs using the broadcasting services bands and the Internet (**Simulcast**)" (the **Inquiry**).

2. Background

Background to simulcasting

2.1 'Broadcasting Service' is defined in section 6(1) of the *Broadcasting Services Act 1992* (**BS Act**) as:

> *'a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, but does not include:*
>
> *(a) a service (including a teletext service) that provides no more than data, or no more than text (with or without associated still images); or*
>
> *(b) a service that makes programs available on demand on a point-to-point basis, including a dial-up service; or*
>
> *(c) a service, or a class of services, that the Minister determines, by notice in the Gazette, not to fall within this definition.'*

2.2 In 1996, the Australian Broadcasting Authority, ACMA's predecessor, reported that radio stations had commenced simulcasting radio programs and that such simulcasting was an activity conducted by a 'broadcasting service' within the meaning of the BS Act.

2.3 I am instructed that the Australian Broadcasting Association (**ABC**) commenced radio simulcasting in 1999. I am also instructed that in approximately 2000, community radio broadcasters commenced simulcasting.

2.4 To avoid any misunderstanding, I note that a simulcast of a radio or television program is different to a retransmission of a television or radio program. A 're-transmitted broadcasting service' is defined in section 12 of the Schedule 7 to the BS Act as a service that does no more than:

(a) *re-transmit programs that have been previously transmitted by a licensed broadcasting service; or*

(b) *re-transmit programs that have been previously transmitted by a national broadcasting service.*

2.5 The use of the word 'previously' means that for a retransmission to occur, the programs must be broadcast prior to the retransmission not simultaneously, as is the case of a simulcast.

2.6 On 12 September 2000, the Minister for Communications, Information Technology and the Arts, Richard Alston, made a Determination under paragraph (c) of the definition of 'broadcasting service' that the following class of services does not fall within that definition:

'a service that makes available television programs or radio programs using the Internet, other than a service that delivers television programs or radio programs using the broadcasting services bands.' (the **Current Determination**).

2.7 The Current Determination excludes from the definition of 'broadcasting service' a service that makes available television programs or radio programs using the Internet (the **Exclusion**) but then provides an exception to the Exclusion for a service that delivers television programs or radio programs using the broadcasting services bands (the **Exception**).

2.8 I am instructed that the first commercial radio station commenced simulcasting in April 2001.

2.9 Since the time of the original simulcasts, the practice of simulcasting has spread throughout the industry and I am instructed that all, or almost all, commercial radio stations, community radio stations, the ABC and Special Broadcasting Service (**SBS**) now

simulcast their radio programs. I understand that the ABC commenced simulcasting its television multichannel ABC News24 online in July 2010.

2.10 I am instructed that, on occasion, broadcasters are asked by content providers not to simulcast certain programs. The agreements with those content providers reflect this request and contain provisions preventing simulcasting.

Simulcasting as a broadcasting service

2.11 In April 2009, the Phonographic Performance Company of Australia (**PPCA**) advised CRA for the first time that it considered that the online communication of radio programs in a simulcast were not covered by the Industry Agreement and Member Agreements which had been entered into in June 2001 between PPCA, CRA and CRA's members because they were not communications delivered to the public by a '*broadcasting service*' (as defined in section 6(1) of the BS Act) and, therefore, were not '*broadcasts*' (within the meaning of that term in the *Copyright Act 1968* (Cth) (**Copyright Act**))[1].

2.12 On 3 February 2010, PPCA commenced proceedings against CRA in the Federal Court of Australia. The dispute raised for consideration the construction of the term "broadcast" in section 10(1) of the Copyright Act, which required a consideration of the definition of "Broadcasting Service" in section 6(1) of the BS Act and consequently a consideration of the Current Determination.

2.13 The primary judge dismissed the application by PPCA[2]. The primary judge found that a radio station that provides a simulcast "*is but one service being a service which combines various delivery methods or platforms and which delivers the same radio program using the broadcasting services bands*"[3]. Therefore, his Honour held that a radio station that simulcasts is a broadcasting service within the meaning of section 6(1) of the BS Act and such activity is within the scope of the licence PPCA has granted each radio station pursuant to the Industry and Member Agreements.[4]

2.14 PPCA appealed the decision of the primary judge to the Full Court of the Federal Court of Australia (the **Full Court**). On 13 February 2013 the Full Court handed down its decision.[5]

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[1] This PPCA claim is based on its interpretation of the Current Determination.
[2] *Phonographic Performance Company of Australia Ltd v Commercial Radio Australia Limited* [2012] FCA 93.
[3] at [130]
[4] at [131]-[132]
[5] *Phonographic Performance Company of Australia v Commercial Radio Australia Limited* [2013] FCAFC 11

2.15 The Full Court upheld PPCA's appeal and held that a service is the provision, by one means or another, such as the internet or terrestrial transmitters, of a radio program. The same radio program may therefore be delivered by difference services (according to their Honours).[6] This interpretation of the meaning of 'a service' meansthat a service that makes radio programs available using the internet will not be a broadcasting service for the purpose of the BSA unless the service that makes radio programs available using the internet also uses the broadcasting services bands.[7] The Full Court therefore interpreted the Current Determination as excluding simulcasts of radio and television programs over the internet from the definition of 'broadcasting service' in the BS Act.

The Inquiry

2.16 On 21 March 2013, the Senate referred the following matter to the Committee for inquiry and report:

The effectiveness of current regulatory arrangements in dealing with the simultaneous transmission of radio programs using the broadcasting services bands and the Internet ('simulcast')

2.17 In response to the Inquiry, a submission was made on behalf of the ABC, CRA, the Community Broadcasting Association of Australia and the SBS (the **Broadcasters**). As part of that submission, the Broadcasters urged the Committee to recommend that the Minister make a new Determination under paragraph (c) of the definition of 'broadcasting service' in subsection 6(1) of the BS Act in or to the effect of the following:

(a) revoke the determination made by the Minister for Communications, Technology and the Arts made on 12 September 2000, and

(b) determine that the following class of service does not fall within that definition:

a service that makes available television or radio programs using the Internet, unless that service is provided simultaneously with a service that provides the same television program or radio program using the broadcasting services bands and both the services are provided by:

(i) the holder of a radio broadcasting services bands licence,

(ii) the Australian Broadcasting Corporation, or

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[6] at [68]
[7] at [71]

(iii) the Special Broadcasting Service. (the **Proposed Determination**)

2.18 The Proposed Determination does not seek to change the Exclusion in any way. That is, it would still seek to exclude from the definition of 'broadcasting service' a service that makes available television programs or radio programs using the Internet. The Proposed Determination only seeks to change the exception to the Exclusion. In so doing it would overcome the adverse effect of the Full Court's strained interpretation of 'a service' as simply being a delivery mechanism for a program and thus 'a broadcasting service', which presently precludes a broadcaster from simulcasting programs (without paying additional licence fees for the same material).

2.19 The Proposed Determination would not apply to commercial television broadcasters in any way. The only television broadcasters which would be affected by the Proposed Determination are the ABC and SBS.

Questions asked by the Committee

2.20 Following receipt of a number of submissions to the Inquiry, the Committee asked the following question of the DBCDE and the Attorney-General's Department:

What would be the potential broadcasting, copyright and other legal implications of the Minister for Broadband, Communications and the Digital Economy issuing a determination to the effect of ensuring that television and radio simulcasts are considered to be a 'broadcasting service' under subsection 6(1) of the Broadcasting Services Act 1992?

2.21 Both the DBCDE and the Attorney-General's Department answered this question and it is in respect of those answers that I have been asked to provide my opinion.

3. Response from the DBCDE

3.1 The DBCDE has raised a number of matters which it considers may be '*issues*' arising out of the Proposed Determination.

3.2 The Proposed Determination does not apply 'to … internet services more generally".[8]

Scope of the Proposed Determination

3.3 As noted above, the Proposed Determination seeks to exclude:

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[8] Cf Ibid para 4.

'*...a service that makes available television or radio programs using the Internet...provided simultaneously with a service that provides the same television or radio program using the broadcasting services bands...provided by:*

(i) the holder of a broadcasting band's licence for radio,

(ii) the Australian Broadcasting Corporation, or

(iii) the Special Broadcasting Service.'

3.4 It appears that the DBCDE has failed to appreciate that the only television broadcasting services which would be affected by the Proposed Determination are those provided by the ABC and the SBS. Many of the concerns of the DBCDE appear to be directed to issues which it suggests "may" arise in the context of the operation of commercial television broadcasting industry. Those concerns fall away and diminish the suggestion that the impact of the Proposed Determination is as significant as the DBCDE has suggested.

Out of area and unlicensed broadcasting

3.5 The DBCDE considers that to bring internet simulcasts within the definition of '*broadcasting service*' is likely to put broadcasters in breach of the licence condition that they operate in a particular geographic area.[9] It also suggests that broadcasting outside a licence area may put broadcasters in breach of the prohibition on broadcasting without a licence.[10]

3.6 The DBCDE draws attention to, among other provisions, clause 8(3)(d) of Schedule 2 to the BS Act, which sets out certain circumstances in which broadcasting outside the licence area may be permitted, but says '*...these criteria are unlikely to apply to internet simulcasting*'.

3.7 Clause 8(3)(d) of Schedule 2 provides:

'*8(3)(d) all of the following subparagraphs apply:*

*(i) the first-mentioned licensee satisfied the ACMA that there is a person (the **eligible person**) who is in a commercial radio broadcasting licence area (the **second licence area**) that is not the*

[9] Clauses 7(2A) and 8(3) of Schedule 2 of the BS Act.
[10] Part 10 of the BS Act.

same as the first-mentioned licence area and who is not receiving adequate reception of a commercial radio broadcasting service or services provided by a commercial radio broadcasting licensee for the second licence area;

(ii) the provision of the first-mentioned services outside the first-mentioned licence area occurs only to the extent necessary to provide adequate reception of the first-mentioned services to the eligible person;

(iii) the ACMA has given permission in writing.[1]

3.8 In this regard, I am instructed that:

(a) it is a common occurrence for radio broadcasting services to be received outside a licence area;

(b) the predominant recipients of the content of simulcasts online are within the licence areas;[11]

(c) the principal purpose of providing programs online is to both allow listeners to obtain reception of such programs, which would otherwise be impossible or difficult to obtain in some circumstances, and to allow listeners to receive programs on a device of their choice; and

(d) simulcasting has occurred at least since the year 1999, without any concern being expressed by the ACMA.

3.9 The Full Court made a similar suggestion about out of area broadcasting. Specifically, the Full Court noted that if a CRA member provides commercial radio broadcasting services by way of the internet, it would be providing those services outside the licence area.[12] The comments made by the Full Court were made in the absence of any evidence in relation to the circumstances in which radio programs are delivered online and outside a licence area.

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[11] Regular surveys of listeners conducted by the Nielsen Company on behalf of CRA and the ABC specifically measure platforms of listening, which means AM, FM, DAB+ and simulcasts taking place over the internet. I am instructed that in the most recent survey, it was found that approximately 9.5% of listening to radio simulcasts is online (Nielsen Radio Ratings Servey 1 1013, Mon-Sun Midnight – Midnight, All people 10+).

[12] at [70].

3.10 The DBCDE, like the Full Court, does not take into account the absence of any suggestion by ACMA that a simulcasting licensee breaches the terms of its licence that concern the stipulated broadcast area. This tends to suggest there is no breach.

3.11 In my view, and in the light of the matters set out above, it is strongly arguable that where radio programs are provided online and therefore outside a licence area, the provision of the service outside the licence area would be found to be a necessary result of the provision of the service within the licence area. Another, but less attractive, argument is that the provision of the service outside the licence area would be found to occur accidentally. Further, it is not to the point that the 'BSA and the regulatory scheme … are fundamentally based around the concept of area-based broadcasting services.'[13] That is entirely consistent with the nature of the licence a broadcaster holds, which is such that one would expect the programming and associated advertising to be directed towards the licence area, Any simulcast by that broadcaster online would contain that same targeted programming and advertising.

3.12 Finally, I observe that if the Proposed Determination is not made, it does not mean that online simulcasting cannot occur. It will merely leave the online content delivery of a simulcast under a different regulatory regime; but such content can still be made available on the internet.

Control rules and media diversity

3.13 As the Proposed Determination does not encompass commercial television broadcasting licensees the concerns about the legislative limits placed on control of commercial television broadcasting licences do not apply.

3.14 In relation to the limits on the control of commercial radio licences, which allow a person to control only two commercial radio licences in any commercial radio licence area,[14] simulcasting online would take place under the broadcaster's existing licence and so these limits are not affected.

3.15 The issues raised by the DBCDE in so far as they apply to radio broadcasters relate to policy issues rather than legal issues. However I can observe that the current regime, under which there are numerous radio broadcasters providing simulcasts, does not appear to have caused any concerns to date in this regard and as previously observed, if the

[13] Ibid p 3 para 1.
[14] Section 54 of the BS Act.

Proposed Determination is not made it will not prevent simulcasting online. Such simulcasting can occur regardless of whether the Proposed Determination is made.

Operation of the anti-siphoning scheme

3.16 As the Proposed Determination will have no effect on commercial television or subscription television broadcasting services the concerns raised by the DBCDE in this regard would appear to be without foundation.

Copyright issues

3.17 The suggestion that, having regard to the meaning of 'broadcast' in s.10(1) of the Copyright Act, the Proposed Determination would alter the definition of 'broadcasting service' with 'flow-on implications for the operation of copyright law',[15] does not withstand scrutiny. First, the definition of 'broadcasting service' includes, in the chapeau of the definition, any means of delivery. Secondly it overlooks the fact that 'broadcast' in the Copyright Act is defined by reference to 'a communication', in circumstances where the definition of 'communicate' under the Copyright Act incorporates internet transmissions; thus there has always been scope (since the Digital Agenda amendments) for a broadcaster to utilise the internet as a means of delivery, subject to the meaning of a 'broadcasting service'.

Commercial/contractual issues

3.18 The litigation that resulted in the decision of the Full Court referred to in paragraph 2.14 above arose out of a dispute between CRA and PPCA in circumstances where the licence given by PPCA related to '*broadcasts*'.

3.19 I am instructed that CRA is unaware of any similar dispute. I am also instructed that it is not uncommon for particular content providers to specifically exclude simulcasting of particular events on the internet in their contracts. This particularly occurs with the broadcast of sporting events. Further, in such a context, it seems reasonable to assume that the commercial exploitation of so-called internet rights would make it plain that the grant of a licence would be in respect of the internet only. In my view, the Proposed Determination has no presently known effect on the ability of content providers to restrict simulcasts.

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[15] Ibid p 5 para 2.

3.20 Both DBCDE and the Attorney-General's Department have no doubt been prompted to raise this issue by the controversy that arose in *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd.*[16] In that case, Telstra, not its trade rival Optus, had obtained licenses from the NRL and ARL for the internet rights to their free-to-air broadcasts of games. Optus offered its subscribers a private recording service that enabled subscribers to watch the broadcasts 'near live'. The subject-matter of the dispute did not involve simulcasts; it concerned whether Optus could avail itself (via its subscribers) of the private recording defence to copyright infringement for reproducing broadcasts, and it was found by the Full Court, overturning the first instance decision, that it could not. Optus' application to the High Court for special leave to appeal the Full Court's decision was dismissed. In any event, free-to-air broadcasts of sporting events would not be affected by the Proposed Determination, which as noted above will have no effect on commercial television services.

Other regulatory implications

3.21 Concern is expressed that the provision of a service across multiple licence areas may result in broadcasters being in breach of Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (the **Consumer Laws**) and court orders.

3.22 I understand that simulcasting has been occurring since at least 1999 without issues arising in relation to the Consumer Laws (and before them, under the *Trade Practices Act* 1974) or court orders. In any event, simulcasting is able to occur regardless of whether or not the Proposed Determination is made and there is no suggestion, so far as I am aware, that simulcasting should be banned by legislation. Compliance with the Consumer Laws and court orders will be a separate matter for the broadcasters in question.

4. Response from the Attorney-General's Department

4.1 The Attorney-General's Department's concerns are contained in its letter of 6 June 2013. I have had some difficulty in providing an opinion in relation to the matters raised in that letter as they are expressed in shorthand form without any significant detail. In any event, I make the following comments.

[16] (2012) 201 FCR 147.

Overturning settled law that radio broadcasts and internet transmissions of content are fundamentally different

4.2 I am not at all sure that the introduction of the Proposed Determination would have any practical effect on 'settled law'. It is my understanding that the Broadcasters considered that the Current Determination had the same effect on their industry as the Proposed Determination and this remained their belief until the Full Court's decision. I note that this was also the belief of the judge at first instance. In that sense, the decision of the Full Court may be said to have overturned 'settled law'. In the event that the reference by the Attorney-General's Department to 'settled law' is meant to be a reference to the Full Court's decision, then that is an incorrect characterisation and overstates the position.

Conflating broadcasts with internet transmissions

4.3 The comments in this regard seem to overlook the fact that the Proposed Determination has a very narrow scope. It only relates to simulcasts made by radio broadcasters, the ABC and SBS. That is, the transmission of content by radio broadcasters, SBS and the ABC online *simultaneously* with the transmission of that same content using the broadcasting services bands. It is therefore not correct to say the Proposed Determination relates to all 'commercial broadcast activity on the internet'. Nor does it 'extend all licenses …to commercial broadcast activity on the internet';[17] as I have observed in paragraph 3.17 above, already the definition of 'broadcast' in the Copyright Act incorporates the notion of 'communicate' which is defined so as to included transmissions over the internet.

Interferes with existing contracts

4.4 I have already considered this issue in relation to the comments made by the DBCDE above. Specifically, the Proposed Determination:

(a) does not encompass simulcasts by commercial television broadcasters (if they occur);

(b) does not, on my instructions, interfere or affect any contracts that the Broadcasters have entered into, other than agreements with PPCA under which the position has only changed as a result of the recent decision of the Full Court; and

[17] Ibid p 1, 2nd bullet point.

(c) only restates the position understood to be the case by the radio broadcasters since the time that the Current Determination was made.

Distorts fundamentally the market for licencing sound recordings on the internet

4.5 This is a policy issue upon which I do not express a view.

Copyright Protection for Broadcasts

4.6 I note that the Attorney-General's Department agrees that copyright protection would be lost for broadcasts which are simulcast online if the Proposed Determination is not made.

4.7 I advise accordingly.

JM Hennessy SC

10 Selborne Chambers

1 July 2013