



10 May 2013

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

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

Dear Committee Secretary

The Effectiveness of Current Regulatory Arrangements in Dealing with the Simultaneous Transmission of Radio Programs using the Broadcasting Services Bands and the Internet (“Inquiry”)

Please find attached a submission on behalf of the Australian Broadcasting Corporation, Commercial Radio Australia, the Community Broadcasting Association of Australia and the Special Broadcasting Service (“**Broadcasters**”) relating to the Inquiry.

The fact that we have joined together to make a combined submission highlights the fact that the issues forming the subject of the Inquiry directly affect all of the Broadcasters.

If the online component of a simulcast is not treated as a broadcast, serious consequences are likely to flow, affecting all of the Broadcasters. This may result in some, if not all, of the Broadcasters ceasing to simulcast, thereby depriving members of the public from the ability to access programs on devices of their choice.

We thank the Committee for its time in considering this matter.

Yours sincerely

Michael Millett

Director Corporate Affairs
Australian Broadcasting Corporation

Joan Warner

Chief Executive Officer
Commercial Radio Australia

Jon Bisset

General Manager
Community Broadcasting Association of Australia

Mandi Wicks

Director of Audio and Language Content
Special Broadcasting Service



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

The Australian Broadcasting Corporation (**ABC**), Commercial Radio Australia (**CRA**), Community Broadcasting Association of Australia (**CBAA**) and Special Broadcasting Service (**SBS**), (together, **Broadcasters**) welcome the opportunity to make a submission to the Environment and Communications References Committee (**Committee**) into the current regulatory arrangements under the *Broadcasting Services Act 1992* (Cth) (**BSA**) in dealing with the simultaneous transmission of radio programs using the broadcasting services bands and the internet.

The ABC is Australia's primary national broadcaster. It is a statutory corporation pursuant to the *Australian Broadcasting Corporation Act 1983* (Cth) (**ABC Act**). The Corporation provides four national radio services and a network of Local Radio stations from 60 locations around the country that is accessible by 99.4% of the Australia population. The ABC delivers five national television services across four channels and offers a range of digital media services, including streaming ABC radio and television programs online and via mobile platforms.

CRA is the peak national industry body for Australian commercial radio stations. CRA has 261 members and represents approximately 99% of the commercial radio broadcasting industry in Australia. 220 CRA members are regional broadcasters.

CBAA is the peak national representative body for community radio licensees. The CBAA has 262 member stations and represents approximately 80% of community radio stations. The community broadcasting sector includes metropolitan-wide radio services in capital cities, sub-metropolitan services and approximately 70% of stations are located in regional, rural and remote areas.

SBS is a national broadcasting service established under the *Special Broadcasting Service Act 1991* (SBS Act). Its principal Charter function is to provide multilingual and multicultural radio and television services that inform, educate and entertain all Australians, and, in doing so, reflect and promote Australia's multicultural society. SBS broadcasts its programming to a national television and radio audience and delivers content online on its website www.sbs.com.au.

The Broadcasters are pleased to assist the Committee in its deliberations by identifying the difficulties that now exist and will arise with the current regulatory arrangements relating to simulcasts of

broadcast radio and public service television programs, by outlining the related public interest issues and by providing the Committee with a clear solution to the resolution of those difficulties.

1. Proposed recommendation

1.1 The Broadcasters ask the Committee to make a recommendation that the Minister immediately make a determination in or to the effect of the terms set out at paragraph 12 below.

2. Summary

2.1 The Broadcasters' primary submissions are:

- (a) Simulcasting (that is, the simultaneous online communication of a broadcast radio program) has taken place in Australia since approximately 1999.
- (b) Until a recent decision of the Federal Court, it was accepted by many participants in the broadcasting industry that a simulcast of a radio program was a '*broadcast*' within the meaning of that term in the *Copyright Act 1968 (Cth)* (**Copyright Act**) and the BSA.
- (c) As a result of the Federal Court proceedings in relation to the Determination issued by the then Minister, Senator Alston, in 2000 (the **Alston Determination**), it is clear that a number of consequences flow which need to be considered in the context of current technologies and practices. These consequences, which are outlined in sub-paragraph (e) below, were not addressed in the Explanatory Statement to the Alston Determination and are unlikely to have been considered by Senator Alston when he made the determination.
- (d) Under the Court's new interpretation of the Alston Determination (the **New Interpretation**) the simulcast of a radio broadcast is no longer considered a '*broadcast*' under the BSA or the Copyright Act. Details of the issue before the Court are set out in the Schedule to this submission.
- (e) If the New Interpretation continues and the online component of a simulcast is not treated as a broadcast, the following consequences will flow:
 - (i) It effectively removes broadcast copyright protection for broadcasts which are simulcast online.

- (ii) It may make it more difficult for Broadcasters to obtain copyright clearances for underlying rights, resulting in fewer broadcasts being simulcast online.
 - (iii) It will be open to copyright owners to claim payment in respect of each separate form of transmission – in effect a double payment for the same program transmitted at the same time via two different technological platforms.
 - (iv) It may result in some, if not all, broadcasters ceasing to simulcast, thereby depriving some members of the public of access to programs on the devices of their choice and, sometimes, at all.
 - (v) There may be different regulatory regimes for exactly the same program which is simultaneously transmitted by a broadcaster using two different forms of technological platforms.
 - (vi) It will create a regulatory regime which is not technologically neutral and give rise to difficulties in drafting future legislation.
 - (vii) It changes the status quo as understood and applied by broadcasters over a long period, without dispute by PPCA.
 - (viii) It may breach Australia's obligations under the Rome Convention.
- (f) The public interest and public benefit in maintaining the status quo prior to the New Interpretation is significant, benefiting the vast majority of the Australian public who listen to ABC/commercial/community/SBS radio or watch ABC/SBS television.

3. Simulcasting

Background to Simulcasting

- 3.1 In 1996, the Australian Broadcasting Authority, ACMA's predecessor, reported that radio stations had commenced simulcasting radio programs and that such simulcasting was an activity conducted by a '*broadcasting service*' within the meaning of the BSA.¹

¹ Australian Broadcasting Authority, '*Investigation into the content of Online Services*', Report to the Minister for Communications and the Arts, 30 June 1996.

- 3.2 The ABC commenced radio simulcasting in 1999. In approximately 2000, community radio broadcasters started simulcasting, and the first commercial radio station commenced simulcasting in April 2001.
- 3.3 Since the time of the original simulcasts, the practise of simulcasting has spread throughout the industry and all, or almost all, commercial radio stations, community radio stations, the ABC and SBS now simulcast their radio programs. The ABC commenced simulcasting its television multichannel ABC News24 online in July 2010.
- 3.4 Regular surveys of listeners conducted by the Nielsen Company on behalf of CRA and the ABC specifically measure platforms of listening, which means AM, FM, DAB+ and simulcasts taking place over the internet. In the most recent survey, it was found that approximately 9.5% of listening to radio simulcasts is online.²

Simulcasting as a Broadcasting Service

- 3.5 In April 2009, Phonographic Performance Company of Australia (**PPCA**) advised CRA for the first time that it considered that the online communication of radio programs in a simulcast was not covered by the Industry Agreement and Member Agreements, which had been entered into in June 2001, because they were not communications delivered to the public by a ‘*broadcasting service*’ (as defined in section 6(1) of the BSA) and, therefore, were not ‘*broadcasts*’ (within the meaning of that term in the Copyright Act)³.
- 3.6 PPCA therefore claimed that it was entitled to a second payment for the online component of the simulcast of a program containing protected sound recordings.

4. The New Interpretation Reduces Copyright Protection for Broadcasters and other Rightsholders

- 4.1 The New Interpretation encourages copyright infringement of the broadcasts, and could potentially affect the rights of underlying rightsholders as well. This is likely to result in fewer programs being available for listeners to access online.

² Nielsen Radio Ratings Survey 1 2013, Mon-Sun Midnight – Midnight, All People 10+.

³ This PPCA claim is based on its interpretation of the Alston Determination. The Broadcasters do not debate in this submission the correct interpretation or effect of the Alston Determination.

Broadcast Copyright

- 4.2 'Broadcasts' are copyright protected under section 87 of the Copyright Act. The maker of a broadcast has the exclusive right to copy the broadcast and communicate it to the public. This means that third parties cannot copy a broadcast without the permission of the broadcaster. This protects broadcasters against third parties who might wish to copy and distribute programs illegally, often for commercial gain.
- 4.3 The effect of the New Interpretation is that the online simulcast of broadcasts will not be protected by copyright, as an online simulcast is no longer deemed to be a broadcast.
- 4.4 The fact that a broadcaster will not be able to protect the online simulcast - as it is no longer deemed a broadcast - creates the potential for whole programs to be copied and distributed without the permission of the broadcaster. If the program contains copyright works, these could be stripped out leaving the remaining content to be copied and used.
- 4.5 The most vulnerable programs are those with no underlying copyright works, which could be copied in their entirety. Examples of programs that are particularly vulnerable include:
- (a) live sports broadcasts;
 - (b) live classical music concerts; and
 - (c) live news and current affairs programs.
- 4.6 The above programs, if communicated via online simulcasts, may now be copied and distributed freely by third parties. In this way, the New Interpretation effectively legalises an act that would previously have been an infringement of copyright. The removal of such significant copyright protection may make it difficult for broadcasters to continue to simulcast their broadcast programs online.

Underlying rightsholders

- 4.7 The removal of copyright protection for the broadcast itself may result in underlying rightsholders – such as independent musicians, composers, artists and writers – being reluctant to grant broadcast simulcast rights.

- 4.8 Currently, such content creators may rely on the Broadcasters to take action to prevent copyright infringement of the content contained within the program. As a result of the New Interpretation, the Broadcasters will no longer be able to take such action. This will leave content creators with the responsibility of enforcing their copyright themselves.
- 4.9 In many cases, content creators do not have the resources to pursue legal action and may be unable to enforce their own copyright. If they can no longer rely upon the Broadcasters to enforce copyright in the broadcast as a whole, they may prove unwilling to grant the Broadcasters the right to simulcast the program.
- 4.10 This is likely to affect a wide range of broadcast programs and would be to the detriment of the listening public, who would be deprived of the choice of listening to their program online.

5. Double Payments to Copyright Owners

- 5.1 Copyright owners should not be enabled to charge broadcasters twice for the simultaneous use of the same copyright material merely because the device on which it is received is different. No single listener can listen to two devices simultaneously; they are either listening to the radio or listening online through a computing device.
- 5.2 As previously mentioned, it is believed that approximately 9.5% of a radio broadcaster's audience in its service area chooses to listen to the broadcast online. This has been a generally consistent trend over the past 5 years. Broadcasters should not be penalised for providing this service to their audience.
- 5.3 The New Interpretation potentially provides windfall profits to copyright owners which cannot be justified as a matter of policy or on any economic rationale.

6. Different Regulatory Regimes

- 6.1 The Broadcasters submit that both the BSA and the Copyright Act are intended to provide a common regulatory regime in respect of programs broadcast by a broadcaster licensed under the BSA.

Broadcasting Services Act

Public policy objectives of the BSA do not support the New Interpretation

- 6.2 The BSA anticipates that broadcasting services will be regulated separately from internet services and other types of services, as a matter of public policy. This is due to the relative degrees of influence of each type of service.⁴
- 6.3 A program exerts the same degree of influence on its listeners, irrespective of its means of delivery. A person who listens to a broadcast on a car radio is no more or less affected by the broadcast than a person who listens to that program at exactly the same time through an online simulcast. Accordingly, the program should be regulated in the same way, irrespective of its means of transmission.
- 6.4 The BSA further states that broadcasting services should be regulated in a way that will readily accommodate technological change. It states that regulation should encourage both the development of broadcasting technologies and the provision of services made possible by such technologies to the Australian community.
- 6.5 The BSA also provides that public interest considerations should be addressed in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services⁵.
- 6.6 The online simulcast of broadcasts is an important technological development, which enables the Australian community to access broadcast programs via the internet if they so choose. In accordance with the policy objectives of the BSA, any regulation should encourage the provision of broadcasting services via new technologies, such as online simulcasts..

⁴ Section 4(1), BSA.

⁵ Section 4(2), BSA.

- 6.7 As a result of the New Interpretation, online simulcasts will no longer be regulated as broadcasts, but may now be governed by Schedule 7 of the BSA (and any other regulation specific to the internet). The practical effect of this is that broadcasters who wish to simulcast programs may now be subject to two sets of regulation.
- 6.8 This places a substantial administrative and financial burden on broadcasters, which is unlikely to encourage the provision of broadcasting services via new technologies and does not accord with the policy objectives set out in the BSA.
- 6.9 Section 4 of the BSA articulates the policy underpinning that legislation (emphasis added):
- “(1) *The Parliament intends that different levels of regulatory control be applied across the range of broadcasting services, datacasting services and internet services according to the degree of influence that different types of broadcasting services, datacasting services and internet services are able to exert in shaping community views in Australia.*
- (2) *The Parliament also intends that broadcasting services and datacasting services in Australia be regulated in a manner that, in the opinion of the ACMA:*
- (a) enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services and datacasting services; and*
- (b) will readily accommodate technological change; and*
- (c) encourages:*
- (i) the development of broadcasting technologies and datacasting technologies, and their application; and*
- (ii) the provision of services made practicable by those technologies to the Australian community.*

Double regulation of online simulcasts under the BSA

- 6.10 As a result of the New Interpretation, there is potential for online simulcasts to be governed under Schedule 7 of the BSA, thereby giving rise to double regulation.
- 6.11 Broadcasting licence holders under the BSA are required to meet standard licence conditions under Schedule 2 to the BSA. The providers of content services are regulated under Schedule 7

of the BSA. Schedule 7 specifically provides that it does not apply to a licensed broadcasting service.

- 6.12 The requirements imposed on broadcasters are already onerous.
- 6.13 Commercial and community broadcasters are required to develop and comply with Codes of Practice⁶; observe the extensive conditions of licence set out in Schedule 2 and observe program standards determined by ACMA.
- 6.14 While the ABC's Charter has recently been amended to include digital media services, the Code of Practice pursuant to the ABC Act only applies to standards for television and radio programming. The ABC voluntarily complies with the Content Services Code, although it does not apply to content delivered through online or mobile services where that content has been previously broadcast on radio or television.
- 6.15 The SBS's Charter has also been recently amended to include digital media services. The Board of SBS is required to develop codes of practice relating to programming matters and notify those codes to the ACMA. The SBS Codes currently set out standards relating to material which is published online.
- 6.16 The effect of the New Interpretation is that broadcasters may potentially be required to meet a further set of standards and conditions established under Schedule 7 of the BSA, contrary to Parliamentary policy.

Anomalies under the Copyright Act

- 6.17 The different treatment of simulcasts also creates anomalies under the Copyright Act. These include:
- (a) The maker of a broadcast has the exclusive right to make a recording of the broadcast and to re-broadcast it or communicate it to the public. No such protection is given in respect of online communications and a broadcaster could not prevent a person from copying or communicating a simulcast program which has been received online⁷. The

⁶ Section 123, BSA.

⁷ Section 87, Copyright Act.

New Interpretation has the unintended effect of derogating from broadcasters' rights and property.

- (b) The Copyright Act provides broadcasters with a statutory licence to broadcast sound recordings without the permission of the owner of copyright in the sound recording provided certain undertakings are given. This statutory licence enables broadcasters to provide a public service by continuing to broadcast while fee negotiations with copyright holders are ongoing.⁸ The apparently unintended effect of the New Interpretation is to effectively remove the statutory licence to broadcast if the broadcast is also simulcast online.
- (c) Educational institutions would not be able to copy from the online version of a simulcast, which may be a more convenient method of exercising their rights under the educational statutory licence.⁹

7. The New Interpretation is Contrary to the Principle of Technological Neutrality

7.1 There is a growing recognition amongst media stakeholders that legislation which governs broadcasting and communications should be technologically neutral where possible.

7.2 A majority of industry submissions to the Convergence Review argued for technological neutrality. This approach was supported by the recommendations in the Convergence Review Final Report. In particular, we refer the Committee to the following:

- **Recommendation 1**

'1. The policy framework for communications in the converged environment should take a technology neutral approach that can adapt to new services, platforms and technologies.

a. Parliament should avoid enacting legislation that either favours or disadvantages any particular communications technology, business model or delivery method for content services.

⁸ Section 109, Copyright Act.

⁹ See Part VA, Copyright Act.

b. *The focus of legislation should be on creating a sustainable structure within which a new independent communications regulator can apply, amend or remove regulatory measures as circumstances require.'*

- **Recommendation 10 (page xviii)**

'10. *There should be a technology-neutral and flexible approach to media content standards.*

...'

- **Recommendation 30 (page xxi)**

'30. *The Review's recommendations should be implemented in three distinct stages:*

c. *Stage 3: The reform of communications legislation should be completed to provide a technology-neutral framework for the regulation of communications infrastructure, platforms, devices and services.'*¹⁰

7.3 The need for technological neutrality has also been addressed in other jurisdictions. For example, in the United Kingdom Professor Ian Hargreaves said:

*'In the UK, exceptions have failed to keep up with technological and social change, leading to widespread consequences. Technology has expanded the potential for communication, research, learning and access to resources, but out of date rules mean this potential is not fully realised. The UK's world class universities – a sector of strategic importance to future growth, both as source of skilled people and knowledge – find this on a daily basis.'*¹¹

¹⁰ Paragraph 9 (pages 8-9). Similar comments were made at paragraphs 6.1 (page 157), 11.34 (page 287) and 11.58 (page 293).

¹¹ See *Digital Opportunity: A Review of Intellectual Property and Growth, an Independent Report* by Professor Ian Hargreaves May 2011. Paragraph 5.2.

7.4 In summary, the New Interpretation of the BSA is contrary to the principle of technological neutrality by treating the same subject matter differently because the broadcast is able to be received on a different device.

8. Status Quo

8.1 Many participants in the broadcasting industry have traditionally operated on the basis that the online portion of a simulcast is a broadcast.

8.2 In the recent examinations of the Alston Determination by the Federal Court, the decision of the primary judge agreed with the accepted interpretation that simulcasts of broadcasts are in effect broadcasts. This was subsequently overturned and an alternative interpretation introduced. The New Interpretation found that the simultaneous online communication of a broadcast was not itself a broadcast. This is contrary to longstanding and accepted practice on which most broadcasters have relied for many years. A short summary of the issue before the court is attached at the Schedule to this submission.

8.3 In the light of the above, the Broadcasters submit that the status quo should be restored through a new ministerial Determination to replace the Alston Determination, now that it has given rise to the New Interpretation.

9. Australia's obligations under the Rome Convention

9.1 Australia is bound by the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the **Rome Convention**). The Rome Convention secures protection in performances of performers, phonograms of producers of phonograms and broadcasts of broadcasting organizations. The national laws of contracting parties to the Rome Convention must comply with the requirements set out in the Convention. WIPO is responsible for the administration of the Rome Convention.

9.2 The Rome Convention provides that broadcasting organisations shall enjoy the right to authorise or prohibit the rebroadcasting or the fixation of their broadcasts¹². By expressly permitting a 'backdoor method' of permitting the recording and retransmission of broadcasts

¹² Article 13, International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

(via simulcasts no longer being deemed to be broadcasts) it is arguable that this is contrary to the express terms of the Convention. If not, it is certainly contrary to the spirit of the Convention.

10. Effect of New Interpretation

10.1 If current regulatory arrangements (under the New Interpretation) for dealing with simultaneous transmissions of the same program are not varied, it will have some significant and potentially serious adverse consequences:

- (a) It will require a careful drafting of future legislation which relates to broadcasting to ensure that:
 - (i) the treatment of simulcasts is taken into account when broadcasts and broadcasting services are the subject of regulation and that broadcasters are not further prejudiced by unintended results of the New Interpretation; and
 - (ii) broadcasters are not required to meet separate and possibly inconsistent requirements.

It is interesting to note that the draft *News Media (Self Regulation) Bill 2013* included a specific provision to exclude ‘*material disseminated ... by means of ... an online service that is associated with a designated broadcasting or datacasting service*’¹³. Without this specific provision, simulcasts of programs would have been caught by the definition of ‘news media organisation’ and hence subject to the oversight of the Public Interest Media Advocate, while the same programs provided over the broadcasting services bands would have been exempt. All legislation will now need to contain similar provisions to prevent such inconsistencies, as legislation applicable to ‘broadcasts’ will no longer catch simulcasts.

¹³ Section 5(2)(e).

- (b) It may result in some or all broadcasters ceasing to simulcast because of the adverse consequences on their operations, in terms of cost and copyright protection for broadcasters and underlying rightsholders.
- (c) If the simulcasting ceases it will have an adverse effect on the general public who wish to access simulcasts using an online device or who are unable to access a high quality broadcast using the broadcasting services bands.

11. Public Interest and Public Benefit

11.1 The Broadcasters submit that the public interest and the public benefit in maintaining the status quo far outweigh any benefits that may arise out of the New Interpretation.

11.2 The public interest is served by reverting to the status quo in a number of ways:

- (a) It is in accordance with the concept of technological neutrality;
- (b) It will prevent a ‘*copyright-free zone*’ where it becomes known that broadcasts can, in effect, be pirated;
- (c) It will allow the Broadcasters to continue to simulcast programs broadcast over the broadcasting services bands;
- (d) It will not raise difficulties of having two separate forms of regulation of the same content simultaneously delivered;
- (e) It will maintain consistency in the application of the BSA; and
- (f) It will not result in Australia directly or indirectly breaching its obligations under the Rome Convention.

The benefit to the public is that audiences will continue to be able to choose to access broadcasts using an online device.

12. Proposed Solution

- 12.1 The Broadcasters urge the Committee to recommend immediate action to overcome the significant adverse consequences of the New Interpretation.
- 12.2 The Broadcasters submit that this could be achieved by recommending that the Minister makes a new Determination in or to the effect of the following:

COMMONWEALTH OF AUSTRALIA

Broadcasting Services Act 1992

Determination under paragraph (c) of the definition of 'broadcasting service' (No. 1 of 2000)

I, Stephen Michael Conroy, Minister for Broadband, Communications and the Digital Economy, under paragraph (c) of the definition of 'broadcasting service' in subsection 6(1) of the *Broadcasting Services Act 1992*.

- (a) revoke the determination made by the Minister for Communications, Technology and the Arts made on 12 September 2000, and
- (b) determine that the following class of service does not fall within that definition:

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

- (i) the holder of a broadcasting services bands licence for radio,
- (ii) the Australian Broadcasting Corporation, or
- (iii) the Special Broadcasting Service.

Dated

Schedule

Outline of Issue before the Federal Court

1. Broadcasting Services Act

1.1 Pursuant to s.6(1) of the BSA, '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 radio frequency 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.*

1.2 The conflicting interpretations of the Section 6(1) arise out of the Ministerial Determination made under section 6(1)(c).

2. The Ministerial Determination

Background to Ministerial Determination

2.1 The issue of convergence of technologies, in the context of the regulation of broadcasting, datacasting and internet services, emerged in the mid-1990s.

2.2 By 1998 the possibility of datacasting had emerged. The BSA was amended by the *Television Broadcasting Services (Digital Conversion) Act 1998 (Cth)* on 27 July 1998, so as to recognise a 'datacasting service' as 'a service (other than a broadcasting service ...) ... where the delivery of that service uses the broadcasting services bands'.

- 2.3 In 2000 the *Broadcasting Services Amendment (Digital Television & Datacasting Act 2000* (Cth) was enacted. It made substantial amendments to the BSA including the addition of Schedule 6 which comprised a regulatory regime for datacasting services to ensure that datacasting services would not become *de facto* broadcasters.
- 2.4 It was in this context that concern arose on the part of the internet industry (not radio stations) that television and radio programs delivered by ISPs over the internet could fall within the definition of 'broadcasting service' and therefore be subject to the BSA's more onerous regulation of broadcasters. Stakeholders (substantial and significant commercial players) urged that there be no regulation of internet audio and video streaming services as broadcasting services to ensure the growth of the internet industry not be impeded.
- 2.5 In response, the Government 'moved quickly to issue the [Ministerial Determination] to provide the Internet industry with a substantial degree of certainty.'¹⁴ Thus the Ministerial Determination was issued to ensure that ISPs were not to be classified as 'broadcasting services'.

Determination

- 2.6 On 12 September 2000, the Ministerial Determination was made in the following terms:

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.

- 2.7 It seems to be uncontroversial that the Determination excluded, on the one hand, Internet content providers (i.e. services that communicate radio program content over the Internet only, such as Australian Internet Radio at <http://www.australianinternetradio.com/> and Net FM at <http://www.netfm.net/>), and on the other hand carved out from that exclusion radio stations that communicate radio programs over the broadcasting services bands only. What is controversial is the breadth of both the exclusion and the carve-out in so far as simulcasts are concerned.

¹⁴ Press release by Senator the Hon Richard Alston dated 27 September 2000.

2.8 PPCA contends that the Determination carved out the online part of a simulcast so that it ceased to be a broadcasting service while the Broadcasters contend that it was not carved out.