



11 July 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**) has provided two submissions to the Committee to date, and understands the Committee is due to hand down its report tomorrow.

We apologise for the timing of this correspondence and submission of further information, but PPCA became aware only this week, via the Committee's website, that further material had been requested and provided (including Counsel opinion) to the Committee by other interested parties.

Having reviewed that material PPCA felt it necessary to provide Counsel opinion (R Cobden, SC of 11 July 2013) to the Committee to address some of the issues and, in our view, inaccuracies contained therein.

We trust the Committee will find this additional information of benefit, and remain available to assist should there be any further questions.

Yours sincerely,

General Manager

MEMORANDUM OF ADVICE

A OPINION SOUGHT

- 1 I have been asked by Phonographic Performance Company of Australia Limited (**PPCA**) to provide a response to, and comments on, the written opinion of Mr Hennessy of Senior Counsel which was given to Commercial Radio Australia Limited (**CRA**) and is dated 1 July 2013 (the **CRA Opinion**).
- 2 I understand that the CRA Opinion was submitted on behalf of CRA as well as the Australian Broadcasting Corporation (**ABC**), Special Broadcasting Service (**SBS**) and Community Broadcasting Association of Australia (**CBAA**) (together, the **Broadcasters**) to the Senate Standing Committee on Environment and Communications (**Committee**) that is conducting an inquiry into the current regulatory arrangements that apply to internet simulcasts (**Inquiry**).
- 3 I am instructed that the CRA Opinion was first brought to PPCA's attention when it became aware on Monday, 8 July 2013 that the submission had been placed on the Committee's website.¹ I understand that the Committee is due to present its final report on Friday, 12 July 2013. Given the limited time available, I do not propose to respond to every issue raised in the CRA Opinion.

B BACKGROUND

The proceedings

- 4 It is apparent that the Inquiry was instituted following the outcome of the Federal Court proceedings between PPCA and CRA (the **Proceedings**)² and subsequent representations made by the Broadcasters to Members of Parliament.
- 5 Mr Hennessy SC appeared for CRA at both the trial and appeal in the Proceedings. As I understand it, he remains briefed to appear on CRA's behalf in its application for leave to appeal to the High Court of Australia. That application will be heard later this year.

¹http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/simulcast_regulation/submissions.htm

² See *Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited* (2012) 95 IPR 585; [2012] FCA 93 (Foster J); and *Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited* (2013) 209 FCR 331; [2013] FCAFC 11 (Full Court).

6 I appeared (with Mr Dimitriadis of Counsel) for PPCA in the Proceedings. We are also briefed to appear for PPCA in CRA's application for special leave.

Background to simulcasting

7 I am instructed that PPCA disagrees with, or would supplement, the background section of the CRA Opinion as follows.

8 The CRA Opinion suggests that radio programs have been simulcast on the internet by radio broadcasters in Australia since at least 1999. However, I am instructed that the simultaneous online streaming by broadcasters of their radio programs (particularly those which feature commercial music) did not become a significant commercial activity in Australia until much later in time. This was due, in part, to the emergence of much faster internet connections and wider bandwidth that became more available to the public in Australia in the mid to late 2000s.

9 For example, I am instructed that in 2005, of the 4.4 million households with home internet access in Australia, only 28% of those had broadband connections whereas 69% accessed the internet via dial-up connections.³ By 2009, the number of homes accessing the internet via broadband connection had risen to 86% of all households with internet access.⁴

10 I am instructed that this increase in the availability of faster internet connections, together with the larger download limits available to consumers, caused an increase in the popularity of online streaming services (such as those provided by the Broadcasters) and allowed for greater quality in the delivery of such services. Incidentally, this advance in technology also resulted in a rise in online piracy of copyright material.

11 In 2006, the then Attorney-General, the Hon Phillip Ruddock MP, announced that the statutory caps applying to the amount radio broadcasters were required to pay for the right to broadcast sound recordings (the **Caps**) would be repealed.⁵ I am instructed that PPCA was aware at this time that some commercial broadcasters

³<http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/D299544DB0CA7EF0CA2572440077F833?opendocument>

⁴<http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/5B15663305C2B5DCCA25796600153023?opendocument>

⁵ For more information on the caps, see PPCA's submissions to the Senate Committee dated 10 May 2013 at pages 12 to 18.

were simulcasting their radio programs over the internet, but that its intention was to negotiate terms for the right to simulcast in the context of future broadcasting licence negotiations following the repeal of the caps. In the event, the repeal did not proceed. See, generally, *PPCA v Commonwealth* (2012) 246 CLR 561.

12 I am instructed that it was not until 2009, when the digital radio switch-on occurred in Australia's major metropolitan cities, that the online simulcasting services provided by commercial radio broadcasters became a serious concern to PPCA and its member record companies.

13 I am instructed that it was around this time that PPCA decided to take action in response to CRA's members, many of whom by then were communicating commercial sound recordings to the public over the internet. PPCA and its members regarded this as being outside the terms of the agreements between PPCA and CRA (and its members), which had been made on 16 June 2000.⁶

14 I am instructed that PPCA wrote to CRA in 2009 in an attempt to negotiate licences for its members' online activities at an industry level. Following these negotiations, PPCA and CRA co-operatively brought the Proceedings in the Federal Court in order to seek judicial clarification of the statutory terms contained in the agreements. The ABC and SBS were informed of the Proceedings, but chose not to participate.

15 I am also instructed that PPCA raised the issue of a separate simulcasting licence with the ABC in 2002 in the context of its digital radio services which launched in that year. The ABC's letter to the Committee dated 8 July 2013 which claims that the issue first arose for the ABC in 2009 is, in this respect, not accurate, according to PPCA.

Reliance on background

16 CRA's reliance on these background matters is, in any event, misplaced.

17 For example, CRA seems to suggest that the fact that PPCA did not approach the Court until 2009 is relevant: see, eg, CRA Opinion para 2.11 ("for the first time").

18 It also relies on its members' allegedly long-held view that the determination made by Senator Alston under s 6(1)(c) of the *Broadcasting Services Act 1992* (Cth)

⁶ Not June 2001 as was suggested in the CRA Opinion at paragraph 2.11.

(BS Act) on 12 September 2000 (the **Ministerial Determination**) had the effect for which CRA has contended in Court: see CRA Opinion para 4.2.

- 19 But a long-held view about the effect of an important provision may simply be incorrect. See *PPCA v FACTS* (1998) 195 CLR 158. Even a long-held view by a regulator may be incorrect, as has been demonstrated in many decided cases. There is no sound reason in policy to follow an incorrect view. It is often sound policy to correct it.

C THE CURRENT LEGAL POSITION

Summary of current legal position

- 20 Under the current legal framework, as decided by the Full Federal Court, a service that streams television or radio programs over the internet to the public is not a “*broadcasting service*” for the purpose of the BS Act, regardless of whether those same programs are also delivered simultaneously to the public by a terrestrial broadcasting service operated by the same person. See the definition of “*broadcasting service*” contained in s 6(1) of the BS Act and see the Ministerial Determination. The text of the Ministerial Determination is set out in many submissions to this Committee.
- 21 The definition of “*broadcast*” in the *Copyright Act 1968* (Cth) (**Copyright Act**) relies upon the meaning of “*broadcasting service*” in the BS Act. Therefore, as the Full Court has held, internet simulcasts are also not a “*broadcast*” for the purposes of the Copyright Act.

D THE CRA OPINION

- 22 The CRA Opinion has apparently come into being in the following way:
- (a) The Senate referred the matter to the Committee for inquiry on 21 March 2013. See CRA Opinion para 2.16.
 - (b) Many submissions were made to the Inquiry. PPCA made a submission and a supplementary submission. The Broadcasters made a submission that included a replacement determination for the Ministerial Determination, which they refer to as the Proposed Determination. See CRA Opinion para 2.17.

- (c) After receipt of a number of submissions, including that from PPCA and those from the Broadcasters, the Committee posed a question to the Department of Broadband, Communications and the Digital Economy (DBCDE) and the Attorney-General's Department. See CRA Opinion para 2.20.
 - (d) The DBCDE and the Attorney-General's Department answered the question: see replies from the DBCDE dated 5 June 2013, and the Attorney-General's Department dated 6 June 2013.
 - (e) The CRA Opinion was given in relation to these answers on 1 July 2013.
 - (f) Subsequently, the Committee posed four further questions to the Attorney-General's Department, which were answered on 8 July 2013.
- 23 As can be seen from the question asked of both departments, it was a question in general terms about a possible determination that had the "effect of ensuring that television and radio simulcasts are considered to be a broadcasting service" under the BS Act. It was not directed particularly to the Broadcasters' Proposed Determination.
- 24 However, many of the responses given in the CRA opinion (see for example, para 3.4) proceed on the inaccurate basis that the departments were only dealing with the Broadcasters' Proposed Determination in answering the question on notice. In fact, the departments dealt with the broader question posed by the Committee.
- 25 In essence, the CRA Opinion advances – explicitly or implicitly – two bases why a new determination, and more precisely the Broadcasters' Proposed Determination, should be made. Those bases are:
- (a) The Broadcasters do not want to pay additional copyright licensing fees for their further exploitation of commercial sound recordings and, in particular, they seek to preserve their historical special protections against paying properly for the use of sound recordings. In effect, the Broadcasters would like the law to change so that it reflects the position that they unsuccessfully advanced before the Full Federal Court.

(b) The Broadcasters are concerned that their copyright protection with respect to “broadcasts” does not extend to their internet simulcasts.

26 I will address these separately.

E PAYMENT OF ADDITIONAL COPYRIGHT FEES FOR INTERNET EXPLOITATION OF SOUND RECORDINGS

Brief history of copyright in sound recordings

27 Since its inception, the 1968 Copyright Act has recognised the exclusive right of the owner of copyright in a sound recording to authorise the “*broadcast*” of that recording. A similar right had been held in 1921 to exist under the 1911 Copyright Act.

28 The term “*broadcast*” in the Copyright Act had, for some 90 years up until March 2001, been confined to transmissions made by wireless telegraphy. There was in addition a limited diffusion right which existed from 1969 to 2001, but it applied only to works and films and not sound recordings.

29 For political reasons, resulting from intense lobbying at the time, radio broadcasters were given preferential treatment under the terms of the 1968 Copyright Act, which came into effect in 1969. The Act granted them certain benefits by way of exceptions to copyright infringement (eg the right to make copies under s 107 and the statutory broadcast licence under s 109) and by way of limitations on what royalties they should pay by way of equitable remuneration to the copyright owners (see s 152 which contains the Caps).

30 For historical reasons, broadcasters in Australia have received a further benefit in being able to broadcast certain works from overseas without requiring authorisation of, or payment to, the copyright owner of such works. In simple terms, the Copyright Act protects international works on a reciprocal basis and does not confer a broadcast right on the owner of sound recordings—most importantly, from the United States (as that country does not recognise the exclusive right of an owner of a sound recording to authorise its broadcast).⁷

⁷ See Copyright Tribunal decision in *Re Phonographic Performance Co of Australia Ltd* (2010) 87 IPR 148 at [19]ff for an explanation of the difference between “protected and unprotected” recordings – a distinction that applies in relation to the “broadcast” and “public performance” rights.

- 31 Many other provisions were enacted in 1969 to deal with certain protections, exceptions and limitations that applied to broadcasts.⁸
- 32 In response to the emergence of the internet as a growing means for delivering copyright material to the public, a broad, technologically-neutral “communication” right was introduced in 2001. This new right is broader than, but includes, the sound recording owners’ previous “broadcast right” under s 85(1)(c). The previous exceptions and limitations that applied specially to “*broadcasts*” were retained by maintaining a definition of “*broadcast*” as a sub-set of “*communicate*”.
- 33 The new definition of “*broadcast*” in the Copyright Act was drafted so as to import the term “*broadcasting service*” and its meaning from the BS Act. As noted above, the definition of “*broadcasting service*” included the Ministerial Determination which excluded services that made available programs using the internet. The Committee will be aware of the relevant background to the Ministerial Determination, as set out in the Foster J’s decision at [67] and the Full Court’s decision at [39]-[51].
- 34 By reason of the new “communication” right, from 2001 sound recording copyright owners became able to commercially exploit new means of delivering content to the public, including by the internet. None of the broadcast-specific exceptions and limitations in the Copyright Act applies to these other forms of communication to the public, such as internet streaming. For example, all international sound recordings (importantly, including those from the United States) receive protection under the Copyright Act when communicated online.

Reasons why broadcast exceptions and limitations in the Copyright Act should not be expanded to internet simulcasts

- 35 The Broadcasters now seek to expand the specific exceptions and limitations that apply in the Copyright Act to “*broadcasts*” to cover their new internet streaming activities. However, they advance no real reason why their special historical treatment should be so extended. If they do wish to advance such an argument, the proper forum is the present inquiry being conducted by the Australian Law Reform Commission into “Copyright in the Digital Economy” (**ALRC Review**).

⁸ See, for example, ss 47, 67, 91, 111.

- 36 The separate treatment of broadcasts and internet deliveries in the Copyright Act is consistent with the previous definition of “*broadcast*” under the Act⁹, the position in other jurisdictions overseas¹⁰ and the position adopted in international treaties.¹¹ It is also consistent with other provisions of the Copyright Act which recognise the distinction between a broadcast, on the one hand, and an internet simulcast of that broadcast on the other, which is an exercise of a separate, exclusive copyright right.¹²
- 37 At para 3.17 of the CRA Opinion, it is suggested that because the meaning of “*broadcast*” is defined by reference to a technologically neutral “*communication*” delivered by a broadcasting service, there has always been scope (since the 2000/2001 amendments) for a broadcast to include internet transmissions. With respect, the reference to the scope of the term “*communication*” is of no assistance to CRA. The term “*broadcast*” in the current definition must be construed by reference to the term “*broadcasting service*” in the BS Act and the Full Court has held that term to exclude, at all relevant times, internet transmissions: the Ministerial Determination was already in place when the 2001 amendments took effect, and has remained in place to this day.
- 38 CRA does not advance any reason why a new determination should create a specific exception, applying only to a select group of people – CRA members, the ABC, SBS and CBAA members – that has the effect of deeming their internet simulcasts (and theirs alone) a “*broadcasting service*” for the purpose of the BS Act. Other broadcasters, whose internet simulcasts would not be deemed a “*broadcasting service*” under the Proposed Determination, would be subject to inconsistent treatment under the BS Act, and would include:
- (a) a subscription television provider (such as Foxtel) who may deliver channels simultaneously via the internet (eg to iPads) to its subscribers;
 - (b) commercial television providers who may deliver their programs simultaneously online; and

⁹ which, prior to 4 March 2001, was defined to mean “transmit by wireless telegraphy to the public”.

¹⁰ See the submissions to the Inquiry made by the International Federation of the Phonographic Industry (IFPI) at pages 2-3.

¹¹ See the IFPI submissions at pages 1-2.

¹² See, for example, s 135C of the Copyright Act which, by specifically extending the operation of Part VA to internet simulcasts, recognises that they are not included in the definition of “*broadcast*”.

- (c) although much more limited, even commercial and community radio broadcasters who happen not to use those particular frequencies characterised as the “broadcasting services bands” in delivering their commercial radio broadcasting services, such as s 40 and s 82 licensees who may want to (and may already) simulcast online.

Also, of course, other internet radio entities who are not also broadcasters will receive inconsistent, and less favourable, treatment.

- 39 Not only would the Proposed Determination fail to achieve the so-called “platform neutrality” that the Broadcasters claim it would, it would add a further layer of complication. It would require one to look at who is providing the service and then whether the content of that service also happens to be delivered at the same time via a specific subset of the radiofrequency spectrum (to the exclusion of all other frequencies and broadcasting platforms) in order to determine whether a service is a “*broadcasting service*”.
- 40 The inconsistent treatment of internet simulcasts would also have flow-on effects for copyright law in Australia, as the definition of “*broadcasting service*” from the BS Act is imported into the definition of “*broadcast*” in the Copyright Act. These flow-on effects were recognised by the various answers to questions on notice given by the DBCDE and Attorney-General’s Department.¹³ Creating further confusion and inconsistency in the operation of the Copyright Act ought to be avoided, especially in the context of the current ALRC Review.
- 41 If a Broadcaster is not satisfied with the terms offered by copyright owners for the right to transmit their material to the public over the internet, the Broadcaster has the right to bring an application to the Copyright Tribunal under Part VI of the Copyright Act and to ask the Tribunal to determine a rate that the Tribunal considers reasonable in the circumstances. There can be no realistic suggestion that “double payment” will result from the Full Court’s statement of the law. It is a fundamental notion of copyright law that different uses of copyright material may require separate authority from copyright owners, even if those uses are in respect of the same material. For example, a licence to print a novel in paperback does not necessarily confer a licence to distribute that same novel in

¹³ See the DBCDE’s answers at page 5; and the Attorney-General’s Department letters of 6 June and 5 July 2013.

electronic form to e-readers. No complaint could legitimately be made for having to pay additional fees for the different use of this same copyright material. And in any event the decided cases in the Tribunal over decades show that the Tribunal is often confronted with claims by copyright users that content owners are seeking additional payments for what the copyright users perceive as a single use of the same content. It is often the case that what is perceived as a single use actually involves the exercise of two separate exclusive rights in the one copyright work. In circumstances such as these, the Copyright Tribunal has determined that the copyright owner is entitled to claim that the users pay for each exercise of an exclusive right (ie pay twice). The Tribunal has shown itself well-equipped to balance between competing interests in such an event.

42 I concur with the views expressed by the Attorney-General's Department that the Proposed Determination would have significant implications for copyright law and would fundamentally alter the carefully balanced structure of the Act in relation to broadcasting industries.

43 Accordingly, in my opinion, it is appropriate that this issue be dealt with by the ALRC Review in the wider context of its review into the current copyright laws. Further adverse consequences and complications are likely to arise if a decision is made without taking into account all of the interrelated factors.

F COPYRIGHT PROTECTION FOR BROADCASTS

44 Paragraph 4.6 of the CRA Opinion, with respect, mischaracterises the Attorney-General's Department's observations. Copyright protection would not be lost for broadcasts which are simulcast online if the Proposed Determination is not made. Rather, when a radio broadcaster chooses also to place its content on the internet, that internet communication is not protected in the same way as a "*broadcast*" is under s 91 of the Copyright Act. In other words, the same level of protection is given to internet simulcasts as exists for internet-only radio programs, such as those transmitted by service providers like Pandora.

45 Whether copyright protection should be extended to such internet communications in the same way as it currently exists for broadcasts is an issue currently under consideration by the ALRC Review. This very point illustrates that the ALRC is better equipped to deal with the issues that arise from any change to the current position in the law that is the subject of the Inquiry.

46 CRA has suggested that its members' inability to protect against copying and redistribution of its internet simulcasts may be a concern to content owners who grant simulcast licences. That would not be so. In those circumstances, unauthorised copying and communication by third parties of the underlying works in the broadcast program would be actionable by the owners of such works. Those owners do not need to rely on the Broadcasters to assert their rights.

G PROBLEMATIC CONSEQUENCES OF THE PROPOSED DETERMINATION

47 Various problematic broadcasting and regulatory implications arise from the Broadcasters' Proposed Determination.

48 I will deal with them briefly.

49 Notably, on the law as stated by the Full Federal Court, these problems do not arise.

Out of area and unlicensed broadcasting

50 The arguments raised in the CRA Opinion in relation to "out of area and unlicensed broadcasting" repeat submissions that were put by CRA to the Full Court. Those arguments failed in the Proceedings and should be disregarded by the Committee. For example, paragraph 3.11 of the CRA Opinion states that:

*... it is strongly arguable that where radio programs are provided online and therefore outside a licence area, the provision of the service outside the licence area would be found to be a **necessary result** of the provision of the service within the licence area. Another, but less attractive, argument is that the provision of the service outside the licence area would be found to occur **accidentally**.*

(Emphasis added)

51 Both of these submissions were made to the Full Court by CRA¹⁴ and were unanimously rejected.¹⁵ In this regard, the DBCDE was, with respect, quite right to observe that "*re-defining a 'broadcasting service' to include online simulcasts is likely to result in broadcasters breaching [their] licence conditions*".

¹⁴ See transcript of proceedings at p 140ff; Emmett J, with respect, correctly observed in relation to an internet simulcast at p 141 that "*it doesn't occur accidentally. It's by design. It goes all around the world, doesn't it?*" and his Honour Besanko J, with respect, also correctly observed: "*Is it a necessary result?...I mean, you don't have to simulcast it, do you?*".

¹⁵ Full Court Decision at [70].

52 Furthermore, the matters that Mr Hennessy SC was asked to assume at paragraph 3.8 of the CRA Opinion do not withstand scrutiny. A response to each of these is set out below:

- (a) The occasions when broadcasting services are delivered outside of a licence area are usually cases of “overspill” which may be a result of changes in atmospheric conditions, or as a result of other geographical factors. See eg *Re Star Broadcasting Network Pty Ltd and the Australian Broadcasting Authority* (2003) 79 ALD 637. These circumstances do not apply in the case of systematic and deliberate transmission outside of a licence area. The ACMA takes such circumstances very seriously, as can be seen from the investigations it makes into such occurrences.¹⁶
- (b) Footnote 11 does not support the proposition contended in subparagraph 3.8(b).¹⁷ I am not aware of any evidence to support CRA’s contention. Common sense would suggest the contrary view.
- (c) Circumstances in which it would otherwise be impossible or difficult to obtain a radio broadcast would include those where a listener is outside the broadcast licence area, or even in another continent. So it is no answer to the proposition that internet simulcasting allows receipt of programs outside the licence area to suggest difficulty of reception. There is no suggestion of any prevalence, at any significant level, of “black spots” for commercial radio in Australia.
- (d) The fact that the ACMA has not expressed any concern is irrelevant and, if anything, suggests that the ACMA considers internet simulcasts to not be a “*broadcasting service*” and therefore not worthy of this concern.

Copyright issues

53 The points raised in the CRA Opinion at para 3.17, with respect, disregard basic principles of statutory construction. The definitions of the words “*broadcasting service*” in the BS Act and “*broadcast*” in the Copyright Act must be read in their entirety. In interpreting a statutory definition, one does not stop reading the

¹⁶ See, by way of example, The ACMA Investigation Report No. 2280 dated 30 October 2009.

¹⁷ Footnote 11 does not provide any information which identifies the location of recipients of the content of simulcasts online.

chapeau of a definition in circumstances where it reads “*but does not include ...*” and then lists a number of exclusions.

54 This part of the CRA Opinion also fails to appreciate that the current definition of “*broadcast*” in the Copyright Act imports by reference the entire definition of “*broadcasting service*” contained in the BS Act. As noted above, the definition of “*broadcast*” in the Copyright Act has at all relevant times reflected the distinction between broadcasts and internet transmissions (including simulcasts).

55 Once these matters are grasped, the DBCDE’s observations that the Proposed Determination would alter the definition of “*broadcasting service*” and have flow-on effects for the operation of copyright law are irrefutable.

Commercial/contractual issues

56 The comment in the CRA Opinion at para 3.19 on commercial/contractual issues sidesteps the crucial issue. Unlike owners of other copyright content, for example rights holders of major sporting codes and events, sound recording owners do not have the ability to withdraw or withhold permission for the use of their sound recordings if they are being used in a “broadcast”. As noted above, s 109 imposes a statutory licence to broadcast. This means that if an internet simulcast were to be subsumed in the “broadcast” right as proposed by the Broadcasters, sound recording owners would not be able to exclude internet simulcasts from their broadcast contracts. In those circumstances, the remuneration that sound recording owners could seek for internet simulcasts would also be restricted by the Caps in s 152.

57 Although the CRA Opinion seeks to distinguish the circumstances of the *Optus TV Now case* from the present issues, the principal issue underpinning that case was the practical ability of content owners to commercially exploit various delivery platforms, namely the broadcast platform and the online/mobile platform. That same issue underpins the present Inquiry. There is no reason to suppose that rightsholders (eg of events such as the Olympics) do not separately license their radio and internet rights. Indeed, experience is to the contrary.

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

- 58 The CRA Opinion relies on the fact that the Broadcasters believed for some time that their internet simulcasts were a “*broadcasting service*” for the purpose of the BS Act, contrary to the terms of the Ministerial Determination. The fact that these broadcasters held that (incorrect) view is of no consequence to whether or not the current position is “settled law”.
- 59 As noted above, the law of copyright in Australia has, in my opinion, at all relevant times drawn a distinction between broadcasts and internet transmissions (including simulcasts). This position is consistent with other jurisdictions, international treaties, and the obligations of Australia under the AUSFTA Agreements. In these respects, I agree with the observations of the Attorney-General’s Department that the Proposed Determination would have the effect of overturning settled copyright law.