

## Submission by ABC Friends to the Inquiry into the competitive neutrality of the public broadcasters

Margaret Reynolds, ABC Friends National President\*

17 June 2018

### Introduction

The Friends of the ABC (now ABC Friends) was established in 1976 in response to funding cuts to the ABC made by the federal government, led by Prime Minister Malcolm Fraser. Its purpose, then and since, has been to lobby on behalf of people who listen to, watch, read and interact with, the ABC. ABC Friends is not aligned to any political party. Our organisation has grown in numbers and strength over the last several decades so that we have members in every state and a national office, led by Margaret Reynolds, ABC Friends National President.

ABC Friends sees properly funded and independent public service media as essential to the quality of life of all Australians and critical for the operation of democracy in Australia. The United Nations Economic, Cultural and Scientific Organisation (UNESCO) has presented this case in compelling terms:

*Neither commercial nor State-controlled, public broadcasting's only raison d'être is public service. It is the public's broadcasting organization; it speaks to everyone as a citizen. Public broadcasters encourage access to and participation in public life. They develop knowledge, broaden horizons and enable people to better understand themselves by better understanding the world and others.*

*Public broadcasting is defined as a meeting place where all citizens are welcome and considered equals. It is an information and education tool, accessible to all and meant for all, whatever their social or economic status. Its mandate is not restricted to information and cultural development-public broadcasting must also appeal to the imagination, and entertain. But it does so with a concern for quality that distinguishes it from commercial broadcasting.<sup>1</sup>*

Further as the Council of Europe recognised a decade ago, public broadcasters also need to offer services on new digital platforms in order to “comprehensively and competitively” acquit their public service missions,<sup>2</sup> and to do this in new, more productive and inclusive ways:

*...allowing them to offer better-targeted and more interactive content and services. [This] also allows public service media to enter into a meaningful dialogue with their*

---

<sup>1</sup> UNESCO (2001) Public Broadcasting: Why? How? UNESCO, 2001, <http://unesco.org/images/0012/001240/124058eo.pdf>.

<sup>2</sup> Council of Europe (2009) Parliamentary Assembly Recommendation 1878 (2009) of 25 June 2009 on funding of public service broadcasting, point 17, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17763&lang=en>

*audiences, engaging them as stakeholders, participants and co-creators, rather than as simply passive recipients. This is particularly relevant to services aimed at youth, whose use of Internet-delivered, mobile and participatory media is significant.*<sup>3</sup>

While there has been some debate about the extent to which public broadcasters should expand their digital services, there is little question that the concept of public service media has proved politically, economically and socially valuable across cultures and continents.<sup>4</sup> It is also a critical source of reliable, independent and trusted news at a time of proliferating, socially divisive misinformation and propaganda online. As the European Commissioner for Human Rights observed in a paper published last year:

*Well-funded and strong public service media are a good indicator that a democracy is healthy – this is the result of a study published last year by the European Broadcasting Union (EBU). The report notably found that countries that have popular, well-funded public service broadcasters encounter less right-wing extremism and corruption and have more press freedom.*

The Commissioner also noted that European public broadcasters are dealing with a variety of serious political threats to their operations:

*...an analysis of the alerts submitted to the Council of Europe Platform to promote the protection of journalism and safety of journalists, since its launch in 2015, shows an emerging trend of threats to the independence of public broadcasters or of their regulatory bodies. A growing number of alerts concern political interference in the editorial line of public broadcasters, insufficient safeguards in the legislation against political bias, or the lack of appropriate funding to guarantee the independence of the public broadcasters.*<sup>5</sup>

The pressing concern of ABC Friends is that public broadcasting is very much under threat in Australia. Setting the case of SBS to one side, the federal government, first led by Tony Abbott and now by Malcolm Turnbull, has inflicted major cuts to the ABC's funding. The 2014 Coalition budget resulted in cuts of \$254 million. The 2018 budget has planned a further cut of \$84 million over the next three years. The ABC's Chief Finance Officer, Louise Higgins, said at a recent Senate Estimates hearing that the ABC had shed more than one thousand jobs since 2014. When it is recalled that the ABC's budget is around \$1.1 billion, and its full-time equivalent workforce is around 4100, the magnitude of the budget cuts and their impact becomes clear.<sup>6</sup>

---

<sup>3</sup> Committee of Ministers, Recommendation Rec(2007)3 of 31 January 2007 on the remit of public service media in the information society, <https://wcd.coe.int/ViewDoc.jsp?id=1089759>

<sup>4</sup> Lowe, G. and Martin, F. (2013) *The Value of Public Service Media*. Göteborg: Nordicom.

<sup>5</sup> Human Rights Comment, Public Service Broadcasting under threat in Europe, Strasbourg, 2 May, 2017, [www.coe.int/eu/web/commissioner/-/public-service-broadcasting-under-threat-in-europe](http://www.coe.int/eu/web/commissioner/-/public-service-broadcasting-under-threat-in-europe).

<sup>6</sup> Australian Broadcasting Corporation (2017) Investing in Audiences: ABC Annual Report 2016-2017. <http://about.abc.net.au/reports-publications/2016-17-annual-report/>

From a longer term perspective, the ABC has suffered a 28% decline in its funding in real terms since the mid-1980s.<sup>7</sup> Put another way, funding for the ABC has decreased from being approximately 0.6% of government revenue in the late 1970s to less than 0.3% in 2017.<sup>8</sup>

These cuts have been only one element in the strategy to diminish and weaken the ABC. The government has also established a series of inquiries to clip its wings. There are inquiries into whether the ABC should have its Charter changed to incorporate the requirement to be 'fair and balanced'; into the delivery of its services to rural and regional Australia; into the disclosure of top salaries at the ABC; and a further review of its efficiency was flagged in the 2018 budget. If nothing else, these represent extraordinary and draining demands on the time and patience of the ABC's executive and management. They are a massive distraction at a time of great challenge for all media. In passing, and in regard to 'fair and balanced', the ABC's code of practice already spells out its statutory duty to ensure that its gathering and presentation of news and information is 'accurate' and 'impartial'<sup>9</sup>.

The Friends' particular concern with this Inquiry into competitive neutrality is that it was conceived as part of a deal between the Turnbull government and Pauline Hanson's One Nation Party. The government has lacked a majority in the Senate and has therefore had to rely on wooing cross benchers to support its legislative proposals. The government sought the support of One Nation to ensure passage of its proposed reforms to legislation on Australian media. Ms Hanson made known her great displeasure with the ABC, which had upset her by producing a *Four Corners* program which raised questions about her party's adherence to laws governing political party expenditure.<sup>10</sup> Ms Hanson's price for supporting the government's media reform was that there should be major cuts to the ABC's funding. Indeed, she had a shopping list of demands in relation to the ABC, each intended to wound the organisation. It is our view that this Inquiry into competitive neutrality is a child of the spiteful deal between the Turnbull government and One Nation.

Some commercial media have also pressed for this Inquiry. They appear to believe that the operation of the ABC has damaged their profitability. The Friends dispute this and agree with Mr Justin Milne, Chair of the ABC, who wrote very recently:

*(T)he declining audiences reported by commercial media are not and never have been the fault of the ABC. What has changed for all media is the arrival of the FAANGs-or Facebook, Amazon, Apple, Netflix and Google- with their mega-billion-dollar production budgets and global scale economies that have upended business models the world over... None of the ABC's past innovations are responsible for the fortunes of the commercial media. To blame public broadcasting for the challenges*

---

<sup>7</sup> Higgins, L. (2018) Speech by Louise Higgins, Chief Finance Officer, ABC's First Annual Public Meeting, February 9<sup>th</sup> 2018. Australian Broadcasting Corporation. <http://about.abc.net.au/speeches/chief-financial-officer-apm-speech/>

<sup>8</sup> Tiley, D. (2018) ABC downhill for thirty years. Screen Hub, February 16<sup>th</sup> 2018. [www.screenhub.com.au/news-article/news/policy/david-tiley/abc-downhill-for-thirty-years-heres-how-255197](http://www.screenhub.com.au/news-article/news/policy/david-tiley/abc-downhill-for-thirty-years-heres-how-255197)

<sup>9</sup> ABC Annual Report, Vol. 2, 2017, pp. 148-9.

<sup>10</sup> *Four Corners* (2017) Please Explain, 3 April, 2017, ABC Television.

*they face today is just as wrong-headed as crediting us for the “rivers of gold” the commercial media enjoyed for decades.*<sup>11</sup>

Indeed a digital ABC has no more affected the potential audiences for Fairfax and News Corporation publications or the major television networks than has the arrival of Australian editions of the *Guardian*, *Buzzfeed*, *Daily Mail* and *Huffington Post*, or the launch of the *New Daily* or *The Conversation* – all generalist news and opinion publications that have managed to find a niche in our media markets in the last decade, even while the major social media platforms have attracted the majority of digital advertising expenditure in the Asia Pacific. This media context suggests that claims that the ABC is ‘crowding out’ competition in news and opinion lack foundation and are politically motivated.<sup>12</sup>

As you will see from our submission, it is our firm contention that the ABC does not enjoy a net advantage in the media marketplace. The ABC is acting in accordance with its Charter and it is serving the public interest. As argued above, properly funded and independent public broadcasting is essential for all Australian citizens and critical for our democracy. Recommendations stemming from this Inquiry should not restrict public service media in Australia.

### **Executive summary**

- Competitive neutrality policy in Australia requires a weighing of the advantages and disadvantages of government ownership or control. It is not absolute and is applied to the extent that it is in the public interest.
- Government bodies such as the ABC adopt a ‘best endeavours’ approach to compliance with competitive neutrality policy.
- The statute setting up the ABC as a public broadcaster evidences a policy decision that significant public benefits accrue to the specific activities it requires and funds the ABC to undertake. The list of activities and the funding itself substantially constrain the activities of the ABC.
- The advantages of the ABC mainly relate to its government funding, which is discretionary in any event and has declined significantly in real terms since the mid-1980s.
- The disadvantages of the ABC in a competitive sense are multiple. The ABC is constrained by its Charter to provide specified services which are deemed to be in the public interest, but which may not all appeal to large audiences. It is not allowed to charge for the majority of its services, nor is it able to sell advertising time, which is the lifeblood of commercial broadcasters. Despite this, it must compete in the marketplace for the acquisition of programs which it does not produce in-house.

---

<sup>11</sup> Milne, J. (2018) Commercial interests out to get the ABC. *Sydney Morning Herald*, 31 May, 2018, p. 19.

<sup>12</sup> See for example Paterson, J. (2018) ABC exists for market failure, not to be media conglomerate. *Australian Financial Review*. May 27th 2018. <https://www.afr.com/opinion/columnists/abc-exists-for-market-failure-not-to-be-media-conglomerate-20180527-h10lc7>

Sport broadcasting is a good example of its lack of bargaining power. These features mean that the ABC is significantly constrained in its ability to 'compete'.

- The ABC Charter has required the organisation to offer innovative services, which expose it to costs and risks in research and development that its commercial competitors may later benefit from, for example in offering ABC iView, a pioneering on demand television service. In this respect, rather than the ABC 'crowding out' commercial innovation in digital markets, an unproven claim, it is more demonstrable that it creates and shapes new markets.
- The ABC Charter was amended in 2013 to allow it to provide digital media services, presumably in policy recognition of the rapidly changing nature and diversification of media markets, the need for the ABC to comprehensively service the public's needs on major digital platforms and to explore the potential of these platforms for reaching young Australian audiences.
- It is unclear whether the ABC in most respects satisfies the definition of business, given all of the features of its operation, in particular its focus on producing content in areas of public benefit such as regional and rural news, and its limited capacity to generate income from commercial activities.
- Finally, it is difficult to see how the application of competitive neutrality policy is in the public interest in all of these circumstances.
- In any event there are established complaint mechanisms in relation to competitive neutrality which have been used in relation to the ABC, which makes it hard to understand why this inquiry is necessary.

### **Competitive Neutrality Policy: origins and operation**

It is well accepted that the activities of government and its entities have significant capacity to impede effective competition in markets. Even when competition law expressly applies to government entities advantages may accrue to government-owned or controlled bodies merely because of government ownership or control. Policy designed to address this issue is termed competitive neutrality policy. The principle behind it is that government business activities conducted in competition with the private sector should not have a competitive advantage simply by virtue of government ownership or control. Various jurisdictions have taken steps to redress competitive balance in this respect under a variety of approaches, on the basis that there should be a level playing field for competition between government bodies and the private sector.

#### *Policy not law*

In Australia, competitive neutrality policy was introduced in 1995 following the Hilmer Review of competition law and policy. Importantly, the Commonwealth and each of the States which signed the Competition Principles Agreement following the Review was able to set its own agenda for implementing competitive neutrality in its own jurisdiction.

It is important to emphasise that competitive neutrality is an area of policy, and not law. Complaints about competitive neutrality can be made to designated bodies such as the Australian Competitive Neutrality Complaints Office (AGCNCO) at national level. Its predecessor considered a complaint against the ABC in respect of its production facilities in 2000, dismissing the complaint.<sup>13</sup>

In circumstances where specific complaint processes are available it is hard to understand why this current Inquiry is actually necessary. There are no penalties for noncompliance with an applicable competitive neutrality policy and no compensation available for persons who are disadvantaged by conduct which is judged not to be competitively neutral. Where a finding of breach of competitive neutrality policy is made, it is up to the responsible Minister to decide whether anything is to be done. Publication of outcomes of complaints increases transparency and accountability of government businesses and portfolio Ministers, but no other obligations necessarily ensue.

#### *Critical importance of public interest*

As competitive neutrality is an area of policy and not law significant discretions apply and the public interest, as in a net benefit to society, is the most critical consideration in the application and assessment of competitive neutrality policy in a particular case. Competitive disadvantages must be weighed against competitive advantages which exist. The public interest test, which is very broad, depends upon whether the benefits of the application of competitive neutrality policy outweigh the costs. The test requires a consideration of the facts and circumstances, and 'every factor which contributes to an ownership-related advantage or disadvantage should be identified and, to the extent practicable, the advantage or disadvantage [should be eliminated].'<sup>14</sup> The Harper Review of Competition Law and Policy which reported in 2015 reinforced the existing application of the public interest test on the basis that it enshrined the correct principle: competition should not be impeded unless it was necessary to secure the public interest, and costs and benefits need to be assessed to meet the policy objective (pp. 94-97).<sup>15</sup>

Treasury is currently conducting a review of competitive neutrality policy, commenced in March 2017, subsequent to the recommendations of the Harper Review.

#### **Role of the ABC as a public broadcaster**

The ABC is a national public broadcaster. It is a state-owned enterprise and its activities are funded directly by the Commonwealth Government. It currently receives around \$1 billion per year, of which nearly \$200 million go into transmission costs, leaving approximately

---

<sup>13</sup> Commonwealth Competitive Neutrality Complaints Office. (2000) ABC Production Facilities. Investigation No. 4. Australian Government. <https://www.pc.gov.au/inquiries/completed/abc-production/report4.pdf>

<sup>14</sup> National Competition Council (1997) Competitive Neutrality Reform: Issues in Implementing Clause 3 of the Competition Principles Agreement at 8.

<sup>15</sup> Australian Government (2015) Competition Policy Review: Final Report. March 31<sup>st</sup> 2015. <http://competitionpolicyreview.gov.au/final-report/>

\$800 million for administration and operation. It is dependent on government funding to support almost all of its activities. It is able to generate a very small amount of additional funding. The ABC was expected to generate a further \$90 million from the sale of goods and services in 2016

## **Competitive neutrality policy and the ABC**

### *Application*

As noted by the Council of Australian Governments (COAG) in 2000, some government business activities such as the ABC are not subject to Executive Control. In these circumstances, such entities should adopt a 'best endeavours' approach to compliance with competitive neutrality policy. This means that the policy requirements of competitive neutrality for the ABC are not absolute. Given the way issues are assessed under competitive neutrality policy, noted above, it is important to reiterate that both the advantages and disadvantages of government ownership are relevant, and that public interest is the overriding consideration.

### *Statutory limitations on ABC services; public interest issues*

The ABC delivers public goods, as do the commercial broadcasters. The ABC, however, has substantial public interest obligations under its Charter to provide within Australia 'innovative and comprehensive broadcasting services of a high standard as part of the Australian broadcasting system consisting of national, commercial and community sectors'. The Charter expressly includes broadcast of programs that contribute to a sense of national identity and inform and entertain, and reflect the cultural diversity of, the Australian community. This also includes programs of an educational nature. The ABC also has an international charter to broadcast internationally 'news, current affairs, entertainment and cultural enrichment' to encourage awareness and understanding of Australia and its attitudes, and enable Australians living overseas to obtain information on Australia. The ABC also has a Charter to provide digital media services, and 'to encourage and promote the musical, dramatic and other performing arts in Australia.'<sup>16</sup>

The ABC has never been a monopoly service provider and 'competes' for eyeballs in the market for supply of services and the acquisition of programming material with commercial broadcasters. However, due to its Charter obligations it has a narrower scope for programming based on areas defined by statute as being of public benefit. This programming scope, which is focused on public benefit elements, in fact disadvantages the ABC significantly in comparison with commercial broadcasters. In addition, it is prohibited from charging for the supply of its programs, but on the other hand must compete with commercial broadcasters for the acquisition of those programs which it does not produce

---

<sup>16</sup> *Australian Broadcasting Corporation Act 1983 (Cth)*, s6

in-house. It is prohibited from selling advertising during its programs, which is the financial life-blood of the commercial operators. All of these factors mean that the ABC is significantly constrained in its ability to 'compete'.

### **How does the market work?**

The ABC delivers television and radio programs, as well as a web service, ABC Online, and related apps and podcasts, 'the primary purpose of which is to entertain, to educate or to inform an audience' as required by the *Broadcasting Services Act 1992* (Cth) (BSA). In order to do this, the ABC has two choices. It can acquire programming which has been created by others or it can create programming. If it elects to take this second path, it can either commission programming or make it in-house. For radio, the ABC produces most of its programming in-house. ABC News on radio carries programming from partner networks such as PBS (US), the BBC (UK), DeutscheWelle (German) and Radio Netherlands.

For television, most news and current affairs programming is produced in-house. As noted, the ABC does not carry advertising and relies on budget appropriations to fund the acquisition and production of programming. When the ABC commissions drama programming, it can offset the programming costs by giving up certain rights. Essentially, the bargain is that the ABC commissions the drama on the basis that it has the rights to the programming in Australia, but the producer can exploit the rights in all other territories. In a global environment where there are large television distribution businesses such as Netflix and Amazon, the overseas rights may be more valuable to these entities. This approach minimises the local cost. It is a similar technique to that employed by commercial television licensees.

If the ABC acquires television programming that has been produced by others, then it competes to buy the Australian rights with both commercial and subscription broadcasters. In the past, the ABC has relied heavily on output deals for its programming. An output deal is an agreement to acquire all programming made available from a particular source, on the basis that some of it may be attractive to the Australian market. Examples of output deals include CBS television to Network Ten, Fox television to the Seven network and the BBC to Foxtel. Currently, there are few major English language television production studios with which the ABC could strike an output deal.

There is no direct requirement for the ABC to deliver sports programs. However, the ABC does deliver such television programming by acquiring rights to sports that are less popular than those broadcast by the commercial networks or Foxtel. The Minister may specify an event, or events of a kind, the televising of which should, in the opinion of the Minister, be available free to the general public (BSA s 115). These events have only ever been sporting events. They are put on the 'anti-siphoning list' as an amendment to *Broadcasting Services (Events) Notice (No. 1) 2010*. These events become available for subscription broadcasters



to acquire six months before the event. However, if the Minister takes the view that no commercial television broadcasting licensee or national broadcaster has had a reasonable opportunity to acquire the right to televise the event concerned, then this six-month period can be reduced to a week. It is sometimes convenient for a subscription broadcaster to concurrently broadcast (or simulcast) an anti-siphoning list event with the ABC in order to meet the requirements of the BSA in respect of that event. That is, the acquisition of sports rights is usually competitive between the subscription television broadcasters and commercial television broadcasters and the ABC bids for the rights for lower cost (less mainstream) sports rights. However, the ABC may acquire more attractive rights when:

- (a) the event is on the anti-siphoning list; and
- (b) it is convenient for a subscription television service provider such as Foxtel.

This is instructive, as the ABC is in no financial position to compete with commercial broadcasters for the 'big ticket' sports events which are so important in determining television ratings. If it had any market power or financial clout or other advantage it would presumably do so.

One aspect of the ABC's market operation that has caused commercial operators some concern is its expenditure on Search Engine Marketing (SEM), for example on Google Adwords, to promote its broadcast programming. This has been presented as unwarranted competition, when in fact it is a basic aspect of digital media promotions and no different to promoting the ABC's output in printed television guides. If the ABC's services cannot be easily found online, this reduces its capacity to be located and used by Australians, decreasing its value as a public service media organisation. Presenting SEM expenditure as unnecessary is a misreading of the ABC's need to adopt new digital communications approaches in a convergent media environment.

Historically, 'free-to-air' television was delivered using spectrum. Commercial and national television broadcasting licences in Australia are issued with a right to use spectrum to deliver those services. That is, the broadcasting licence has a spectrum use licence 'stapled' to it. These spectrum use licences are apparatus licences issued under the *Radiocommunications Act 1992* (Cth). However, unlike almost all other apparatus licences, there is a presumption of renewal at the same time that the broadcasting licence is renewed. Indeed, the spectrum used for the delivery of broadcasting services is treated differently from other spectrum and the 'broadcasting services bands' are currently managed separately from the spectrum used to deliver services such as mobile telecommunications.

Today, many people who watch television do not use this spectrum with television receivers. Instead, they stream services using their personal computers or dedicated devices such as the Telstra TV device. In the case of both commercial and national television licensees, this streaming can be both live and 'catch-up' or on demand. In the case of catch-up services, the broadcaster needs to provision storage of the programming in such a way

that appropriate software can be used by the viewer to watch the program. In the case of commercial broadcasters, this also means the insertion of advertisements into the catch-up stream. The ABC is required to provide such services as part of its Charter.

For all broadcasters, there is also the requirement to ensure that the streaming rights to programs that will be offered on a catch-up basis are acquired at the same time as the 'over-the-air' rights. This applies to commissioned programming and programming that has been produced by others. The ABC Charter was amended in 2013 to allow it to provide such digital media services, and to recognise its significant public benefit web service, ABC Online. Arguably this change was an essential recognition of the way programming is now consumed by the public, and a failure to do so would have otherwise rendered its important public interest Charter obligations nugatory in a relatively short space of time.

The ABC's move into these areas was a clear policy decision by government to acknowledge it innovates in the public interest, and not as a 'competitive' strategy. For example the ABC's move into 24 hour television news broadcasting, with ABC News 24, was not an attempt to compete with Sky News (as has often been portrayed by its detractors) but a strategy to reform the ABC's television news production practice and drive productivity reforms through new convergent production techniques, such as studio automation. Worldwide, public service broadcasters have often led digital innovation in the provision of services with a notable example being the BBC and its sophisticated digital offerings.<sup>17</sup> In this respect economist Mariana Mazzucato argues that the public sector is 'de-risking' the private sector by setting the direction in which a market will develop, developing the technical and intellectual capacities that will help build public-private sector innovation, and by learning from and sharing innovation challenges.<sup>18</sup> In the case of on demand television, Australia's commercial television channels lagged behind its public broadcasters in presenting services that were accessible, useable and reliable, while the ABC and SBS put those factors at the forefront of their digital development strategies. The ABC was also the first broadcaster in Australia to offer a trial of audio description for on-demand television content, a technically challenging but important service for cultural inclusion of blind and hearing impaired Australians.<sup>19</sup>

In the past decade, there have been some claims raised that the ABC is 'crowding out' the commercial sector in its innovation activities, although there is no evidence for this. Rather the ABC is taking on the cost and risk of innovation that will later benefit both consumers and commercial services, through technological agenda setting, the priming of a market for the service, the presentation of a delivery model and the publication of information about

---

<sup>17</sup> Cunningham, S. (2013) *Hidden innovation: policy, industry and the creative sector*. Brisbane: University of Queensland Press

<sup>18</sup> Mazzucato, M. (2015) *The Entrepreneurial State: Debunking Public vs Private Sector Myths*. New York, NY: Public Affairs

<sup>19</sup> Department of Communications and the Arts (2016) Final Report on the Trial of Audio Description on ABC iview. April 5<sup>th</sup> 2017. <https://www.communications.gov.au/documents/final-report-trial-audio-description-abc-iview>

the innovation process, for example in reports to parliament. Such developments are clearly in the public and the national interest.

### **What are the ‘business activities’ of the ABC?**

As a broadcaster it is unclear whether the ABC in most respects satisfies the definition of a business at all. It does not sell its broadcasts to viewers. It does not sell advertising time. It is important to recall the observation in the recent Harper Review that competitive neutrality only applies where a significant business activity charges for goods and services, has an actual or potential competitor, and a degree of independence in relation to production, supply and price<sup>20</sup>. The only competitive neutrality complaint that has been heard against the ABC involved ABC Productions, which as well as producing television programs for broadcast on the ABC network using production facilities, equipment and production staff of the ABC, also tendered on a commercial basis to provide production facilities and labour hire to other film and television producers. The claim was dismissed.

The ABC may commission and sell television content but it does this most in areas of public benefit, market failure and high production costs, for example regional and rural news, or local drama and children’s television (and with the latter, in collaboration with private enterprise, sustaining the independent production sector).<sup>21</sup> It has arrangements in relation to ABC Shop Online and ABC iView, but these are not core activities. They reflect the need for the ABC to raise additional funding in light of ongoing budget cuts, and to service audience demands for access to digital program material that it does not retain copyright to provide, beyond a certain broadcast window.

In the production of news and current affairs programming for both television and radio, there is a mixed reliance on content produced by in-house teams, news agencies (for example, Australian Associated Press, Reuters or Agence France Presse) and international providers. In its relationships with external news organisations it is sustaining the market for public interest journalism and in turn adding value to material, where it is able to modify the content. Some international news sources provide material on an exclusive basis (the relationship between NBC (US) and Seven is an example) and others on a non-exclusive basis. Depending on the licence terms, this non-exclusive basis could include modified reuse. The effect is that the ABC is a major provider of curated news. One way in which the ABC can offset its news costs is to syndicate that curated news service. It does this to businesses which are not in the radio or television sector such as the outdoor media firm oOh! Media.

---

<sup>20</sup> Competition Policy Review, Issues Paper, 14 April 2014, 3.17

<sup>21</sup> Australian Children’s Television Foundation (2018) Inquiry into Australian Content on Broadcast, Radio and Streaming Services, January 2018.

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/AustralianContent/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/AustralianContent/Submissions)

Australian Associated Press (**AAP**) is owned by three Australian newspaper publishers (News Corp Australia, Fairfax, and Seven West Media). There has been some comment, primarily in *The Australian*, that the ABC deal with oOh! Media is an example of the ABC 'competing' with commercial interests. However, the ABC is a customer of AAP. AAP is not a broadcaster and it provides a wide range of news services to the broader Australian media. The ABC was able to offer oOh! Media a syndicated feed of curated content in a form that AAP does not currently offer.

### **What 'advantages' and 'disadvantages' does the ABC have from government ownership?**

The requirement is that the ABC must be competitively neutral on a whole of business basis offsetting advantages against disadvantages. The ABC is funded by government so does not seek to make a profit. However, its market options are sorely constrained by the obligations contained in its Charter and in its inability to either charge for programming supplied or to sell advertising. The effect of this is that the ABC, as a state-owned enterprise, does not have any competitive advantage conferred upon it as a consequence of state ownership. Indeed, constraints on the funding of the ABC by governments of both hues has meant that the corporation is less able to compete for attractive programming. The loss of the BBC output deal to Foxtel with effect from July 2014 is an example. The numerous restrictions imposed on the ABC are likely to significantly outweigh any advantages.

### **Public interest issues generally**

The application of competitive neutrality policy must be in the public interest. The Charter of the ABC determines the activities which it should undertake in the public interest as a policy of government. The ABC is truly substantially disadvantaged, as has been shown above. It is difficult to see how the application of competitive neutrality policy is in the public interest, in all the circumstances.

### **Other issues: Advantages ABC supplies to commercial subscription service providers**

On the other side, it is important to understand that valuable ABC programs can be used by subscription television service providers to enhance their offerings. Such a subscription television service provider may choose to re-transmit any or all of the local commercial television broadcasting services (within their licence area) and the services broadcast by the ABC and SBS. This right is provided on a conditional basis under section 212 of the *Broadcasting Services Act 1992* (Cth) and there are underlying rights payments to be made under the *Copyright Act 1968* (Cth). That is, ABC programming forms a very low-cost element of services from businesses such as Foxtel. The underlying rights fee paid to the Phonographic Performance Company of Australia is not ABC revenue except to the extent that the ABC holds relevant music performance rights.

\*This submission has benefitted greatly from the assistance of Professor Deborah Healey, at UNSW Law, Dr Rob Nicholls, at UNSW Business, Dr Rhonda Smith, at the University of Melbourne, and Dr. Daniel Joyce, at UNSW Law. Professor Ed Davis, NSW President of ABC Friends, and Dr Fiona Martin, at the University of Sydney, have also contributed significantly to the submission.