10 May 2013

Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

By email: ec.sen@aph.gov.au

Dear Committee Secretary,

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')

Phonographic Performance Company of Australia (**PPCA**) thanks the Committee for providing PPCA with the opportunity to make a submission in relation to the this inquiry.

PPCA is an Australian copyright collecting society that grants licences for the broadcast, communication or public playing of recorded music and music videos. We represent the interests of thousands of copyright owners and recording artists. Our registered artists and record labels span the gamut of small independent artists and labels to world renowned artists and major label record companies. PPCA distributes the licence fees we collect from the provision of such licences to the record labels and Australian recording artists that are registered with us.

The simulcasting of music over the internet is another way in which our artists and record labels can have their music licensed. Both in Australia and in other territories, the simulcasting or communication of sound recordings is distinct from the broadcasting of sound recordings – and consequently should be valued and remunerated separately. However, inequities in the *Copyright Act 1968 (Cth)* and certain commercial practices are detrimentally affecting the ability of creators and copyright owners of recorded music to be remunerated appropriately for their creative efforts and endeavours.

As the Committee will see in the attached submission, it is imperative that we continue to promote and preserve the rights of Australian artists and content creators, so that they are fully rewarded for their creative work. This will ensure the continued development of a thriving creative community that sustains and creates jobs and enables Australian creators to be rewarded for their creative output.

In this context, PPCA would be pleased to provide additional information in respect of any of the points raised in this submission. Please do not hesitate to contact me if you require any additional information.

Yours sincerely,

Lynne Small
General Manager

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1. Executive Summary

In this submission, PPCA intends to bring to the Committee's attention to the following matters:

- **Issue is subject to several reviews:** the issue under consideration by this Committee raises policy issues that are being considered as a part of existing government reviews and also litigation. Any consideration to change the current regulatory arrangements should take these existing reviews into account.

- **Imbalances in the Copyright Act – including the Statutory Caps:** the *Copyright Act 1968* contains inequities that are imposed on sound recording copyright owners – but are not imposed for example, on the owners of musical works. The *Copyright Act 1968* also includes statutory pricing caps which limit the amount of fees payable by radio broadcasters to sound recording copyright owners. These caps do not apply to any other copyright owners or creators. For example, these caps do not apply to the owners of musical works. Owners of musical works are also not subject to any restrictions relating to the licensing of their works, restrictions that would be imposed on sound recording copyright owners if simulcasting would be characterised as falling under broadcasting. There should be consistent treatment of copyright owners' abilities to license separate activities that use their works under the *Copyright Act 1968*. Characterising a "simulcast" as a "broadcast" would further disadvantage sound recording copyright owners and artists from receiving equitable remuneration for the use of their works, reducing remuneration collections in an unprecedented way. It would also further preserve the privileged position of radio broadcasters. Any proposed changes to the current regulatory arrangements must consider the removal of the statutory caps.

- **Communication right is a separate right:** copyright law both in Australia and internationally, distinguishes broadcasting and communication via the internet as separate exclusive rights. Characterising a "simulcast" as a "broadcast" would be inconsistent with the international position and it is likely it would conflict with Australia's international obligations – including the Australia – United States Free Trade Agreement. Copyright owners have traditionally licensed, and should continue to be able to license, separate uses of their works and should be able to receive equitable remuneration for such use.

- **Innovation should be encouraged:** radio broadcasters that simulcast their programs are operating and competing in the same digital environment as operators of online streaming services. These services are not afforded the same legislative protections as radio broadcasters through pricing protection for the use of recorded music. These online streaming services operate under freely negotiated voluntary licences. The online streaming industry should be a level playing field that encourages new innovative services and competition. Deeming a "simulcast" as a "broadcast" will have an adverse impact on the development of these new services that cannot compete fairly with commercial radio. It will also impact Australia's participation in the digital economy.

- **Fairness for sound recording creators**: Australian artists and record companies deserve to be remunerated fairly for the use of their sound recordings when they are simulcast over the internet. PPCA does not wish to stop radio broadcasters from simulcasting their radio programs. All PPCA is seeking is the opportunity to negotiate a fair licence fee so that those who create and invest in the creation of sound recordings can be remunerated fairly for the use of their creative works. If an agreement cannot be reached, then the matter can be determined by the independent arbiter – the Copyright Tribunal.

2. Introduction

2.1 About PPCA

PPCA is a national non-governmental, non-profit organisation which was established in 1969. PPCA is a copyright collecting society[1] that represents the interests of Australian recording artists as well as record companies and labels that are registered with PPCA. As at the date of this submission, PPCA represents:

- over 1,200 record companies / sound recording copyright owners (some of which are recording artists);
- over 15,000 record labels; and
- over 2,500 artists through our Artist Direct Distribution Scheme.[2]

Lists of these record companies and labels are published on PPCA's website.[3]

The shareholders of PPCA comprise of Australia's major record companies: Sony Music Entertainment Australia Pty Ltd (**Sony**), EMI Music Australia Pty Ltd (**EMI**), Universal Music Australia Pty Limited (**Universal**) and Warner Music Australia Pty Limited (**Warner**). These companies hold shares in PPCA but they are not entitled to receive any dividends.

The PPCA Board comprises of one representative from each of Sony, Universal and Warner, one representative from the artist manager sector, two elected representatives from the artist community and one elected representative from PPCA's non-shareholder licensors. The majority of PPCA's Board members represent independent Australian record labels and artists.

2.2 What are Sound Recordings?

In order to gain a proper understanding about PPCA and the issues that are to be discussed in this submission, it is important from the outset to explain what a sound recording is in the copyright context.

A sound recording is defined in the *Copyright Act 1968 (Cth)* (the **Copyright Act**) as the aggregate of the sounds embodied in a record (which includes for example, a compact disc, record, cassette, or any other device in which sounds are embodied).

2.3 What Types of Licences does PPCA Issue?

PPCA undertakes several licensing activities on behalf of its licensors and registered artists. As a collecting society, PPCA acts as a central licensing body so that people who would like to use sound

[1] A collecting society is an organisation that is provided with a mandate (by statute or agreement) to collectively manage specified copyright works. Collecting societies provide copyright owners with the ability to receive payments for the use of their copyright works on a collective basis thereby minimising administration and enforcement costs for the copyright owner and increasing efficiency for the licensee. Collecting societies also enable licensees to enter into "blanket licences" which provide licensees with access to a wide range of materials without the need to negotiate separate licences with each copyright owner.
[2] See section 2.3 below for further information regarding the PPCA Artist Direct Distribution Scheme.
[3] See http://www.ppca.com.au/labels/list-of-current-licensors/

recordings or music videos for broadcast or public performance purposes can obtain a single comprehensive non-exclusive 'blanket' licence that includes repertoire from a vast number of record companies and recording artists.

PPCA issues licences to thousands of businesses which play recorded music and/or music videos in public ranging from pubs, shops, gyms and nightclubs through to schools, cinemas, festivals and restaurants.

PPCA also issues licences to radio and television broadcasters which enables these broadcasters to play recorded music within their programming. PPCA can also issue licences to operators of certain types of streaming services.

Protected sound recordings are discussed in more detail in section 4.3 of this submission. Protected sound recordings are those covered by the provisions of the Copyright Act and the *Copyright (International Protection) Regulations*. You do not require a licence to broadcast or publicly perform sound recordings that are not protected – but a licence will be required for the musical work. However all sound recordings that are communicated online are considered 'protected' and online communications require a licence to stream those sound recordings. Due to the distinctions afforded to sound recording communications in the online environment, it is clear that these are separate rights which should be subject to separate remuneration for rights holders.

Therefore the benefit of a PPCA blanket licence is twofold. First, it enables a licensee to play all of its recorded music irrespective of whether or not the licensee can determine if the sound recording is protected. A PPCA licence eliminates the risk of copyright infringement in relation to the vast catalogues of sound recordings covered by such a licence. Secondly it allows the licensee to obtain the licence from a single source, rather than obtaining licences from multiple sound recording copyright owners.

Examples of the types of licences issued by PPCA include:

Licence Type	What is this Licence?	Who Uses this Licence?
Public performance Licences	This licence enables persons to play recorded music or exhibit music videos in public.	• Commercial premises and venues where recorded music or music videos are played in public: for example retail premises, shopping centres, bars, hotels, nightclubs, event venues, gyms, restaurants and cafes. The full list of PPCA tariffs and corresponding licence fees is published on the PPCA website.[4] • PPCA currently licenses over 55,000 businesses and individuals to play protected sound recordings and/or music videos in public on a non-exclusive basis.

[4] See: http://www.ppca.com.au/music-users-/tariffs/

Licence Type	What is this Licence?	Who Uses this Licence?
Broadcast Licences	This licence enables television and radio broadcasters to play recorded music or music videos (as applicable) as a part of their broadcasting service.	• National public television broadcasters • Commercial free to air television broadcasters • Pay television broadcasters • National public radio stations • Commercial radio stations • Community radio stations • other holders of class licences under the *Broadcasting Services Act (Cth) 1992*.
Music on Hold Licences	This licence covers the playing of protected sound recordings (including from the radio or television) to telephone callers while they are waiting "on hold".	Any premises that plays music on hold.
Internet Streaming Licences	This licence enables the communication of sound recordings over the internet or mobile networks.	Operators of internet radio stations, and customised radio stations that stream recorded music.
Audiovisual Streaming Licences	This licence enables the communication of certain audiovisual programs and content over the internet or mobile networks.	Operators of IPTV services, catch-up TV services where recorded music is incorporated and streamed as a part of the program.
Simulcasting Licences	This licence permits the simultaneous transmission of content that is delivered by a broadcasting service by another means, such as the internet or mobile networks.	Operators of broadcast services that make their content available as a simultaneous transmission online or via mobile networks.

PPCA offers standard terms and conditions for the public performance licences that it issues. These are available for access on PPCA's website.[5] The licence fees set by PPCA are established either by

[5] ibid

negotiation with individuals or through industry representative bodies[6] or by order of the Copyright Tribunal.[7]

It is important to note that, even though PPCA has been granted rights to issue the aforementioned licences, PPCA is not a monopoly. Each of PPCA licensors are able to directly issue licences for the public performance, broadcast and communication of their sound recordings. This is because PPCA operates on a non-exclusive basis. We advise all potential licensees about their ability to obtain a licence directly from the relevant copyright owners prior to providing a licence. Effectively PPCA competes with its licensors in respect of its licensing activities, and as a consequence, we determine our licence fees independently from our licensors.

All of PPCA's income is derived from the licensing activities that it undertakes. PPCA does not retain a profit for its services. After administration costs are deducted, PPCA distributes the licence fees that it collects to registered copyright owners and registered Australian recording artists in accordance with our Distribution Policy that is published on our website.[8] To provide a further breakdown, after the deduction of administration costs:

- 2.5% is allocated to grants / donations (e.g. PPCA Performers' Trust[9]);
- 48.75% is allocated to the PPCA licensors; and
- 48.75% is available for distribution amongst the registered artists under the Artist Direct Distribution Scheme.

The Artist Direct Distribution Scheme (**ADD Scheme**) enables featured Australian artists to register for a direct payment from PPCA when their recordings receive an allocation in the annual PPCA Distribution. These featured artists are entitled to register (free of charge) to participate in the scheme irrespective of whether or not the artist owns the copyright in the recordings. The ADD Scheme is an ex gratia arrangement, and it allows for 50% of earnings on each of the registered tracks to be shared by the featured Australian recording artists on that track. If artists do not register for direct payment under the ADD Scheme, the proportion of the earnings that would otherwise have been made available to those artists is paid to the copyright owner for that recording. Detailed track specific statements are provided to both registered artists and PPCA licensors, so they are aware of any amounts paid directly to individual recording artists. By providing detailed payment statements, PPCA provides the PPCA licensors with sufficient information so that they can make any further payments to the artists on their roster in line with the terms of their individual recording agreements.

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[6] As set out in section 5.1 of this submission, an example of an industry agreement is the agreement between PPCA and Commercial Radio Australia. Other industry bodies that PPCA has agreements with include Free TV and Community Broadcasting Association of Australia.

[7] The Copyright Tribunal is an an independent body that was established under Part VI of the Copyright Act and is administered by the Federal Court of Australia. The Copyright Tribunal has been granted jurisdiction to hear matters relating to the granting of copyright related licences, determine the licence fees (or equitable remuneration) payable in respect of compulsory and voluntary licences and to hear disputes relating to existing and proposed copyright licensing schemes. Further information is available at this website: http://www.copyrighttribunal.gov.au/about and section 4.1 of this submission sets out further information.

[8] See: http://www.ppca.com.au/IgnitionSuite/uploads/docs/PPCA%20Distribution%20Policy%20-%201%20July%202011.pdf

[9] See: http://www.ppca.com.au/ppca-about-us/ppca-performers-trust-foundation/

2.4 Why Are These Licences Required?

Under the Copyright Act, the owners of copyright in sound recordings have exclusive rights to undertake certain activities in relation to the sound recordings, including the rights:

- to make a copy of the sound recording;
- to cause the recording to be heard in public;
- to communicate the recording to the public; and
- to enter into a commercial rental arrangement in respect of the recording.[10]

Similar provisions apply to owners of music videos.

In most circumstances a person would need permission from the copyright owner to undertake any of the activities set out above. PPCA is authorised on a non-exclusive basis to grant licences to organisations and individuals to do some of these acts on behalf of the copyright owners, and to collect licence fees in return for such use.

It is important to note that under the Copyright Act there are two copyrights in any recording:

- **There is copyright in the song**: this is the underlying musical composition and/or lyrics (i.e. the "musical work" and “literary work”); and
- **There is copyright in the sound recording**: this is the recorded version of the musical work.

As an example, the song ‘Love is in the Air’ was written by Harry Vanda and George Young and the most well known recording of the song was recorded by John Paul Young. Therefore the rights attached to this version of the song are controlled by Vanda and Young’s publisher for the musical work, and John Paul Young’s record label for the sound recording.

The Australasian Performing Right Association (**APRA**) is a collecting society that grants licences for the broadcast and public performance rights in the musical work. APRA distributes the licence fee income that it receives to its members who comprise of songwriters, composers and music publishers.

As there are two types of copyright in a song, in most instances two licences are required if a person, for example, wants to play a song in public or stream it on the internet:

- one from APRA for the musical work; and
- one from either PPCA or the individual sound recording copyright owner for the sound recording.

The requirement to obtain separate licences and the distinction between sound recordings and musical works is not unique to Australian law.

[10] Section 85(1) Copyright Act 1968.

3. The Submission

3.1 Supporting Submissions

PPCA is grateful for the opportunity to make a submission to this Inquiry and we believe that we are well positioned to provide insights in relation to the regulation of internet simulcasts. This is because not only does PPCA have a mandate to license simulcasts, but PPCA is also a participant in the relevant proceedings initiated on a collaborative basis between PPCA and the commercial radio sector.[11]

This submission is made on behalf of PPCA's licensors and registered artists. PPCA licensors and registered artists may also make separate submissions to the Committee. PPCA supports the submissions that have been made separately to the Committee by the Australian Recording Industry Association Limited (**ARIA**), Australian Independent Record Labels Association, the Association of Artist Managers (AAM) and the Australian Copyright Council.

3.2 Terms of Reference

The Terms of Reference require comment on:

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 regulatory arrangements that are the subject of this Inquiry are complex and, in PPCA's respectful opinion, cannot and should not be reviewed in isolation. Any recommendations made by the Committee must consider the background under which this Inquiry is being undertaken. The single issue under consideration in this Inquiry is already subject to extensive review in several other much broader forums:

- **Convergence Review**: the Final Report of the Convergence Review[12] was released by the Federal Government on 30 April 2012, having been underway for over 16 months. Over 340 submissions were considered, together with the insights gained from extensive public consultation at regional, metropolitan, and international forums. The Final Report proposed several reforms, but many of the copyright specific issues that arose as a part of the Convergence Review are also being considered by the Australian Law Reform Commission Inquiry into Copyright and the Digital Economy. To date, the Federal Government is yet to respond substantively to the extensive report delivered by the Review Committee;

- **Australian Law Reform Commission Inquiry into Copyright and the Digital Economy**: the Australian Law Reform Commission (**ALRC**) commenced this inquiry[13] in June 2012. The focus of the inquiry is to consider whether the exceptions and statutory licences set out in the Copyright Act are appropriate for Australia's participation in the digital economy and the converged media environment. This is one of the most significant copyright reviews to be undertaken in Australia in

[11] See section 6.2 of this submission.
[12] The Convergence Review was an independent review commenced by the Australian Federal Government in 2010 to review the policy and regulatory frameworks applicable to media and communications convergence.
[13] http://www.alrc.gov.au/inquiries/copyright-and-digital-economy

recent history. Public and industry participation in this inquiry has been immense with approximately 283 public submissions provided to the ALRC in response to the Issues Paper that was released in August 2012.[14] The ALRC is due to deliver a further discussion paper on 4 June 2013 which will promote further debate and will encourage further submissions. The ALRC is due to submit its report and recommendations to the Federal Government by 30 November 2013. We note that the ALRC has made a submission to this Inquiry indicating that as a part of its wider review, it is considering the operation of provisions relevant to this Inquiry; and

- **Legal proceedings**: as the Committee is aware, the issue relating to communication of sound recordings as a simulcast is currently the subject of litigation between Commercial Radio Australia (**CRA**) and PPCA. CRA recently applied for special leave for the matter to be heard in the High Court. It is anticipated that a decision on CRA's request for the matter to be considered by the High Court will be made in the latter half of 2013. The context of this litigation and the legal arguments upon which the litigation is premised are discussed in more detail in section 6 of this submission.

In light of the aforementioned reviews and judicial determinations, we are of the view that it would be beneficial for the Committee to consider the existing aforementioned reviews when framing its recommendations. PPCA believes that, given the complex interaction of multiple legislative instruments (for example, the Copyright Act and the Broadcasting Services Act 1992 (Cth)), and the far reaching implications of any amendments (for multiple parties, including rights holders and broadcasters), serious consideration must be given to the potential unintended consequences of the implementation of any amendments to the current regulatory arrangements.

[14] See: http://www.alrc.gov.au/news-media/2011-2013/copyright-e-news-issue-5

4. Current Copyright Regulation

In order to examine the effectiveness of the current regulatory arrangements relating to the simulcasting of radio programs, it is important to provide an overview of the regulatory framework under which PPCA and its licensors and registered artists operate. The Copyright Act provides creators of copyright material with protection and provides a strong foundation that supports creativity. It is only through strong copyright regulation that there will be continued investment in Australian recording artists and investment in new technologies. The Copyright Act also provides the framework for various licensing regimes and also provides avenues for recourse through the Copyright Tribunal if parties require an independent third party to assist with the determination of licence schemes and the corresponding licence fees. However, the Copyright Act also contains inequities in relation to sound recording copyright owners, and any proposed changes to the regulatory arrangements regarding radio simulcasting must be considered in the context of these inequities. The Copyright Act also interacts with the *Broadcasting Services Act 1992* (Cth) (**Broadcasting Services Act**) – so changes to one Act can impact the other.

4.1 The Copyright Tribunal

The Copyright Tribunal of Australia is an independent body established under s 138 of the Copyright Act. The Copyright Act and the Copyright (Tribunal Procedure) Regulations set out the membership, functions, powers and procedures of the Copyright Tribunal.

The Copyright Tribunal has jurisdiction:

- to hear and determine applications for the granting of licences under licensing schemes relevant to the Copyright Act;
- to hear disputes relating to the terms of existing or proposed licensing schemes and to determine the equitable remuneration or fees payable under such licences, and
- to make orders with respect to the operation of statutory licensing schemes.

Sections 154 to 156 of the Copyright Act contain provisions for reference to the Copyright Tribunal by a licensor or potential licensees (and organisations representing them), in relation to existing and proposed licence schemes. The Copyright Tribunal has jurisdiction to confirm or vary a licence scheme or proposed licence scheme. It may also substitute a new scheme for the one referred to it.

Section 157 of the Copyright Act provides for various kinds of applications to the Copyright Tribunal by licensors and potential licensees (and organisations representing them), where there has been a failure to agree on the grant of a licence. An application to the Copyright Tribunal may be made in cases to which a licence scheme applies and in cases to which a licence scheme does not apply, by persons who require a licence or by organisations representing them. The Copyright Tribunal is given power to make orders as to the charges and conditions the Copyright Tribunal considers applicable under a licence scheme, or, depending on the circumstances in which the application is made, those charges and conditions that the Copyright Tribunal considers “reasonable in the circumstances”, in relation to the granting of a particular licence.

Consequently, the Copyright Tribunal acts as an independent arbiter in relation to copyright materials and can, at the request of one or more of the relevant parties, determine appropriate terms and rates for the use of copyright material when the parties are unable to agree.

The Copyright Tribunal is constrained, however, when asked to assess the appropriate fee in respect of the use of sound recordings in radio broadcasts, because of the operation of the statutory caps contained in sections 152(8) and 152(11) of the Copyright Act. These sections are discussed in more detail below.

Therefore, due to these statutory caps, free to air radio broadcasters enjoy a privileged position in respect of the terms under which they can utilise the content created by artists and record labels.

Firstly, they have the benefit of a 'compulsory' (or statutory) licence – that is, controllers of sound recordings are unable to prevent the broadcast of their recordings, providing the broadcasters meet particular conditions. Secondly, they have the benefit of the 'cap' placed on the level of fees the Copyright Tribunal may impose on any broadcaster for the use of the copyright protected sound recordings.

Statutory Licences

Statutory licences (or statutory exclusions from infringement) are created by the Copyright Act when specified conditions as set out in the Copyright Act are satisfied. Generally, statutory licences are characterised by provisions[15]:

- that "copyright is not infringed if the conditions specified in the particular section are satisfied";
- for a declared collecting society to administer the statutory licence;
- that both the user of the copyright material and the purpose of its use must satisfy the relevant statutory description;
- that the user must notify the declared society of the use being made of the copyright material, and, except where the user is the Commonwealth or State Government, must undertake to pay equitable remuneration to the declared collecting society for the use of the copyright material, either by agreement, or if an agreement cannot be reached, an amount as determined by the Copyright Tribunal; and
- for determining the extent of copying that takes place under the statutory licence.

The compulsory licence – section 109 of the Copyright Act

Under the Copyright Act, owners or controllers of copyright in sound recordings have an exclusive right to permit the broadcast of those sound recordings.[16] However, due to the operation of s109 of the Copyright Act, radio broadcasters have access to a compulsory licence. Section 109 provides that

[15] Information primarily sourced from http://www.copyrighttribunal.gov.au/
[16] Section 85(1) Copyright Act 1968

copyright in a published sound recording is not infringed by the making of a broadcast of that sound recording by a broadcaster without the authorisation of the sound recording copyright owner if:

(a) there is an order of the Copyright Tribunal in force, covering that broadcast; or

(b) where no such order is in place, the broadcaster has given undertakings to pay such amounts as may be determined under a Copyright Tribunal order.

Therefore sound recording rights owners are unable to prevent the use of their material by any radio broadcaster.

An important point to note here is that the privileged position afforded to broadcasters by s109 of the Copyright Act is not available, for example, to operators of internet streaming services. Instead, as discussed in section 7.2 of this submission, these internet streaming businesses enter into voluntary licences to stream recorded music on freely negotiated terms. If an agreement cannot be reached, the parties have the option to refer the matter to the Copyright Tribunal for determination.

The statutory licence fee 'caps'

One of the cornerstones of the Copyright Act is that creators are entitled to be paid equitable remuneration for the use of their work, particularly in the context of statutory licences. However, in the case of the broadcast of sound recordings a legislative exception[17] has been made to this principle. This is despite the fact that the commercial success of many radio stations, particularly FM commercial stations, may be attributed to the exploitation of commercial sound recordings.

Voluntary Licences

Voluntary licences are the result of negotiation between a copyright owner or its representative (such as a collecting society), and the licensee. Many of the provisions in the Copyright Act that are relevant to voluntary licences depend on the notion of a "licence scheme" (as referred to previously). Most licence schemes are administered by collecting societies. Licences granted under licence schemes are often referred to as "blanket licences". They cover all works in the particular collecting society's repertoire. In PPCA's view, voluntary licences provide greater fairness to both parties as it allows the parties to freely negotiate the terms and if agreement cannot be reached, each party can refer the matter to the Copyright Tribunal.

[17] The statutory caps detailed in section 4.2 of this submission.

4.2 The Statutory Caps

Every broadcaster or owner of copyright in a published sound recording has a right to apply to the Copyright Tribunal for an order determining what the broadcaster should pay to the sound recording copyright owner for the use of their material. In practice such applications are generally only initiated when the relevant parties have been unable to agree on appropriate terms.

However, sections 152(8) and 152(11) of the Copyright Act limit the Copyright Tribunal's capacity to set a fair rate for the broadcasting of sound recordings as:

- **Section 152(8)** provides that the Copyright Tribunal must not fix an annual licence fee in excess of 1% of gross revenue of a radio broadcaster who holds a licence allocated under the Broadcasting Services Act for that broadcaster's use of sound recordings. Both commercial and community radio broadcasters would fall within this category; and

- **Section 152 (11)** provides that the Copyright Tribunal must not fix an annual licence fee in excess of 0.5 (i.e. $0.005) cents per person of Australia's population for radio broadcasts made by the Australian Broadcasting Corporation (**ABC**).

Since the introduction of the Copyright Act, over 40 years ago, the caps summarised above have been in place. As mentioned above, section 109 of the Copyright Act enables radio broadcasters to exercise a statutory licence to broadcast protected sound recordings. Provided that such a broadcaster has paid (or gives an undertaking to pay) a licence fee in an amount (if any) determined by the Copyright Tribunal, a copyright holder is unable to take infringement action.

The caps were prescribed in the Copyright Act in order to take into account "special circumstances" that existed at the time - i.e. in the late 1960s (but which were not articulated by the government at that time). Initially, it was intended that the Copyright Act would provide for "equitable remuneration" to owners of copyright in sound recordings in exchange for the broadcasting right. However, this was revised in a later version of the proposed Copyright Act, which contained a right to equitable remuneration but subject to the respective caps of 1% and 0.5 cents per head of population. The Attorney-General stated in a second reading speech[18]:

"These limits have been set to allay fears expressed by both the commercial broadcasting stations and the Australian Broadcasting Commission that the payment of royalties for the broadcasting of records could impose a substantial financial burden on them. The limits have been fixed in the light of the special circumstances now existing[19] in Australia in relation to the broadcasting of records and are not intended to imply that any particular royalty or rate of royalty is appropriate for the broadcasting of musical copyright works."

Therefore, the caps were introduced in 1969 to allay fears concerning the level of royalties that could be payable in respect of radio broadcasts. An examination of those "fears" is expressed in correspondence

[18] Second Reading Speech by Mr. Bowen, House of Representatives Hansard, 16 May 1968.
[19] Our emphasis.

from the Federation of Australian Commercial Broadcasters (**FACB**) to the Attorney-General. In a letter of 22 September 1967, FACB referred to is own submissions on the 1967 Bill and expressed its fear that the future financial effects of the performance copyright provided for in that Bill included the prospect that the record manufacturers would seek and obtain royalties as high as 7.5% of advertising revenue from a station.[20]

Initially, it was also proposed that the Copyright Act would provide for the review of the caps by the Copyright Tribunal, after a period of five years. This was deleted in the Committee stage, on the basis that the caps were legislated and should therefore only be altered by later legislation.

Reviews of the Caps

Since the inception of the Copyright Act, two independent inquiries have taken place in which the caps in section 152 have been considered and both inquiries have recommended their removal for commercial broadcasters.

In 1995, the Federal Government commissioned the "Review of Australian Collecting Societies", conducted by eminent Australian legal practitioner, Shane Simpson (**Simpson Report**).[21] The Simpson Report, published in July 1995, observed that the fees paid by broadcasters under section 152 of the Copyright Act were "artificially low" and concluded*:*

"Broadcasters are in no need of the protection offered by the present cap. They are sufficiently well represented to be able to negotiate market rates without the protective arm of the government interfering in that process. Experience has shown that the best way of setting rates is by inter-partes negotiation with access to the Copyright Tribunal to determine matters that cannot be resolved that way. ***It is recommended that the ceiling on the broadcast fee payable pursuant to section 152 be removed forthwith****."*[22]

No action was taken by the Federal Government in response to the Simpson Report.

In 1999, the Federal Government again reviewed copyright legislation, through the Intellectual Property Review Committee (the **Ergas Committee**). PPCA (together with ARIA) commissioned the Allen Consulting Group to conduct an economic analysis of, in particular, the 1% cap as well as the cap in relation to the ABC[23]. The Ergas Committee issued its report in September 2000[24] (the **Ergas Report**).

In relation to section 152(8) of the Copyright Act, the Ergas Committee accepted the view put forward by PPCA, that the retention of the 1% cap represented an unjustified subsidy for commercial radio. It also accepted that the 1% cap had been included in the Copyright Act in order to "ease the burden" on the radio industry[25] but was no longer warranted in the light of the substantial change in the economic

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[20] Letter from E Lloyd Sommerlad, Federal Director, Federation of Australian Commercial Broadcasters to the Hon. N H Bowen, Attorney-General, 22 September 1967.
[21] See: http://arts.gov.au/sites/default/files/pdfs/the-simpson-report-1995.pdf
[22] Section 13.1.5
[23] The Regulation of Copyright Fees for Broadcasters' Use of Sound Recordings
[24] Review of Intellectual Property Legislation Under the Competition Principles Agreement, Final Report by the Intellectual Property and Competition Review Committee, September 2000
[25] Page 115 of the Ergas Report

situation of the radio industry. The Ergas Committee expressed the view that no public policy purpose was served by the cap, which could distort competition, resource use, and income distribution.

Accordingly, the Ergas Committee recommended:

"To achieve competitive neutrality and remove unnecessary impediments to the functioning of markets on a commercial basis, the Committee recommends that s.152(8) of [the Copyright Act] be amended to remove the broadcast fee price cap."[26]

The Ergas Report did not recommend changing the cap set out in section 152(11) of the Copyright Act.[27]

In May 2006 the then Attorney General, Philip Ruddock, announced[28] that the Federal Government had agreed to remove the legislative cap on sound recording licence fees paid by radio broadcasters as '*sound recording owners (mainly record companies and artists) and radio broadcasters, who operate in a profitable and robust industry, should be able to negotiate a market rate without legislative intervention'*.

Several years have elapsed since the publication of the Ergas Report, the Federal Government's response to the Ergas Report, and Attorney General Ruddock's announcement that the caps would be removed. Yet the caps still remain. PPCA remains of the firm view that the caps contained within section 152 of the Copyright Act are unjustifiable. This is particularly the case given the landscape for the communication of sound recordings, the size of the commercial radio industry and the activities and operation of the ABC are vastly different to that which existed in 1968.

There are a number of reasons for PPCA's position:

(a) The caps are distortionary

The effect of the cap is that the Australian recording industry and Australian recording artists are providing an annual subsidy to the highly profitable commercial radio sector and the ABC.

Within the commercial radio sector itself, additional distortions occur between various stations and networks. For example, a station which relies heavily on sound recordings is effectively being subsidised in relation to one of its key input costs. However, this subsidy is not applied to the same extent by a "talk" radio station - which plays much less music and where a key financial investment is on air talent.

Since publication of the Ergas Report and the Ruddock announcement, and as the law presently stands, a new distortion has arisen – which has also been compounded by changes in the digital landscape. A new distortion now exists between operators who simulcast their programs and those who do not.

If, contrary to the recent findings of the Full Federal Court[29], a simulcast of radio programs via the internet were to be held to fall within the definition of "broadcast" as set out in the Copyright Act, then correspondingly, sections 152(8) and 152(11) of the Copyright Act would also apply in relation to certain

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[26] Page 14 and 116 of the Ergas Report

[27] ibid

[28] See http://pandora.nla.gov.au/pan/21248/20060722-0000/www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Second_Quarter_14_May_2006_-_Major_Copyright_Reforms_Strike_Balace_-_0882006.html

[29] PPCA v CRA [2013] FCAFC 11

simulcasts. In other words, the fees payable to PPCA by those entities which offer two services - simulcasts and traditional radio broadcasts, would be capped at 1% of revenue or 0.5 cents per person. This would create a further market distortion as no cap would be applicable to the fees payable by a business that communicates a music radio service (incorporating sound recordings) via the internet alone.[30] This would clearly create market inequity which would disadvantage new entrants seeking to participate in the developing digital economy, and would stifle innovation.

(b) The caps are anachronistic

Since the caps were introduced, the commercial radio sector has flourished into a $1 billion dollar a year industry.[31] Any "special circumstances" which may have existed over 40 years ago are no longer applicable, especially in relation to the commercial radio sector. There is nothing that justifies the continuation of the caps. In relative size the Australian recorded music market is less than half of the commercial radio market.[32] It appears inconceivable that commercial radio does not have the capacity to negotiate with an industry a fraction of its size. As set out in section 7.2 of this submission, the commercial radio sector is expanding its reach by offering its programming via the internet and is in a healthy, profitable financial position.

(c) The caps reduce economic efficiency and lack equity

The Allen Consulting Group in its analysis referred to above, noted that the caps reduce economic efficiency and lack equity. The analysis identified that the key economic impacts of section 152 of the Copyright Act were:

- there was no market failure to which the caps were addressed;
- the caps distorted the volume of music used in radio, by artificially creating non market based incentives for broadcasters in relation to increasing music use at the expense of non-music formats, e.g. talk;
- reduction of revenue for copyright owners and Australian recording artists;
- creation of less Australian recordings as a result of artificially diminished returns to Australian recording artists in respect of radio broadcasts and the consequential loss of incentive;
- potentially decreased quality in music because of the artificial depression of returns to producers of sound recordings; and
- the subsidy provided by the Australian recording industry to the radio sector through the caps was not imposed on any other provider of inputs used by commercial radio.

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[30] See section 7.2 of this submission for further information.
[31] See: http://www.acma.gov.au/WEB/STANDARD.PC/pc=PC_312232. Recent figures have not been published by ACMA on its website.
[32] See: http://www.aria.com.au/pages/documents/physanddigsalesxvalue.pdf

(d) The caps are unnecessary

There is no justification for the caps - especially due to the existence of the Copyright Tribunal. The Copyright Tribunal has the jurisdiction to independently assess fees for such licence schemes.

The Copyright Tribunal is an independent arbiter and it may determine for example, that a fair market rate is in fact less than the limitations imposed by sections 152(8) and 152(11) of the Copyright Act. Alternatively, the Copyright Tribunal could determine that a fair market rate could exceed these limitations – which means that the creators of sound recordings and Australian recording artists are currently subsidising the commercial radio sector and the ABC.

(e) The caps are inflexible and arbitrary

In PPCA's view, there is no characteristic inherent in the broadcast right for sound recordings that supports the figure of 1% of revenue or 0.5 cents per person as constituting equitable remuneration for the use of that right.

The arbitrariness of the caps is that:

- **in respect of the 0.5 cent cap**: no provisions are made for indexation to take account of inflation, so its value has substantially diminished over time. In addition, since the imposition of this cap, the ABC's radio services has vastly increased in terms of the number of services, the reach of these services and the types of programming that are now offered. To put this in perspective, the introduction of the ABC's Triple J, which relies heavily on music, resulted in no increase in licence fees to sound recording copyright holders. Even if we assume that the rate of 0.5 cents per head of population was appropriate in 1968 (which in our view, it clearly was not), subject to indexation alone, this amount would have increased to $0.05 (i.e.5 cents) per person by the present time.[33] That is a tenfold increase, excluding any consideration of increased usage arising from the additional services offered; and

- **in respect of the 1% cap**: the fact that it applies equally to broadcasters which provide mainly news or talk as well as those commercial broadcasters whose business models predominantly involve broadcasting music highlights the inequity and arbitrary nature of the cap.

(f) The caps are anomalous

The caps are inconsistent with the economic efficiency objectives that underpin Australia's competition policy. Also, a review of the Copyright Act will show that the Copyright Act contains no other example of a statutory cap for copyright material. For example, no caps are in place for the use of musical works, films, photographs or any other copyright protected materials.

Musical works are not constrained by any statutory caps. PPCA only receives a fraction of the radio broadcast revenue paid to APRA for use of the musical work.

[33] Calculated using the RBA inflation calculator found at http://www.rba.gov.au/calculator/annualDecimal.html

The caps are also out of step with legislation in other countries. Copyright law relating to sound recordings in other jurisdictions does not include limitations in respect of the licence fees payable for radio broadcasts (or other copyright material). In countries such as the UK, Japan, New Zealand and Canada, a fair market rate is negotiated between the parties or determined by an independent specialist copyright body. Actual rates around the world vary from about 1.5% to 4% of revenue.

(g) The caps may not be permissible in the light of Australia's International treaty obligations

Article 12 of the *Rome Convention 1961*[34] sets out that equitable remuneration is to be paid in respect of the broadcast or communication of a sound recording. Article 16.1(a) limits Article 12 by providing that a signatory to the treaty has discretion as to whether it protects copyright in a sound recording, but it does not specifically give a contracting state the right to limit payment of equitable remuneration for the protected use.

Similarly, Article 15(10) of the *WIPO Performances and Phonograms Treaty 1996*[35] provides the right of producers and performers of sound recordings to "a single equitable remuneration for the direct or indirect use…for broadcasting or any communication to the public…", subject to a contracting state's ability to make reservations in similar terms to those contained in Article 16(1) of the Rome Convention.

4.3 Protected vs. Unprotected Sound Recordings

Under Australian copyright law, exclusive copyright rights are, broadly speaking, given to owners and performers from other nations on a reciprocal basis. As copyright law in the United States does not grant an exclusive "broadcast right" in sound recordings, Australian copyright law does not recognise the broadcast right in respect of sound recordings that originate solely from the United States (subject to certain exceptions).

However, copyright law in the United States does recognise the exclusive right of sound recording owners to *perform the copyrighted work publicly by means of a digital audio transmission*.[36] Therefore, Australian copyright law does protect US sound recordings by providing their owners with the exclusive right to communicate them over the internet in Australia.

In general terms, for public performance and broadcasting, copyright protection applies to the playing of a sound recording in public in Australia if that recording was made by a citizen, national or resident of, or body corporate incorporated in, a protected country.[37] The United States, as an example, is not a "protected" country at present, but that does not mean that all recordings by American artists or recordings made in the United States are 'unprotected' under Australian copyright law.

In order to determine whether a particular sound recording in a particular circumstance is protected or not the following information will be required:

- *how is the recording being used? (e.g. is it for public performance, broadcast or internet streaming?);*

[34] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Obligations
[35] This is also discussed in section 8.2 of this submission.
[36] §106 US Copyright Act
[37] The current list of protected countries can be viewed at : http://www.austlii.edu.au/au/legis/cth/consol_reg/cpr1969506/sch3.html

- *who "made" the recording? If it was a record company – where is their place of incorporation?;*
- *the place where the track was recorded (e.g. the location of the recording studio);*
- *the release date of the track, the country of first release and if released in Australia, the date of first release in Australia; and*
- *the names of everyone who performed on the recordings and their citizenship or residency at the date the recording was made.*

Therefore it is a misnomer that sound recordings from the United States are necessarily 'unprotected recordings' for the purpose of broadcast within Australia, and can therefore be either broadcast or played without the need for any licence. In fact many recordings made by US artists are protected, because of the way that specific aspects of the legal requirements are applied.

So what does the protected vs. unprotected differential mean for simulcasting?

Copyright law – both in Australia and around the world, treats the "broadcast right" and "communication right" as separate rights and correspondingly, a separate right of remuneration is attributable for the exploitation of this right. Even though some recordings are considered as 'unprotected' when they are broadcast or played in public – it is important to note that all recordings are considered as protected recordings when they are communicated – including simulcasts over the internet. Copyright owners should be remunerated separately for this separate usage.

4.4 Interaction of the Copyright Act with the Broadcasting Services Act

The Copyright Act and the Broadcasting Services Act are inextricably linked. Changes to the Broadcasting Services Act will have an impact on the Copyright Act.

There are currently a number of benefits flowing to those services which are characterised as being delivered as a "broadcast". Some of these benefits include:

- access to the compulsory licence;
- the limit (or cap) on the level of licence fees which can be imposed in relation to sound recordings; and
- the ability to utilise 'unprotected' recordings, which do not require a licence for the purpose of a broadcast.

Whether or not an activity is characterised as a broadcast flows from the interaction of provisions in both the Copyright Act and the Broadcasting Services Act.

Definition of a Broadcast – a look at the Copyright Act and the Broadcasting Services Act

Accordingly, the starting point in terms of the statutory provisions is the definition of "broadcast" in s 10(1) of the Copyright Act, as it currently exists:

> ***"broadcast"*** *means a communication to the public delivered by a broadcasting service within the meaning of the Broadcasting Services Act 1992. For the purposes of the application of this definition to a service provided under a satellite BSA licence, assume that there is no conditional access system that relates to the service.*[38]
>
> *Note: A broadcasting service does not include the following:*
>
> *(a) a service (including a teletext service) that provides only data or only text (with or without associated images); or*
>
> *(b) a service that makes programs available on demand on a point-to-point basis, including a dial-up service.*

The operative part of the definition for present purposes is the first sentence.

This in turn refers to the concept of a "broadcasting service" within the meaning of the Broadcasting Services Act, which is defined in s 6(1) as follows:

> ***"broadcasting service"*** *means 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.*

It will be noted that provision is made in paragraph (c) of this definition for a particular service or class of services to be excluded from the definition by Ministerial determination. Relevantly, such a determination (the **Ministerial Determination**) was made on 12 September 2000. The matter referred to the Federal

[38] The second sentence ("For the purposes … the service") has been inserted into the definition since the commencement of this proceeding by the *Broadcasting Legislation Amendment (Digital Television) Act* 2010, Schedule 1, item 135, which came into effect on 30 June 2010.

Court by PPCA turns upon the proper construction of the Ministerial Determination. It was in the following terms (emphasis added):[39]

> ***I, RICHARD KENNETH ROBERT ALSTON, Minister for Communications, Information Technology and the Arts, under paragraph (c) of the definition of "broadcasting service" in subsection 6(1) of the Broadcasting Services Act 1992, determine 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.***

It is convenient to refer to the whole of the bolded paragraph as the "exclusion", and to the underlined portion as the "exception".

Finally, the term "broadcasting services bands" is defined in s 6(1) of the Broadcasting Services Act. Two versions of the definition may be relevant: that current at 12 September 2000 (when the Ministerial Determination was made) and that current today. The definition as at 12 September 2000 was as follows:

"broadcasting services bands" means that part of the radiofrequency spectrum that:

(a) is designated under section 31 of the Radiocommunications Act 1992 as being primarily for broadcasting purposes; and

(b) is referred by the Minister under that section to the ABA for planning.

The current definition of "broadcasting services bands" is as follows:

"broadcasting services bands" means:

(a) that part of the radiofrequency spectrum that:

(i) is designated under subsection 31(1) of the Radiocommunications Act 1992 as being primarily for broadcasting purposes; and

(ii) is referred by the Minister under that subsection to the ACMA for planning; and

(b) that part of the radiofrequency spectrum that:

(i) is designated under subsection 31(1A) of the Radiocommunications Act 1992 as being partly for the purpose of digital radio broadcasting services and restricted datacasting services; and

(ii) is referred by the Minister under that subsection to the ACMA for planning.

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[39] http://www.comlaw.gov.au/Details/F2004B00501

Each means, in essence, that the "broadcasting services bands" are that part of the radiofrequency spectrum designated as being for particular purposes and referred for planning by an applicable regulatory authority (formerly the ABA; presently the ACMA).[40] In practical terms, the "broadcasting services bands" comprise that part of the spectrum used for radio and television broadcasts. Importantly for present purposes, when CRA's members' radio programs are being delivered by way of the internet, they are not travelling over that part of the spectrum.

Various parliamentary and other extrinsic materials indicate that the purpose of the exemption from the Ministerial Determination was not to exempt the internet activities of existing terrestrial broadcasters; rather, the intention was to preserve the application of the new and detailed regulatory regime that had just been enacted for datacasting services. The material indicates that the fundamental policy intention behind the Ministerial Determination was to address concerns on the part of the then developing internet industry that audio and video streaming might fall within the definition of a "broadcasting service", and therefore be subject to the regulatory regime in the Broadcasting Services Act. Some of the key references to the Ministerial Determination are outlined in Appendix A to this submission.

Radio broadcasters are in a privileged position in relation to the use of sound recordings. Various protections provided to these broadcasters are not applied to other operators. Radio broadcasters have access to the compulsory licence under the Copyright Act, they are also afforded the benefit of the statutory caps which limit the licence fees payable by them for the broadcast of recorded music and they also have the ability to utilise 'unprotected' recordings, which do not require a licence for the purpose of a broadcast.

Further legislative changes which would characterise an internet "simulcast" as a "broadcast", as that term is currently used in the Copyright Act, would provide broadcasters with further benefits that are not enjoyed by other operators and would further disadvantage sound recording copyright owners. The removal of the caps and voluntary licensing would be preferable – with recourse to the 'independent umpire" (the Copyright Tribunal) being available if agreement cannot be reached.

The interpretation of the relevant legislative sections has been subject to litigation. Most recently the Full Federal Court (in a unanimous decision) determined that a simulcast is not a broadcast. This is discussed in more detail in section 6 of this submission.

[40] Australian Communications and Media Authority.

5. PPCA and the Radio Industry

5.1 Commercial Radio

As set out above in section 2.3 of this submission, PPCA offers licences to commercial, community and public radio broadcasters. These licences allow these entities to broadcast sound recordings as a part of their broadcasting service.

Since the early 1980s, PPCA has licensed the commercial radio sector through various agreements. PPCA currently has an agreement in place with CRA (formerly the *Federation of Australia Radio Broadcasters*) as a part of an "industry" agreement dated 16 June 2000.

Commercial radio is a thriving and profitable industry which recorded an increase of 4.65% in revenues during the most recent quarter (ending 31 March 2013), which equated to a total of $59.99 million for the five metropolitan commercial radio markets alone.[41] Australian commercial radio is a $1billion dollar industry for which sound recordings comprise the primary form of content programming on many of these stations. In 2012, the five metropolitan commercial radio markets alone generated a total of $674 million in advertising revenue for the year.[42] This total does not take into consideration additional revenue earned from these five metropolitan markets or the revenue earned from any commercial broadcasters that operate outside of these five radio markets. Figures published by the Australian Communications and Media Authority (**ACMA**) in 2010 noted that the commercial radio sector reported $1,039 million in revenue in 2009. [43]

Under the terms of this industry agreement, CRA is responsible for collecting the licence fees payable under the agreement from its members, and paying these fees to PPCA on behalf of its members.

The annual aggregate licence fee paid by CRA members to PPCA equates to approximately 0.4% of their combined gross annual revenue. In other words, Australian commercial radio pays approximately $4 million each year to PPCA for its use of sound recordings on 257 commercial radio stations.[44]

The licence fees payable by commercial radio broadcasters arise from the industry negotiations conducted between PPCA and CRA. Under the industry agreement, CRA determines the proportion of the licence fees payable by the individual CRA members to PPCA. The amount paid by each CRA member is not routinely provided to PPCA. The 0.4% is not applied to all members on a blanket basis as each CRA member pays a different percentage of their revenues.

The current rate of 0.4% has been the result of industry negotiation spanning the past 24 years and has been constrained by the limitations of the pricing caps set out in the Copyright Act.[45] The current industry

[41] CRA press release 8 April 2013: http://www.commercialradio.com.au/index.cfm?page_id=1305&news_display_year=2013&display_news_id_5517=2007
[42] CRA press release 8 January 2013: http://www.commercialradio.com.au/index.cfm?page_id=1305&news_display_year=2013&display_news_id_5517=1995
[43] See: http://www.acma.gov.au/WEB/STANDARD.PC/pc=PC_312232. Recent figures have not been published by ACMA on its website.
[44] According to the CRA website, there are 261 commercial radio stations in Australia. 257 of these are members of CRA. See: http://www.commercialradio.com.au/index.cfm?page_id=1010
[45] See section 4.2 of this submission for further information.

agreement has been extended on an interim basis several times by PPCA to allow the Federal Government to consider removal of the pricing caps.

5.2 Community Radio

PPCA has an industry agreement in place with the Community Broadcasting Association of Australia (**CBAA**). CBAA is the peak industry body that represents community radio broadcasters across Australia. The industry agreement sets out the terms upon which CBAA members are licensed by PPCA for the broadcast of sound recordings as a part of their broadcasting service. The rates payable by CBAA members are also less than 1% of their gross revenue.

Not all community radio broadcasters are members of CBAA. Consequently, PPCA has separate licences in place for those community radio broadcasters who are not CBAA members. The rates payable are also less than 1% of gross revenue.

5.3 ABC

Section 152(11)of the Copyright Act provides that the Copyright Tribunal may not set an annual licence fee in excess of 0.5 cents (i.e. $0.005) per person of Australia's population for radio broadcasts made by the Australian Broadcasting Corporation (**ABC**).[46]

Since 1993, the ABC has paid the amount of 0.5 cents per head of population pursuant to the Copyright Act. PPCA currently receives around $115,000 per year from the ABC for the broadcast of sound recordings across all of its radio stations.

5.4 Other PPCA Licences

Although PPCA has licences in place with the aforementioned radio broadcasters that enable them to broadcast sound recordings as a part of their broadcasting service, the current licences do not grant the broadcasters a licence to simulcast their broadcasts over the internet or mobile networks. Although PPCA has been approached by CBAA members and the ABC in respect of these licences, the parties have mutually agreed to place such discussions on hold, pending the resolution of the potential High Court proceedings.[47] Although attempts have been made in the past by PPCA to engage CRA regarding such licences, PPCA has not been successful and the resulting litigation is a consequence of this.[48]

[46] Section 158(11) of the Copyright Act (Cth) 1968
[47] See section 6 of this submission for further information regarding the pending High Court proceedings.
[48] See section 6.1 of this submission for further information.

The licence fees payable by the ABC for the broadcast of sound recordings has been capped for over 40 years even though the extent of usage has increased along with the range of operations of the ABC. There has been no adjustment at all to reflect the change in the cost of living.

Commercial radio is a highly profitable billion dollar industry that is being subsidised by sound recording copyright owners due to the legislative caps that are imposed in the Copyright Act.

The caps have a real and supressing impact on the ability of sound recording copyright owners to achieve a fair return for the use of their content. The imposition of any legislative changes that deem a "simulcast" as the same as a "broadcast" should only be considered in light of the removal of the legislative caps.

6. Internet simulcasts: Co-operative Litigation between PPCA and CRA to Determine the Status of Internet Simulcasts

6.1 Background to the Proceedings

The issue before the Committee has been the subject of litigation between PPCA and CRA.

PPCA entered into an agreement with CRA on 16 June 2000 that allowed CRA's members to broadcast PPCA controlled sound recordings (the **Broadcast Agreement**). The definition of "broadcast" in that agreement relies on the meaning given to that term in s 10(1) of the Copyright Act.

The word "broadcast" in the Copyright Act relevantly means "*a communication to the public delivered by a broadcasting service within the meaning of the Broadcasting Services Act 1992*". Section 6(1) of the Broadcasting Services Act provides the definition of "broadcasting service". That definition says, under s 6(1)(c) that the Minister may determine that a service, or class of service, does not fall within the definition of broadcasting service.

On 12 September 2000, the then Minister for Communications, Information Technology and the Arts, Richard Alston, made a determination under s6(1)(c) that the following service is not a broadcasting service (the **Ministerial Determination**)[49]:

a service that makes available programs or radio programs using the Internet, [**the Exclusion**] *other than a service that delivers television programs or radio programs using the broadcasting services bands* [**the Exception**].

The Court adopted the definitions in square brackets above to distinguish between the first part of the Ministerial Determination which *excludes* certain services from the definition, and the second part which then *excepts* certain services from the Exclusion.

In 2009, PPCA and CRA engaged in correspondence concerning the practice of radio broadcasters who had begun simulcasting their terrestrial broadcasts on the internet via live web streams. PPCA took the view that, according to the Ministerial Determination these internet simulcasts were not a "broadcast" and therefore not covered by the Broadcast Agreement. CRA disagreed.

6.2 Co-operative Approach

Rather than immediately initiating legal action against the radio broadcasters for infringing PPCA's members' copyright, or seeking injunctions restraining their simulcasting activities, PPCA sought to resolve the issue cooperatively with CRA at an industry level.

PPCA and CRA worked together in framing the terms of the dispute to be adjudicated by the Court and the parties jointly prepared the Statement of Claim and an Agreed Statement of Facts to crystallise the dispute. PPCA only sought declaratory relief from the Court. Proceedings were commenced in the Federal Court on 3 February 2010 and the matter was heard by Foster J on 7-8 October 2010.

[49] See section 4.4 and Appendix A of this submission.

6.3 First Instance Decision

On 15 February 2012, Foster J handed down his decision at first instance[50] in favour of CRA and took the view that the radio broadcasters' internet simulcasts were a *broadcast* within the meaning of the Copyright Act. His Honour focused on the meaning of the word "*service*" contained in the definition of *broadcasting service* and in the Ministerial Determination and held that it "*encompasses the entire business activity carried on by the service provider"* (emphasis added).[51]

Therefore, his Honour held that because the radio broadcasters had delivered their radio programs using the broadcasting services bands (which was part of the same service that made available the same programs using the internet), the Exception to the Exclusion applied and the internet simulcasts were a *broadcast*.

6.4 Full Court Appeal

PPCA lodged an appeal to Foster J's decision on 7 March 2012, arguing that his Honour had adopted the wrong interpretation of the meaning of *broadcasting service*. PPCA's arguments on appeal were based on the plain meaning of the words contained in the legislation and PPCA drew to the Court's attention a number of unintended and serious consequences that arose from his Honour's interpretation.

Both parties at trial and the appeal referred to extensive extrinsic material leading up to the Ministerial Determination. Both parties accepted on appeal that the Exception to the Exclusion was drafted in order to prevent potential "datacasters" from relying on the internet Exception to deliver a *de facto* broadcasting service.[52]

6.5 Full Court Decision

On appeal, the Full Court (Emmett, Besanko and Yates JJ)[53] unanimously reversed Foster J's decision and took a different view to the meaning of the word *service* contained in the Broadcasting Services Act. After considering the lengthy legislative history that lead to the Ministerial Determination and focusing on the meaning of the words *broadcasting service* in detail, together with the purpose of the Broadcasting Services Act, the Court found at [68]-[69]:

*…**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 be delivered by different services. Thus DMG* [a radio broadcaster] *delivered its radio program by one service that used the internet and by another service that used the broadcasting services bands.*

A broadcasting service is the delivery, in a particular manner, of a radio program, consisting of matter intended to entertain, educate or inform. Thus the delivery of the radio program by transmission from a

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[50] Phonographic Performance Company of Australia Ltd v Commercial Radio Australia Ltd [2012] FCA 93; (2012) 94 IPR 585 (**PPCA v CRA First Instance**).
[51] PPCA v CRA First Instance at [115].
[52] PPCA argued that datacasters were in the unique position in that they had access to the scarce resource that is the *broadcasting services bands* and also had the ability to use the internet to deliver their content over those bands – thus, a datacasting service could involve the use of both the internet and broadcasting services bands in the one transmission that delivered content. This was the mischief to which the Exception in the Ministerial Determination was directed.
[53] Phonographic Performance Company of Australia Ltd v Commercial Radio Australia Ltd [2013] FCAFC 11.

terrestrial transmitter is a different broadcasting service from the delivery of the same radio program using the internet.

The Court concluded at [71] that, according to the Ministerial Determination, a service that is delivered or made available using the internet (such as the radio broadcaster's internet simulcasts) is not a broadcasting service. Therefore, radio broadcaster's internet simulcasts were not covered by the Broadcast Agreement. The Court also noted that none of the services offered by the radio broadcasters in question was a service that delivered programs using both the internet and the broadcasting services bands (falling within the Exception).

Maintaining the co-operative approach to the litigation, PPCA wrote to CRA shortly after the Full Court's decision was handed down and proposed that the parties have a 6 month period of negotiation, in good faith, in relation to an appropriate licence for internet simulcasts (before any further legal action be considered). PPCA is still awaiting CRA's response to that proposal.

In late March 2013 PPCA subsequently received notification that CRA had lodged an application for special leave to appeal the February 2013 Full Federal Court decision to the High Court. At this point it is anticipated that the High Court will consider this request during the second half of 2013.

The issue under review by the Committee is currently the subject of legal proceedings and a potential review by the High Court of Australia. Any recommendations by the Committee should take the litigation into consideration.

7. Other Online Streaming Services Impacted by Simulcasting

7.1 The Digital Landscape in Australia

Technological changes over the past decade and the growth in consumer demand for immediate access to content has seen the emergence of new digital industries which utilise the internet to deliver content (such as music, film and games) to consumers.

The timeline set out below indicates the evolution of digital music distribution channels in Australia. In recent years, compact discs and other physical formats have been surpassed as consumers embrace MP3 and other digital formats to listen to music:

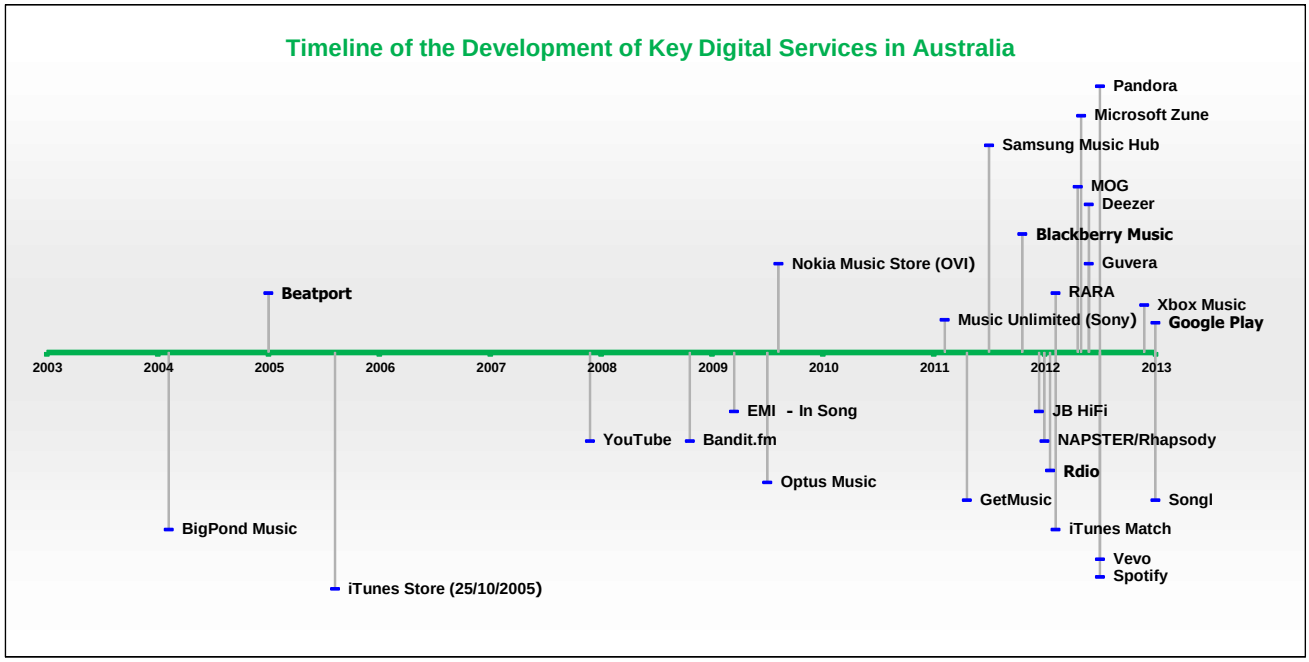

Figure 1 Timeline of the Development of Key Digital Services in Australia

As the timeline above indicates, there are a range of different digital music distribution channels including:

Digital Retailers	• These are services that enable consumers to download music from an online "music store". Digital files are downloaded, which users pay for online. The digital files can include content such as books, music, movies etc. • Some examples include Apple iTunes Store, Zune Marketplace, Amazon MP3 and JB Hi Fi. • PPCA does not license digital retailers. The rights for these types of services are licensed directly by the copyright owners.
Streaming Services	• Whereas a digital music retailer delivers an actual file to the consumer, streaming services enable consumers to access the content without actually owning or being licensed the source file. • These are "cloud" services that provide access to a library of content. • Some well known examples include YouTube, Last.FM, Spotify, Pandora and Rdio. • As set out in section 7.2 below, the licensing models for streaming services vary, and PPCA is able to offer licences for a subset of the streaming services.

7.2 Music Streaming Services

Music streaming services and online radio stations are examples of new and innovative businesses that have been developed within the last decade. These services operate using different business models, and the licensing of use of sound recordings within these services can be sourced from PPCA or the various sound recording copyright owners – depending on the nature of the service. The table below outlines the key types of streaming services, and the various licensing options that are available in relation to the streaming of sound recordings:

SERVICE TYPE	DESCRIPTION	EXAMPLES OF OPERATORS	CAN PPCA ISSUE A STREAMING LICENCE FOR THIS SERVICE TYPE?
Linear Internet Radio	• These are online radio stations that use the internet only (as opposed to the broadcasting service bands or a combination of both) to play music. • Listeners cannot control or influence what they hear. For example, listeners cannot pause, skip tracks or select which songs they want to listen to.	*Energy Groove Radio*: http://www.energygroove.com.au/ *Faith Hope Love:* http://www.fhl.fm	Yes
Customised / Personalised Internet Radio	• These are online streaming services which provide listeners with the ability to "customise" or influence the content they listen to. • Listeners cannot choose specific songs to listen to but they will be able to skip or pause songs. • Listeners may also customise their listening experience by selecting particular genres of music, or expressing preferences for particular artists (although listeners cannot select to listen to these artists on-demand).	*Last.FM*: http://www.last.fm *Pandora*: http://www.pandora.com/	Yes
On-Demand Streaming Services	• These are online streaming services that allow listeners to select which songs they want to listen to on an on demand basis. • Listeners can control the nature and timing of the stream – including the ability to pause, rewind or fast forward.	*Spotify*: https://www.spotify.com *Rdio*: http://www.rdio.com/ *JB Hi Fi Now*: https://now.jbhifi.com.au/#/music/Home/Choose/ *YouTube*: http://www.youtube.com	No These services are licensed directly by the sound recording copyright owners.

All of the different types of streaming services set out in the table above have been licensed under freely negotiated, voluntary licences. PPCA is able to, and has issued licences for certain types of streaming services – namely linear internet radio and customised streaming services. Also, as PPCA's rights are non-exclusive, our licensors have also licensed some of these services directly.

Online streaming services such as linear internet radio and customised streaming services, operate in the same digital market as radio broadcasters that simulcast their terrestrial broadcasts over the internet. In terms of the delivery of these two services – there is nothing dissimilar.

In fact, the main difference is that online streaming services have entered into voluntary, commercial licences that are not constrained by the 1% cap. In contrast, if "simulcasts" are categorised as "broadcasts", then radio broadcasters would not pay anything for the simulcasts of their broadcasts and they would also have the benefit of the statutory caps in relation to their terrestrial broadcasts. They also avoid paying anything for recordings that are unprotected for broadcasting purposes but protected when streamed. This means that unlike terrestrial or "traditional" broadcasts, a licence is required for all online streams or digital communications of sound recordings. Consequently there is not a level playing field, and innovative new services are at a significant disadvantage to traditional radio broadcasters.

Although radio broadcasters often contend that the simulcasting of their terrestrial broadcasts is primarily for the convenience of listeners (who want portability), the online simulcasting of their broadcasting service is another way of increasing the revenue base for the shareholders of these broadcasting companies. In a press release dated 6 July 2012, CRA noted that "*Radio is continuing to perform in comparison to other traditional media in maintaining a solid revenue base and its multiplatform delivery is a major component of its effectiveness for advertisers*."[54] The simulcasting of terrestrial broadcasts is another means for commercial radio to increase its reach for advertisers. This is supported by figures published in January 2012, where the Chief Executive Officer of DMG Radio (Australia) Pty Ltd (**DMG**) in an interview noted that "*70% of the network's audience streams every month while the Nova app has been downloaded more than 260,000 times since its launch in October [2011] and serves over a million ad impressions a week*.[55]" It was further noted by the Chief Executive Officer of DMG in the interview that "*Trying to find a way to bundle our broadcast and mobile offerings to advertisers will be very important, we have just hired some staff in Sydney that have been brought on specifically to help us do that*."[56]

Yet due to the statutory caps and the contention that a simulcast is the equivalent of a broadcast, rights holders and artists are not being fairly compensated for the use of their recordings despite the extent of the use of sound recordings and the value that simulcasting provides for these businesses. If a simulcast of radio programs via the internet falls within the definition of a "broadcast" as set out in the Copyright Act, then sections 152(8) and 152(11) would also apply in relation to certain simulcasts. In other words, the fees payable to copyright owners and artists by those entities which offer two services, namely simulcasts and traditional radio broadcasts, would be capped at either 1% of revenue or 0.5 cents per person. However, no such cap would apply to the fees payable by an entity that chooses to communicate radio programs (and sound recordings) via the internet alone. This creates a distortion in the market place and does not provide incentive for the development of new businesses in the burgeoning digital

[54] See: http://www.commercialradio.com.au/index.cfm?page_id=1305&news_display_year=2012&display_news_id_5517=1959
[55] See: http://www.bandt.com.au/features/radio-waves-in-the-new-year
[56] ibid

economy. This will also disadvantage Australian artists and record companies and will ultimately be detrimental to Australia taking its place as an active participant in the digital economy.

As evidenced by Figure 1 above, sound recording rights holders have demonstrated their willingness to license online service offerings and freely negotiate the terms. There is no wish to circumvent traditional broadcasters also operating in the digital space – the sound recording rights holders seek only the opportunity to negotiate fair licences for such activities.

Innovation should be encouraged – not deterred. PPCA does not want to inhibit radio broadcasters from offering their services online. However, providing radio broadcasters with an advantage in the internet streaming industry will stifle competition and the development of new online only services. Ultimately, audiences may miss out on innovative new services that cannot fairly compete with commercial radio giants that have the protection of a statutory cap.

8. Impact of Regulation of Internet Simulcasts Under the Copyright Act

8.1 A Snapshot of the Implications

Should the Committee elect to recommend that the internet simulcast of radio programs by traditional broadcasters be treated as a 'broadcast' under the current Copyright Act, a number of negative impacts may follow.

These include:

- Expanded constraint of the Copyright Tribunal, further limiting its ability to order equitable remuneration for the use of copyright material in the online environment;
- An unfair limitation on the fair return to be achieved by Australian recording artists and record companies when their material is used online;
- The use of international and local repertoire in global streaming services without the permission of the rights holders;
- Inconsistent treatment of classes of copyright holders;
- Non-compliance with AUSFTA obligations; and
- The lessening of competition and innovation in the developing digital market for music services.

Copyright Tribunal Constraints

The Copyright Tribunal, as the specialist body established specifically for this purpose, should not be artificially constrained in its task of determining equitable remuneration for the use of copyright material. The treatment of internet simulcasts as 'broadcasts' would have the effect of extending the legislative caps contained in s152 beyond the arena of traditional terrestrial broadcasting into the developing market for online digital music services.

An unfair limitation on the fair return for recording artists

Australian recording artists and record labels are entitled to seek a fair return for each use of their material. Services that involve the widespread online communication of their work are clearly undertaking a separate and distinct activity to terrestrial broadcasts, which are confined to particular limited geographic licence areas. It is a fundamental principle of copyright law that owners are able to license the different uses of their work, even if those uses are not specified in legislation. For example, book publishers are able to separately license the production of paperback and hardback book formats. Similarly, different agents or representatives may be granted rights to exploit content in different defined geographic regions.

Additionally, limitations on returns also affect other participants in the music ecosystem. The livelihoods of individuals and organisations other than artists and record labels rely on the recording industry, for

example music retailers, artist managers and suppliers of goods and services to the industry. The smaller the investment made in the development of Australian artists by record labels, the larger the likelihood of an adverse impact for these individuals and organisations. Further, it is possible that the wider Australian community may be affected by the existence of section 152 of the Act. For example, it may operate as a deterrent to those considering a career as a recording artist, or to investment in those artists, or in record companies and labels. This will have a detrimental impact on ensuring that Australian voices are heard and is at odds with the goals set out in the National Cultural Policy.

International and Local Repertoire

Rights holders (both local and international), are entitled to consider and authorise (where they choose) the use of their material on different services. The mere extension of traditional broadcasting services to the online environment should not automatically result in the exploitation of copyright material without the agreement of the rights holders.

Inconsistent treatment of classes of copyright holders

At present no other copyright holders (beyond those holding copyright in sound recordings) are subject to any price constraint when negotiating fair terms for the use of their work, and nor is the Copyright Tribunal subject to artificial constraint when determining the rates to be paid for other copyright material. For example, photographers are not subject to a pricing cap in relation to the use of their photographs. Therefore the existing caps on radio broadcast of sound recordings apply to the *recording artists and investing record labels only* – the copyright owners in the relevant musical works (i.e. the songwriters and music publishers) are not impacted by any legislative cap when seeking equitable remuneration for the use of their content. They are free to negotiate separate licences for different activities (even if those activities are not specified as separate in the legislation) because they are not subject to the unique combination of the statutory licence and legislative caps.

Furthermore, these inequities are compounded by the fact that s109 of the Copyright Act relates only to sound recordings and removes the ability for a sound recording copyright owner to grant or withhold licences for the broadcast of their recordings on a discretionary basis. No such constraint applies to rights holders of musical works. They are able to freely grant or withhold licences on a voluntary licensing basis.

Sound recording copyright owners should be treated consistently with musical work and other copyright owners, whereas they currently experience inequities and would experience further increased inequity if simulcasts were to be treated as broadcasts.

Non-compliance with AUSFTA obligations

Under the Australia-United States Free Trade Agreement (**AUSFTA**), Article 17.6, Australian copyright law must not make any exceptions or limitations to producers' and performers' exclusive rights to communicate their sound recordings over the internet. Such limitations are only permitted in respect of *"traditional free over-the-air…broadcasting*" (see Article 17.6(3)(b)).

If internet simulcasts are characterised as a "broadcast" under the Copyright Act, Australia may be in breach of the AUSFTA in relation to the radio broadcasters' internet simulcasts by providing the following limitations to the exclusive internet communication right:

(a) US sound recordings would not be protected by Australian copyright law when radio broadcasters communicate those recordings over the internet as part of a simulcast (due to the application of the *Copyright (International Protection) Regulations 1969* (Cth));

(b) the communication of sound recordings over the internet by radio broadcasters as part of simulcast would be subject to the statutory licence in s 109 of the Copyright Act; and

(c) the communication of sound recordings over the internet by radio broadcasters as part of a simulcast would be subject to the statutory caps contained in s 152(8) and 152(11) of the Copyright Act.

The lessening of competition and innovation in the developing digital market for music services

The online music streaming industry should compete on a level playing field. Providing favoured terms to a sub-category of participants (i.e. those who also engage in terrestrial broadcasting) disadvantages new services entering the market and stifles competition. This may impede the development of innovative services and disadvantage Australian audiences. We can see no good policy reason why an anachronistic price cap should be extended to an emerging market.

8.2 Communication Right – Australian and International Position

As set out elsewhere in this submission, broadcasting and communication rights are distinct sets of rights and consequently, should be subject to separate equitable remuneration for the copyright owners of sound recordings.

International Position

The distinction between communication and broadcast rights is not unique to Australian law. At an international level, the *WIPO Copyright Treaty 1996: WIPO Performances and Phonograms Treaty 1996* was enacted as an international response to the emergence of the internet and developments in communications technologies by setting measures to protect copyright. One of these measures was the enactment of the exclusive right of communication to the public.[57]

In major music markets such as the United States[58], the United Kingdom[59], Canada[60] and Japan[61] , the simulcasting of terrestrial radio broadcasts are licensed, whether by statutory licence (as is the situation in the United States) or by collective licensing as per the other territories. In each case, simulcasting is acknowledged as a separate exploitation which is either subject to the payment of a separate licence fee or valued within the determination of equitable remuneration for the grant of rights.

[57] For the purposes of the treaty, "communication to the public" of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article 15 of the treaty, "communication to the public" includes making the sounds or representations of sounds fixed in a phonogram audible to the public.
[58] See http://www.soundexchange.com/about/the-law/ and http://soundexchangeforms.wordpress.com/2012/12/17/2013-broadcaster-crb-wsa
[59] See http://www.ppluk.com/I-Play-Music/Radio-Broadcasting/Radio-types/Online-radio-and-services/
[60] See http://www.resound.ca/en/music_users/online.htm
[61] See http://www.riaj.or.jp/e/information/index.html

The International Federation of the Phonographic Industry (**IFPI**)[62] and its participating collecting society members located throughout the world have recognised that broadcasters, subject to any local conditions imposed upon them, may wish to simulcast their broadcasting services via the internet to territories outside of their own. IFPI established a multilateral agreement for its participating collecting society members which enables cross-border simulcast licences to be offered. This agreement enables radio broadcasters to obtain a licence for all the participating territories from a single collecting society. There are over 42 participating countries to this agreement ranging from European territories such as Germany, Belgium and Switzerland, Asian territories such as Malaysia, Hong Kong and Thailand through to territories in the Americas such as Peru, Panama and Paraguay. Central to this is that simulcasting is valued separately and licensed within these territories.

Australian Position

The Australian position is of course at the heart of this Inquiry. However it is important to note that ratification of the aforementioned international treaties was coupled with extensive reviews relating to addressing the challenges for copyright due to technological advancements. This lead the Australian government to enact a broad based, technology neutral right of communication to the public via the *Copyright Amendment (Digital Agenda) Act 2000*.

If simulcasts of radio programs by broadcasters are considered as a 'broadcast' under the Copyright Act, then several negative impacts will result from this. The right to "communicate" sound recordings to the public is an exclusive right granted to copyright owners under Australian and international law and changes to dilute this right would be inconsistent with our international obligations, including compliance with our AUSFTA obligations. It would also further constrain the Copyright Tribunal from being able to determine what constitutes equitable remuneration for the use of copyright material in the online environment – thereby undermining the ability for sound recording copyright owners and artists to be remunerated fairly for the use of their work online. It would also serve as a further inconsistent treatment of sound recording copyright owners compared to other copyright owners (for example the owners of musical works) who are remunerated for the simulcasting and broadcasting of musical works.

[62] IFPI is a not for profit members organisation represents the recording industry worldwide with some 1400 members in 66 countries and affiliated industry associations in 55 countries. Its members comprise of companies or people that produce sound recordings or music videos which are made available to the public.

9. The Myths vs. The Facts

The Myths	The Facts
Making radio broadcasters pay for simulcasts or removing the 1% cap will disadvantage regional radio broadcasters who struggle to make any money.	• The vast majority of regional radio stations are owned by large companies such as Macquarie Bank, ARN, DMG and Southern Cross. These corporations generally act for the benefit of their investors, and are operating profitably. • Licensing the simulcasting (or broadcasting) of recorded music should be on freely negotiated terms between the parties, with the particular circumstances of each licensee taken into consideration. If negotiations fail, and the Copyright Tribunal needs to set the rate, it would certainly carefully consider the circumstances of the relevant sectors in order to set a rate commensurate with the financial position of each of the parties. • Further, section 157(2) of the Copyright Act provides that individual licensees may seek a ruling from the Copyright Tribunal, based on their own particular situation, if they feel that a licence scheme that would otherwise apply to them is unreasonable in their specific circumstances.
Radio Stations help artists and labels sell their products by giving music airtime and promotion - so radio stations shouldn't have to pay to simulcast their stations.	• The primary driver of commercial radio is to sell advertising to attract listeners – and the music that is played is used to attract these listeners and consequently sell advertising. • To put it in another context, if someone carries a Gucci wallet with the Gucci logo on it, does that mean that Gucci should give that person the wallet because they are helping to promote their company? In reality a commercial entity may *choose* to give away some of its product for promotional purposes, but only the specific products and quantities it chooses at any given time. For decades now record labels and Australian recording artists have been forced to provide their material at less than market rates. • In an age of digital empowerment for artists and record labels, where social media and other digital channels like YouTube provide unprecedented promotional value, the idea of radio being the major source of marketing for artists is no longer the case. No one could argue that the promotional capacity of radio in 1968 is the same today, given the enormous changes to society in the interim. • Having said that, the music industry and the radio industry

The Myths	The Facts
	share a symbiotic relationship. It is in the music industry's best interest that there is a healthy and vibrant broadcasting sector. Consequently the music industry does not wish to harm the radio industry, but merely obtain reasonable returns for the key broadcast business input (ie quality sound recordings) created through the investment and creative output of labels and artists. If commercial radio believes that the promotional value they provide to recordings is an important factor, it is something to be raised during rate negotiations (or during any reference to the Copyright Tribunal). • Any promotional value radio delivers to sound recording rights holders also benefits songwriters and publishers in relation to their copyright material. Yet there is no statutory 'cap' on the licence fees songwriters and publishers are able to negotiate with radio broadcasters. Songwriters and publishers are able to seek a fair rate for their work and freely negotiate licences for the simulcasting of their work - recording artists and record labels should have the same opportunity.
This argument is all about big multinational record companies being greedy	• PPCA's licensors are not just the three multinational record labels, but thousands of small businesses and individual artists. The issue isn't about record company greed – but more about ensuring that creators are fairly rewarded for their creative efforts. The right to equitable remuneration is fundamental to copyright. • It is extremely rare to find an Australian occupation or industry where the value of an individual's labour and services, or a company's right to trade their products at market value, is restricted by a 40+year old piece of Government legislation which places a ceiling on their earnings. The statutory caps and other inequities for recorded music copyright owners in the Copyright Act do this. • The argument is about the rights of recording artists and sound recording copyright owners across the country, who are restricted by an archaic cap and other inequities in the Copyright Act - while there is no cap in place on what is paid to songwriters, who get significantly more than recording artists with no limitations on songwriters receiving remuneration for the simulcasting of their musical works.

The Myths	The Facts
	• As is the case with songwriters and/or composers, all that recording artists ask is that, where no agreement can be reached about the value of the communication rights, then a fair value will be determined independently by the Copyright Tribunal. • The value of the Australian recording industry was $607 million in 2004 and $398 million in 2012[63]. Therefore it cannot be the 'David and Goliath battle' that the CRA contends, whilst they continue to report quarterly revenue increases taking the annual value of their industry to over $600 million in advertising revenue in the 5 metropolitan markets alone or around $1billion in total[64]. • The government (and legislation) should enable recording artists and labels to be fairly remunerated for their creative endeavours. Supporting a subsidy for commercial radio and assisting its investors to receive higher dividends should not take precedence. Diminishing the value of the communication right by deeming a simulcast to be a broadcast will have this effect. • Price protection and further concessions by deeming a simulcast as a broadcast should not be afforded to a billion dollar a year industry. The owners of musical works do not face any price caps or limitations on their ability to license the simulcasting of musical works - and the recording industry should not be unfairly impeded. Other suppliers to the radio broadcasting industry are not required to cap their prices so it is grossly unfair that sound recording copyright owners are forced to provide their products at a reduced rate. • If a simulcast is considered as a broadcast – then, without the removal of the statutory caps, there will be a further erosion of the ability of copyright owners and artists to obtain a fair market rate for their work. • The 0.4% rate that is currently received by the recorded music industry from commercial radio is one of the lowest

[63] http://www.aria.com.au/pages/documents/physanddigsalesxvalue.pdf

[64] See http://www.commercialradio.com.au/index.cfm?page_id=1305&news_display_year=2013&display_news_id_5517=1995 and http://www.acma.gov.au/WEB/STANDARD.PC/pc=PC_312232

The Myths	The Facts
	rates in the developed world, with territories such as the UK, Japan, New Zealand, Canada and France being able to negotiate a fair market rate or a rate that is determined by an independent specialist copyright body. Actual rates around the world vary from about 1.5% to 4%. • It would be considered absurd if the government passed a law that stated that Australian cinemas were not required to pay more than 1% of their annual box office receipts to the makers of Australian films. Not that people would stop writing scripts or making low budget films, as this is what the creative psyche is born to do. However the drop in the level of excellence and quality that comes from inadequate rewards in return for the risk involved would be obvious.
Radio already pays $25 million a year in licence fees for music	• CRA has stated that it currently pays $25 million a year in copyright fees[65] and has used it as a justification as to why sound recording licence fees should not be increased. • It is important to note that the $25 million relates to copyright fees in total – not just fees related to sound recordings. PPCA receives approximately $4million from commercial radio for the broadcast of recorded music. We assume that the rest of the fees are payable to APRA for publishing. This demonstrates that PPCA receives only a fraction of the radio broadcast revenue paid to APRA for use of the musical work, which is not constrained by any cap. In addition, APRA has licensed CRA members for the simulcasting of musical works without any constraints. • The current legislation disrupts the performance of market mechanisms and allows radio to make profits on a false economy. The imposition of further changes to the communication right by considering a simulcast as a broadcast would further disrupt the market. If left to the market to determine, as happens with the value of musical works (not subject to the cap or simulcasting constraints), recording artists would be paid commensurate with the real value their recordings give to radio.

[65] See http://www.themusicnetwork.com/music-news/media/2010/02/18/ppca-tell-radio-to-pay-up/

The Myths	The Facts
Shouldn't music be heard everywhere in Australia? If radio stations have to pay to simulcast – then this will cut off access for people in regional Australia?	• As the digital landscape continues to expand and with the planned national roll-out of the Federal Government's National Broadband Network, the scope for regional Australia to access digital radio or other digital and online music channels will only continue to grow. • Music should be heard – but commercial enterprises that are based on the delivery of music, such as radio, should also fairly remunerate the creators of this music. • PPCA does not want to stop music being heard online. We want to work with the commercial radio sector to ensure that a fair rate is agreed for the use of the works created by our licensors and registered artists.
1% of revenue is a significant fee – why should radio have to pay more?	• In 1968 the cap for the ABC was set at half a cent per head of population (i.e. $0.005 per head) and, since then, it has not been adjusted to reflect any movements in the cost of living or the expansion of the ABC radio networks (eg the introduction of the Triple J and other additional digital radio stations to the network). • These caps are well below the rates applicable in other similar territories around the world (including the UK and NZ) and unfairly limit the amounts paid to artists by radio broadcasters. • The caps have been in place for over forty years. PPCA believes that they undervalue the use of sound recordings so that artists are effectively subsidising the provision of content to the highly profitable commercial radio sector. • Market conditions have changed significantly since the caps were introduced over 40 years ago. The existence of the caps has meant that the licence fee rates for sound recordings have not been properly reviewed in all of that time, and this has severely disadvantaged the recording artists and labels that create sound recordings. • Simulcasting is a separate right which should be subject to fair remuneration for sound recording rights holders and artists. If a simulcast is characterised as a broadcast – then the ability of sound recording rights holders and artists to obtain fair remuneration will be further restrained due to the

The Myths	The Facts
	statutory pricing caps. • The key issue is not whether radio should be paying more or less but that there is an opportunity to properly assess the appropriate fees in the context of current market conditions as they apply from time to time.
The simulcasting of radio broadcasts over the internet has not increased the number of listeners to radio – it's the same listeners accessing radio through multiple devices.	• Radio is about earning revenue for shareholders and cross platform opportunities (using the internet) is a key driver for increasing revenues for the commercial radio sector.[66] If radio does not see any commercial advantage (eg building a market in an important new area) in simulcasting their programs online, why are they investing any time or money on it? • There is no question that the simulcasting of traditional radio broadcasts via the internet expands the reach of those broadcasters beyond the territory limitations of their radio licences. It allows them to access new markets of listeners outside the boundaries of their broadcast territory, appeal to a broader range of advertisers, and engage in ecommerce opportunities.

[66] See: http://www.bandt.com.au/features/radio-waves-in-the-new-year

10. Conclusion

In light of the extensive reviews already on foot, in PPCA's view the Committee should not, at this time, recommend any isolated regulatory amendments.

If the Committee is of a mind to recommend limited reform, the only compelling case for change relates to the removal of the artificial caps[67] on the equitable remuneration available to sound recording rights holders when their recordings are used for radio broadcasts. It is the combination of the compulsory licence in s109 of the Copyright Act and these outdated caps which have given rise to the current inequities in relation to broadcasters' use of sound recordings, which are magnified in the evolving digital music economy.

At present, the balance of sound recordings owners' proprietary rights to generate income from their content compared to broadcasters' rights to use that content is currently tipped too far in favour of broadcasters. In the interest of fairness, equity and the promotion of healthy competition those caps should be removed. At the very least, these price caps should not be extended into the digital environment.

Sound recording owners and recording artists would be put to even further disadvantage if the inequities that currently apply to the licensing of sound recordings for terrestrial broadcasts were extended to internet simulcasts by way of legislative changes. Such an outcome would not accord with the objectives of copyright law in providing incentive for investment in innovation and content creation. Copyright should act as a stimulus for people to create works and for others to invest in the exploitation of such creative works.

Any legislative change that treated internet simulcasts in the same way that current "broadcasts" are treated under the Copyright Act would have the following specific undesirable outcomes:

- Creators (artists) and owners of copyright in sound recordings will have their works communicated around the world and will receive little return (or no return in relation to US sound recordings) for this further exploitation of their works by radio broadcasters.
- The Copyright Act would treat owners of different types of works inconsistently by, on the one hand, allowing owners of musical works to separately license different uses of their works (such as internet simulcasts) without constraints, and on the other hand preventing sound recording owners from doing so. This would also be inconsistent with fundamental copyright principles and commercial practice where it is accepted that rights holders are able to control the different uses of their works.
- It would stifle innovation and prevent fair competition from emerging internet streaming services that would not be placed in the same privileged position as the holders of radio broadcasting licences who have the benefit of the caps.
- Australia would be in breach of its obligations under the AUSFTA and out of step with comparable overseas jurisdictions where the right to communicate works to the public is

[67] Section 152 of the Copyright Act

considered as an exclusive right of the copyright owner and a right that has a value attributed to it for such exploitation.

PPCA does not wish to inhibit or deny radio broadcasters the opportunity to operate in the online environment through the simulcasting of their terrestrial broadcast services. In fact, as recently as this year, PPCA has reached out to CRA on a number of occasions, advising them of this and PPCA's willingness to participate in discussions on appropriate licence terms for the online activities of its members. Although PPCA is yet to receive a response, we remain committed to commencing discussions with the commercial radio sector. PPCA is only asking for the opportunity to negotiate fair licences for such activities to ensure that recording artists are rewarded for their creative effort and record labels rewarded for the risk capital that they invest.

Appendix A

Background to the Ministerial Determination

Section 4.4 of this submission sets out the interaction of the Copyright Act and the Broadcasting Services Act as they apply to the definition of a "broadcast". Key to this is the relevant Ministerial Determination, which PPCA contends was directed at datacasting services. A curiosity of the history is that, in the event, and apparently contrary to expectations, datacasting did not eventuate as an important activity at all. However, the apprehension that this would be the case informs the reasons for the making of the Ministerial Determination.

Introduction of the Digital Television Regime and Datacasting Services in Australia

On 24 March 1998, the Government announced its intention to introduce digital terrestrial television and datacasting services in Australia.[68]

In June and July 1998, the Senate heard evidence relating to, and debated, the proposed legislative changes. Concerns raised for discussion before the Senate included, for example, the potential for datacasters to provide internet access as a datacasting service (delivered over the broadcasting services bands),[69] and the regulatory implications of datacasters entering the field of broadcasting.[70] One key recurring issue was that spectrum made available for datacasting could be used to download online content.[71]

On 27 July 1998, the Government legislated for the introduction of digital terrestrial television broadcasting by amending the BS Act with the *Television Broadcasting Services (Digital Conversion) Act* 1998 (Cth) (the **Digital Conversion Act**).

The legislated scheme stipulated amongst other things, additional "datacasting" services, to be provided by new entrants and incumbent broadcasters on spectrum freed up as a result of the commencement of digital broadcasting.

Although the new legislation set out the basic framework for converting free-to-air commercial and national television from analog to digital, the rules governing the operation of digital television and datacasting services were to be determined following a number of statutory reviews.[72]

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[68] Department for Communications, Information Technologies and the Arts (DCITA) Media Release, *Digital – A new Era in Television Broadcasting*

[69] For example, Mr Tanner from the ABA gave evidence at the Senate Legislation Committee hearing on 1 June 1998 that he thought "the spectrum made available for datacasting as it is defined in the bill could certainly be used to download certain on-line—well, any on-line—applications."

[70] On 3 July 1998, Senator Alston said during debate of the bill "This bill is not designed to solve the problems of the entire television or internet industries. This bill is to do with enabling broadcasters to migrate from analog to digital according to a reasonable timetable, and at the same time, to have datacasting/Internet applications available".

[71] For example, Mr Ward from the Internet Industry Association (IIA) said: "I think the way this datacasting service will operate certainly in the foreseeable future, that is the next two or three years, is that you will essentially be migrating what is available currently through Internet based services into a form where it is available to normal television receivers through antennas."

[72] Second Reading Speech, 10 May 2000.

Datacasting was defined in the Digital Conversion Act as "a service (other than a broadcasting service) that delivers information (whether in the form of data, text, speech, images or any other form) to persons having equipment appropriate for receiving that information where the delivery of that service uses the broadcasting services bands".[73] This form of definition was required:

- because the market for datacasting services had not yet developed;
- because the precise nature and scope of the services was unknown at the time; and
- to alleviate concerns that datacasters would compete with traditional broadcasters.[74]

The Department of Communications, Information Technology and the Arts (**DCITA**) received submissions from various stakeholders interested in providing datacasting services.[75] In June 1999, DCITA released its "Report on the Review into Scope of Datacasting Services and Enhanced Programming" which presented a number of options for distinguishing datacasting services from broadcasting services by way of definition in the legislation.[76]

Digital Television and Datacasting Bill 2000

On 21 December 1999 the Government announced its decisions on the limitations that would apply to datacasting services and other requirements for the introduction of digital television.[77] A new definition of datacasting services was to be introduced to provide more certainty about the scope of those services, ensuring differentiation from broadcasting services[78] and setting out a range of restrictions on datacasting (as outlined below).[79]

On 10 May 2000, the *Broadcasting Services Amendment (Digital Television and Datacasting) Bill* 2000 (Cth) (the **Digital Television and Datacasting Bill**) and the *Datacasting Charge (Imposition) Amendment Bill* 2000 (Cth) were introduced to implement these decisions.[80]

The primary objective of the regulatory regime for datacasting was to distinguish clearly between datacasting and broadcasting services.[81] The Second Reading Speech for the Digital Television and Datacasting Bill in the House of Representatives noted that:

The parliament has legislated that no new commercial television licences can be issued until after 2006. Therefore, the regulatory regime needs to prevent this being circumvented by ensuring that datacasters do not become de facto broadcasters.

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[73] The Digital Conversion Act, Schedule 4, Clause 2.
[74] The Digital Conversion Act
[75] DCITA, "Review into Scope of Datacasting Services and Enhanced Programming".
[76] ibid
[77] Minister for Communications, Information Technology and the Arts, "Digital – new choices, better services for Australians".
[78] These concerns were later reflected by the Productivity Commission in its Inquiry Report into Broadcasting in which a number of datacasting services were contemplated but with an emphasis that datacasting must not become a means of offering broadcasting services – through internet radio, for example.
[79] Minister for Communications, Information, Technology and the Arts, "Digital – New Choices, Better Services for Australians": "The Government will introduce a new definition of Datacasting services to provide more certainty about the scope of these new and innovative services while ensuring that datacasting will be distinctly different from current television services".
[80] CB, vol 2, tab 25.
[81] Report of the Senate Legislation Committee.

The regulatory approach adopted was to restrict the kinds or "genres" of programs and services that datacasters would be allowed to provide.[82] In particular, the new Bill changed the datacasting definition by placing genre and audio content restrictions on datacasting licences.

The intention was that datacasters would be prevented from providing content in genres regarded as appropriate for free-to-air television – for example, drama, current affairs, sporting programs and events, music programs, infotainment and lifestyle programs, light entertainment and variety programs, compilation programs, quiz programs and games shows. Datacasters would be able to provide short extracts of these program genres, as long as the extracts were not self-contained, and not provided in a way that facilitates their combination to form a television program.[83]

Moreover, there would be limitations placed on the audio material datacasters could provide. This was primarily intended to prevent them from operating as radio broadcasters.[84]

Outside the restricted genres, datacasters would be able to provide other services. These included internet carriage services which provide individual end users with point to point connections to the internet, including internet websites. The regulatory regime applying to datacasting services would apply only to services provided in the broadcasting services bands spectrum, and would not affect services delivered by other technical means. Subject to this limitation, they were anticipated to apply in respect of all datacasting services, whether by commercial broadcasters, national broadcasters or other datacasters.[85]

Subsequent Amendments to the Bill

The Digital Television and Datacasting Bill was referred to the Senate for evidence and debate in May and June 2000. Various stakeholders expressed concerns that the proposed constraints on datacasting licences were overly restrictive. For example, prospective datacasters expressed disappointment that an opportunity to provide new services to rural and regional areas was being declined.[86] Others raised concerns that free-to-air broadcasters were being protected unnecessarily from competition by datacasting at the expense of consumers.[87]

Concerns were also expressed in relation to the new regulatory implications faced by the emergence of datacasting:[88]

The distribution of Internet type material via the broadcasting service bands marks one of the first meaningful problems of convergence that this parliament has had to confront. On the one hand, we have broadcasting regulation which proceeds by conditions attached to licences. On the other hand, we have the point to point regulation that governs the Internet. Datacasting sits somewhere in between. The challenge confronting us is to find a system that provides these benefits without creating the backdoor broadcasting.

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[82] Report of the Senate Legislation Committee, Second Reading Speech, 10 May 2000.
[83] Second Reading Speech, 10 May 2000.
[84] ibid.
[85] ibid.
[86] See the submissions made by Telstra at the Senate Legislation Committee Hearing on 31 May 2000; and comments by Senator Bishop during debate of the bill.
[87] See, for example, the comments made by Senator Schacht during debate of the bill.
[88] Senate Debate.

Significant amendments were then made to the Digital Television and Datacasting Bill at the Senate Committee stage. In its final form, the *Broadcasting Services Amendment (Digital Television and Datacasting) Act* 2000 (Cth) (the **Digital Television and Datacasting Act**) made substantial amendments to the BS Act. The legislation added a new schedule (Schedule 6) to the BS Act. This comprised the regulatory regime for datacasting services: it established a licensing system (Part 2) and contained detailed specifications for datacasting services to ensure that they would not become *de facto* television broadcasts (Part 3). These provisions sought to ensure that datacasting licensees would not broadcast matter that would be equivalent to a television news, drama, sports, documentary, lifestyle or entertainment program, or a commercial radio program (unless they were extracts no longer than 10 minutes, and not strung together so as to constitute a single program). Datacasters were allowed to transmit information and education programs, Parliamentary and Court proceedings, text and still images, interactive computer games and internet content.[89]

Review of Audio and Video streaming

In the Second Reading Speech for the Digital Television and Datacasting Bill, the Government proposed a non-statutory review to be conducted by the ABA over the following 12 months. The issue to be reviewed concerned uncertainty as to whether services such as streamed audio and video obtainable on the internet were, legally, broadcasting services.

In particular, in the Second Reading Speech, it was noted that:[90]

Datacasting licensees will be able to provide their customers with point to point connections to the Internet. This will increase the range of business models available to datacasters. For example, it will allow a datacaster to function as an Internet service provider, providing connections to the Internet rather than just content.

In common with all other means of accessing the Internet, this would allow users of datacasting services to have access to programs such as video clips of news stories, or streamed audio and video services, where they are made available on websites. The moratorium in the BSA on new commercial television services applies to services delivered by any technological means including the Internet. However, there is currently some uncertainty whether services such as streamed audio and video obtainable on the Internet are, legally, broadcasting services. This is a generic issue relating to the convergence of broadcasting with other services, and it is therefore proposed to refer the matter to the ABA for their detailed consideration over the next 12 months.

In summary, the concern was: would internet services being provided via datacasting be considered "broadcasting services" and hence attract regulation under the Broadcasting Services Act by virtue of being delivered over the broadcasting service bands? In particular, should services providing television programs and/or radio programs over the internet be classified as a broadcasting service, these services would be subject to licence conditions under the appropriate broadcasting licensing regime. Depending on the nature of the service, persons providing such services would be required to hold, and comply with, the appropriate individual service licence, or comply with the conditions of the relevant class licence

[89] The Digital Television and Datacasting Act, Schedule 6.
[90] Second Reading Speech, 10 May 2000.

stipulated under the Broadcasting Services Act. Substantial penalties can be imposed for the provision of unlicensed broadcasting services, or of services which breach licence conditions.[91]

Industry representatives had also expressed concern at the prospect of television and/or radio programs being available over the internet being regulated as broadcasting services. It was also highlighted that legal uncertainty over streamed internet services had the potential to adversely affect the emerging internet industry in Australia. The internet and information technology industries called for urgent legal clarification on the status of streamed internet services.[92]

Section 216E was inserted into the BS Act requiring that the Minister cause a statutory review to be conducted before 1 January 2002 into "… whether, in the context of converging media technologies, streamed audio and video content obtainable on the Internet should be regarded as a broadcasting service".[93] Industry concern following the passage of this legislation gave rise to concerns that a more timely resolution was necessary.[94] Accordingly, a review was conducted in July 2000.

A report by DCITA was issued in March 2001, titled *Report on Review of Streamed Internet Audio and Video Content* (the **DCITA Report**).[95] It records what happened during the review.

The review involved consultation with and consideration of advice from stakeholders including:

(a) the Australian Information Industries Association (AIIA);
(b) the Internet Industry Association (IIA);
(c) the Federation of Commercial Television Stations (FACTS);
(d) the Service Providers Action Network (SPAN);
(e) members of the Australian Information Economy Advisory Council (AIEAC); and
(f) the Australian Broadcasting Authority (ABA).[96]

During consultations, a clear consensus emerged in favour of internet audio and video streaming services not being regulated as a broadcasting service under the BS Act.[97] Arguments put forward in support of this position included:

(a) likely business models for internet content providers may be significantly different from that of traditional broadcasters;
(b) regulating internet services as broadcasting services would lead to a competitive disadvantage in the international economy, particularly if the Australian regulatory framework was significantly more restrictive than that of overseas competitors. This would have negative implications for future levels of investment in the Australian information and communications sector;
(c) the commercial success of communications and IT companies is already subject to high risks. Regulation of internet services, such as audio and video streaming, would create additional barriers for these businesses and curtail industry development in Australia; and

[91] Report on Review of Streamed Internet and Video Content.
[92] ibid.
[93] ibid.
[94] ibid.
[95] ibid.
[96] ibid.
[97] ibid.

(d) streamed audio and video programming delivered over the internet has the potential to provide consumers with greater access to information and entertainment services. Regulating internet streaming services as broadcasting services may impede the growth of these new services, which offer an alternative to traditional broadcasting content.[98]

The Government's Decision and its Implementation

On 21 July 2000, the Minister announced the Government decision that internet services such as audio and video streaming outside the broadcasting services bands should not be considered broadcasting services under the Broadcasting Services Act.[99]

The media release of 21 July 2000 in which the Minister announced his intention to make what became the Ministerial Determination confirmed his intention only to preserve the application of existing regulations to services delivered over the broadcasting services bands (emphasis added):[100]

Senator Alston said that the decision to make it absolutely clear that Internet video and audio streaming are not regarded as broadcasting will apply to all Internet video and audio streaming other than over the broadcasting services bands which will be regulated under the recent digital television legislation.

The Ministerial Determination was gazetted on 27 September 2000 and subsequently tabled on 3 October 2000.

A further media release issued by the Minister on 27 September 2000 referred to a lack of legal certainty and expressly indicates that the Minister's intention was to ensure that internet streaming provided outside the broadcasting services bands – through home computers, or on mobile phones – would not be regarded as a broadcasting service.[101]

The Government was plainly concerned to ensure that prospective datacasters could not rely on the Ministerial Determination to escape the need to comply with the datacasting rules in the BS Act, simply by delivering services over the internet (using the broadcasting services bands).[102]

The Minister also issued an Explanatory Statement to accompany the Ministerial Determination. Relevantly, the statement said (emphasis added):[103]

The determination includes a service that uses the Internet, even if part of the means of delivery of the service is technology which may not clearly be part of the Internet, so long as the service does not deliver programs using the broadcasting services bands. For example, the determination will cover services which enable users to access material from the Internet using a wireless application protocol device such as a mobile phone, whether or not the wireless application protocol is itself part of the Internet.

The exclusion from the exemption for a service that delivers programs using the broadcasting services bands is necessary to prevent the exemption being exploited to deliver a defacto broadcasting service

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[98] ibid.
[99] ibid.
[100] Media Release, Senator the Hon Richard Alston, "Video and Audio Streaming".
[101] Media Release, Senator the Hon Richard Alston, "Internet video and audio streaming defined".
[102] See the second underlined portion from the extract of the Explanatory Statement below.
[103] Explanatory Statement to Ministerial Determination.

using those bands. *"Broadcasting services bands" is defined in subsection 6(1) of the Act to mean that part of the radiofrequency spectrum that is designated under section 31 of the Radiocommunications Act 1992 as being primarily for broadcasting purposes and is assigned by the Minister to the Australian Broadcasting Authority for planning.*

As the DCITA Report indicates,[104] it was considered that the most appropriate means of clarifying the legal status of internet video and audio streaming was a Ministerial determination under subsection 6(1) paragraph (c) of the definition of "broadcasting service" in the Broadcasting Services Act. The issue of a determination had the advantage of being more flexible and giving effect to the decision more quickly than an amendment to the legislation.[105] The determination provides a substantial degree of certainty, and is subject to Parliamentary scrutiny as a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act* 1901 (Cth).[106]

The DCITA Report also noted that (emphasis added):[107]

The purpose of issuing a Ministerial determination was to provide clarity on the legal status of Internet audio and video streaming services--not to alter the existing legal or policy framework governing digital television and datacasting services. As part of the digital television conversion scheme, the Parliament enacted rules covering the operation of datacasting services under the Broadcasting Services Amendment (Digital Television and Datacasting) Act 2000. These rules cover the delivery of audio and video material using the broadcasting services bands spectrum, and it is therefore neither necessary nor appropriate to extend the determination to cover services that use this spectrum. The term "broadcasting services bands" is defined in subsection 6(1) of the Act to mean that part of the radiofrequency spectrum that is designated under section 31 of the Radiocommunications Act 1992 as being primarily for broadcasting purposes, and is assigned by the Minister to the ABA for planning.

[104] Report on Review of Streamed Internet and Video Content.
[105] ibid.
[106] ibid.
[107] ibid.