

SUMMARY OF COUNSEL'S OPINION

1. **Mr John Hennessy SC** was asked to provide an opinion in relation to the commentary made by the DBCDE and the Attorney-General's Department on the draft Determination proposed by the radio broadcasters, the ABC and SBS (the Broadcasters).
2. The Departmental comments raised the following issues:
 - Implications of the determination for the BSA's licence area restrictions
 - Operation of the anti-siphoning scheme
 - Regulatory implications
 - Commercial/ contract issues
 - Copyright issues
3. **Mr Hennessey** noted that:
 - radio broadcasters had been simulcasting since 1999 (ABC)
 - the claim that an online simulcast is not a broadcasting service was not made by PPCA until April 2009; and
4. In summary, **Mr Hennessy** considered each of the issues arising under the broad categories outlined as without foundation, and unlikely to occur.
5. Further **Mr Hennessey**:
 - drew attention to the fact that the Departments had both failed to acknowledge that the draft Determination proposed by the Broadcasters did **not** apply to commercial television broadcasts, rendering baseless many concerns raised, such as anti-siphoning, retransmission and copyright.
 - addressed out of area broadcasting, noting that this had been occurring for many years and that, in his considered view, simulcasting would be likely to be found to be permitted under the BSA. Mr Hennessey pointed out that the fact that the ACMA has taken no action in relation to simulcasts over many years supported this view. In addition, he made the obvious point that failure to make the Determination would not prevent simulcasting in any event.
 - noted there would be no flow-on implications for the operation of copyright laws.
 - advised that no contractual/commercial issues would arise as simulcasts can be, and in fact are already in some instances, precluded as part of the agreement with the content supplier.
 - noted there would be no interference with 'settled law' as the recent interpretation given by the Appeals Court of the Federal Court is very new.
 - noted that the Attorney-General's Department had agreed that if the draft Determination is not made, copyright protection would be lost for broadcasts which are simulcast online. This is a serious issue.