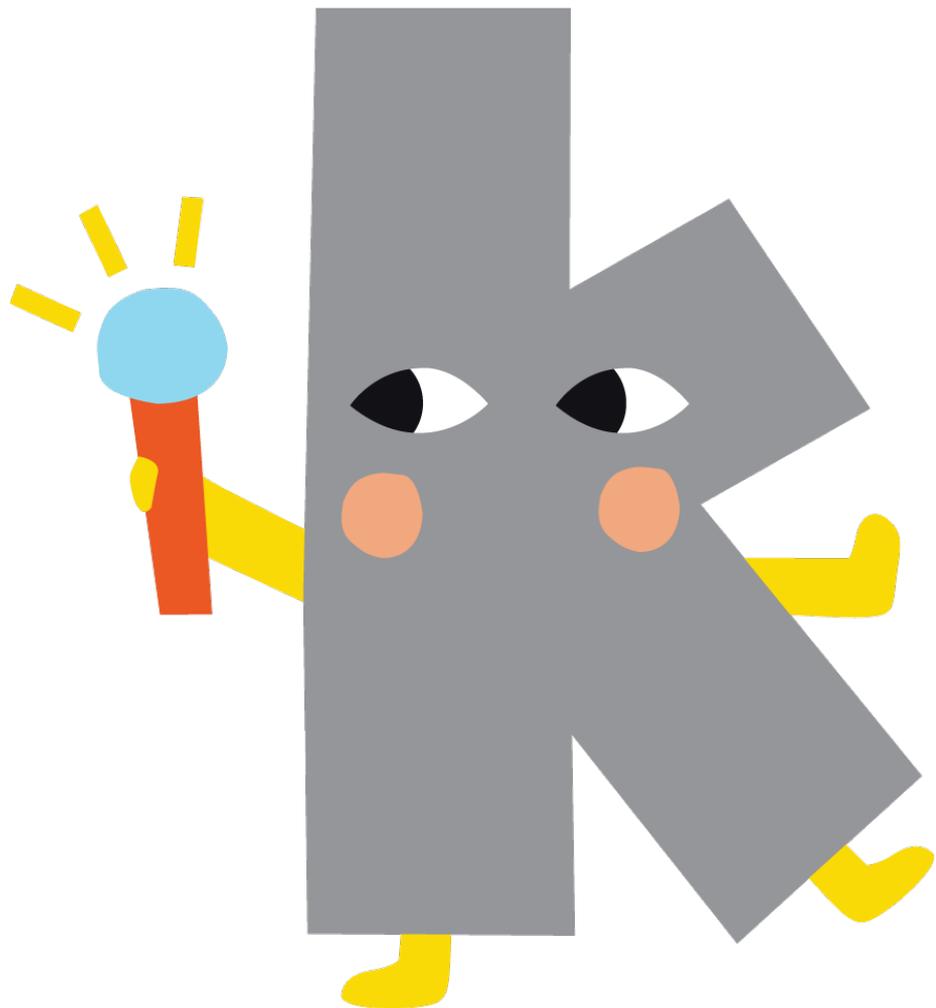


Inquiry into the Competitive Neutrality of the National Broadcasters

Kinderling Kids Radio Submission
June 22, 2018





Background

Kinderling Kids Radio Limited (Kinderling) is an example of wholly original Australian innovation which has reinvented radio for the 21st century. Its commercial offering is a radio station synchronized to the daily and nightly routine of households with children 0 to 6 years old, the purpose of which is to help parents as they move through the different (and occasionally challenging) energies and moods of their day with kids.

Kinderling is the product of pure innovation: nothing like Kinderling existed before it was invented in Australia.

Its launch in June 2015 was only possible through the commitment of early stage venture investors to two years of detailed research, development, product testing and consumer engagement.

One of the first independent companies to successfully launch a national network on DAB+, Kinderling entered the top 10 most listened to national DAB+ stations within its first year on-air and won the peer-judged Best Digital Radio Format award at the Australian Commercial Radio Awards.



Executive Summary of Submission

Kinderling has proven a market previously unmet by either commercial or public broadcasters exists – a radio station for children and their families.

In three award-winning years, Kinderling has built a strong brand, a track record of innovation and deep sector partnerships.

On discovering the ABC was contemplating launching a service in this market, Kinderling engaged with the ABC seeking information and offering the opportunity of partnerships.

In 2018, the ABC decided to enter the very same media space Kinderling pioneered and compete directly.

If Kinderling had entered a media space within which the ABC had pre-existed, there would be no basis for Kinderling to make this submission.

In response, the ABC might proffer the following process justifying its launch of a competitive offering: the idea of ABC Kids was tested with the ABC's audience; a pilot was created; and, based on the success of the pilot, ABC Kids Listen was successful in achieving a Great Ideas Grant to launch. They may assert that such a process points to how the ABC is testing and launching innovation. We would respectfully disagree in the strongest terms.

This Panel and its inquiry is concerned with how the ABC observes the principles of competitive neutrality.

In the case of ABC Kids Listen, it should be asked: did the ABC Kids' Listen Grant application reflect the true cost of launching a DAB+ radio station - that is, the cost of acquiring content, the cost of broadcast licenses, the costs of talent and the cost of running advertising across the ABC network?

As Kinderling seeks to demonstrate in this submission, the ABC enjoys an undue advantage in that many of the costs associated with ABC Kids Listen are masked by government ownership of the ABC.



It is Kinderling's submission that an appropriate remedy it for the application of principles of competitive neutrality to apply to the ABC.



Kinderling Responses to The Panel's Questions

QUESTION 8

Considering the commercial activities of the national broadcasters (e.g. where they are selling or purchasing goods and services), is there evidence that they have taken undue advantage of their government ownership, to the detriment of competitive outcomes?

ABC Kids Listen is likely to be operating under a lower cost structure than is available to Kinderling due to commercial advantages arising directly from government ownership.

There are at least four ways government ownership and its vertical integration provide ABC Kids Listen with a material advantage over its competitors, including Kinderling.

1. Recorded Music

ABC Music is a commercial enterprise within the ABC Corporation. It is Kinderling's understanding that ABC Kids Listen programs 100% of its music from recordings owned or controlled by ABC Music.

As a commercial operator, Kinderling has had to invest capital to license or acquire content for broadcast.

The Panel maybe keen to understand the commercial basis upon which ABC Kids Listen pays for music and other licenced content it broadcasts? For example, does ABC Kids Listen acquire its content on arm's length, objectively commercial terms?

If it does not, Kinderling respectfully suggest it is open to the Panel to query whether the ABC is under-reporting the true operating cost of ABC Kids Listen and as a result thereof enjoys an undue commercial advantage.

2. Music Publishing and Public Performance Rights

The right to publicly perform copyrighted works embodied in sound recordings is secured by way of license agreements with music publishers and blanket licence arrangements with performing right associations. Kinderling and the ABC must



each agree terms with the Australian performing right association (APRA/AMCOS) and the PPCA.

While Kinderling has no leverage to do anything other than strike commercial terms with APRA/AMCOS and the PPCA, Kinderling query whether the ABC:

- as a result of its government ownership, pays lower fees for the same rights than other commercial operators such as Kinderling, and
- is granted different rights because the ABC does not need to generate a commercial return.

3. Unfair marketing advantage due to its government ownership

Kinderling must fund its own marketing budgets to build brand awareness and drive audience consumption through advertising.

ABC Kids Listen by contrast utilises the full breadth of the ABC platform - advertisements on ABC2, display advertisements on iView and ABC Online – to advertise its offering to audiences.

Kinderling invite the Panel to test whether, in calculating its marketing expense to launch and promote ABC Kids Listen, the ABC budgeted the true, arm's length commercial value of this advertising?

An undue advantage will accrue to ABC Kids Listen in circumstances where it is not required to account for the cash cost of this advertising in the same way a competitor such as Kinderling would be required to pay for equivalent TV and online advertising.

4. Commercial arrangements with on-air talent.

Like most radio stations Kinderling employs a team of dedicated presenters and producers. Where necessary, Kinderling contract external talent who provide voice services for a fee.

ABC Kids Listen utilises a roster of existing ABC personalities to lend their voices to its broadcast.

Kinderling query if ABC Kids Listen must show as an operating expense the cost of on-air talent, or is this cost absorbed by the broader ABC cost infrastructure



through general employment agreements on-air talent have with the ABC? If circumstances constitute the latter, then Kinderling believes it is another example of how ABC Kids Listen operates with a lower cost base as a result of its government ownership.

If the answer to any of the forgoing questions is in the affirmative then Kinderling would submit that this represents evidence that the ABC Kids Listen cost base does not accurately reflect the true cost of operating a broadcast station on commercially viable, arm's length terms and to that extent it enjoys an undue advantage due to government ownership, to the detriment of competitors such as Kinderling.

As is explained in Kinderling's response to Question 13, the ABC asserts a key point of its differentiation to Kinderling is that ABC Kids Listen does not carry advertising. This is false because such a distinction only arises because of market distortions which institutionally aid the ABC, namely: (a) the ABC's government ownership, and (b) the absence of a requirement to earn a commercial return.

In other words, if ABC wishes to compete in markets (which, for the avoidance of doubt, Kinderling welcome) then such competition should be fair competition based on the quality of content, its curation and the listener experience - not on the basis of unfair advantages which competitors to the ABC do not enjoy.

QUESTION 9

What is the differential impact of regulation on commercial and national broadcasters, and is there evidence of consequent adverse impacts on competition and outcomes?

As referenced in Kinderling's response to Question 8, Kinderling believes there are different regulatory regimes with regards to content rights for commercial broadcasters and the ABC.

Kinderling see the differential impact is as follows:

1. Kinderling has to pay more money to collecting societies to license the same content as the ABC.
2. The ABC is not bound by the same restrictions as commercial broadcasters around how and where its content can be made available. It is possible that the ABC has separate license agreements in place that accommodate such



arrangement. However, Kinderling would argue that the ABC has undue advantage in reaching such agreements with rights holders as it can demonstrate no commercial motivation (as there exists an absence of need for commercial return).

QUESTION 10

Is the reporting and accountability by the national broadcasters on their best endeavours to observe competitive neutrality adequate?

Kinderling believes the reporting and accountability of the ABC in this regard is manifestly inadequate and Kinderling welcome the Panel's inquiry into this area.

Details supporting Kinderling's conclusion are set out in more detail in Kinderling's answer to Question 13 where Kinderling detail how, despite assurances provided to Kinderling by the ABC, a 'best endeavours' test had no effect in deterring ABC management from a course which launched ABC Kids Listen with an almost identical strategic positioning to Kinderling.

Kinderling submits that the application of principles of competitive neutrality are necessary to ameliorate, in consumers' interests, the effect the ABC has when it elects to enter new digital markets.

QUESTION 11

Are you aware of any specific instances where the ABC or SBS may have received any other competitive advantage, due to their public ownership, to the detriment of a private competitor?

ABC Music is a commercial enterprise within the ABC Corporation. It is Kinderling's understanding that ABC Kids Listen programs 100% of its music from recordings owned or controlled by ABC Music.

Kinderling invite the Panel to consider the ramifications for musicians, record labels and the public interest where the public broadcaster only programs music in which it holds a commercial interest. While all the musicians on ABC Music are worthy of air-play, there are many, equally worthy, artists who are not on ABC Music (and supported in equally worthy ways by record labels that are not ABC Music) that deserve the same opportunity for air play and the exposure to grow their audience that can facilitate sales of recorded music, broadcast royalties and ticket sales from touring.



As the Panel considers questions of public interest, Kinderling would ask is the ABC putting its commercial interest ahead of its role as a supporter of Australian creative talent? Stated another way, could you imagine if Triple J only played artists that had recording deals with ABC Music?

QUESTION 12.

No response.

QUESTION 13.

From your perspective do the national broadcasters seek a balance between competing in the market and complementing the market? Is that balance the same for traditional broadcasting and for new digital platforms?

Based on Kinderling's experience, the ABC faces challenges adequately resolving the tension between it competing in a market and it complementing that market.

Kinderling does not claim a monopoly on having the idea of a radio station for children. However, Kinderling would like to make the point that if the ABC had always intended to launch its own offering, it had seven years prior to the arrival of Kinderling to do so. In October 2016 the ABC announced its intention to launch a children's radio station. The announcement came in the form of a Tweet that directed ABC2 followers to an online survey. Within that survey the ABC presented a children's audio brand concept and - crucially - asked two questions about user habits listening to Kinderling Kids Radio.

Upon hearing of ABC's intent to launch a children's radio station, Kinderling sought to proactively engage with the ABC to see whether there was opportunity to pursue the ABC's objectives in partnership with Kinderling. Kinderling has forged an impressive track record of successful partnerships with larger organizations: Southern Cross Austereo, Apple, G8 Education and Qantas. Given Kinderling's start-up agility and programming innovation, Kinderling felt Kinderling had something to contribute to the ABC's thinking.

This was reinforced by our interpretation of the remarks of the then incoming Managing Director of the ABC, Ms Michelle Guthrie, who made a strident public advocacy for the ABC to source fresh thinking around partnerships with external



players. Specifically, in address titled “The ABC of Innovation” Michelle Guthrie, said:¹

The ABC will have to be more innovative in its approach [by] seeking creative partnerships.

Partnering is key because it will help solve the distribution end of the equation, creating new pathways for our content to reach audiences and also, over time, yielding additional efficiencies that can be poured back into content investment.

...

I have made no secret of the fact that I think the ABC should be leveraging its clout in this space.

...

The ABC already partners well, both indirectly and indirectly, with many companies.

Kinderling believed this line of thinking, spearheaded by the Managing Director, would be reflected by senior managers and department heads.

In a series of meetings between the ABC and Kinderling, Mr Kaldor (Founder of Kinderling):

(a) made the ABC aware that there were then currently 3 pre-existing commercial broadcasters within the zero to six-year old radio space of which the ABC, as per its Charter, would need to take “into account”, and

(b) observed that a clear and unmet need for an audio offering existed in the market segment of seven to 12-year olds.

In February 2017 Kinderling met with the Head of ABC Radio, [REDACTED] and the Head of Content and Digital Strategy (Radio), [REDACTED], to further understand the ABC’s strategy and ascertain if and how the ABC and Kinderling might work together in the emerging children’s audio space.

¹ Guthrie, M. “The ABC of Innovation, address to Creative Country: the business of innovation”, Address to *Creative Country the business of innovation conference*, Melbourne <<http://about.abc.net.au/speeches/the-abc-of-innovation-address-to-creative-country-the-business-of-innovation/>> Posted 28th July 2016



informed Mr Kaldor that:

- (a) the ABC's investigations for market entry were exploratory,
- (b) there was merely a pilot operating,
- (c) management would need to evaluate the success of that pilot before making any decision
- (d) any ABC station would be aimed at two to five-year olds only, as opposed to Kinderling's broader demographic of zero to six, and that
- (e) the ABC would not focus on family co-listening or parenting and that the ABC's programming would be centred around early learning.

Mr Kaldor countered that:

- (a) a 2 to 5-year old demographic appeared very narrow to justify a dedicated radio station. There are no early learning moments at 8pm, so why create a radio station for educational content when the entire audience is asleep for almost half the programming schedule?
- (b) given the narrower demographic of 2 to 5-year olds, Kinderling invited the ABC to consider a partnership: the ABC could create or repurpose its educational programming and Kinderling could commercially license that content and broadcast it to its already installed audience of 2-5 year olds. Such an arrangement would leverage each organization's competitive advantages. The ABC would generate an income stream from the sunk cost of content already within its library and extend its brand into Kinderling's already installed audience. Kinderling was creating a pilot network of 24 daycare centres around Australia where every day educators tune into an early learning radio show co-designed by Kinderling. This is an Australian first innovation and Kinderling's program is now being rolled out to 500 day care centres across Australia. However, this idea was rejected by the ABC.
- (c) Kinderling also suggested a proposal whereby Kinderling migrates its station onto the ABC network (renting DAB+ spectrum from the ABC) and blocks out key dayparts for advertising-free ABC content. The ABC would generate a substantial income stream that could subsidise its broader DAB+ network costs and enable it launch other programming formats. This idea was also rejected.

In that meeting and subsequent written and verbal communications, the ABC sought to provide Kinderling with assurances that the ABC's then proposed (and as



yet then unlaunched) ABC Kids Listen would complement the market; not compete with Kinderling.

As the Panel's inquiry seeks insight into the national broadcasters' decision making processes, Kinderling would respectfully invite the Panel to seek information from the ABC about how it deliberated on the decision to approve its children's audio pilot into a full market entry strategy. In particular:

1. Is the ABC able to demonstrate that the 'best endeavours' competitive neutrality test was applied in Kinderling's case?
2. How did the ABC understand its obligation to "take account" of "broadcasting services provided by the commercial and community sectors" (and specifically Kinderling) as the ABC Charter requires?²
3. Has the ABC historically considered the children's audio space to be a media space of 'market failure'? To what extent did Kinderling's entry change that consideration and affect the ABC's decision to enter the same market as Kinderling? Does the ABC still consider the audio space for 7-12 years a market failure? Why did the ABC decide to enter the audio space for zero to six year olds (or, taken in good faith, 2 to 5 year olds) but not 7 to 12 year olds?
4. What weight was given by the ABC to the commercial impact on Kinderling and other players of the ABC launching ABC Kids Listen in direct competition to Kinderling?

Answers to the forgoing questions are relevant under this Question 13 because in August, 2017 the ABC informed Kinderling that ABC Kids Listen had been successful in attracting a Great Ideas³ Grant and, consequently, it would move towards launch. For the purposes of this question it would be helpful to understand if Great Ideas Grant criteria required applicants to identify the originality of their idea and how they were taking into account existing commercial or community players?

² The ABC Charter, emphasis added:

In the provision by the Corporation of its broadcasting services within Australia:

(a) *the Corporation shall take account of*

(i) *the broadcasting services provided by the commercial and community sectors of the Australian broadcasting system;*

³ <http://about.abc.net.au/speeches/a-new-way-of-working-for-our-content-teams/>



Upon notifying Kinderling of the ABC's intention to move ahead to launch, ██████ stated in an email to Evan Kaldor, dated August 1 2017, the ABC's decision to Kinderling in the following terms:

"As discussed previously, we believe the parameters we are setting for ABC Kids Listen are sufficiently different to Kinderling to allow both services to operate in the market.

We intend to target ABC Kids Listen to a narrower demographic of 2 – 5-year-olds and will play only content produced for younger children. We won't be producing content aimed specifically at parents and won't be carrying advertising.

I believe there is room for multiple providers in the field of quality audio for children, and the intended focus of our service will assist in differentiation."⁴

Kinderling understood ██████ to mean by these statements that the ABC intended to differentiate the ABC's offering in the market (that is, to use language of Question 13, to complement, not compete, with Kinderling). However, the record shows that in fact the ABC copied Kinderling strategy by:

- (a) focusing on precisely the same demographic Kinderling targets,
- (b) using the same or very similar language and market positioning as Kinderling, and
- (c) releasing an app whose GUI apes with remarkable similarity Kinderling's app.

To illustrate the divergence between what was advised to Kinderling and what the ABC did, compare ██████ communication above with the ABC's launch communications on its website, extracted below, which says in relevant part:

"Our aim is to provide children aged 0-5 and their families with a way to access the music and stories they love...ABC KIDS listen has been designed to suit the changing needs of a child's day and night."⁵

"a new dedicated kids digital radio station and app for preschoolers and their families...The programs are themed and designed to suit a child's daily routine"⁶

⁴ Email from ██████ to Mr Kaldor dated 1st August 2017

⁵ <http://www.abc.net.au/kidslisten/about/> (emphasis added)

⁶ <http://www.abc.net.au/kidslisten/ideas/welcome-to-abc-kids-listen/9451266> (emphasis added)



Conduct of this kind by our national public broadcaster raises questions of public policy around the robustness of the processes and protocols (if any) the ABC applies in decision-making and the accountability of its management for such action.

If the Panel's Inquiry determines that such process and protocols are either non-existent or are inadequate, it is Kinderling's submission that a competitive neutrality framework should be considered as an appropriate remedy to give effect to public policy issues the ABC Charter explicitly states should inform ABC decision-making.

The ABC is a great institution which historically has, in the public interest, taken important decisions which help the whole community, some of which have unquestionably been the result of addressing clear market failure. For example, before Triple J existed, there was market failure for a national youth radio station focused on alternative music; ABC2 provided high quality children's TV programming and is the largest visual children's network in Australia. These were and remain important investments made in the public interest by our public broadcaster.

Kinderling has taken considerable economic and reputational risk in demonstrating the viability of an audience and programming format. Based on Kinderling's experience of ABC Kids Listen, Kinderling see the potential for a troubling precedent – a start-up decides to test the market for a new media space. The public broadcaster watches. The start-up proves the existence of an audience or the demand for a new programming format. The ABC appears to allocate a small innovation budget to its new project but this masks the true cost of its content and advertising budgets, which cannot be matched by a startup. The public broadcaster adopts the same or similar format and enters at scale supported by a deep library of content and a substantial marketing machine. The public broadcaster has tremendous latitude based on the absence of an imperative for a commercial return. The ABC wins the space and takes all the audience.

Kinderling ask - is this the type of competition the Panel believes is in the public interest?

Secondly, how does this reconcile to the Productivity Commission's guideline that *"...Australia's broadcasting policy should...encourage innovation in the provision of broadcasting services"*.



Finally, based on Kinderling's specific experience, Kinderling respectfully invite the Panel to explore what would have been in the greater public interest: the launch of a new audio offering which serves a new demographic hitherto unserved (7-12 year olds), or the use of tax payer funds to compete with existing commercial players already adequately serving an existing demographic (zero to 6 year olds)?

QUESTION 14

Do you have comment on these guiding principles?

Kinderling's submission endorses in the strongest possible terms the application to the ABC of principles similar to those the Productivity Commission set out in its 2000 Inquiry into Broadcasting and as reproduced on page 13 of the Issues Paper. They are sensible, balanced and necessary.

/ends

EVAN KALDOR
Founder
Kinderling Kids Radio