



Australian Government

Department of Communications and the Arts

# Inquiry into the Competitive Neutrality of the National Broadcasters—report by the Expert Panel

September 2018



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## Letter to Minister

28 September 2018

Senator the Hon Mitch Fifield  
Minister for Communications and the Arts  
Parliament House  
CANBERRA ACT 2600

Dear Minister

### **Report of the Inquiry into the Competitive Neutrality of the National Broadcasters**

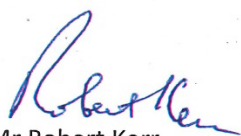
We are pleased to provide you with this report of the Inquiry into the Competitive Neutrality of the National Broadcasters.

In accordance with the Inquiry's Terms of Reference, we have explored the practices of the National Broadcasters and considered whether they are operating in a manner consistent with the general principles of competitive neutrality.

We have found that the National Broadcasters are operating in a manner consistent with the general principles of competitive neutrality. However, we consider that changes should be made to increase the transparency of the National Broadcasters' business activities and the ways in which they consider issues of competitive neutrality and their participation in media markets.

We thank the National Broadcasters for their cooperation with the Inquiry, as well as the other organisations and individuals who made submissions. We are also appreciative of the valuable support and assistance provided by the Taskforce within your Department.

Yours sincerely



Mr Robert Kerr  
Panel Chair



Ms Julie Flynn  
Panel Member



Ms Sandra Levy AO  
Panel Member



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## Glossary

ABC	Australian Broadcasting Corporation
ABC Act	<i>Australian Broadcasting Corporation Act 1983</i>
ABC Charter	Section 6 ABC Act
ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
ACTF	Australian Children's Television Foundation
AGCNCO	Australian Government Competitive Neutrality Complaints Office
ANAO	Australian National Audit Office
AVOD	Advertising video on demand
BBC	British Broadcasting Corporation
BSA	<i>Broadcasting Services Act 1992</i>
CAC	SBS Community Advisory Committee
CAGR	Compound annual growth rate
CALD	Culturally and linguistically diverse
COAG	Council of Australian Governments
CNP	Commonwealth Competitive Neutrality Policy Statement (1996)
CRA	Commercial Radio Australia
DAB	Digital Audio Broadcasting
DAB+	Upgrade to DAB system
DTT	Digital terrestrial television
DoCA	Department of Communications and the Arts
EY	Ernst & Young
FAANGs	Facebook, Apple, Amazon, Netflix and Google
FBT	Fringe Benefits Tax
FECCA	Federation of Ethnic Communities' Councils of Australia
FM	Frequency modulation radio broadcasting format
FTA	Free-to-air television broadcasting
Harper Review	Competition Policy Review Final Report (2015)
JEERA	Journalism Education and Research Association of Australia Incorporated
LOTE	Language other than English
MEAA	Media, Entertainment and Arts Alliance
NITV	National Indigenous Television
Ofcom	UK Office of Communications
OTT	Over the top



PSB	Public sector broadcasting
PwC	PricewaterhouseCoopers Australia
SBS	Special Broadcasting Service
SBS Act	<i>Special Broadcasting Service Act 1991</i>
SBS Charter	Section 6 SBS Act
SMP	Studio Media Productions
SPA	Screen Producers Australia
SVOD	Subscription video on demand
VOD	Video on demand

## Key points

- This Inquiry is about whether the National Broadcasters—the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS)—are competing fairly with the private sector. The National Broadcasters have pursued new opportunities in changing media markets and new competitive circumstances have emerged.
- Most significant competitive pressures for news, entertainment and advertising are coming from giant international companies. Nonetheless, the National Broadcasters are forces in Australian markets, with their competitive weight enhanced by secure funding at a time of higher commercial risk, supported by relatively high productivity growth.
- Competitive neutrality seeks to ensure that competition is not distorted by public entities taking inappropriate advantage of government ownership. It is not intended to prevent public entities from competing, nor to relieve discomfort from competitive processes which are bringing benefits to consumers as they rapidly adopt and enjoy new services.
- The Commonwealth's Competitive Neutrality Policy (CNP) is focussed on government trading corporations and its relevance to the National Broadcasters is more limited. Nevertheless, the National Broadcasters operate under a best endeavours approach to competitive neutrality.
- With respect to their business activities (with user-charging), the National Broadcasters are abiding by a best endeavours approach to competitive neutrality. It is unlikely to be front of mind but mostly conforms to good internal business organisation. There is no evidence that costs are not appropriately allocated. And prices are generally set to market rates.
- Different regulatory circumstances facing the National Broadcasters, compared to the private sector, represent Parliamentary decisions which are difficult to bring to financial account.
- Some improvements in transparency and internal procedures are possible. The separate Treasury review of the CNP may clarify improvements arising from the recommendations of the Harper Review of Competition Policy.
- Beyond the application of the competitive neutrality management guidelines to business activities, the question arises as to how competitive neutrality principles about competing fairly without distortion might apply to the free services delivered by the ABC and SBS.
- Free ABC and SBS services are having some competitive impact. Submissions included complaints about the ABC's online news service and SBS' multi-channel and streaming services. But the National Broadcasters are established and funded to provide free services. So long as they operate within their statutory Charters they are operating in the public interest.
- Submissions questioned whether the ABC and SBS were operating within their Charters. The Charters are written very broadly, and reporting against the Charters is not detailed or robust enough to settle doubts. Accountability is difficult, especially as there is no opportunity for Charter complaints to be addressed.
- Given their market shares, and other factors, this Inquiry considers the National Broadcasters are not causing significant competitive distortions beyond the public interest.
- While the National Broadcasters are not prohibited from competing, some improvements in the way they interact with markets should be contemplated.



## Terms of Reference

### Background

Government businesses compete with the private sector in a number of markets. The Commonwealth Competitive Neutrality Policy requires that government business activities should not enjoy net competitive advantages simply by virtue of their public sector ownership. At the same time, competitive neutrality principles do not imply that government businesses cannot be successful in competition with private businesses.

Both National Broadcasters provide important services for the benefit of the Australian community in line with a legislated Charter. Some aspects of this they undertake or deliver in competition with private sector operators. It is timely to consider how the national broadcasters operate in modern media context and whether the ways they compete with the private sector are appropriate. These policy issues have not been reviewed in depth since the 1997 report by Bob Mansfield considered the way in which the national broadcasters conduct business activities within the confines of competitive neutrality principles. It is also timely to conduct this Inquiry in concert with the wider review of Competitive Neutrality Policy being undertaken by the Treasury.

### Scope of the Inquiry

This Inquiry will explore the practices of the national broadcasters and advise the Government on whether they are operating in a manner consistent with the general principles of competitive neutrality.

The Inquiry will consider how Australian Broadcasting Corporation (ABC) and Special Broadcasting Service (SBS) operate within the markets of which they are part and the basis on which they are competing with the private sector. This should focus on:

- the application of competitive neutrality principles to the business activities of the ABC and SBS, including in operational decision making and risk management
- the cost structures of business activities
- the regulatory obligations for ABC and SBS compared to those for private sector operators, insofar as these relate to competitive neutrality principles
- the adequacy of current compliance and reporting arrangements, and
- complaints and accountability mechanisms operated by the broadcasters, insofar as they relate to competitive neutrality principles.

The panel will also make observations on the role of national broadcasters in the modern media environment.

### Process

The Inquiry will be undertaken by an expert panel consisting of three members and will be supported by staff from the Department of Communication and the Arts. The panel will undertake appropriate consultation with relevant stakeholders, including the national broadcasters, commercial media, advertisers and viewers, and will prepare a report to the Government covering all aspects of these terms of reference.

### Timing

The completion date has been extended from July 2018 to the end of September 2018. The Inquiry will include a public call for submissions.



## Executive summary

This Inquiry is about whether the National Broadcasters, the ABC and SBS, are competing fairly with the private sector. It was launched by the Minister for Communications in March 2018 following concerns raised with the Government by Members of Parliament and Australia's commercial media industry focussing on whether the National Broadcasters are operating appropriately in the modern media environment.

The National Broadcasters provide important services for the benefit of the Australian community in line with their legislated Charters. Some aspects of this they deliver in competition with private sector operators. In rapidly changing media markets the National Broadcasters have pursued new opportunities and so new competitive circumstances have emerged.

Figure 1: Australia's broadcasting media ecology

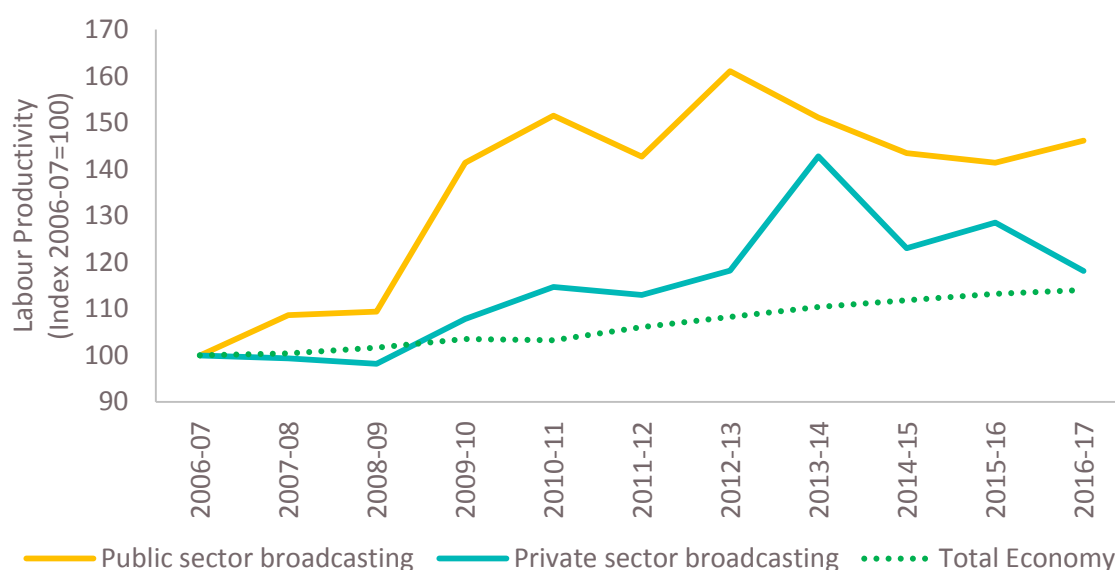
National Broadcasters		Commercial Media	Subscription and SVOD Services	Publishing Print and Digital	International FAANGS
ABC	SBS	Seven Network	Foxtel	Fairfax Media	Facebook
		Network Ten	Stan	News Corp Australia	Amazon
		Nine Network	Netflix		Apple
		WIN Television	Amazon Prime		Netflix
		Prime7			Google
		Southern Cross Austereo			
		Commercial Radio Stations			

**Note:** This figure is not intended to be an exhaustive representation. There were 274 commercial radio licences as at 31 January 2017.<sup>1</sup>

Most significant competitive pressures for news, entertainment and advertising are coming from giant international companies, the so-called FAANGs (Facebook, Apple, Amazon, Netflix and Google) placing advertising revenues of Australian media companies under pressure. (The FAANGs' participation in Australian markets is part of a separate inquiry by the ACCC into digital platforms). Nonetheless the National Broadcasters are appreciable forces in the Australian market, with their competitive weight enhanced by secure government funding at a time of higher commercial risks and low returns. Their capacity to compete has been supported by a relatively high rate of labour productivity growth.

<sup>1</sup> ACMA, List of Commercial Radio broadcasting licences, 31 January 2017. Available at: <https://www.acma.gov.au/-/media/Licence-Issue-and-Allocation/Information/pdf/Commercial-Radio-Broadcasting-Licences-LIC022.pdf?la=en>

Figure 2: Estimated labour productivity growth in the broadcasting sector, 2006–2007 to 2016–2017



Source: Attachment C: Bureau of Communications and the Arts Research (2018). Estimates of labour productivity trends in Australian public and private broadcasting.

## Competitive Neutrality

This Inquiry is asked to look at the National Broadcasters' operations through the lens of competitive neutrality.

Competitive Neutrality Policy stems from COAG agreements on competition policies and seeks to ensure that competition is not distorted by public entities taking inappropriate advantage of public ownership.

According to the 1995 Competition Policy Agreement:

*The objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. These principles only apply to the business activities of publicly owned entities, not to the non-business, non-profit activities of these entities.<sup>2</sup>*

The 1996 Commonwealth Competitive Neutrality Policy (CNP)—which details the application of competitive neutrality principles within the Commonwealth sector—notes that:

*Competitive neutrality does not imply that government businesses cannot be successful in competition with private businesses. Government businesses can achieve success as a result of their own merits and intrinsic strengths, but not as a consequence of unfair advantages flowing from government ownership.<sup>3</sup>*

Competitive neutrality is not intended to prevent public entities from competing, nor to relieve discomfort from competitive processes which bring benefits to consumers. Australian media consumers have rapidly adopted and enjoyed new services brought forward by competition.

<sup>2</sup> Productivity Commission (1995). Competition Policy Agreements, p. 17. Available at: <https://www.pc.gov.au/inquiries/completed/access/files/ncp-agreement.pdf>.

<sup>3</sup> Commonwealth of Australia, Commonwealth Competitive Neutrality Policy Statement (1996), p. 5.



The CNP is focussed on government trading corporations and its relevance to the National Broadcasters is more limited. Nevertheless, the National Broadcasters operate under a best endeavours approach to competitive neutrality. Here competitive neutrality is intended to cover the business activities of the ABC and SBS.

## Business activities of the National Broadcasters

In order to help assess compliance by the National Broadcasters with respect to their business activities (with user-charging), and to address some specific aspects of this Inquiry's Terms of Reference (especially cost structures), Ernst & Young (EY) was commissioned by this Inquiry to do a targeted investigation.

### EY report on cost allocation and pricing practices of the National Broadcasters

To inform the Inquiry, the Department of Communications and the Arts engaged Ernst & Young (EY) to review the cost allocation and pricing practices of the ABC and SBS' business activities. EY adopted a targeted approach to the review which considered the overarching strategies and policies and focused on particular business activities of interest (e.g. most material, related to growth areas) rather than undertake a comprehensive review. Given the project's limited timeline, EY relied on a detailed review of the National Broadcasters' submissions, consultation with executive staff from the National Broadcasters and additional information provided by the two broadcasters.

EY made the following key findings in its report. The full report is at Attachment B.

#### Findings in relation to the ABC

1. The ABC does not have a formal competitive neutrality policy and it is not clear how the ABC considers competitive neutrality in decision-making.
2. There does not appear to be any evidence that the ABC's approach to cost allocation and pricing has breached the principles of competitive neutrality
3. ABC Commercial does not appear to be operating at best practice in relation to cost allocation.
4. ABC Commercial has limited ability to influence the price of its content and services.
5. The ABC's assessment of how competitive neutrality applies to ABC Commercial is a useful exercise but can be improved.

#### Findings in relation to SBS

1. SBS does not have a formal competitive neutrality policy, but there is evidence that it applies competitive neutrality principles in its decision-making.
2. There does not appear to be any evidence that SBS' approach to cost allocation and pricing has breached the principles of competitive neutrality.
3. SBS has in place a well-established cost allocation methodology.
4. SBS has limited ability to influence the price of advertising or content.
5. The approach that SBS takes to fulfilling its Charter and its funding model have important implications for its operating model.

In relation to implications for SBS' operating model (the last point above), EY noted the issues raised are distinct to the ABC. In particular:

- SBS maintains that all activities are undertaken to fulfil its Charter. However within this constraint, SBS appears to engage in a number of more 'commercially focussed' activities (i.e. activities that deliver on the Charter but are also commercially attractive to SBS), and
- SBS' hybrid funding model creates a strong incentive for these activities to at least recover the avoidable costs of undertaking them. If it does not, it will merely will reduce the funding available for other activities over the funding cycle. This would support a view that it is not breaching competitive neutrality in competing in parts of the market.



The Panel drew on these investigations in assessing the detailed responses provided by the National Broadcasters to a range of specific and general questions about their competitive neutrality practices. Submissions from other stakeholders were also relevant.

The Panel referred to four tests:

1. Have there been complaints to the Australian Government Competitive Neutrality Complaints Office (AGCNCO)?
2. Are there specific examples of significant pricing or other market distortions?
3. Do the average market shares of the National Broadcasters signal material competitive impact, and have there been significant changes?
4. Do the National Broadcasters have internal processes for proper cost allocation and market entry?

With respect to their business activities, the Panel concluded that the National Broadcasters are abiding by a best endeavours approach to the CNP. These matters seem unlikely to be front of mind for the National Broadcasters, but the requirements mostly seem to correspond to good internal business organisation.

Thus costs are separately identified and allocated, and prices are mostly set to market rates. Tax and debt neutrality have little relevance.

Regulatory neutrality presents a more complex picture. There are strongly divergent views around the relative weight of the different regulatory arrangements faced by the National Broadcasters, compared to private sector businesses. But the Panel concluded that these have been set by Parliament and therefore represent decisions in the public interest.

The cost burdens of these different regulations are difficult to bring to useful financial account.

Moreover, there have been no competitive neutrality complaints about the National Broadcasters put this century to the Government's complaints agency, the AGCNCO, and market shares of the National Broadcasters do not show significant change (although this may change in a rapidly changing market with new services).

Some improvements in competitive neutrality transparency and internal processes are possible and warranted. The separate Treasury review of the CNP arising from the Harper Review of Competition Policy may clarify competitive neutrality reporting requirements.

The Panel considers that the National Broadcasters should continue to abide by the CNP on a best endeavours basis.





## A wider relevance of competitive neutrality principles?

Beyond the application of the CNP to business activities, the Inquiry's Terms of Reference invite the question as to how competitive neutrality principles might relate to the whole of the services (free services) provided by the ABC and SBS. The Harper Review called for a potential broadening of the competitive neutrality principles stating:

*Government business activities that compete with private provision, whether for-profit or not-for-profit, should comply with competitive neutrality principles to ensure they do not enjoy a net competitive advantage simply as a result of government ownership.<sup>4</sup>*

The Treasury Review of the CNP may throw further light on this but in the meanwhile the Panel has been asked to make an assessment with respect to the National Broadcasters.

The National Broadcasters questioned the relevance of a wider application of competitive neutrality principles. They have received no guidance as to a wider application. (Indeed, the Panel can find no evidence that they received the guidance about the best endeavours requirement foreshadowed by COAG in November 2000 for just their business activities). But in any case, in relation to the general principles of competitive neutrality, the ABC points to the requirement in its Charter to take account of the services provided by the commercial and community broadcasting sectors.<sup>5</sup> Similarly, SBS refers to the requirement in its Charter to contribute to 'the overall diversity of Australian television and radio services' and to take into account the contribution of the ABC and the community broadcasting sector.<sup>6</sup>

Free services offered by the ABC and SBS are having some competitive impact. Private sector media companies took full opportunity in submissions to this Inquiry to explain their experiences and concerns. Submissions included complaints about the ABC's online news services and SBS' multi-channels and streaming services.

- All key submissions expressed support for the role of the National Broadcasters.
- Free TV Australia, representing free-to-air broadcasters, focuses its submission on SBS. It raises concerns regarding SBS' content acquisitions policy and claiming that it is not in line with the SBS Charter.
- Subscription service Stan is concerned that SBS On Demand is a free version of paid subscription streaming services and increases competition for international content purchasing which Stan believes is outside the SBS Charter obligations.
- News publishers Fairfax Media and News Corp Australia raise concerns that the free online news services of both the ABC and SBS are competing for the same audiences and therefore undermining the revenue base of commercial news media.
- Commercial Radio Australia, representing radio broadcasters, raises concerns in relation to the radio operations of the National Broadcasters, focusing mainly on the operations of ABC Radio.
- Independent producers, represented by Screen Producers Australia, raise issues about the behaviour of National Broadcasters in relation to bargaining power and terms of trade<sup>7</sup> for content producers.
- Small media players, including Kinderling and Story Box Library, question the fairness of the ABC's behaviour.

<sup>4</sup> Australian Government (2015). Competition Policy Review Final Report, p.33. Available at: <http://competitionpolicyreview.gov.au/final-report/>

<sup>5</sup> ABC Submission (2018), p. 26

<sup>6</sup> SBS Submission (2018), p. 9

<sup>7</sup> Terms of trade refers to governing arrangements between broadcasters and producers. This includes contractual arrangements regarding fees, rights and licencing arrangements.



- Consumer and community groups, such as ABC Friends, Save our SBS and the Federation of Ethnic Communities' Councils of Australia, emphasise the importance of the National Broadcasters. Save Our SBS is concerned about SBS' advertising and the impact it has on SBS' content acquisitions policy, claiming that it drives it towards more commercially-oriented programming.
- Other groups including employment groups, think tanks and sector representative groups provide their perspectives on international influence and trends in Australia's media markets and share their views on the activities of the National Broadcasters.
- Of the 6816 submissions from individuals, 6621 were received via a campaign website operated by GetUp!. Submissions from members of the public overwhelmingly expressed support for the public service roles played by the National Broadcasters and opposed the privatisation of the ABC.

The Panel notes that the National Broadcasters are established and funded to provide free services. This includes digital services. So long as they operate in line with their Charters they are operating in the public interest as defined by their statutes.

The rapid adoption by the National Broadcasters of opportunities to provide new services has increased the circumstances where they are 'rubbing up' against commercial counterparts (see [Figure 3](#) on the following page).

A number of submissions questioned whether the ABC and (particularly) SBS were operating within their Charters. In the Panel's view the Charters are written very broadly. This could provide for efficient flexibility. But it also invites questions about boundaries. Reporting and accountability about Charter performance does not seem to the Panel to be sufficiently detailed or robust enough to settle doubts. Ultimately these are matters of Board responsibility.

Given all these considerations, the Panel has come to a cautious reading about the operations of the National Broadcasters in the light of the general principles of competitive neutrality. An element of judgement can be carried over from their compliance with the narrow CNP, in particular their business decision-making. The Panel has also referred to the four tests mentioned above.

Overall, and balancing competition with other factors, the Panel considers the National Broadcasters are not causing significant distortions to the competitive process beyond the public interest.



Figure 3: Introduction of key digital services into the Australian media market

	National Broadcasters Digital and OTT	Australian Commercial Digital and OTT	Australian Subscription TV and SVOD	International OTT Services
<b>1994</b>			Foxtel Austar	
<b>1999</b>			Foxtel Austar	Google
<b>2001</b>	ABC Kids ABC Fly TV		Foxtel Austar	
<b>2005</b>	ABC2		Foxtel Austar	Apple iTunes YouTube Google
<b>2007</b>	ABC2		Foxtel Austar	Apple iTunes Hulu YouTube Google
<b>2008</b>	ABC2 ABC iView		Foxtel Austar	Apple iTunes Hulu YouTube Google
<b>2009</b>	ABC3 ABC2 ABC Kids SBS TWO ABC iView	7TWO 9GO! One	Foxtel Austar	Apple iTunes Hulu YouTube Google
<b>2010</b>	ABC3 ABC2 ABC Kids ABC News 24 SBS TWO ABC iView	GEM ELEVEN 7Mate 7TWO 9GO! One Plus7	Fetch TV Foxtel Austar	Apple iTunes Netflix Hulu YouTube Google
<b>2011</b>	ABC3 ABC2 ABC Kids ABC News 24 SBS TWO SBS On Demand ABC iView	GEM ELEVEN 7Mate 7TWO 9GO! One Plus7	Fetch TV Foxtel Austar	Apple iTunes Amazon Prime Netflix Hulu YouTube Google
<b>2012</b>	ABC3 ABC2 ABC Kids ABC News 24 SBS TWO NITV SBS On Demand ABC iView	GEM ELEVEN 7Mate 7TWO 9GO! One Plus7	Fetch TV Foxtel Go Foxtel	Google Play Apple iTunes Amazon Prime Netflix Hulu YouTube Google
<b>2013</b>	ABC3 ABC2 ABC Kids ABC News 24 SBS 2 NITV SBS On Demand ABC iView	GEM ELEVEN 7Mate 7TWO 9GO! One Tenplay Jump In Plus7	Foxtel Play Foxtel Go Fetch TV Foxtel	Google Play Apple iTunes Amazon Prime Netflix Hulu YouTube Google



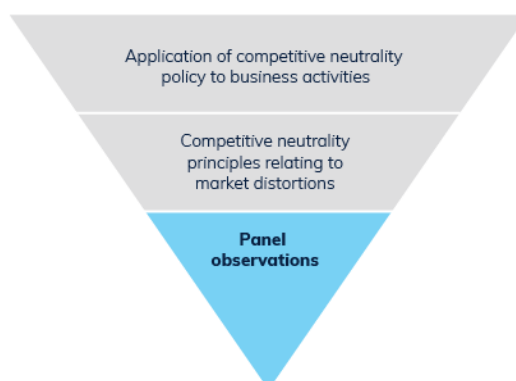
<b>2014</b>	ABC3 ABC2 ABC News 24 SBS 2 NITV SBS On Demand ABC iView	GEM ELEVEN 7Mate 7TWO 9GO! One <b>FreeviewPlus</b> Tenplay Jump In Plus7	<b>Presto</b> Foxtel Play Foxtel Go Fetch TV Foxtel	Google Play Apple iTunes Amazon Prime Netflix Hulu YouTube Google
<b>2015</b>	<b>SBS Food Network</b> ABC3 ABC2 ABC News 24 SBS 2 NITV SBS On Demand ABC iView	<b>Racing.com</b> <b>9Life</b> GEM ELEVEN 7Mate 7TWO 9GO! One <b>Nine StreamCo</b> FreeviewPlus Tenplay Jump In Plus7	<b>Stan</b> Presto Foxtel Play Foxtel Go Fetch TV Foxtel	Google Play Apple iTunes Amazon Prime Netflix Hulu YouTube Google
<b>2016</b>	SBS Food Network <b>ABC ME</b> ABC2 ABC News 24 <b>SBS Viceland</b> NITV SBS On Demand ABC iView	<b>7flix</b> Racing.com 9Life GEM ELEVEN 7Mate 7TWO 9GO! One Nine StreamCo FreeviewPlus Tenplay <b>9Now</b> Plus7	Stan Presto Foxtel Play Foxtel Go Fetch TV Foxtel	Google Play Apple iTunes Amazon Prime Netflix Hulu YouTube Google
<b>2017</b>	SBS Food Network ABC ME ABC2 <b>ABC NEWS</b> SBS Viceland NITV SBS On Demand ABC iView	7flix Racing.com 9Life GEM ELEVEN 7Mate 7TWO 9GO! One Nine StreamCo FreeviewPlus Tenplay 9Now Plus7	Stan Presto Foxtel Play Foxtel Now Fetch TV Foxtel	Google Play Apple iTunes Amazon Prime Netflix Hulu YouTube Google

Source: based on Figure 2: Evolution of Australia's content market, p. 18 of Free TV's submission to the Australian and Children's Screen Content Review, 29 September 2017.



## Other observations

The Panel has also been asked to make observations on the role of the National Broadcasters in the modern media environment. The Panel has interpreted this request to relate to matters flowing on from its competitive neutrality investigations.



The Panel has chosen to make observations on capacity to compete, transparency, Charters, and market entry and participation. Some further insights have been drawn from the new regulatory arrangements in the UK, where some principles concerning competition seem to be relevant.

## Findings and recommendations

This Inquiry has explored the practices of the National Broadcasters and considered whether they are operating in a manner consistent with the general principles of competitive neutrality. In undertaking this work, the Inquiry has considered detailed submissions from the National Broadcasters, the private sector and other stakeholders; the changing media landscape; international approaches; and a consultant's findings on the cost allocation practices of the National Broadcasters. Guided by a set of analytical principles and several tests, it has a focus on the public interest. Informed by this, the Inquiry has made the following findings and recommendations.

### Findings

#### Competitive neutrality principles ([Chapter 2](#))

1. A best endeavours approach by the National Broadcasters to the application of the Competitive Neutrality Policy to their business activities continues to be appropriate.
2. More generally, the general principles of competitive neutrality are relevant to the other forms of market participation by the National Broadcasters.

#### The media landscape ([Chapter 3](#))

3. The media landscape is likely to continue to change rapidly, creating new forms and points of competition, which may continue to impact adversely on some commercial organisations. It is worth noting the proposed merger of Fairfax and Nine Entertainment is a response to these pressures and may be indicative of further market consolidation.
4. Rapid market changes are resulting in an increase in the instances in which the National Broadcasters are 'rubbing up' against a range of domestic private sector competitors.
5. Major sources of competition in media markets are likely to continue to be international companies with resulting impact on all domestic media organisations.

#### The role of the National Broadcasters ([Chapter 4](#))

6. The National Broadcasters have adapted to the challenge of change by extending the range and type of their services, taking full advantage of market developments and technological innovation, to the benefit of the public.
7. In order to comply with their Charters, the National Broadcasters seek to maximise their reach by being significant providers of content across all platforms. Their capacity to do so is limited by their budgets.

#### Discussion of issues ([Chapter 7](#))

##### *Application of the Competitive Neutrality Policy to business activities*

##### *Cost allocation and pricing*

8. The Panel notes that the National Broadcasters generally price to market and there is no evidence that they are not appropriately allocating costs.

##### *Regulatory neutrality*

9. The Panel notes the differences in the regulatory arrangements for the National Broadcasters and the private sector. However, the Panel is unable to bring regulatory comparison to useful financial account.



10. The Panel notes that the Australian and Children's Screen Content Review, currently with Government, is considering the content elements of the regulatory regime as it applies to commercial broadcasters and any decisions will follow from that review.

#### *Taxation neutrality*

11. The Panel notes that to the extent that taxation issues are relevant to Competitive Neutrality Policy relating to the National Broadcasters, the evidence is that the National Broadcasters in effect comply with competitive neutrality requirements.

#### *Debt neutrality*

12. The Panel notes that to the extent that issues relating to debt are relevant to competitive neutrality, there is no evidence that the National Broadcasters do not comply with competitive neutrality requirements.

#### *Operational decision-making and risk management*

13. The Panel notes that the evidence is that operational decision-making and risk management are appropriate, deriving from conventional business practices, and therefore conforming to competitive neutrality requirements.

#### *Competitive neutrality complaints and accountability mechanisms*

14. The Panel notes that there is an independent complaints process in place for competitive neutrality that has not been used this century with regard to the National Broadcasters.

#### *Conclusions regarding the application of the Competitive Neutrality Policy to business activities*

15. The National Broadcasters are meeting the best endeavours approach to the Competitive Neutrality Policy (which applies to their business activities), insofar as best endeavours has been defined.
16. With respect to the cost allocation methods used by the National Broadcasters for their business activities, there is no evidence that they do not conform with the Competitive Neutrality Policy. Pricing to market is evidence of no significant competitive distortion. This has been confirmed by independent consultants.
17. The average market share of commercial activities of the National Broadcasters are not large, have not increased markedly over time, and do not give rise to concerns. Nonetheless, competitive impacts may still occur in particular sub-markets.

#### *Competitive neutrality principles relating to other market distortions*

##### *Online news*

18. The Panel finds that in relation to the provision of online news services, the ABC and SBS are behaving in accordance with their Charters.<sup>8</sup> These services also comply with the general principles of competitive neutrality.

##### *Terms of trade with content providers*

19. The Panel notes that the issues raised in relation to 'terms of trade' are essentially contract issues and do not relate to competitive neutrality. However, there may be scope for the National Broadcasters to improve the way they interact with market participants to ensure transparency and good business practice (see [Chapter 8](#)).

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<sup>8</sup> The Panel notes that, in addition to base funding, the Government is providing the ABC \$41.4 million over three years from 2016–2017 for enhanced newsgathering to sustain local news and current affairs, particularly those services located outside capital cities.

*Advertising and marketing of own services*

20. The Panel notes the National Broadcasters are able to promote their services online. This is consistent with the way they have always promoted their radio and television services to ensure the widest possible audience reach. The Panel considers normal competitive interactions are occurring, and there are no concerns for competitive neutrality principles.
21. The Panel notes there is nothing in the National Broadcasters' Charters, nor in the general principles of competitive neutrality, that prevents them from promoting their own services. The Panel notes that in the context of the Competitive Neutrality Policy, competitive advantages arising from size are not considered a concern.

*'Commercialisation' of SBS*

22. The Panel notes that what has been exhibited by private sector organisations is competitive discomfort. As long as the National Broadcasters' decisions are endorsed by their Boards and are subject to parliamentary review then, by definition, the activity is in the public interest. (Also see the discussion in [Chapter 8](#) relating to the responsibilities of the ABC and SBS Boards.)

*Conclusions regarding competitive neutrality principles relating to other market distortions*

23. The issues raised reflect increased competition generally in the digital space whether streaming services or online news services.
24. They also reflect a context of increased viewer demands and expectation along with the rapid take-up of new technologies.
25. As stated above, as long as the National Broadcasters are within their Charters then, by definition, the activity is in the public interest.
26. However, the Charters of both National Broadcasters are broad and open to interpretation by the Boards.
27. In relation to the matters under review by this Inquiry, both National Broadcasters would benefit from more public transparency around how they approach the issues of fair competition.
28. Accountability is difficult, especially as there is no opportunity for Charter complaints to be addressed.

*Observations on the role of the National Broadcasters in the modern media environment ([Chapter 8](#))**Capacity to compete*

29. The Panel considers that the National Broadcasters should be able to adapt to new market opportunities in the public interest. However, choice will be limited by a finite budget.
30. The Panel notes that the amount of money being generated by SBS through advertising revenue represents a small percentage of total television advertising, and therefore, is not considered material.
31. Furthermore, following the Efficiency Review of 2014 the SBS budget was cut and the Government stated that SBS should make up part of the shortfall through advertising.<sup>9</sup>

<sup>9</sup> The Panel notes that in the 2018–19 Budget, the Government provided \$14.6 million over two years from 2018–19 to SBS to replace revenue from advertising and product placement that SBS could not raise because legislation to provide the broadcaster with further 'advertising flexibility' has not been passed by the Parliament.





## Recommendations

### Competitive neutrality principles ([Chapter 2](#))

1. If decisions on the Review of the Commonwealth's Competitive Neutrality Policy by the Treasury enhance competitive neutrality management guidelines or extend competitive neutrality principles more generally, then the National Broadcasters should conform to these requirements on a best endeavours basis.
2. At the same time, the National Broadcasters should be provided with guidance (as previously foreshadowed by COAG) as to how they should comply.

### Issues raised by stakeholders ([Chapter 6](#))

#### *Radio broadcasters*

3. The Panel notes that issues to do with technical regulation, especially licence areas, have not been fundamentally reviewed since their inception in the 1930s. The Panel has referred these issues to the Department for further policy consideration.

### Discussion of issues ([Chapter 7](#))

#### *Application of the Competitive Neutrality Policy to business activities*

##### *Regulatory neutrality*

4. The Panel notes that neither the Content Review, nor this Inquiry, address the content issues raised by commercial radio, and draws this to the attention of the Department for future policy consideration.
5. The Panel considers that a fresh approach to regulatory impact statements should be applied to decisions in prospect, to ensure regulations remain relevant, are consistent with competitive neutrality and are not causing market distortions beyond the public interest.
6. In relation to those matters that do not fall within the scope of this Inquiry, or other reviews currently underway, those matters should be referred to the Department for further policy consideration.

#### *General recommendations regarding the application of the Competitive Neutrality Policy to business activities*

7. As identified by the Ernst & Young Report, there are a number of areas where the ABC could improve its approach to cost allocation and pricing to enhance transparency and give greater confidence that its costing and pricing practices are aligned with competitive neutrality principles.
8. The National Broadcasters' processes for commercial business activities appear adequate. However, changes should be made to ensure that there are processes in place for improved transparency, accountability and reporting.

#### *Competitive neutrality principles relating to other market distortions*

##### *Dealings with smaller providers*

9. The Panel notes that ABC Commercial, in collaborating with smaller companies, must observe best practice business negotiations to avoid appearance of unfair competition (see also [Chapter 8](#)).

### Observations on the role of the National Broadcasters in the modern media environment ([Chapter 8](#))

#### *Transparency*

10. The Panel supports the ABC's commitment to improve transparency and accountability through its corporate plan and invites SBS to do likewise.



11. The Panel notes that the National Broadcasters' annual reports are of necessity 'backward looking' documents. The Panel considers that the National Broadcasters should provide a statement of intentions covering how they intend to spend their funds in the future which would provide Parliament and the public with greater transparency and accountability of the expenditure of funds.

#### *Charters*

12. The Panel considers that the National Broadcasters should improve their reporting of Charter performance in the context of the general principles of competitive neutrality. If this enhanced reporting does not occur, the government should consider a way of managing complaints about Charter performance in this area.

#### *Market entry and participation*

13. The Panel is of the view that appropriate guidance from the Board would give some substance to the ABC's Charter obligation to take account of commercial broadcasters.
14. While SBS has no equivalent Charter obligation, there seems no reason why the SBS Board should not pursue similar benefits for the market.

#### *Longer term funding framework*

15. The Panel recommends that government considers options, drawing on the UK example, to give a longer term framework for the funding of the National Broadcasters, accompanied by increased transparency and accountability to the benefit of consumers and competition more broadly.

# Chapter 1: The Inquiry

## Introduction

In 2017, the Australian Government committed to conduct an inquiry into the competitive neutrality of the national broadcasters—the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS).<sup>10</sup> This decision followed concerns raised with the Government from parts of Australia's private media sector and Members of Parliament as to whether the national broadcasters are operating appropriately in the modern media environment. These concerns have focussed on whether or not the National Broadcasters are competing fairly. Competition issues have been raised by the private media sector through other forums, such as Senate inquiries.

On 29 March 2018, the Minister for Communications, Senator the Hon Mitch Fifield, released [Terms of Reference for the Inquiry](#) and announced the appointment of an expert panel to conduct the Inquiry. The Panel comprised Mr Robert Kerr, Ms Sandra Levy AO and Ms Julie Flynn. The Panel was chaired by Mr Kerr and supported by a taskforce within the Department of Communications and the Arts.

The Inquiry was required to examine whether the ABC and SBS are operating in a manner consistent with the Commonwealth Competitive Neutrality Policy (CNP) and general principles of competitive neutrality. Competitive neutrality principles provide that government business activities should not enjoy net competitive advantages simply by virtue of their public sector ownership.

## Process

### Consultation

As required by the Terms of Reference, the Panel has consulted relevant stakeholders.

Following its appointment, the Panel conducted a series of initial meetings with key stakeholders to gather general views on the topics covered by the Terms of Reference (a list of meetings is at [Appendix 1](#)).

After conducting these initial meetings the Panel released an Issues Paper on 26 April 2018 setting out the process the Inquiry would follow and guiding questions for the analysis, and seeking submissions from interested stakeholders. Submissions closed on 22 June 2018. A number of extensions were sought and granted. A total of 6,839 submissions were received, including from the national broadcasters, private sector media operators, other organisations and individuals (a list of those who made submissions is at [Appendix 2](#)). All submissions have been published on the Department's website,<sup>11</sup> unless the author requested otherwise or the submission contained information that could not be published (such as information of a commercial-in-confidence nature). Not all submissions related to the Inquiry's Terms of Reference (see the discussion in [Chapter 6](#) and [Chapter 7](#)).

The Panel also, on request, held a number of follow-up meetings with key stakeholders following the close of submissions to allow the opportunity for further clarification of issues.

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<sup>10</sup> One Nation support for media reform package (2017). Available at:

<http://mitchfifield.com/Media/MediaReleases/tabid/70/articleType/ArticleView/articleId/1422/One-Nation-support-for-media-reform-package.aspx>.

<sup>11</sup> Department of Communications and the Arts. (2018). Inquiry into the competitive neutrality of the national broadcasters. Available at: <https://www.communications.gov.au/have-your-say/inquiry-competitive-neutrality-national-broadcasters>.

## Research and analysis

In addition to stakeholder submissions and meetings, the Inquiry sought additional information including the following:

- Two external reports commissioned by the Department:
  - Australian Broadcast Media Landscape 2018–2022 prepared by PricewaterhouseCoopers Australia (PwC) (Attachment A)
  - Economic advice on cost allocation and pricing practices of the national broadcasters prepared by Ernst & Young (EY) (Attachment B).
- A paper prepared by the Department's Bureau of Communications and Arts Research on Estimates of labour productivity trends in Australian public and private broadcasting (Attachment C).
- Other research and analysis undertaken by Panel members and the Inquiry taskforce.

## Other reviews

This Inquiry took place in the context of a number of other reviews including:

- the Australian and Children's Screen Content Review;<sup>12</sup>
- the Australian Competition and Consumer Commission's Digital Platforms Inquiry;<sup>13</sup>
- the Treasury's Review of the CNP;<sup>14</sup> and
- the Efficiency Review of the ABC and SBS.<sup>15</sup>

While these other reviews have informed the Panel's work, the Panel has been cognisant of the terms of reference for these other reviews and has sought not to overlap or re-examine issues being considered by these reviews. The Review of the CNP by the Treasury, once considered by government, may lead to some further adjustments to the way competitive neutrality policy is implemented and managed. The Panel would expect those changes to extend, where appropriate, to the best endeavours approach taken by the National Broadcasters.

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<sup>12</sup> This review was conducted jointly by the Department of Communications and the Arts, the Australian Communications and Media Authority and Screen Australia in the second half of 2017. In addition, the House of Representatives Standing Committee released its report on its inquiry into Australian film and television industry on 7 December 2017. The Panel understands that the Government will consider the findings of both reviews, and respond in due course.

Department of Communications and the Arts. (2017). Australian and Children's Screen Content Review. Available at: <https://www.communications.gov.au/australian-childrens-screen-content-review>.

<sup>13</sup> Preliminary report due to the Treasurer by 3 December 2018, with a final report due by 3 June 2019. Australian Competition and Consumer Commission. (2018). Digital platforms inquiry. Available at: <https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry>.

<sup>14</sup> The review was underway at the time of writing.

The Treasury. (2017). Competitive Neutrality Review. Available at: <https://consult.treasury.gov.au/market-and-competition-policy-division/competitive-neutrality-review/>.

<sup>15</sup> Due to report end of October 2018.

Department of Communications and the Arts. (2018). National Broadcasters Efficiency Review. Available at: <https://www.communications.gov.au/what-we-do/television/national-broadcasters-efficiency-review>.



## Structure of this report

This report is divided into the following parts:

- **Key points**—includes the key points of the Inquiry.
- **Terms of Reference**—sets out the Inquiry's Terms of Reference.
- **Executive summary**—provides a summary of the report and lists the Inquiry's findings and recommendations.
- **Chapter 1: The Inquiry (this chapter)**—outlines the background to this Inquiry, the process undertaken by the Panel (including consultation, and research and analysis), related inquiries and the structure of this report.
- **Chapter 2: Competitive neutrality principles**—discusses both the particular application of the CNP to the business activities of the National Broadcasters, and the broader application of competitive neutrality principles to other services.
- **Chapter 3: The media landscape**—provides an overview of the media sector, including the way the Australian media market has been affected by significant changes in consumer behaviour brought about by technological change.
- **Chapter 4: The role of the National Broadcasters**—summarises the legislative foundations of the role of Australia's National Broadcasters and their evolution in a changing environment and adoption of modern technologies to provide their services.
- **Chapter 5: National broadcasters' responses to Issues Paper questions**—summarises the National Broadcasters' responses to the questions directed to them in the Issues Paper.
- **Chapter 6: Issues raised by stakeholders**—summarises the range of issues raised by stakeholders in their submission.
- **Chapter 7: Discussion of issues**—discusses the relevance of issues raised by stakeholders to the Terms of Reference of this Inquiry and provides Panel's assessments and findings
- **Chapter 8: Panel observations on the role of the National Broadcasters in the modern media environment**—outlines other observations by the Panel on the role of the National Broadcasters in the modern media environment, informed by the review.
- **Appendices**—the following appendices are included:
  - [Appendix 1](#) List of meetings
  - [Appendix 2](#) List of submissions
  - [Appendix 3](#) Background paper on the definition of a 'business'
  - [Appendix 4](#) Background paper on 'model market participant'
- **Attachments**—the following reports are attached:
  - A. PwC's *Australian Broadcast Media Landscape 2018–2022*
  - B. Ernst & Young's *Economic advice on cost allocation and pricing practices of the national broadcasters*
  - C. The Bureau of Communications and Arts Research's *Estimates of labour productivity trends in Australian public and private broadcasting*.



## Chapter 2: Competitive neutrality principles

### Overview

The principles of competitive neutrality provide that government business activities should not enjoy net competitive advantages simply by virtue of their public sector ownership. How the principles of competitive neutrality are currently applied to government businesses is articulated in the Commonwealth Competitive Neutrality Policy (CNP).

This Inquiry has focused on the application of competitive neutrality principles to business activities of the National Broadcasters (in line with the CNP). It has also considered the general principles of competitive neutrality as they relate to other possible market distortions, as well as a number of broader issues. The Inquiry has drawn on the CNP as the Policy is the primary articulation of competitive neutrality principles in Australia as they apply to defined business activities. The Policy also applies to the National Broadcasters on a best endeavours basis. However, given the broader considerations of this Inquiry, and in recognition of the specific role of the Australian Government Competitive Neutrality Complaints Office (AGCNCO), the Panel has not attempted to replicate the complaints process followed by the AGCNCO.

This chapter outlines the history of the CNP, and the approach of this Inquiry in relation to the general principles of competitive neutrality.

The National Broadcasters have continuously adapted to the opportunities of the modern media environment, especially digital and online services, in response to a changing competitive environment. Submissions to this Inquiry test the boundaries of competitive neutrality principles.

### Competitive Neutrality Policy

The principles of competitive neutrality were introduced in Australia two decades ago as part of wide ranging competition policy reforms articulated in the 1995 Competition Policy Agreement:

*The objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. These principles only apply to the business activities of publicly owned entities, not to the non-business, non-profit activities of these entities.*<sup>16</sup>

The 1996 CNP details the application of competitive neutrality principles within the Commonwealth sector. The Policy notes that:

*Competitive neutrality does not imply that government businesses cannot be successful in competition with private businesses. Government businesses can achieve success as a result of their own merits and intrinsic strengths, but not as a consequence of unfair advantages flowing from government ownership.*<sup>17</sup>

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<sup>16</sup> Productivity Commission (1995). Competition Policy Agreements, p. 17. Available at: <https://www.pc.gov.au/inquiries/completed/access/files/ncp-agreement.pdf/>.

<sup>17</sup> Commonwealth of Australia, Commonwealth Competitive Neutrality Policy Statement, (1999), p. 5.



The Policy specifies that ‘Competitive neutrality requirements will be applied to significant government business activities, but will not be applied to non-profit, non-business activities.’<sup>18</sup> To be considered a ‘business activity’, the Policy specifies that following criteria must be met:

- there must be user-charging for goods or services (the user may be in the private sector or public sector);
- there must be an actual or potential competitor (either in the private or public sector)—i.e. users are not restricted by law or policy from choosing alternative sources of supply; and
- managers of the activity have a degree of independence in relation to the production or supply of the good or service and the price at which it is provided.<sup>19</sup>

The Policy deems certain organisations to be ‘significant’ business activities.<sup>20</sup> ‘Other activities which operate in accordance with the definition of a business and have commercial receipts exceeding \$10 million per year will be assessed for significance on a case-by-case basis.’<sup>21</sup>

It should be noted that, according to the Policy:

*While the relevant criteria might capture many forms of government activity, the policy intention is to apply competitive neutrality arrangements to significant government businesses, and even then, only to the extent that the benefits of the arrangements outweigh administrative cost.*<sup>22</sup>

The Policy outlines six elements of competitive neutrality (see the box below titled [Elements of the Competitive Neutrality Policy \(CNP\)](#)), and a process for implementing them. It also specifies the oversight, compliance, reporting and complaints arrangements for competitive neutrality, with complaints handled by the Australian Government Competitive Neutrality Complaints Office (AGCNCO), within the Productivity Commission. The 2004 Commonwealth Competitive Neutrality Guidelines for Managers provide guidance in implementing the Policy.<sup>23</sup>

#### Elements of the Competitive Neutrality Policy (CNP)

The CNP<sup>24</sup> outlines the elements of competitive neutrality as:

- **Organisational structure/corporatisation:** this involves the adoption of appropriate organisational structures for business activities.
- **Taxation neutrality:** this will be achieved by removing taxation exemptions from identified organisations where this can be achieved in a cost effective and administratively simple manner. Alternatively, taxation neutrality may be achieved by retaining taxation exemptions and establishing taxation equivalent regimes, providing it is cost effective to do so.

<sup>18</sup> Commonwealth of Australia, Commonwealth Competitive Neutrality Policy Statement, (1999), p. 7.

<sup>19</sup> Commonwealth of Australia, Commonwealth Competitive Neutrality Policy Statement, (1999), p. 7.

<sup>20</sup> All Government Business Enterprises and their subsidiaries; other share-limited trading companies; and all designated business units.

Commonwealth of Australia, Commonwealth Competitive Neutrality Policy Statement, (1999), p. 8.

<sup>21</sup> Commonwealth of Australia, Commonwealth Competitive Neutrality Policy Statement, (1999), p. 8.

<sup>22</sup> Commonwealth of Australia, Commonwealth Competitive Neutrality Policy Statement, (1999), p. 8.

<sup>23</sup> Commonwealth of Australia, Australian Government Competitive Neutrality—Guidelines for Managers, Canberra, 2004, p. 16 Available at: [https://consult.treasury.gov.au/market-and-competition-policy-division/competitive-neutrality-review/supporting\\_documents/2004%20Competitive%20Neutrality%20Guidelines%20for%20Managers%20AGCN\\_guide\\_v4.pdf](https://consult.treasury.gov.au/market-and-competition-policy-division/competitive-neutrality-review/supporting_documents/2004%20Competitive%20Neutrality%20Guidelines%20for%20Managers%20AGCN_guide_v4.pdf).

<sup>24</sup> Commonwealth of Australia, Commonwealth Competitive Neutrality Policy Statement, (1999), Available at: <http://archive.treasury.gov.au/contentitem.asp?ContentID=275>.





- **Debt neutrality:** this will be achieved by subjecting identified organisations to similar borrowing costs to those faced by private sector businesses.
- **Rate of return:** the organisation is required to earn commercial returns at least sufficient to justify the long-term retention of assets in the business, and to pay commercial dividends (i.e., equivalent to the average for their industry) to the Budget from those returns.
- **Regulatory neutrality:** this will be achieved by subjecting, where appropriate, all identified organisations to the same regulatory environment as private sector businesses. Regulatory amendment will only be made where it is appropriate and cost effective to do so.
- **Full cost pricing:** where organisations undertake significant business activities as part of a broader range of functions, then agencies, where appropriate, should pay all applicable taxes or tax equivalents and debt guarantee charges. In addition, agencies should ensure that prices charged reflect full cost attribution for these business activities.

The Policy states that where the Productivity Commission (through the AGCNCO) is investigating a complaint that a government business activity should be subject to competitive neutrality arrangements it will assess whether:

- the business activity has a significant competitive advantage resulting from government ownership;
- the business activity has a substantial degree of market power in a market;
- the pricing behaviour of a government business has had the effect of eliminating or substantially damaging a competitor, preventing entry, or preventing or deterring competitive conduct in that or any other market; and
- it would be cost effective to apply competitive neutrality principles to the activity.<sup>25</sup>

### Applicability of the CNP to the National Broadcasters

The CNP identifies the ABC and SBS' consumer goods businesses, as well as the ABC's studio rentals, as government business activities subject to competitive neutrality.<sup>26</sup>

A November 2000 decision of the Council of Australian Governments (COAG) clarified the National Broadcasters are to adopt a best endeavours<sup>27</sup> approach to competitive neutrality. This was in recognition that some government businesses—including those of the National Broadcasters—are not subject to the executive control of a government. COAG stated that this would require governments, at a minimum, to provide a transparent statement of competitive neutrality obligations to the business.<sup>28</sup>

<sup>25</sup> Commonwealth of Australia, Commonwealth Competitive Neutrality Policy Statement, (1999), p. 21, Available at: <http://archive.treasury.gov.au/contentitem.asp?ContentID=275>.

<sup>26</sup> Commonwealth of Australia, Commonwealth Competitive Neutrality Policy Statement, (1999), Appendix, Available at: <http://archive.treasury.gov.au/contentitem.asp?ContentID=275>.

<sup>27</sup> No guidance has been issued on what a 'best endeavours' approach would entail. Alex Hartmann notes that 'An obligation to use 'best endeavours', requires a party to act honestly, reasonably and make a positive effort to perform the relevant obligations. These actions must also be balanced against countervailing considerations such as existing duties and obligations, commercial and financial interests of the party obliged to use the best endeavours and timing.'

Australian Construction Law Newsletter #117 (2007). 'Best Endeavours' and 'Reasonable Endeavours' Explained—When You Agree to Use Your 'Best' or 'Reasonable Endeavours' What Does it Actually Mean?', p.46, <http://www.austlii.edu.au/au/journals/AUConstrLawNlr/2007/69.pdf>. Quoted by Ernst & Young at p. 11 of its report.

<sup>28</sup> National Competition Council (2002), Assessment of governments' progress in implementing the National Competition Policy and related reforms, Volume one: Assessment, August 2002, p. 2.17. Available at: <http://ncp.ncc.gov.au/docs/2002%20assessment.pdf>.





As indicated later in the report, the National Broadcasters believe that they are complying with the CNP on a best endeavours basis.

The Australian Government Competitive Neutrality Complaints Office (AGCNCO) has received one complaint relating to the National Broadcasters. Received in 1999, the complaint related to the ABC's production facilities, with the AGCNCO finding that the ABC was acting consistently with competitive neutrality principles (see the box titled [Complaint about the ABC to the Competitive Neutrality Complaints Office](#) in [Chapter 7](#)).<sup>29</sup>

The Competition Policy (Harper) Review called for a potential broadening of the application of the competitive neutrality principles stating:

*Government business activities that compete with private provision, whether for-profit or not-for-profit, should comply with competitive neutrality principles to ensure they do not enjoy a net competitive advantage simply as a result of government ownership.*<sup>30</sup>

In response to the Harper Review, the Treasury is currently reviewing the CNP.<sup>31</sup> While the review has yet to be finalised, the Treasury's consultation paper indicated that it will update the Policy to, among other things, reflect the COAG decision relating to the ABC and SBS.<sup>32</sup>

## This Inquiry and the general principles of competitive neutrality

The Terms of Reference specify that this Inquiry is to examine whether the National Broadcasters are operating in a manner consistent with the overarching general principles of competitive neutrality. To date, the general principles have only been given policy effect through the CNP which relates to a defined set of business activities as described above.

The Terms of Reference go on to state that the Inquiry will consider how the ABC and SBS operate within the markets of which they are part and the basis on which they are competing with the private sector. Drawing on the CNP, the Terms of Reference specify that this should focus on:

- the application of competitive neutrality principles to the business activities of the ABC and SBS, including in operational decision-making and risk management;
- the cost structures of business activities;
- the regulatory obligations for the ABC and SBS compared to those for private sector operators, insofar as these relate to competitive neutrality principles;
- the adequacy of current compliance and reporting arrangements; and
- complaints and accountability mechanisms operated by the broadcasters, insofar as they relate to competitive neutrality principles.

The Terms of Reference also call on the Panel to 'make observations on the role of national broadcasters in the modern media environment'.

As indicated in the Issues Paper, in addition to investigating the specific matters in the Terms of Reference, the Panel has considered the application of competitive neutrality principles in a broader sense. It has considered the report of the Harper Review and other contextual factors when examining

<sup>29</sup> Productivity Commission. (2000). ABC Production Facilities. Available at: <https://www.pc.gov.au/inquiries/completed/abc-production>.

<sup>30</sup> Australian Government (2015). Competition Policy Review Final Report, p. 33, Available at: <http://competitionpolicyreview.gov.au/final-report/>.

<sup>31</sup> The Treasury. (2017). Competitive Neutrality Review. Available at: <https://consult.treasury.gov.au/market-and-competition-policy-division/competitive-neutrality-review/>.

<sup>32</sup> The Treasury (2017). Consultation Paper—Competitive Neutrality Review, p. 11.

the overall impact of competition on the market. The Panel has also used the following analytic principles listed in the Issues Paper to guide this analysis:

- Public interest is the primary focus.
- Competition serves the public interest by promoting efficiency and choice, but it does not encompass the whole public interest.
- Competitive neutrality is a necessary part of competition policy because of the substantial participation by government entities in markets.
- Successive governments have deemed that funding of the National Broadcasters is in the public interest.
- Transparency by government entities is needed for accountability and confidence that obligations and policies are being properly implemented.
- As far as possible, policies and regulations should be implemented in ways that do not inhibit adaptation to changing markets and technologies.

The Inquiry's Issues Paper asked stakeholders if they had any comments on the analytic principles of the Inquiry. There was general support for the analytic principles from the National Broadcasters. The ABC stated that it 'considers that the Panel's guiding principles on competition outlined in the Issues Paper are well expressed and will usefully inform the Panel's analysis'.<sup>33</sup> The ABC also expressed agreement with the focus on broad public interest and the importance of transparency.<sup>34</sup> SBS' submission similarly commented that 'these principles appear reasonable and provide an appropriate basis for guiding the review'.<sup>35</sup> The submission also suggested that public interest must be more clearly defined, and that a holistic approach be taken to assessing SBS' operations and compliance with competitive neutrality.<sup>36</sup>

## Meaning of 'business'

As noted above, the CNP applies to a defined set of business activities, including where there is user-charging for goods and services and where commercial receipts exceed \$10 million per year. In this context, the ABC and SBS' consumer goods businesses, as well as the ABC's studio rentals, are covered by the Policy. The Panel has assessed these business activities against the Policy.

However, as canvassed by the Harper Review and highlighted by submissions to this Inquiry, the impact of the ABC and SBS on the private sector extends well beyond these user-charging goods and services. Such business impacts affect competitive circumstances. The Panel has sought to weigh up the relevance of competitive neutrality principles to these wider circumstances. To inform this, the Panel has looked to how case law deals with the definition of a 'business' (this is discussed further in [Appendix 2](#)).

## Competition concerns in other markets

Australia is not alone in dealing with issues of competition between national broadcasters and private sector operators. For example, similar concerns have been raised in the United Kingdom in relation to its public service broadcasters, the BBC and Channel 4.

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<sup>33</sup> ABC Submission (2018), p. 27.

<sup>34</sup> ABC Submission (2018), p. 27.

<sup>35</sup> SBS Submission (2018), p. 74.

<sup>36</sup> SBS Submission (2018), pp. 74–75.

The UK's communications regulator, Ofcom, has responsibilities for regulating the BBC, including in relation to the BBC's impact on competition. Ofcom has noted that:

*The effects of the BBC on competition may be positive: it may serve to stimulate demand and grow markets, as well as encouraging innovation within the sector to the benefit of audiences across the UK. However, as a large publicly-funded organisation, the BBC may also harm the ability of others to compete effectively, potentially by crowding out competition or deterring others from investing or innovating.<sup>37</sup>*

While the approach in the UK may provide insights for Australia, it should be noted that the BBC is a relatively much larger operator in its market.

## Panel discussion

The Panel notes that competitive neutrality is one of a range of policies to promote efficient competition. Competition encourages efficient resource use, investment and innovation, thus seeking to maximise societal welfare, serving the public interest through keen prices, choice and responsiveness. Competitive neutrality was introduced two decades ago as part of wide-ranging competition policy reforms. Other policies include anti-trust measures and regulatory reform. In practice few significant competitive neutrality issues have arisen and it has been seen as a minor—but necessary—adjunct to competition policy.

To date, competitive neutrality has been focussed on neutralising advantages of government ownership in user-charging markets with price competition, and efficient pricing based on true (undistorted) costs.

Government has established threshold tests for government businesses to meet before the CNP applies (see [Competitive Neutrality Policy](#) above) and has set out the advantages enjoyed by government businesses that may need to be neutralised, including tax, debt and regulatory neutrality, some of which are in this Inquiry's Terms of Reference.

The ABC and SBS are included under the CNP, but only on a best endeavours basis. Other than the generally available Commonwealth Competitive Neutrality Policy Guidelines for Managers, the ABC and SBS have received no guidance (as far as the Panel is aware) as to how to fulfil this best endeavours obligation.

But distortions to efficient competition may not be limited to direct price and cost distortions in a user-charging context. The Inquiry's Terms of Reference invoke the 'general principles of competitive neutrality'. While these may be inferred from existing policy settings, these general principles are not laid out other than in the CNP. Hence different and wide interpretations appear in various submissions. The Panel has kept the objective of efficient competition and its analytic principles in view as it has worked through these questions.

The presence of a substantial public entity participating in a market—where the entity's behaviour is not governed by commercial considerations of risk and financial returns—may possibly have an impact on competition. This may be the case whether or not prices are charged. SBS notes, for example, that it competes in three areas: audiences, advertising spend and content.<sup>38</sup> Since competition is generally good for the public interest, benefits can flow. Competitive discomfort experienced by market participants may be a consequence.

<sup>37</sup> Ofcom (2017). Regulating the BBC's impact on competition—Statement on requirements and guidelines, p. 1, Available at: [https://www.ofcom.org.uk/data/assets/pdf\\_file/0037/99577/BBCCompetitionStatement.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0037/99577/BBCCompetitionStatement.pdf).

<sup>38</sup> SBS Submission (2018), p. 36.



To the extent that the National Broadcasters are supplying services that would not otherwise be supplied, then issues of competition cannot arise. Some interpret the ABC and SBS Charters as leading in that direction. Private sector operators can choose to compete with these services at any time.

Successive governments have maintained the funding of the National Broadcasters on public interest grounds, guided by the broadcasters' statutory Charters and with a funding envelope determining the scale of the broadcasters' activities. In some broad sense competition consequences could therefore be held to meet the public interest test.

With this degree of participation in markets having been decided, the question arises as to whether the behaviour of the public entities may distort efficient competition beyond the price and cost distortions that are the focus of the CNP. Possible areas of concern under the rubric of competitive effects may relate to contracts, marketing, innovation and regulation.

Implicit government guarantees relating to security of funding may affect calculation of risk and enthusiasm for contracting in the market, including the length of contracts and licensing. (In theory, a price effect could be rendered from these considerations, but such complexities are unlikely to be captured by current competitive neutrality policy).

At a time when commercial returns are low, the implicit value (e.g. the capital equivalent value of the funding stream) of public funding arguably gives a public entity more weight in the market. In the United Kingdom, it has been suggested that:

*The [BBC] Executive sees the BBC as a small player in an increasingly global marketplace, which may result in it underestimating its impact in some of the domestic markets in which it operates.*<sup>39</sup>

Marketing by the National Broadcasters might be considered a means of facilitating access by consumers to their desired services, and therefore pro-competitive and in consumers' interest. But it might also have a 'crowding out' effect on private sector operators whose revenues are affected.

The ABC Charter requirement for innovation could conceivably have unintended effects. Private sector operators could be less keen on the risks and costs of innovation if they feel public entities are not bound by the same commercial considerations.

If regulatory arrangements differ between the private sector and government entities, the results may conceivably distort competitive outcomes. While the National Broadcasters face some regulatory requirements and oversight that private sector operators do not (such as government employment rules and Parliamentary scrutiny), the reverse also applies. Private sector broadcasters face content quotas and complaints oversight that the National Broadcasters do not. Differences in regulation are covered by the CNP but are hard to bring to financial account.

Some appreciation of the capacity of the National Broadcasters to compete is relevant.

Being budget funded they might be expected to be less sensitive to market impacts or measures. They do not need to go to capital markets for funding. They do not report profits or pay dividends as measures of success. So, decision-making is not affected by commercial factors.

<sup>39</sup> Fingleton Associates. (2015). BBC Fair Trading Policy Review—report published by the BBC Trust | Fingleton Associates. Available at: <http://www.fingletonassociates.com/publications/bbc-fair-trading-policy-review-report-published-by-the-bbc-trust/>.

An obligation to justify taxpayer funding, and other accountability requirements, would be an incentive for the National Broadcasters to perform well. Public choice theory suggests that public entities are not free of incentives. For example, they may have an internally-driven incentive to compete and to expand.

They may also suffer from inefficiencies and burdens that are commonly thought to slow public sector organisations. Incentives for success and penalties for failure are less simple and clear cut as exist in the commercial world.

To the extent they are held back, the market impact of the National Broadcasters would be dulled, especially in an industry that is marked by rapid change which would reward agility.

Through all these different influences the data shows a significant increase in labour productivity over the last 10 years by the National Broadcasters (see [Figure 2](#)).

While private sector labour productivity remains above the National Broadcasters, the increase in labour productivity growth has been in excess of the private sector, and (along with the whole broadcasting sector), higher than for the economy as a whole. This suggests good adaptation, relatively high performance and a material capacity to compete.

A finite budget means that trade-offs between different activities have a hard boundary. This has been recognised by the ABC, for example, with the ABC Board acknowledging:

*that within a fixed funding envelope, choices need to be made on allocating resources. In transforming the ABC, the priority must be on delivering to audiences.<sup>40</sup>*

It may not be possible to address in policy terms all the dimensions of competitive distortions that may occur in different markets. If the Treasury review recommends extending the CNP, then public entities will need to apply it, including best endeavours entities. But the Panel judges this quite unclear at this time and does not rely on it.

## Tests for issues raised by stakeholders

As well as weighing up the arguments put forward in submissions, and the evidence provided in the EY and PwC consultancies, the Panel has referred to the following four tests in its consideration of the issues raised by stakeholders. While no one test will be conclusive, application of a combination of tests has allowed the Panel to draw firm conclusions.

1. Have there been complaints to the Australian Government Competitive Neutrality Complaints Office (AGCNCO)?
2. Are there specific examples of significant pricing or other market distortions?
3. Do the average market shares of the National Broadcasters signal material competitive impact, and have there been significant changes?
4. Do the National Broadcasters have internal processes for proper cost allocation and market entry?

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<sup>40</sup> Australian Broadcasting Corporation. (2017). Statement from the ABC Board—Investing in Audiences. Available at: <http://about.abc.net.au/statements/board-statement-investing-in-audiences/>.

## Panel comments

- A best endeavours approach by the National Broadcasters to the application of the Competitive Neutrality Policy to their business activities continues to be appropriate.
- More generally, the general principles of competitive neutrality are relevant to the other forms of market participation by the National Broadcasters.
- If decisions on the Review of the Commonwealth's Competitive Neutrality Policy by the Treasury enhance competitive neutrality management guidelines or extend competitive neutrality principles more generally, then the National Broadcasters should conform to these requirements on a best endeavours basis.
- At the same time, the National Broadcasters should be provided with guidance (as previously foreshadowed by COAG) as to how they should comply.

## Chapter 3: The media landscape

The National Broadcasters operate within the broader context of the Australian media market. Shifts in both the Australian and international media markets have had an effect on the operations and services of both the National Broadcasters and private sector operators and have changed the ways and areas in which they have to compete. This chapter provides an overview of the media sector, outlining trends in the Australian and international media markets, and Australian broadcasters' responses to these changes. Finally, it highlights predictions for the future of the media market.

This chapter draws on research and analysis from PwC's Australian Broadcast Media Landscape 2018–2022 commissioned for this Inquiry (Attachment A).

### Overview of the media sector

The Australian media market consists of five key categories of service provider (see [Figure 4](#)):

1. National Broadcasters—the ABC and SBS
2. Commercial media—television and radio
3. Subscription services—e.g. Foxtel and Stan
4. Publishers—print and digital
5. FAANGs—Facebook, Amazon, Apple, Netflix and Google.

[Chapter 4](#) provides an overview of the role of the National Broadcasters in this market.

Figure 4: Australia's broadcasting media ecology

National Broadcasters		Commercial Media	Subscription and SVOD Services	Publishing Print and Digital	International FAANGS
ABC	SBS	Seven Network Network Ten Nine Network WIN Television Prime7 Southern Cross Austereo Commercial Radio Stations	Foxtel Stan Netflix Amazon Prime	Fairfax Media News Corp Australia	Facebook Amazon Apple Netflix Google

**Note:** This figure is not intended to be an exhaustive representation. There were 274 commercial radio licences as at 31 January 2017.<sup>41</sup>

Businesses in the media sector offer a variety of different content, TV, radio and digital services, and individual media companies each operate to buy or sell different combinations of these. As such, there is not a single 'market' or single group of companies to consider when examining competition issues associated with the National Broadcasters.

Commercial free-to-air (FTA) television companies provide digital terrestrial television services, catch-up services, advertising video on demand (AVOD) and streaming services. Foxtel has provided a premium subscription television service in Australia for over 20 years. Increasingly, subscription services are also

<sup>41</sup> ACMA, List of Commercial Radio broadcasting licences, 31 January 2017. <https://www.acma.gov.au/-/media/Licence-Issue-and-Allocation/Information/pdf/Commercial-Radio-Broadcasting-Licences-LIC022.pdf?la=en>.



being provided over the internet by companies such as Netflix, Stan and Amazon Prime. Commercial radio companies provide audio broadcast services through AM, FM, DAB+, online and podcast. Print media companies now also offer services online through digital platforms, some free, and some subscription-based, increasingly including video content.

Commercial media companies and subscription service providers are privately owned, for-profit entities. Traditional ‘free-to-air’ (FTA) and commercial media’s (including TV, radio and newspapers) primary revenue is generated through the sale of advertising. In doing so, they compete with all other businesses to broadcast content that appeals to their targeted audience. As with all businesses selling advertising, they operate to maximise the value of that space by drawing in the largest or most appropriate (target market) audience for the advertising. Commercial media businesses try to achieve this by delivering content with regard to the advertising space, which attracts the audience to view the advertising. They also seek to maximise profits by minimising the cost of the content and its transmission to the greatest degree possible without impacting on audience attraction.

In Australia, the government intervenes in radio and television markets through the *Broadcasting Services Act* (BSA) which sets out particular rules relating to the use and price of radio frequency for transmissions, controls on advertising and controls on certain content intended to protect consumers from harm (such as offensive content) or increase the availability of certain programming to audiences (including Australian content and major sporting events). Like commercial FTA broadcasters subscription television providers such as Foxtel are licensed under the BSA but are generally subject to lighter obligations. For example Foxtel is required to adhere to a range of licence conditions, program standards and classification requirements, and Australian drama expenditure obligations, but is not subject to specific rules for children’s programs or regionally focussed programming which apply to commercial FTA broadcasters. OTT services such as Netflix and Stan do not have to be licensed under the BSA and have limited regulation, but are subject to the *Classification (Publications, Films and Computer Games) Act 1995*.<sup>42</sup> Newspapers are also not regulated through a licensing framework but are subject to other applicable laws and regulations, for example defamation.<sup>43</sup>

## Trends

Audience fragmentation and the decline in advertising revenue for traditional media have now reached a critical point, and the rapid speed at which these changes are occurring has been overwhelming for many in the Australian media industry. Recent changes such as the switch to digital and online services have caused disruption to media markets in Australia and globally (see [Competition from digital platforms](#) below). A combination of shifts in industry and consumer behaviours has altered traditional markets. These shifts include:

- Migrating of some audiences from FTA television to competing media such as online video;<sup>44</sup>
- Shifting preferences of advertisers and media buyers to online advertising channels;<sup>45</sup>
- Increasing consumer demand for on-demand online video;<sup>46</sup>
- Proliferation of internet connected devices such as smartphones, tablets and internet-connected televisions and speakers;<sup>47</sup>

<sup>42</sup> *Classification (Publications, Films and Computer Games) Act 1995*. Available at: <http://www.classification.gov.au/About/Pages/Legislation.aspx>.

<sup>43</sup> The Panel notes that the ACCC is conducting an inquiry considering digital media services, and may produce findings related to the regulatory requirements of new and online services.

<sup>44</sup> Australian Communications and Media Authority (2017). Communications report 2016–17, p. 71.

<sup>45</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, pp. 1, 9.

<sup>46</sup> Australian Communications and Media Authority (2017). Communications report 2016–17, p. 72.

<sup>47</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, pp. 1, 8.





- Over-the-Top (OTT) streaming services such as Netflix and Stan have enabled consumers to access a range of content at a lower price than traditional subscription services impacting the viewing habits of both free-to-air and pay TV consumers;
- Increase in audiences for, time spent and expenditure on interactive gaming;<sup>48</sup>
- Decline in cinema attendance and response by the filmed entertainment segment;<sup>49</sup>
- Increase in streaming music and podcasting;<sup>50</sup>
- Changing in-car technologies, with many new cars coming with built-in music streaming and podcasting services;<sup>51</sup> and
- Content providers are not only developing and updating product offerings, but also commissioning original content to create a competitive advantage, for example Foxtel and Netflix commissioning Australian content.<sup>52</sup>

## Competition from digital platforms

The increase in consumers' demand for on-demand online video and the entrance of international participants into the Australian media market has had an impact on competition in the media market. Facebook, Amazon, Apple, Netflix and Google, sometimes abbreviated as the 'FAANGs' are some of the new market entrants that have increased competition in Australia, particularly in the online platform sector. The ABC and SBS have also been impacted by these changes particularly in relation to viewing numbers and like the commercial operators, have sought to address the impacts through developing a suite of online services including catch-up services, streaming services and apps.

The ABC's submission stated that the FAANGs have had a significant impact not only on the Australian media market, but media markets and businesses internationally:

*The ABC cautions the Panel against attempts to mischaracterise the global forces that threaten the business models of traditional commercial media organisations. It is not the ABC but new market entrants like Facebook, Amazon, Apple, Netflix and Google that have fundamentally disrupted traditional media business models the world over.*<sup>53</sup>

The ACCC is conducting an inquiry into digital platforms such as the FAANGs to examine the effect that digital search engines, social media platforms and other digital content aggregation platforms have on competition in media and advertising services markets. In particular, the ACCC inquiry is looking at the impact of digital platforms on the supply of news and journalistic content and the implications of this for media content creators, advertisers and consumers.<sup>54</sup> The ACCC inquiry highlights the importance of the challenges Australian broadcasters face due to the entry of digital platforms to the Australian market, including unequal treatment of regulation and shifts in market power.<sup>55</sup> This market environment has

<sup>48</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 14.

<sup>49</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 14.

<sup>50</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 14.

<sup>51</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 7.

<sup>52</sup> Australian Communications and Media Authority (2017). Communications report 2016–17, p. 70.

<sup>53</sup> ABC Submission (2018), p. 58.

<sup>54</sup> Australian Competition and Consumer Commission. (2017). Digital platforms inquiry. Available at: <https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry>.

<sup>55</sup> Australian Competition and Consumer Commission. (2018). ACCC examining vital questions in media and advertising. Available at: <https://www.accc.gov.au/media-release/accc-examining-vital-questions-in-media-and-advertising>.



caused both the national and commercial broadcasters to reassess and change some of their services and service delivery.

There is a number of areas in which international and digital market participants compete with Australia's national and commercial broadcasters for content, audiences and advertising revenue. This heightened competition has impacts for the services and service delivery of all Australian broadcasters.

### Advertising

The ability for digital platforms to have both significant reach and higher precision in targeting consumers with particular interests or purchasing patterns has made online advertising more efficient than traditional advertising channels, such as television and radio.<sup>56</sup> The Australian Communications and Media Authority (ACMA) reports that print media's share of advertising expenditure has decreased (from 46% to 13%) while the share of online advertising has increased (15% to 48%) from 2009 to 2016.<sup>57</sup> Digital platforms, particularly Google and Facebook, have increased their share of advertising revenue. Research in 2016 by Morgan Stanley estimated that digital platforms in media, such as Google and Facebook, would take up to 40% of total Australian advertising revenue for the year, or three quarters of the total Australian online advertising expenditure for 2016.<sup>58</sup> The large quantities of data that Google and Facebook collect from their users, as well as their high resource capabilities and continued use by consumers has made the platforms highly attractive to advertisers.<sup>59</sup> This poses a challenge to Australian broadcasters also competing for advertising both online and through traditional platforms.

### News

PwC has identified two key trends in news consumption that have had an impact on the Australian media market: first, the shift to online sources of news, and second, the discovery of news through social media. News Corp, the Nine Entertainment Group and the ABC's online news sites are among the most popular (see [Figure 5](#)).<sup>60</sup> Social media sites are increasingly becoming a source of news, for example 37% of Facebook's 15 million users in Australia say they use the platform to find news.<sup>61</sup> However, levels of consumer trust between traditional news sources and social media differ significantly, with one study finding 82% trust levels for traditional media compared with 12% for social media.<sup>62</sup> These changing consumer news preferences also have an impact on the priorities of broadcasters.

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<sup>56</sup> Australian Competition and Consumer Commission (2018). Digital platforms inquiry—Issues paper, p. 7.

<sup>57</sup> Australian Competition and Consumer Commission (2018). Digital platforms inquiry—Issues paper, p. 16.

<sup>58</sup> Australian Competition and Consumer Commission (2018). Digital platforms inquiry—Issues paper, p. 16.

<sup>59</sup> Australian Competition and Consumer Commission (2018). Digital platforms inquiry—Issues paper, p. 17.

<sup>60</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 19.

<sup>61</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. i.

<sup>62</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 20.



## Platforms

The increase in accessibility of online and digital content in Australia has also had an impact on how consumers are using television screens, which previously were predominantly used for viewing FTA television and subscription television. Televisions are now also being used to view platforms such as YouTube, Facebook and Vimeo, and watching SVOD services like Netflix.<sup>63</sup> These alternative uses for the TV screen have grown from 53 minutes per day in 2014 to 1 hour, 7 minutes per day in 2017.<sup>64</sup>

The growth in digital platforms and entry of international market participants has had, and will continue to have, competition impacts on the operations and services of Australian broadcasters. These are explored in greater detail in the following sections.

Figure 5: Online news sources (February 2018)

Name	Unique Audience (000)	Sessions Per Person	Time Per Person (HH:MM:SS)
news.com.au	5,749	13	00:33:31
ABC News websites	4,849	10	00:32:28
nine.com.au	4,557	15	00:57:28
smh.com.au	3,910	7	00:43:30
Yahoo7 News websites	3,072	8	00:15:16
Daily Mail Australia	2,778	13	00:34:53
The Guardian	2,570	8	00:29:07
BBC	2,411	10	00:32:59
MSN News	2,141	6	00:16:44
The Age	2,042	6	00:32:09

Source: Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, page 20, Figure 22—based on Nielsen Digital Ratings (Monthly), February 2018, People 2+, Current Events & Global News sub-category.

<sup>63</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 15.

<sup>64</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 15.

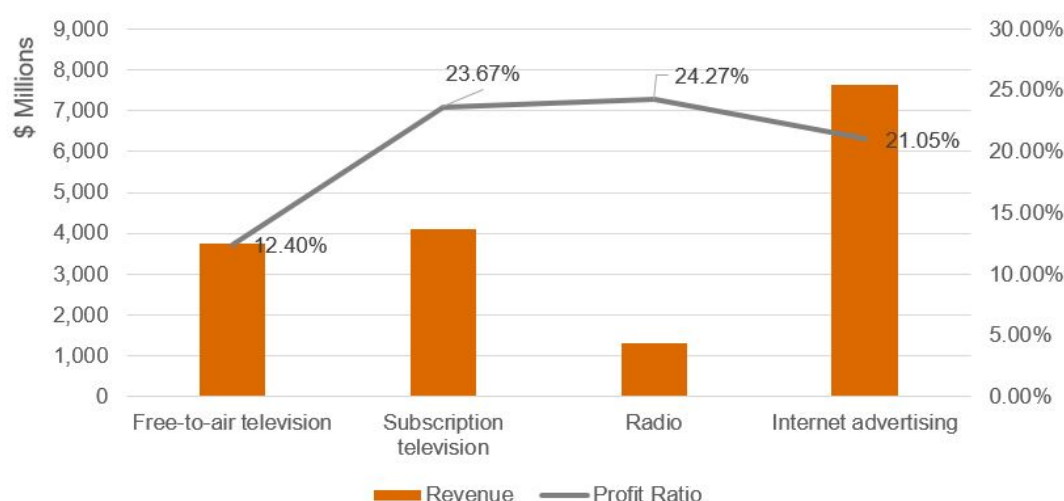
## Revenue and profitability of the commercial broadcasters

It is difficult to assess industry profitability, as only publicly listed companies publish their earnings margins. PwC has estimated the weighted average profit margin per sector as shown in [Figure 6](#) using 2016–2017 Annual Reports for the largest players in free-to-air television, subscription television, radio and two successful internet advertising companies:

Figure 6: Revenue and profitability of the commercial broadcasters

### Average profit margin per sector for 2017

Free-to-air television	12.4%
Subscription television	23.7%
Radio	24.3%
Internet advertising	21%



**FTA TV Sources:** Ten Network Holdings Ltd Annual Report 2016, Nine Entertainment Co. Holdings Ltd Annual Report 2017 and Seven West Media Annual Report 2017

**Subscription TV Source:** News Corp Annual Report 2017

**Radio Sources:** Southern Cross Austereo Annual Report 2017, Macquarie Media Ltd Annual Report 2017, Nova Entertainment Group Australia Pty Ltd 2017 Special Purpose accounts

**Internet advertising Sources:** Google Australia Pty Ltd Financial Report 2016, Carsales.Com Ltd Annual Report 2017

Source: Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 13.



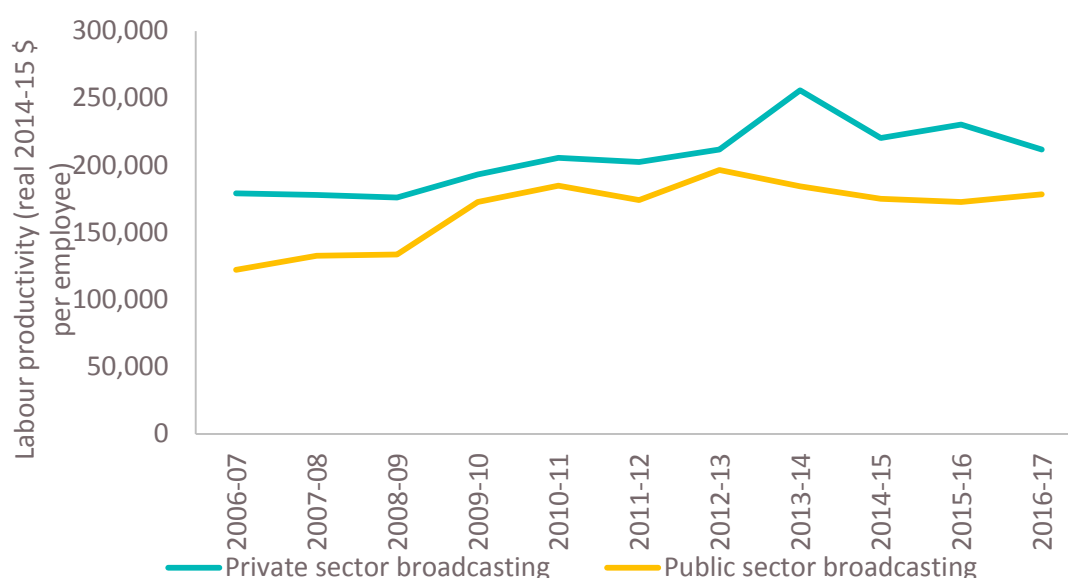
The Bureau of Communications and Arts Research (BCAR), within the Department of Communications and the Arts, has compared estimates of labour productivity trends in Australian public and private broadcasting (report at Attachment C). Its research has found that while the productivity level of the private sector is higher than the public sector, the estimated labour productivity *growth* in public broadcasting exceeds that of the private sector. As noted in the report:

*...estimated labour productivity growth has been faster in the public sector over the period due to both faster output growth and slower employment growth. Estimated output growth averaged 2.9 per cent per year for private sector broadcasting between 2006–07 to 2016–17 compared to 3.8 per cent per year for public sector broadcasting. Estimated employment growth averaged 1.4 per cent per year in private sector broadcasting over that period compared to 0.3 per cent per year in public sector broadcasting.*<sup>65</sup>

BCAR also notes that labour productivity has grown faster in public and private broadcasting sectors than for the economy as a whole.<sup>66</sup>

The following figures illustrate the estimated labour productivity levels of the broadcasting sector (Figure 7), and compare the estimated labour productivity *growth* of the broadcasting sector with that of the total economy (Figure 8).

Figure 7: Estimated labour productivity levels in the broadcasting sector, 2006–07 to 2016–17



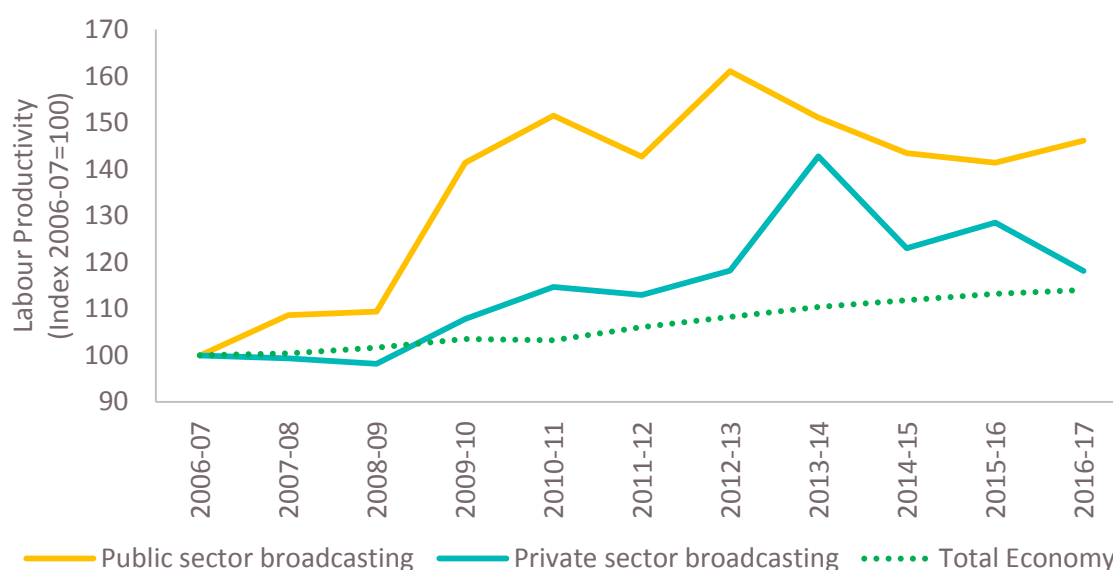
Source: Attachment C: Bureau of Communications and the Arts Research (2018). Estimates of labour productivity trends in Australian public and private broadcasting, p. 8.

<sup>65</sup> Attachment C: Bureau of Communications and the Arts Research (2018). Estimates of labour productivity trends in Australian public and private broadcasting, p. 10.

<sup>66</sup> Attachment C: Bureau of Communications and the Arts Research (2018). Estimates of labour productivity trends in Australian public and private broadcasting, p. 9.



Figure 8: Estimated labour productivity growth in the broadcasting sector, 2006–07 to 2016–17



Source: Attachment C: Bureau of Communications and the Arts Research (2018). Estimates of labour productivity trends in Australian public and private broadcasting, p. 9.

## Broadcasters' responses to changing media landscape

### Commercial broadcasters

Free TV Australia has noted that the increase in competition for viewers caused by the growing consumer preference for viewing content on digital services and through different platforms is:

*very challenging for the traditional free-to-air TV sector. Audiences are fragmenting, advertising revenues are declining and consumers are quickly forming new viewing habits*<sup>67</sup>

Similarly, News Corp Australia has noted consumers' and advertisers' move to new platforms like Google and Facebook, stating that this undermines 'the sustainability of publishers' business models'.<sup>68</sup>

Commercial FTA television market participants have responded to changes and new challenges in the Australian media market, including:

- Reducing operational costs.<sup>69</sup>
- Re-negotiating sports rights, which has resulted in more sharing of rights with non-FTA TV players (such as Fox Sports) and significant sports rights changing hands (such as cricket moving from Nine Entertainment Co to Seven West Media/Fox Sports, the Australian Open moving from Seven West Media to Nine Entertainment Co, and the Melbourne Cup moving from Seven West Media to Network Ten).<sup>70</sup>
- Diversifying income streams via investments in growth businesses with less exposure to advertising revenues. For example, investments in business-to-consumer businesses such as subscription Video on Demand and non-media businesses.<sup>71</sup>

<sup>67</sup> Free TV Australia Submission (2018), p. 18.

<sup>68</sup> News Corp Australia Submission (2018), p. 1.

<sup>69</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 2.

<sup>70</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 2.

<sup>71</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 2.

- Improving measurement of audiences, including increasing audience measurement body OzTAM's panel size and the introduction of reporting on AVOD audiences in addition to terrestrial audiences in order to provide more precise audience information to potential advertisers.<sup>72</sup>
- Jointly investing in marketing, via a new industry body, Think TV, to promote the efficacy of television advertising to advertisers.<sup>73</sup>

In 2017, the government abolished broadcasting license fees for commercial broadcasters, and replaced them with a new tax for spectrum use under the *Commercial Broadcasting (Tax) Act 2017*. This resulted in an overall reduction in fees, and therefore has helped reduce the burden of regulation and costs to commercial television and radio broadcasters.

### National Broadcasters

The National Broadcasters have also been affected by changes in the media market. In particular, they have been affected by changes in consumer preferences and the entry of digital platforms.

As noted by the ABC:

*The growth of the internet, smartphones and tablet use, and the rise of digital giants (such as Google, Facebook and Netflix) has significantly changed audience behaviours and expectations. Old boundaries between traditional markets and platforms have been blurred, and, in many ways, content markets are now global... The ABC has not been immune from these new dynamics. It too has faced challenges to adapt to remain relevant, meet audience expectations, deliver on its legislative Charter, and continue to offer taxpayers value for money.*<sup>74</sup>

SBS similarly states:

*SBS is not a large enough player to influence international market trends, but must respond to changes in the commercial market.*<sup>75</sup>

In its submission, SBS provides a representation (Figure 9 below) of the relative audience market shares of the key television broadcasters in Australia. It also illustrates the average ages and genders (represented as the percentage of female viewers) of the audience share of each broadcaster. This shows the dispersion of market shares and limited overlap and limitations in competition between the channels operated by the National Broadcasters and commercial broadcasters.

<sup>72</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 2.

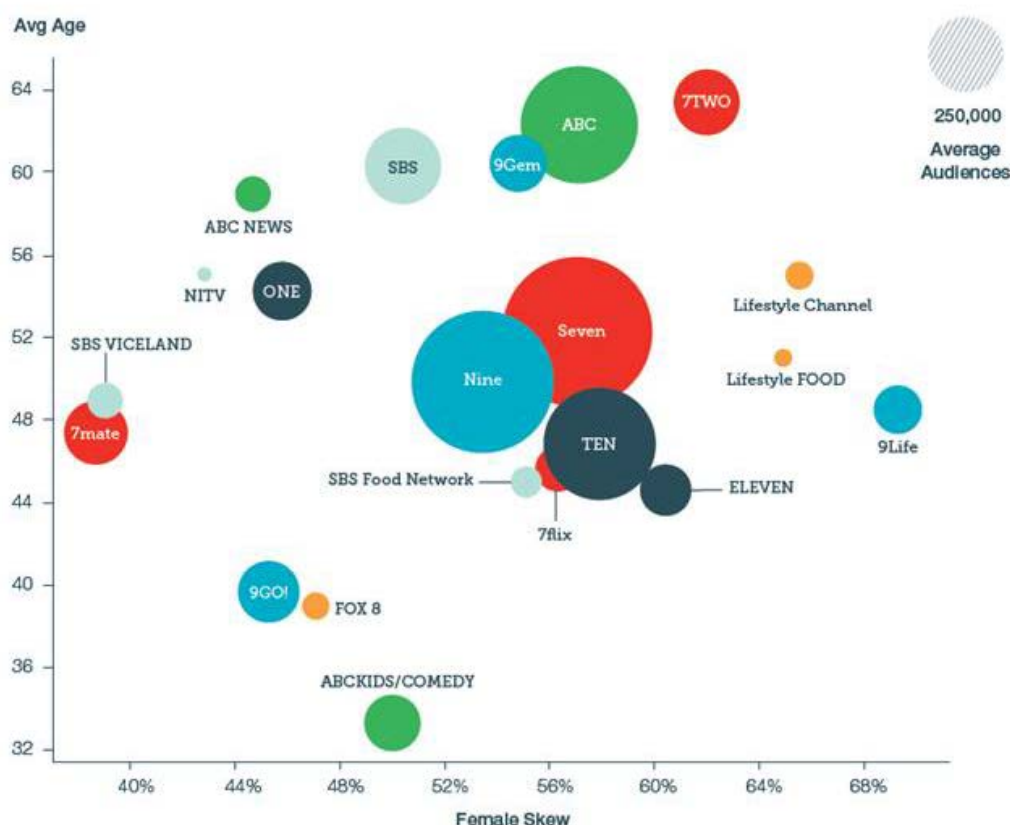
<sup>73</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 2.

<sup>74</sup> ABC Submission (2018), p. 4.

<sup>75</sup> SBS Submission (2018), p. 63.



Figure 9: Australian FTA multi-channel market shares 2017–18, April year-to-date



Source: SBS Submission (2018), p. 10.<sup>76</sup>

According to the ACMA Communications Report 2016–17:

- FTA television had the largest share of viewing hours at 50%.<sup>77</sup>
- Netflix Australia had a 55% share of the SVOD market, while Stan had 24%.<sup>78</sup>

The National Broadcasters have thus also had to respond to changes in the market through focusing on their services and the way they are delivered, including:

- updates to both the ABC and SBS Charters in 2013 to include digital media services, as noted in [Chapter 4](#)
- spending on digital marketing activities to ensure maximum audience reach<sup>79</sup>
- providing digital media services, including online news services—the ABC argues that if it ‘limited itself to traditional news bulletins on television, it would substantially limit its reach among the public that ultimately funds the ABC, as a large proportion of Australian audiences have moved online and seek news via digital platforms’<sup>80</sup>
- investing in new ways to leverage new technology and new platforms<sup>81</sup>

<sup>76</sup> SBS cites ‘OzTAM & RegTAM, FTA & STV Database, 1800–23:59, Consolidated 28, July 2017–April 2018, FTA: 5 City Metro/Combined Agg. Markets. STV: National STV, Total Individuals’ as the source of this diagram.

<sup>77</sup> Australian Communications and Media Authority (2017). Communications report 2016–17, p. 4.

<sup>78</sup> Australian Communications and Media Authority (2017). Communications report 2016–17, p. 5.

<sup>79</sup> ABC Submission (2018), p. 6; SBS Submission (2018), p. 43.

<sup>80</sup> ABC Submission (2018), pp. 6, 43.

<sup>81</sup> ABC Submission (2018), p. 19.



- increasing focus on the importance of the digital offering to SBS' reach and relevance,<sup>82</sup> and
- digital acceleration through concentrating on building a distinctive network across both traditional and digital platforms to allow for a wide range of views and voices to be represented in mainstream media on rapidly evolving digital platforms—SBS argues that access to content on digital platforms should not be confined to a homogenous commercial offering.<sup>83</sup>

PwC highlights the role of the National Broadcasters in innovation and risk-taking in the changing media environment:

*...trying new formats and untried content will appear increasingly risky and it is fair to expect a greater reliance on franchises (ie updated versions of existing programming) and proven international formats, leaving the role of content innovation and risk-taking to the public broadcasters.*

*Examples of innovation and risk-taking by the public broadcasters occur not only in content but also in distribution and internal organisation structures. For example, SBS was the first broadcaster to take a truly platform-agnostic view of video content distribution and by 2016 SBS On Demand was available on 24 different platforms, including gaming consoles. SBS's view was that IP distribution was not secondary or 'catch-up' but that it would be the preferred first option for some of its audience. This innovation has proved prescient.*

*The ABC too has restructured in 2018 to produce content in more platform-agnostic and efficient ways. For example, a new 'audio current affairs' unit replaces duplicated resources across individual radio programs and podcasts to ensure collaboration and reduce overlaps.*

*Should these innovations prove effective, some will be adopted by the commercial broadcast media, which has a historic capability in 'fast-following'. The role of the public broadcast sector therefore can also be seen as an informal proving ground for the entire industry.<sup>84</sup>*

The National Broadcasters' submissions also touch on these issues.

## Predictions

The Australian media market will continue to shift in response to the current market environment. Both the National Broadcasters and commercial broadcasters will be affected by these changes, and will have to respond to new and shifting sources of competition. PwC predicts the following outcomes given the current market trends and behaviours of competitors and consumers:

- **Decline in advertising revenues from terrestrial TV services**—Commercial FTA TV advertising revenues from core terrestrial TV services is expected to decline from a 21% share in 2017 to 14% in 2022.<sup>85</sup>
- **Flat revenues and low growth among premium subscription television services**—Facing increasing competition from lower-priced Subscription Video on Demand (SVOD) services, premium (box-delivered) subscription television (STV) services such as Foxtel are expected to have flat revenues and low growth over the next 3 to 5 years with compound annual growth forecast at 1.2% for both subscription fees and advertising revenues.<sup>86</sup>

<sup>82</sup> SBS Submission (2018), p. 29.

<sup>83</sup> SBS Submission (2018), p. 29.

<sup>84</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p.23.

<sup>85</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 3.

<sup>86</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 4.



- **High growth in subscription Video on Demand (SVOD)**—forecast to grow at a 30.1% compound annual growth rate (CAGR) to reach \$3,167 million by 2022. Unlike premium STV and FTA TV, the SVOD market in Australia is dominated by US-based Netflix, offering a \$12 per month, entirely internet protocol distributed on-demand scripted content service.<sup>87</sup>
- **More non-Australian SVOD players expected to enter or scale up**—the major change expected in the subscription television market over the next 3 to 5 years is for more non-Australian SVOD players to enter or scale up.<sup>88</sup>
- **More tightly segmented SVOD offerings and audiences**—As the SVOD market in Australia grows and matures, it is expected that major players such as Netflix will segment their offering and audiences more tightly. This segmentation may result in a new, cheaper ad-funded model being introduced, similar to the segmentation seen in the streaming music industry (e.g. Spotify's free ad-funded entry level service and premium paid service which is ad-free).<sup>89</sup>
- **Emergence of other business models**—Other business models are expected to emerge, such as Amazon's retail-led model, where high quality content services are offered at low or even no cost in order to secure competitive advantage in consumer retail services.<sup>90</sup>
- **Australian subscription television players joining global commissioning clubs**—In response to large content expenditures by Netflix and Amazon, Australian subscription television players may join global 'commissioning clubs', such as Atrium TV, which seek to create premium scripted content for participating commissioners to offer exclusively in each of their territories.<sup>91</sup>
- **Flat revenues for terrestrial and digital advertising**—Terrestrial and digital radio (DAB+) advertising revenues are forecast to be flat over the next five years at a 1.5% compound annual growth rate.<sup>92</sup>
- **Growth in streaming radio advertising revenue**—PwC forecasts ad revenues from streaming radio (including Spotify) to grow by 10.1% CAGR to 2022 to reach \$278 million and podcasting to grow by 85.9% CAGR to reach \$8.9 million over the same period.<sup>93</sup>
- **New entrants in streaming and podcasting**—The most significant change in the radio landscape will be new entrants—local and international—in the areas of streaming and podcasting. These growth areas are attractive to new entrants due to their low barriers to entry, including low regulatory oversight.<sup>94</sup>
- **Decline in commercial radio's share of advertising**—Commercial radio's share of advertising (excluding streaming and podcasting) is forecast to decline slightly from 7% to 6% over the next five years.<sup>95</sup>
- **Further co-operation on internet protocol distribution**—Future changes expected include further co-operation on internet protocol distribution (beyond the current Freeview arrangements) in order to recapture young audiences whose departure from terrestrial FTA TV viewing is the most significant of all demographic groups.<sup>96</sup>

<sup>87</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 5.

<sup>88</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 5.

<sup>89</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 6.

<sup>90</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 6.

<sup>91</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 6.

<sup>92</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 7.

<sup>93</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 8.

<sup>94</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 8.

<sup>95</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 8.

<sup>96</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 2.

## Panel comments

- The media landscape is likely to continue to change rapidly, creating new forms and points of competition, which may continue to impact adversely on some commercial organisations. It is worth noting the proposed merger of Fairfax and Nine Entertainment is a response to these pressures and may be indicative of further market consolidation.
- Rapid market changes are resulting in an increase in the instances in which the National Broadcasters are 'rubbing up' against a range of domestic private sector competitors.
- Major sources of competition in media markets are likely to continue to be international companies with resulting impact on all domestic media organisations.



## Chapter 4: The role of the National Broadcasters

The National Broadcasters were established by Acts of Parliament with specific social and cultural remits and to provide content that is guided by their Charter responsibilities. Changes in technology and consumer behaviour such as the transition to increased digital and online services has had an impact on all media organisations, including the National Broadcasters. This chapter sets out the history and obligations of the National Broadcasters, the different offerings and services they provide, their means of generating revenue, and the government funding they receive.

### The ABC

Established in 1932, originally as the Australian Broadcasting Commission, the ABC was created by government as a way to regulate broadcast services and to ensure that audiences had reasonable access to a range and high standard of radio services.<sup>97</sup> In 1983, Parliament passed the *Australian Broadcasting Corporation Act 1983* (the ABC Act), which saw the inclusion of a Charter (outlined below). The Charter and other provisions of the ABC Act give the ABC particular responsibilities, such as providing independent news and information.<sup>98</sup> The ABC Act establishes the ABC's independence from government under section 8, which requires the ABC Board, amongst other things, to 'maintain the independence and integrity of the Corporation'.<sup>99</sup>

#### ABC Charter

##### Section 6 of the *Australian Broadcasting Corporation Act 1983*

(1) The functions of the Corporation are:

- (a) 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 and, without limiting the generality of the foregoing, to provide:
  - (i) broadcasting programs that contribute to a sense of national identity and inform and entertain, and reflect the cultural diversity of, the Australian community; and
  - (ii) broadcasting programs of an educational nature;
- (b) to transmit to countries outside Australia broadcasting programs of news, current affairs, entertainment and cultural enrichment that will:
  - (i) encourage awareness of Australia and an international understanding of Australian attitudes on world affairs; and
  - (ii) enable Australian citizens living or travelling outside Australia to obtain information about Australian affairs and Australian attitudes on world affairs; and
- (ba) to provide digital media services; and
- (c) to encourage and promote the musical, dramatic and other performing arts in Australia.

Note: See also section 31AA (Corporation or prescribed companies to be the only providers of Commonwealth-funded international broadcasting services).

<sup>97</sup> Australian Broadcasting Corporation. ABC History. Available at: <http://about.abc.net.au/abc-history/>.

<sup>98</sup> Australian Government (2018). Portfolio Budget Statements 2018–19. Budget Related Paper No. 1.3. Communications and the Arts Portfolio, p. 69.

<sup>99</sup> *Australian Broadcasting Corporation Act 1983*. Available at: <https://www.legislation.gov.au/Details/C2013C00136>.



- (2) 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;
    - (ii) the standards from time to time determined by the ACMA in respect of broadcasting services;
    - (iii) the responsibility of the Corporation as the provider of an independent national broadcasting service to provide a balance between broadcasting programs of wide appeal and specialised broadcasting programs;
    - (iv) the multicultural character of the Australian community; and
    - (v) in connection with the provision of broadcasting programs of an educational nature--the responsibilities of the States in relation to education; and
  - (b) the Corporation shall take all such measures, being measures consistent with the obligations of the Corporation under paragraph (a), as, in the opinion of the Board, will be conducive to the full development by the Corporation of suitable broadcasting programs.
- (3) The functions of the Corporation under subsection (1) and the duties imposed on the Corporation under subsection (2) constitute the Charter of the Corporation.
- (4) Nothing in this section shall be taken to impose on the Corporation a duty that is enforceable by proceedings in a court.

Other duties of the Board are detailed in section 8 of the ABC Act as follows:

**Section 8 of the *Australian Broadcasting Corporation Act 1983***

- (1) It is the duty of the Board:
- (a) to ensure that the functions of the Corporation are performed efficiently and with the maximum benefit to the people of Australia
  - (b) to maintain the independence and integrity of the Corporation
  - (c) to ensure that the gathering and presentation by the Corporation of news and information is accurate and impartial according to the recognized standards of objective journalism, and
  - (d) to ensure that the Corporation does not contravene, or fail to comply with:
    - (i) any of the provisions of this Act or any other Act that are applicable to the Corporation; or
    - (ii) any directions given to, or requirements made in relation to, the Corporation under any of those provisions, and
  - (e) to develop codes of practice relating to:
    - (i) programming matters, and
    - (ii) if the Corporation has the function of providing a datacasting service under section 6A—that service
- and to notify those codes to the ACMA.



The ABC delivers services spanning television, radio and digital platforms (see [Figure 10](#)).<sup>100</sup> The ABC operates six national television channels, three national radio networks, and digital services such as ABC iview, streaming, ABC News and Current Affairs online, ABC Open, abc.net.au and podcasts.<sup>101</sup> According to the ABC, it reaches more than 20 million Australians each month.<sup>102</sup>

The ABC's combined national audience reach, which includes television, radio and online, was estimated to be 70% over the period of a week in 2017, an increase of 1% compared to 2016 (69%).<sup>103</sup> ABC Radio reached 4.7 million listeners in the five major metropolitan areas in an average week between 2016 and 2017 (a 22.3% share of total listeners).<sup>104</sup> In 2016–17, the average monthly reach of ABC Online in Australia was 7.7 million, or 39% of Australians who have web access. This represents a 2% increase in reach from 2015–16.<sup>105</sup>

In 2013, the ABC's Charter was amended to include digital media services in response to the 2012 Convergence Review.<sup>106</sup> The amendments updated the Charters of both National Broadcasters to reflect that the ABC and SBS are 'at the forefront of Australian media's transition to a new digital environment and their digital engagement can no longer be regarded as a peripheral activity to their traditional broadcasting.'<sup>107</sup> The ABC was one of the first broadcasters to launch a video on demand platform in Australia.<sup>108</sup> The ABC launched iview, Australia's first high-resolution, full-screen online video service, in July 2008.<sup>109</sup>

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<sup>100</sup> ABC Submission (2018), p. 11.

<sup>101</sup> ABC Submission (2018) p. 12.

<sup>102</sup> ABC Submission (2018), p. 12.

<sup>103</sup> Australian Broadcasting Corporation (2017). Annual Report 2016–2017, p. 30.

<sup>104</sup> ABC Submission (2018), Attachment B, p. 21.

<sup>105</sup> Australian Broadcasting Corporation (2017). Annual Report 2016–2017, p. 30.

<sup>106</sup> Parliament of Australia. (2013). Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013. Available at:

[https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r4992](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r4992).

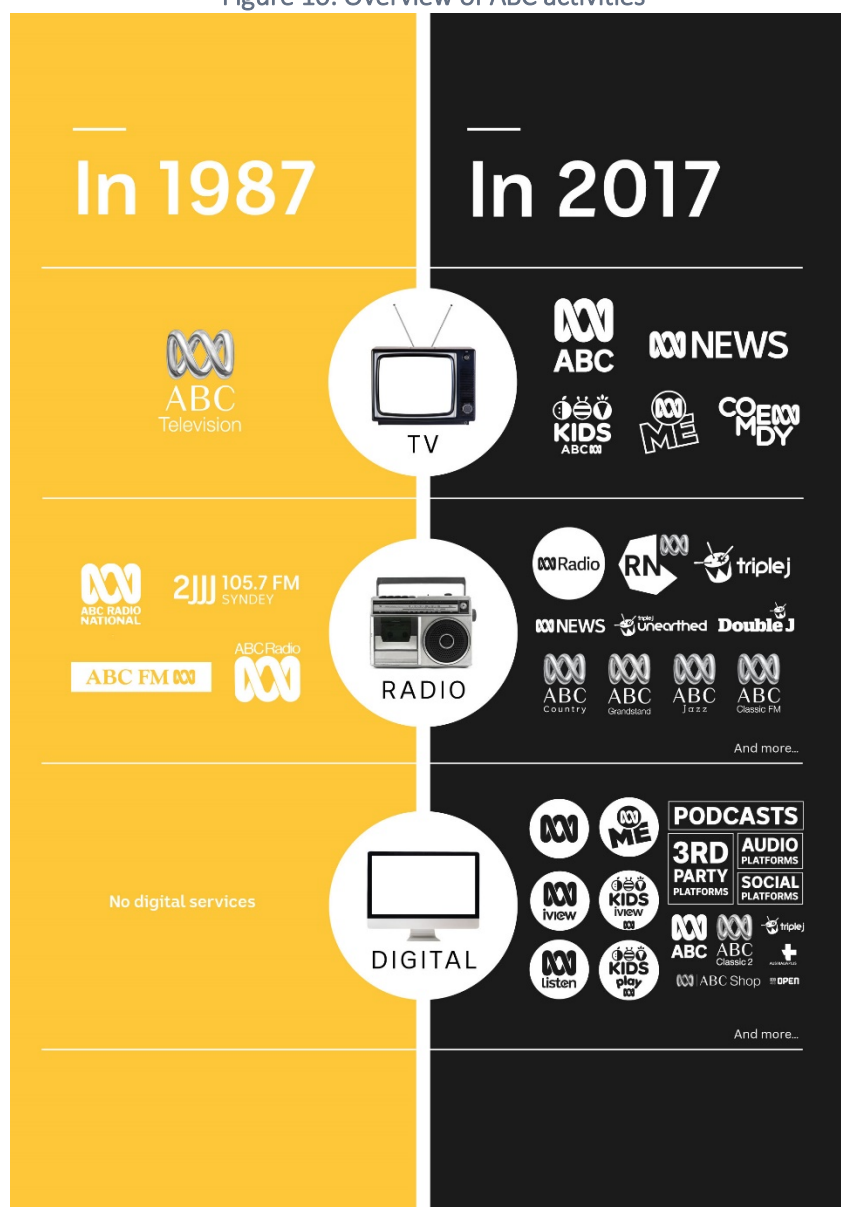
<sup>107</sup> Parliament House of Australia (2013). Explanatory Memorandum—Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013, p. 4, Available at:

[http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4992\\_ems\\_5921e924-1cb5-4c1a-be5a-5d85d54416c0/upload\\_pdf/378327.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4992_ems_5921e924-1cb5-4c1a-be5a-5d85d54416c0/upload_pdf/378327.pdf;fileType=application%2Fpdf).

<sup>108</sup> ABC Submission (2018), Attachment B, p. 87.

<sup>109</sup> Australian Broadcasting Corporation (2017). Annual Report 2008–09, pp. 15, 17.

Figure 10: Overview of ABC activities



Source: ABC Submission (2018) p. 11.

The ABC is provided with an annual budget from the Commonwealth that enables it to operate and provide its services. The ABC received \$1.04 billion (93%) of its funding from government in 2017–18.<sup>110</sup> The ABC also conducts certain business activities to generate own-source revenue in addition to government funding, amounting to \$83.2 million (7%) of its budget in 2017–18. In 2017–18, the ABC employed 4,111 staff.<sup>111</sup>

<sup>110</sup> Australian Government (2018). Portfolio Budget Statements 2018–19. Budget Related Paper No. 1.3. Communications and the Arts Portfolio, p. 71.

<sup>111</sup> Australian Government (2018). Portfolio Budget Statements 2018–19. Budget Related Paper No. 1.3. Communications and the Arts Portfolio, p. 71.



According to the RBB Economics Report (Attachment B to the ABC's submission), ABC Commercial (a unit of the ABC) generates revenue through five key business areas:

1. Content Sales and Distribution, which acquires and distributes ABC and other licenced content to broadcasters, digital platforms and other third parties as well as managing the syndication of ABC content
2. Retail, which operates ABC Shop Online and the ABC Centres network that are both involved in the sale of ABC licensed products across a wide range of categories
3. Music, which records and represents Australian songwriters and composers as well as staging and marketing concerts and other live events
4. Studio and Media Productions, which provides the surplus production facilities and staff capacity of ABC Radio and TV to third parties including commercial television networks and film and television production companies, and
5. Publishing, which publishes children's books in partnership with HarperCollins Australia as well as books and magazines relating to ABC programming.<sup>112</sup>

On 15 August 2018, the ABC announced it would be closing down the ABC Shop Online at the end of the year due to the decline in physical sales.<sup>113</sup>

## SBS

SBS was originally established on 1 January 1978 under the *Broadcasting and Television Amendment Act 1977*. In 1991, the *Special Broadcasting Service Act 1991* (the SBS Act) established SBS as a corporation and sets out SBS' Charter (outlined below). SBS has a specific cultural remit to provide multicultural and multilingual television, radio and digital media services that inform, educate and entertain all Australians.<sup>114</sup>

### SBS Charter

#### Section 6 of the *Special Broadcasting Service Act 1991*

- (1) The principal function of the SBS is to provide multilingual and multicultural radio, television and digital media services that inform, educate and entertain all Australians, and, in doing so, reflect Australia's multicultural society.
- (2) The SBS, in performing its principal function, must:
  - (a) contribute to meeting the communications needs of Australia's multicultural society, including ethnic, Aboriginal and Torres Strait Islander communities; and
  - (b) increase awareness of the contribution of a diversity of cultures to the continuing development of Australian society; and
  - (c) promote understanding and acceptance of the cultural, linguistic and ethnic diversity of the Australian people; and
  - (d) contribute to the retention and continuing development of language and other cultural skills; and

<sup>112</sup> ABC Submission (2018), Attachment B, p. 9.

<sup>113</sup> Australian Broadcasting Corporation. (2018). ABC Commercial announcement on retail activity. Available at: <http://about.abc.net.au/statements/abc-commercial-announcement-on-retail-activity/>.

<sup>114</sup> *Special Broadcasting Service Act 1991*. Available at: <https://www.legislation.gov.au/Details/C2014C00736>.





- (e) as far as practicable, inform, educate and entertain Australians in their preferred languages; and
  - (f) make use of Australia's diverse creative resources; and
  - (g) to the extent to which the function relates to radio and television services--contribute to the overall diversity of Australian television and radio services, particularly taking into account the contribution of the Australian Broadcasting Corporation and the community broadcasting sector; and
  - (h) to the extent to which the function relates to radio and television services--contribute to extending the range of Australian television and radio services, and reflect the changing nature of Australian society, by presenting many points of view and using innovative forms of expression.
- (3) The principal function of the SBS under subsection (1) and the duties imposed on the SBS under subsection (2) constitute the Charter of the SBS.
- (4) Nothing in this section imposes on the SBS a duty that is enforceable by proceedings in a court.
- (5) A subsidiary function of the SBS is to carry on, within or outside Australia, any business or other activity incidental to the fulfilment of the Charter.

The role and duties of the SBS Board are detailed sections 9 and 10 of the SBS Act which state:

#### **Section 9 of the *Special Broadcasting Service Act 1991***

The role of the Board is:

- (a) to decide the objectives, strategies and policies to be followed by the SBS in performing its functions; and
- (b) to ensure that the SBS performs its functions in a proper, efficient and economical manner and with the maximum benefit to the people of Australia.

#### **Section 10 of the *Special Broadcasting Service Act 1991***

(1) It is the duty of the Board:

- (a) to maintain the independence and integrity of the SBS; and
- (b) to develop and publicise the SBS's programming policies; and
- (c) to ensure, by means of the SBS's programming policies, that the gathering and presentation by the SBS of news and information is accurate and is balanced over time and across the schedule of programs broadcast; and
- (d) to ensure that the SBS does not contravene:
  - (i) this Act or any other Act; or
  - (ii) any directions given to, or requirements made in relation to, the SBS under this Act or another Act; and
- (e) to ensure the efficient and cost effective functioning of the SBS; and



- (f) to ensure that the SBS seeks to co-operate closely with the Australian Broadcasting Corporation to maximise the efficiency of the publicly funded sectors of Australian broadcasting; and
  - (g) to be aware of, and responsive to, community needs and opinions on matters relevant to the Charter; and
  - (h) to develop and publicise the SBS's policies on the handling of complaints; and
  - (i) to ensure that the pursuit by the SBS of its subsidiary functions does not detract from the SBS fulfilling its Charter responsibilities; and
  - (j) to develop codes of practice relating to:
    - (i) programming matters; and
    - (ii) if the SBS has the function of providing a datacasting service under section 6A—that service;
- and to notify those codes to the ACMA.

SBS delivers content through free-to-air television, subscription services, radio and online platforms.<sup>115</sup> SBS' offerings include SBS One, SBS Viceland (a channel aimed at younger audiences), SBS On Demand, National Indigenous Television (NITV), Food Network and SBS Radio.<sup>116</sup> SBS states that it aims to create and commission content which 'informs and promotes understanding among all Australians and maximise opportunities for people from diverse backgrounds to engage in social, political and cultural discourse'.<sup>117</sup> Some of SBS' services are commercial including the sale of goods and services, advertising,<sup>118</sup> sponsorship and rents.<sup>119</sup>

As noted above, the National Broadcasters' Charters were amended in 2013 to include the provision of digital media services.<sup>120</sup> SBS On Demand is SBS' main online platform, which streams programs and video on demand services.

Unlike the ABC, SBS operates under a hybrid model where it receives \$281.6 million (71%) of its funding from government and \$115.6 million (29%) from advertising and other commercial activities.<sup>121</sup> The *Broadcasting and Television Amendment Act 1977* permitted program sponsorship with approval of the minister. This also permitted SBS to charge for the provision of services and facilities, and to sell

<sup>115</sup> Australian Government (2018). Portfolio Budget Statements 2018–19. Budget Related Paper No. 1.3. Communications and the Arts Portfolio, p. 285.

<sup>116</sup> Australian Government (2018). Portfolio Budget Statements 2018–19. Budget Related Paper No. 1.3. Communications and the Arts Portfolio, p. 285.

<sup>117</sup> SBS Submission (2018), p. 20.

<sup>118</sup> Special Broadcasting Service. Faqs: SBS Corporate. Available at: <https://www.sbs.com.au/aboutus/faqs>.

<sup>119</sup> Parliament House of Australia. (2007). Special Broadcasting Service (SBS): Operations and funding. Available at: [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Publications\\_Archive/archive/SBS](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/SBS).

<sup>120</sup> Parliament House of Australia (2013). Explanatory Memorandum—Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013, p. 4, Available at: [http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4992\\_ems\\_5921e924-1cb5-4c1a-be5a-5d85d54416c0/upload\\_pdf/378327.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4992_ems_5921e924-1cb5-4c1a-be5a-5d85d54416c0/upload_pdf/378327.pdf;fileType=application%2Fpdf).

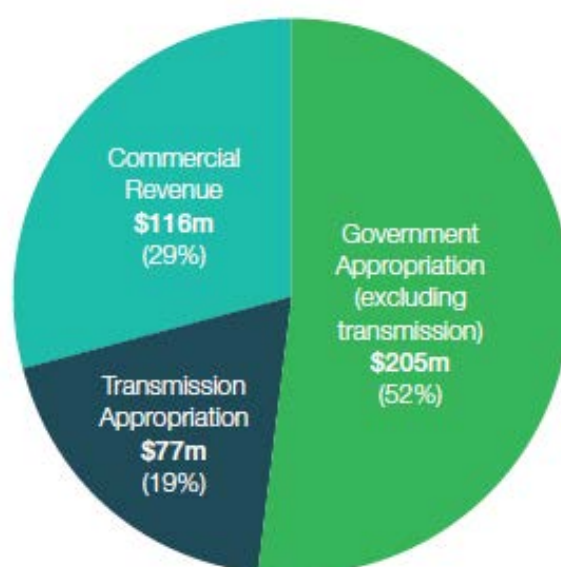
<sup>121</sup> Percentages derived from the SBS Annual Report 2017, where SBS report revenue from Government of \$281,598,000 and total own source revenue of \$115,621,000 which includes \$93,100,000 from advertising and sponsorship.



programs and rights or interests in programs. It was not, however, to generate revenue from commercial advertising.

The *Special Broadcasting Service Act 1991* authorised ‘advertisements or sponsorship announcements’. Section 45(2)(a) of the Act prescribes that the advertisements are only to run ‘during periods before programs commence, after programs end or during natural program breaks’. The time limit for these is five minutes per hour and does not include station promotional material. SBS’ own-source revenue has grown in recent years due to the sale of advertising across television. SBS reported advertising and sponsorship revenues of \$93.1 million in 2016–17, up from \$76.2 million in 2015–16.<sup>122</sup> SBS employed 1,154 staff in 2017–18.<sup>123</sup> SBS is considerably smaller than the ABC, receiving, for example, approximately one quarter of the ABC’s funding in 2017–18<sup>124</sup>.

Figure 11: SBS Revenue



Source: SBS Submission (2018), p. 32

In a report prepared for SBS (and included in SBS’ submission), Deloitte states that SBS competes in the following three areas:

- Audiences—competing with the ABC, commercial FTA television providers, subscription television players, SVOD providers, radio digital platform providers and news organisations.
- Advertising spend—competing with the same organisations as it does for audiences (except for the ABC).
- Content—competing against the ABC, all commercial FTA broadcasters, subscription television providers, SVOD players and all digital platforms.<sup>125</sup>

<sup>122</sup> Special Broadcasting Service (2017). Annual Report 2016–2017.

<sup>123</sup> Australian Government (2018). Portfolio Budget Statements 2018–19. Budget Related Paper No. 1.3. Communications and the Arts Portfolio, p. 287.

<sup>124</sup> Australian Government (2018). Portfolio Budget Statements 2018–19. Budget Related Paper No. 1.3.

Communications and the Arts Portfolio. Figure derived from the ABC (p. 71) and SBS (p. 287). Exact figure: 26.8%

<sup>125</sup> SBS Submission (2018), [Appendix 1.1](#), p. 14.

## Introduction of key services by national and commercial broadcasters

Both National Broadcasters and commercial broadcasters have adapted to and developed new market opportunities as new technologies have changed the way audiences consume content. [Figure 12](#) on the following page outlines the different digital services introduced by national and commercial broadcasters across time, as well as the entry of international market participants in Australia.

The rapid acceleration in the last three to five years in the ways consumers are accessing information and entertainment has led to the National Broadcasters making significant changes to the ways they deliver their content. Some of these shifts have been driven by changes in the global media market, increased competition from global market participants and changes in consumer preferences.

As noted in the ABC's 2018–19 Corporate Plan:

*This is evident in a marked trend towards on-demand viewing in preference to scheduled content delivery services, particularly among younger audiences. It is also evident in the shift towards media consumption on mobile devices.*<sup>126</sup>

The ABC's 2018–19 Corporate Plan also notes the increasing trend of industry consolidation, and the impacts this has on the services the ABC delivers:

*The new global players and the ongoing shift in advertising dollars towards digital platforms are placing significant competitive pressures on Australia's commercial free-to-air networks and other content suppliers. This has contributed to some commercial operators withdrawing from unsustainable markets, many of them in rural and regional Australia. The 2018 report from the Senate Select Committee Inquiry into the Future of Public Interest Journalism noted that, as commercial broadcasters increasingly withdraw from places that are no longer commercially viable, "...the ABC is often left as the last provider of local current affairs, particularly for many regional and rural communities."*<sup>127</sup>

## Panel comments

- The National Broadcasters have adapted to the challenge of change by extending the range and type of their services, taking full advantage of market developments and technological innovation, to the benefit of the public.
- In order to comply with their Charters, the National Broadcasters seek to maximise their reach by being significant providers of content across all platforms. Their capacity to do so is limited by their budgets.

<sup>126</sup> Australian Broadcasting Corporation (2018). Corporate Plan 2018–19, p. 12.

<sup>127</sup> Australian Broadcasting Corporation (2018). Corporate Plan 2018–19, p. 11.

Figure 12: Introduction of key digital services into the Australian media market

	National Broadcasters Digital and OTT	Australian Commercial Digital and OTT	Australian Subscription TV and SVOD	International OTT Services
<b>1994</b>			Foxtel Austar	
<b>1999</b>			Foxtel Austar	Google
<b>2001</b>	ABC Kids ABC Fly TV		Foxtel Austar	
<b>2005</b>	ABC2		Foxtel Austar	Apple iTunes YouTube Google
<b>2007</b>	ABC2		Foxtel Austar	Apple iTunes Hulu YouTube Google
<b>2008</b>	ABC2 ABC iView		Foxtel Austar	Apple iTunes Hulu YouTube Google
<b>2009</b>	ABC3 ABC2 ABC Kids SBS TWO ABC iView	7TWO 9GO! One	Foxtel Austar	Apple iTunes Hulu YouTube Google
<b>2010</b>	ABC3 ABC2 ABC Kids ABC News 24 SBS TWO ABC iView	GEM ELEVEN 7Mate 7TWO 9GO! One Plus7	Fetch TV Foxtel Austar	Apple iTunes Netflix Hulu YouTube Google
<b>2011</b>	ABC3 ABC2 ABC Kids ABC News 24 SBS TWO SBS On Demand ABC iView	GEM ELEVEN 7Mate 7TWO 9GO! One Plus7	Fetch TV Foxtel Austar	Apple iTunes Amazon Prime Netflix Hulu YouTube Google
<b>2012</b>	ABC3 ABC2 ABC Kids ABC News 24 SBS TWO NITV SBS On Demand ABC iView	GEM ELEVEN 7Mate 7TWO 9GO! One Plus7	Fetch TV Foxtel Go Foxtel	Google Play Apple iTunes Amazon Prime Netflix Hulu YouTube Google
<b>2013</b>	ABC3 ABC2 ABC Kids ABC News 24 SBS 2 NITV SBS On Demand ABC iView	GEM ELEVEN 7Mate 7TWO 9GO! One Tenplay Jump In Plus7	Foxtel Play Foxtel Go Fetch TV Foxtel	Google Play Apple iTunes Amazon Prime Netflix Hulu YouTube Google



<b>2014</b>	ABC3 ABC2 ABC News 24 SBS 2 NITV SBS On Demand ABC iView	GEM ELEVEN 7Mate 7TWO 9GO! One <b>FreeviewPlus</b> Tenplay Jump In Plus7	<b>Presto</b> Foxtel Play Foxtel Go Fetch TV Foxtel	Google Play Apple iTunes Amazon Prime Netflix Hulu YouTube Google
<b>2015</b>	<b>SBS Food Network</b> ABC3 ABC2 ABC News 24 SBS 2 NITV SBS On Demand ABC iView	<b>Racing.com</b> <b>9Life</b> GEM ELEVEN 7Mate 7TWO 9GO! One <b>Nine StreamCo</b> FreeviewPlus Tenplay Jump In Plus7	<b>Stan</b> Presto Foxtel Play Foxtel Go Fetch TV Foxtel	Google Play Apple iTunes Amazon Prime Netflix Hulu YouTube Google
<b>2016</b>	SBS Food Network <b>ABC ME</b> ABC2 ABC News 24 <b>SBS Viceland</b> NITV SBS On Demand ABC iView	<b>7flix</b> Racing.com 9Life GEM ELEVEN 7Mate 7TWO 9GO! One Nine StreamCo FreeviewPlus Tenplay <b>9Now</b> Plus7	Stan Presto Foxtel Play Foxtel Go Fetch TV Foxtel	Google Play Apple iTunes Amazon Prime Netflix Hulu YouTube Google
<b>2017</b>	SBS Food Network ABC ME ABC2 <b>ABC NEWS</b> SBS Viceland NITV SBS On Demand ABC iView	7flix Racing.com 9Life GEM ELEVEN 7Mate 7TWO 9GO! One Nine StreamCo FreeviewPlus Tenplay 9Now Plus7	Stan Presto Foxtel Play Foxtel Now Fetch TV Foxtel	Google Play Apple iTunes Amazon Prime Netflix Hulu YouTube Google

Source: based on Figure 2: Evolution of Australia's content market, p. 18 of Free TV's submission to the Australian and Children's Screen Content Review, 29 September 2017.



## Chapter 5: National Broadcasters' responses to Issues Paper questions

### Background

As noted in [Chapter 2](#), COAG decided in 2000 to apply a best endeavours approach to competitive neutrality for the National Broadcasters. At that time television and radio broadcasting were still operating in analogue mode, and although the ABC had commenced its online services through [abc.net.au](#), these services were still in development and their reach was relatively small compared to current online reach.

As set out in [Chapter 4](#), both the National Broadcasters have since responded to rapid changes in the broadcasting sector and the wider media market.

The introduction of digital terrestrial television (DTT) in 2001 and the development of Digital Audio Broadcasting (DAB) in 2009, along with the rapid proliferation of high speed broadband, has significantly changed the way in which their services are delivered.

In 2013 the Parliament recognised the speed of change and the need for the National Broadcasters to respond to changing market conditions, by amending their governing Acts to encompass their online services.

Given these changes the Inquiry determined it appropriate to review how competitive neutrality is considered by the National Broadcasters in the current media environment. The Issues Paper posed a number of questions to each broadcaster about how they apply a best endeavours approach to competitive neutrality issues.

The national Broadcasters responses also relate to some of the issues raised by stakeholders (see [Chapter 6](#)). Further analysis of those issues is at [Chapter 6](#) and [Chapter 7](#).

### ABC responses to the Issues Paper questions

The ABC has provided a detailed and comprehensive submission in response to the Issues Paper. The submission sets out some general comments relevant to the Inquiry as a whole, which are noted here prior to an analysis of the ABC responses to the specific questions.

The ABC has requested that the Panel be guided by the following in undertaking its Inquiry:

- Competitive neutrality does not require that government entities should not compete with the private sector.
- The ABC Act and Charter reflect the scope of activities to be undertaken by the ABC; the appropriateness of that scope is not within the Terms of Reference of this inquiry.
- In assessing whether the ABC operates with any 'net competitive advantages' by virtue of government ownership, the Panel should have regard to various legislative restrictions on the ABC's activities.
- The ABC has an important public service mandate, which it is required to fulfil.<sup>128</sup>

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<sup>128</sup> ABC Submission (2018), pp. 24–25.



The ABC commissioned RBB Economics to prepare a report to aid its submission to the inquiry. The ABC asked RBB Economics to '[explore] the effects of the ABC on competition in the Australian media sector, within the context of the Australian Government's ongoing inquiry into the competitive neutrality of the national broadcasters ...'<sup>129</sup>

The report considered the available information in the following contexts:

- The potential for the ABC's activities to lead to a 'crowding out' of the audiences available to other media operators.<sup>130</sup>
- The potential for the ABC's activities to lead to pro-competitive effects on the Australian media sector, in particular the potential for the ABC's investments and innovations to enhance efficiency and competition among media operators.<sup>131</sup>

The RBB Economics report made the following findings:

- There was no evidence of crowding out of the audiences of commercial media operators by the ABC, on the basis that:
  - the ABC's activities are significantly differentiated from those of the commercial media operators;
  - the ABC has undertaken a number of significant initiatives that have substantially boosted its own audiences, either in the short term or over longer periods;
  - it seems unlikely that the ABC's activities have had a substantial effect on the online advertising revenues of the commercial broadcasters and news providers; and
  - several cross-country studies have shown no evidence of an adverse effect of public sector broadcaster activities on commercial media operators.<sup>132,133</sup>
- There is substantial evidence that, in the areas the report considers, the ABC's activities are likely to have resulted in significant benefits to the wider media industry, in that:
  - the ABC's activities result in a direct benefit to the industry through licensing, partnerships, and community and cadet investments; and
  - the ABC has made substantial investments in initiatives and types of content.<sup>134</sup>

### Question 1: Awareness of competitive neutrality

*What awareness is there in your organisation of the requirement to undertake a 'best endeavours' approach to complying with the Competitive Neutrality Policy? What organisational policies and processes are in place?*

The ABC's submission, while noting that it is not formally subject to the Commonwealth Government's Competitive Neutrality Policy (CNP), nevertheless indicates that the ABC supports the principles of competitive neutrality and applies them in its business activities.<sup>135</sup>

The submission notes that the CNP limits the application of the Policy to 'significant government business activities'; accordingly, they will not be applied to an organisation's non-profit or non-business activities.<sup>136</sup> The submission also states that the 1995 Competition Principles Agreement provides

<sup>129</sup> ABC Submission (2018), Attachment B, p. 4.

<sup>130</sup> ABC Submission (2018), Attachment B, pp. 4–5.

<sup>131</sup> ABC Submission (2018), Attachment B, p. 5.

<sup>132</sup> ABC Submission (2018), p. 35.

<sup>133</sup> ABC Submission (2018), Attachment B, pp. 5–6.

<sup>134</sup> ABC Submission (2018), Attachment B, p. 6.

<sup>135</sup> ABC Submission (2018), Attachment A, p. 2.

<sup>136</sup> Commonwealth of Australia, Commonwealth Competitive Neutrality Policy Statement, (1999), p. 7, Available at: <http://archive.treasury.gov.au/contentitem.asp?ContentID=275>.





support for the principle that competitive neutrality principles only apply to the extent that the benefits of implementation outweigh the costs.

The ABC notes that the only business segment that satisfies the above definitions (and therefore conducted in a manner consistent with competitive neutrality principles) is ABC Commercial.<sup>137</sup>

ABC Commercial comprises five key business areas: Content Sales and Distribution; Music; Publishing; Retail; and Studio Media Productions.<sup>138</sup> The ABC's submission states that services such as the ABC's broadcasting services, ABC iview and the ABC News website are not user-charging, and therefore do not meet the definition of 'business activity'.<sup>139</sup>

The ABC considers that it conducts its business in a manner consistent with other government entities that are subject to the CNP in that:

- parties can make complaints to the Australian Government Competitive Neutrality Complaints Office (AGCNCO) about unfair competition from the ABC, and
- ABC Commercial's operations are conducted in accordance with the Competitive Neutrality Guidelines for Managers.<sup>140</sup>

The submission notes that the ABC is cognisant of the requirement for ABC Commercial to act in a manner consistent with competitive neutrality principles. It also states that the ABC recently conducted a review to determine whether ABC Commercial operates with a competitive advantage in any of the five areas identified in the Guidelines for Managers as follows (the findings of the review are set out at Attachment E of the ABC's submission).<sup>141</sup> The ABC considers that the results demonstrate that ABC Commercial operates in a manner that is consistent with the CNP.<sup>142</sup>

- Taxation neutrality—taxation should be factored into the cost base (and therefore the prices of the relevant business activities) to maintain tax neutrality between government business and any competitors or potential competitors.<sup>143</sup> The submission notes that:
  - the ABC is exempt from some corporate and state taxes through the operation of section 71(1) of the ABC Act.
  - ABC Commercial pays Goods and Services Tax which is submitted as part of ABC's corporate Business Activity Statements.
  - ABC Commercial pays Fringe Benefits Tax which is submitted as part of ABC's corporate FBT return.
  - ABC Commercial pays Withholding Tax on relevant transactions.<sup>144</sup>
  - ABC Commercial's relevant business unit is Studio Media Production, which sets and takes into account labour rates based on industry rates.<sup>145</sup>

<sup>137</sup> ABC Submission (2018), pp. 22–23.

<sup>138</sup> ABC Submission (2018), p. 22.

<sup>139</sup> ABC Submission (2018), p. 22.

<sup>140</sup> ABC Submission (2018), p. 22.

<sup>141</sup> ABC Submission (2018), p. 23.

<sup>142</sup> ABC Submission (2018), p. 23.

<sup>143</sup> ABC Submission (2018), Attachment E, p. 6; Commonwealth of Australia, Australian Government Competitive Neutrality—Guidelines for Managers, Canberra, 2004, p. 16, Available at: [https://consult.treasury.gov.au/market-and-competition-policy-division/competitive-neutrality-review/supporting\\_documents/2004%20Competitive%20Neutrality%20Guidelines%20for%20Managers%20AGCN\\_guide\\_v4.pdf](https://consult.treasury.gov.au/market-and-competition-policy-division/competitive-neutrality-review/supporting_documents/2004%20Competitive%20Neutrality%20Guidelines%20for%20Managers%20AGCN_guide_v4.pdf).

<sup>144</sup> ABC Submission (2018), Attachment E, p. 6.

<sup>145</sup> ABC Submission (2018), Attachment E, pp. 6–7.



- ABC Commercial has not entered into any transactions that would attract the relevant business unit to land tax, stamp duty, or capital gains tax.<sup>146</sup>
- **Debt neutrality**—cost bases (and therefore prices) must be adjusted where the relevant business unit borrows money that reflects the credit risk of the Australian Government as a whole rather than a rate reflecting the credit risk of that type of business activity.<sup>147</sup> Competitive neutrality considers two types of relevant debt: budget debt (debt provided from the Commonwealth Budget through the Department of Finance) and market debt (debt provided through the capital markets, banks, or other financiers).<sup>148</sup> Where a significant business activity receives a cost advantage in borrowing because of its government ownership, it may need to make a debt neutrality payment.<sup>149</sup> The ABC notes in its submission that it only has one long-term loan in its name which does not relate to the activities of ABC Commercial.<sup>150</sup>
- **Regulatory neutrality**—cost bases must be adjusted by an amount equivalent to any advantage the relevant business unit accrues by not being subject to similar regulatory arrangements and obligations as their competitors.<sup>151</sup> The Competitive Neutrality Guidelines for Managers notes that a regulatory advantage will ‘take the form of either an exemption from an obligation to make a certain payment, or undertake certain activities or perform activities in a certain manner’.<sup>152</sup> Generally, regulatory advantages manifest themselves in the following areas:
  - Exemptions from local planning, building and environmental laws.
  - Exemptions from prudential requirements.
  - Preferred treatment by other agencies.
  - Amended reporting and/or licensing requirements.

The submission states that ABC Commercial operates within a ‘rigorous regulatory environment’, including the ABC Act which imposes significant restrictions on the ABC’s ability to conduct a business (for example, preventing it from generating revenue through advertisements or commercial sponsorships).<sup>153</sup> The ABC also complies with various reporting and contractual management obligations.<sup>154</sup>
- **Rate of return allocation**—prices of goods and services are at least sufficient to earn the relevant business activity a commercial rate of return overall and over a reasonable period of time.<sup>155</sup> The rate of return should, over time, be at least equal to the long-term (10 year) Commonwealth bond rate, as this is the Commonwealth’s base level cost of capital, plus a margin for risk.<sup>156</sup> The ABC considers that, after conducting a review of ABC Commercial’s financial performance

<sup>146</sup> ABC Submission (2018), Attachment E, pp. 6–7.

<sup>147</sup> ABC Submission (2018), Attachment E, p. 8; Commonwealth of Australia, Australian Government Competitive Neutrality—Guidelines for Managers, Canberra, 2004, p. 21.

<sup>148</sup> Commonwealth of Australia, Australian Government Competitive Neutrality—Guidelines for Managers, Canberra, 2004, p. 22.

<sup>149</sup> ABC Submission (2018), Attachment E, p. 8.

<sup>150</sup> ABC Submission (2018), Attachment E, p. 8.

<sup>151</sup> ABC Submission (2018), Attachment E, p. 9; Commonwealth of Australia, Australian Government Competitive Neutrality—Guidelines for Managers, Canberra (2004) p. 27.

<sup>152</sup> Commonwealth of Australia, Australian Government Competitive Neutrality—Guidelines for Managers, Canberra, 2004, p. 28.

<sup>153</sup> ABC Submission (2018), Attachment E, p. 9.

<sup>154</sup> ABC Submission (2018), Attachment E, pp. 9–10.

<sup>155</sup> ABC Submission (2018), Attachment E, p. 11; Commonwealth of Australia, Australian Government Competitive Neutrality—Guidelines for Managers, Canberra, 2004, p. 29.

<sup>156</sup> ABC Submission (2018), Attachment E, p. 11; Commonwealth of Australia, Australian Government Competitive Neutrality—Guidelines for Managers, Canberra, 2004, p. 31.



demonstrates that it earned a rate of return higher than the 10-year Commonwealth bond rate.<sup>157</sup>

- Cost allocation—agencies should ensure that prices charged reflect full cost attribution for their business activities.<sup>158</sup> The submission sets out the steps that ABC Commercial takes to ensure that it complies with this obligation, including noting the fact that ABC Commercial sets the pricing for its services at the relevant market rates.<sup>159</sup> The submission also notes that the method of costing labour and facilities by SMP (Studio Media Productions) exceeds the minimum cost benchmark consistent with competitive neutrality principles.<sup>160</sup>

## Question 2: Competitive neutrality and new activities

*What approach is used by your organisation to consider issues of competitive neutrality when commencing new activities or entering new markets? Are there examples of how this has been applied?*

The submission states that, in line with its Charter obligations, the ABC:

- gives appropriate regard to the impact of its activities on the commercial and community sector in its broader content activities
- strives to create its own individual programs and does not seek to replicate other programs or formats broadcast by other content providers, and
- does not use government funding to compete unfairly for content or audiences.<sup>161</sup>

The ABC notes that its current organisational structure enables it to create source content in three main areas: Entertainment and Specialist; News, Analysis and Investigations; and Regional and Local. Details on how each of these areas source, produce and deliver content is set out in section 3 of the ABC's submission. The submission states that, broadly speaking, the ABC (among other functions):

- is guided by its Charter obligations rather than any commercial imperatives to attract advertising revenue
- operates as an innovator and as a supporter of local production industries
- undertakes a rigorous editorial assessment of the content it commissions against the ABC Charter and the *Investing in Audiences* strategy. The ABC's *Investing in Audiences* strategy is underpinned by four core elements:
  - Creating content that reflects its Charter values and delivering services audiences expect, while finding new and innovative ways to tell stories.
  - Exceeding audience expectations.
  - Developing the best creative environments for its teams.
  - Using innovative ways to connect with all Australians; and<sup>162</sup>
- maintains an independent news service.<sup>163</sup>

<sup>157</sup> ABC Submission (2018), Attachment E, p. 11.

<sup>158</sup> ABC Submission (2018), Attachment E, p. 12; Commonwealth of Australia, Australian Government Competitive Neutrality—Guidelines for Managers, Canberra, 2004, p. 37.

<sup>159</sup> ABC Submission (2018), p. 23; ABC Submission (2018), Attachment E, pp. 12–13.

<sup>160</sup> ABC submission, Attachment E, page 13.

<sup>161</sup> ABC Submission (2018), p. 26, ABC Submission (2018), Attachment A, p. 2.

<sup>162</sup> ABC Submission (2018), Attachment D, p. 6.

<sup>163</sup> ABC Submission (2018), p. 29.



The ABC sees the interaction between general principles of competitive neutrality and the ABC Charter as one which requires it to give appropriate regard to the impact of its activities on the commercial and community sector in its broader content activities, and to ensure that it does not use its government funding to compete unfairly for content or audiences. For example:

- the ABC does not broadcast reality television or mainstream sports, in recognition that these services are already offered by the commercial broadcasters;<sup>164</sup>
- the ABC's lifestyle programming does not feature commercial sponsorship or cross promotion, such that the ABC does not compete with the commercial media organisations on a revenue basis;<sup>165</sup>
- adopting an acquisition process that takes into account factors such as how well the content complements the ABC's commissioned content in terms of genre and audience, the distinctiveness of the content, value for money, and quality of the content.<sup>166</sup> In most cases, content acquired by the ABC is of limited interest to commercial networks—in such cases where commercial operators seek to acquire the content, budgetary constraints prevent the ABC from being able to match competing bids;<sup>167</sup>
- the launch of 'Double J' (in 1975) essentially filled an existing gap in the market, and the ABC undertook consultation with community radio prior to launch.<sup>168</sup> Moreover, prior to the launch of the ABC KIDS listen station, the ABC took into account the existing commercial market (including potential competitors), prior to launching its service.<sup>169</sup>

### Question 3: Taking account of commercial and community broadcasting

*In view of the general principles of competitive neutrality, what relevance does the ABC give to the requirement in the ABC Act section 6(2) that it 'take account of the broadcasting services provided by the commercial and community sectors of the Australian Broadcasting system'?*

As referred to above, the ABC considers that it gives appropriate regard to the impact of its activities on the commercial and community sector. However, the submission notes that this requirement is not the sole factor that the ABC considers, and that the ABC has a range of other obligations under its Charter.<sup>170</sup> Moreover, the ABC notes that this requirement does not require that the ABC refrain from undertaking activities which might be said to have a potential impact on the commercial and community sectors.<sup>171</sup>

The ABC states that its content strategy is driven by a number of factors, including ensuring that its content is of high quality and distinctive when compared with the service offerings of their commercial and community counterparts.<sup>172</sup> The examples discussed as part of the ABC response to question 2 are also illustrative of the ABC's consideration of the commercial and community sector. For example, the ABC submission indicates that they do not seek to compete with commercial free-to-air broadcasters for coverage of major live television sports rights and reality programming.<sup>173</sup>

<sup>164</sup> ABC Submission (2018), p. 31.

<sup>165</sup> ABC Submission (2018), p. 31.

<sup>166</sup> ABC Submission (2018), pp. 35–36.

<sup>167</sup> ABC Submission (2018), p. 36.

<sup>168</sup> ABC Submission (2018), p. 37.

<sup>169</sup> ABC Submission (2018), p. 39.

<sup>170</sup> ABC Submission (2018), p. 26.

<sup>171</sup> ABC Submission (2018), p. 26.

<sup>172</sup> ABC Submission (2018), p. 26.

<sup>173</sup> ABC Submission (2018), p. 6.



## Question 4: Application of the requirement to on air, iview and online news services

*How does it apply this requirement to its on air, iview and online news services?*

The ABC notes that its approach to creating and sourcing content is consistent across all of its platforms.<sup>174</sup>

## SBS responses to the Issues Paper questions

SBS' submission sets out to highlight its regulatory and legislative constraints which it states prevents it from successfully competing with commercial counterparts. SBS states that it strives to fulfil its Charter obligations and deliver a distinctive and culturally diverse program offering.

SBS commissioned a report by Deloitte to aid its submission on the applicability of competitive neutrality to SBS. The report provides general guiding principles on the application of competitive neutrality (question 14 asked of stakeholders in the Issues Paper), and directly addressed question 7 asked of SBS. The comments made in relation to question 14 are found below, and the comments made in relation to question 7 are found under that relevant sub-heading.

### Question 1: Awareness of competitive neutrality

*What awareness is there in your organisation of the requirement to undertake a 'best endeavours' approach to complying with the Competitive Neutrality Policy? What organisational policies and processes are in place?*

SBS' submission states that there is 'a high degree of awareness' among its executives and senior management in relation to the requirement to undertake a best endeavours approach to competitive neutrality principles.<sup>175</sup> SBS states that such awareness stems from SBS' commitment to the SBS Act and its related policies and frameworks.

The submission notes that decisions made by SBS are undertaken and evaluated against the following considerations:

- The SBS Charter.
- The role of the SBS Board of Directors in discharging its obligations under sections 9 and 10 of the SBS Act.
- The powers and duties of SBS as set out in section 44 of the SBS Act.
- SBS' advertising powers as set out in sections 45 and 45A of the SBS Act.

The submission argues that SBS operates in relatively constrained position *vis-à-vis* their commercial counterparts, arising not only from the above considerations, but also the requirement that SBS comply with a number of other legislative provisions in relation to the discharge of its functions.<sup>176</sup>

### Question 2: Competitive neutrality and new activities

*What approach is used by your organisation to consider issues of competitive neutrality when commencing new activities or entering new markets? Are there examples of how this has been applied?*

SBS notes that it considers issues of competitive neutrality by giving primacy to the SBS Act.<sup>177</sup>

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<sup>174</sup> ABC Submission (2018), Attachment A, p. 3.

<sup>175</sup> SBS Submission (2018), p. 7.

<sup>176</sup> SBS Submission (2018), p. 26.

<sup>177</sup> SBS Submission (2018), p. 8.

The submission states that it is impossible for SBS to discharge its obligations in a manner that, in some cases, may overlap with the programs offered by other broadcasters.<sup>178</sup> Moreover, SBS notes that there is nothing in the SBS Act, or through the application of competitive neutrality principles, that would inherently prevent SBS from competing with the domestic media sector.<sup>179</sup> However, SBS considers that where there is competition from commercial broadcasters for certain programs, it is typically unable to compete.<sup>180</sup>

SBS states that it has a set of principles that it uses to guide its consideration of all new activities:

- SBS considers whether the activity presents an opportunity to enhance and improve SBS' delivery of its obligations under its Charter (specifically around audience engagement on digital platforms and extending reach and fulfilment of local content aspirations).<sup>181</sup> SBS considers that this approach will ensure that its new activities will maximise public outcomes, which is consistent with competitive neutrality principles.<sup>182</sup>
- There must be market demand for a service and where the service also aligns with its objectives to maximise its delivery on its Charter.<sup>183</sup>
- In most case where new activities also present opportunities to increase own-source revenues, SBS will only enter into an activity where the marginal cost of doing so will be covered by incremental revenue increases arising from that activity.<sup>184</sup>
- New activities should align with SBS' capacity to leverage its innovative and agile workforce to support its Charter.<sup>185</sup>

SBS states that, moreover, it adopts a process for determining the resource allocation for its activities:

- A committee comprising senior staff considers a full business case proposal and tests the veracity of the financial data.<sup>186</sup>
- An executive committee oversees SBS' content strategy, and the broader executive team assess the activities.<sup>187</sup>
- For significant investments or new strategic initiatives, presentation to the SBS Board of Directors for review and endorsement.<sup>188</sup>
- Ongoing periodic reporting on budget and key performance metrics to the senior executive.<sup>189</sup>

The submission demonstrates the application of the abovementioned principles in the context of SBS' approach to the implementation of its Food Network.

<sup>178</sup> SBS Submission (2018), p. 26.

<sup>179</sup> SBS Submission (2018), pp. 26, 28.

<sup>180</sup> SBS Submission (2018), p. 27.

<sup>181</sup> SBS Submission (2018), p. 27.

<sup>182</sup> SBS Submission (2018), p. 27.

<sup>183</sup> SBS Submission (2018), p. 27.

<sup>184</sup> SBS Submission (2018), p. 27.

<sup>185</sup> SBS Submission (2018), p. 27.

<sup>186</sup> SBS Submission (2018), p. 28.

<sup>187</sup> SBS Submission (2018), p. 28.

<sup>188</sup> SBS Submission (2018), p. 28.

<sup>189</sup> SBS Submission (2018), p. 28.





## Question 5: Television and radio diversity, and taking account of the ABC and community broadcasting

*In view of the general principles of competitive neutrality what relevance does the SBS give to section 2(g) of its Charter that the SBS in relation to its radio and television services ‘contribute to the overall diversity of Australian television and radio services, particularly taking into account the contribution of the Australian Broadcasting Corporation and the community broadcasting sector’?*

SBS’ submission notes that it gives extensive consideration to all of the requirements of its Charter, which includes the requirement that SBS contribute to the overall diversity of Australian media services across its suite of programs and platforms.<sup>190</sup> This also requires the SBS to take into account the contribution of the ABC and the community broadcasting sector.<sup>191</sup>

The submission highlights that SBS is a niche operator with distinctive service offerings, reflected in both its corporate plan and its Charter.<sup>192</sup> The submission notes, in particular, SBS’ ability to engage with audiences from culturally and linguistically backgrounds (of note is that the submission refers to targets set by SBS to ensure it provides a distinctive market product, with such targets relating to culturally and linguistically diverse programming).<sup>193</sup>

SBS states that it always has regard to section 2(g) of its Charter, in order to safeguard against an overlap between its services and those offered by the ABC and the community broadcasting sector.<sup>194</sup> In doing so, it ensures that the services it offers are complementary to, and not in competition with, services offered by these other organisations and sectors.<sup>195</sup> Moreover, SBS states that it consults with both the ABC and the community broadcasting sector, and its distinctiveness of service is continually monitored.<sup>196</sup>

## Question 6: Consideration of the requirement in relation to SBS On Demand

*Noting that this Charter provision applies specifically to television and radio, is this requirement considered in relation to SBS On Demand?*

SBS states that SBS On Demand is a distinctive market proposition that caters to emerging consumptions methods.<sup>197</sup> SBS notes that digital services have been mandated in its Charter since 2013, and SBS takes into account the services offered by other domestic streaming services in offering culturally and linguistically diverse programming, and programming in languages other than English.<sup>198</sup>

SBS states that, as a niche operator, it focusses on digital innovation as a means of ensuring its sustainability and relevance.<sup>199</sup> It advises that the decision to prioritise investment in digital services was given the utmost consideration as an operating strategy, given SBS’ limited content budget.<sup>200</sup>

<sup>190</sup> SBS Submission (2018), p. 9.

<sup>191</sup> SBS Submission (2018), p. 9.

<sup>192</sup> SBS Submission (2018), p. 44.

<sup>193</sup> SBS Submission (2018), pp. 10, 46.

<sup>194</sup> SBS Submission (2018), p. 9.

<sup>195</sup> SBS Submission (2018), p. 9.

<sup>196</sup> SBS Submission (2018), pp. 9–10.

<sup>197</sup> SBS Submission (2018), p. 12.

<sup>198</sup> SBS Submission (2018), p. 54.

<sup>199</sup> SBS Submission (2018), p. 12.

<sup>200</sup> SBS Submission (2018), p. 12.



The submission notes that:

*As with the SBS main channel, where content is not CALD [culturally and linguistically diverse] or LOTE [language other than English], it plays a critical and successful role in engaging audiences with SBS On Demand which enables SBS to promote the breadth of its offering across channels and platforms, specifically CALD [culturally and linguistically diverse] and LOTE [language other than English] programs.<sup>201</sup>*

### Question 7: Approach to competitive neutrality in relation to commercial players

*Noting that unlike the ABC, SBS does not have a requirement to take account of the 'broadcasting services provided by the commercial broadcasters' and that SBS has the ability to seek advertising to partially fund its activities, how does SBS approach the broad issues of competitive neutrality in relation to commercial players?*

The submission states that SBS' small market size and structural disadvantages prevent it from materially influencing the advertising market.<sup>202</sup> This conclusion is based on the fact that SBS is the smallest operator in the free-to-air media sector, has the smallest overall budget, the lowest average market share, and attracts the smallest share of revenues.<sup>203</sup> Moreover, there are legislative restrictions which also constrain SBS' ability to compete for advertising revenue.<sup>204</sup>

Broadly speaking, the submission highlights the challenges SBS faces in competing with commercial operators in the following key areas:

- Content budgets:<sup>205</sup> SBS draws attention to its relatively smaller content budget, which prevents it from creating a consistent offering of programming (such as long-running reality television franchises which appear on free-to-air television).<sup>206</sup> Aside from these financial constraints, SBS considers its Charter drives differentiation in the market and empowers it to pursue public interest objectives, which constrains its ability to compete for content.<sup>207</sup> SBS states that these considerations significantly inform its content strategy, but also ultimately restrict its ability to compete.
- Programming constraints:<sup>208</sup> SBS states that, with its small content budget, it must be highly tactical in maximising the value of its investments. The submission also notes that the significantly changing media environment (specifically with reference to large international companies), has also further restricted SBS' ability to compete.<sup>209</sup> SBS draws on its declining audience figures for the 25–54 demographic as evidence of the challenges it faces.<sup>210</sup>
- Scheduling:<sup>211</sup> Again drawing on its relatively small content budget, SBS states that it must compile a cohesive programming strategy from 'over 500 disparate distributors across the world' when compared to other media content providers in Australia.<sup>212</sup>

<sup>201</sup> SBS Submission (2018), p. 54.

<sup>202</sup> SBS Submission (2018), p. 13

<sup>203</sup> SBS Submission (2018), p. 14

<sup>204</sup> SBS Submission (2018), pp. 13-14

<sup>205</sup> SBS Submission (2018), pp. 59-61

<sup>206</sup> SBS Submission (2018), p. 15

<sup>207</sup> SBS Submission (2018), p. 58

<sup>208</sup> SBS Submission (2018), p. 62

<sup>209</sup> SBS Submission (2018), p. 58

<sup>210</sup> SBS Submission (2018), p. 58

<sup>211</sup> SBS Submission (2018), p. 63

<sup>212</sup> SBS Submission (2018), pp. 16, 63



- Securing distinctive content.<sup>213</sup> SBS states that it needs to be able to source content from a diverse range of providers in order to deliver on one of its core mandates—to connect with mainstream multicultural Australia on television or online.<sup>214</sup> The submission notes the following factors as influencing SBS’ competitive capacity to secure distinctive content:
  - It delivers a balance between commissioned and acquired content, noting that Australian content is more expensive to make.<sup>215</sup>
  - Searching for distinctive content narrows its field of options.<sup>216</sup>
  - The volatility in the acquisitions market means that it is difficult to deliver a consistent and diverse offering of content.<sup>217</sup>
  - SBS must be more judicious about the timing of the decisions it makes.<sup>218</sup>
  - The diverse ways in which consumers can view content (e.g. Netflix), while good from a consumer perspective, reinforces to SBS the need to secure distinctive content.<sup>219</sup>
- Constraints on marketing.<sup>220</sup> SBS states that its unique programming models (short-run programs), and limited budget, put it at a significant disadvantage compared with commercial competitors in promoting its content and attracting audiences.<sup>221</sup>

As foreshadowed above, the Deloitte Report sets out a proposed framework for assessing whether SBS’ activities raise competitive neutrality concerns (show below).<sup>222</sup>

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<sup>213</sup> SBS Submission (2018), pp. 64-69

<sup>214</sup> SBS Submission (2018), p. 64

<sup>215</sup> SBS Submission (2018), p. 64

<sup>216</sup> SBS Submission (2018), p. 64

<sup>217</sup> SBS Submission (2018), p. 65.

<sup>218</sup> SBS Submission (2018), p. 65.

<sup>219</sup> SBS Submission (2018), p. 65.

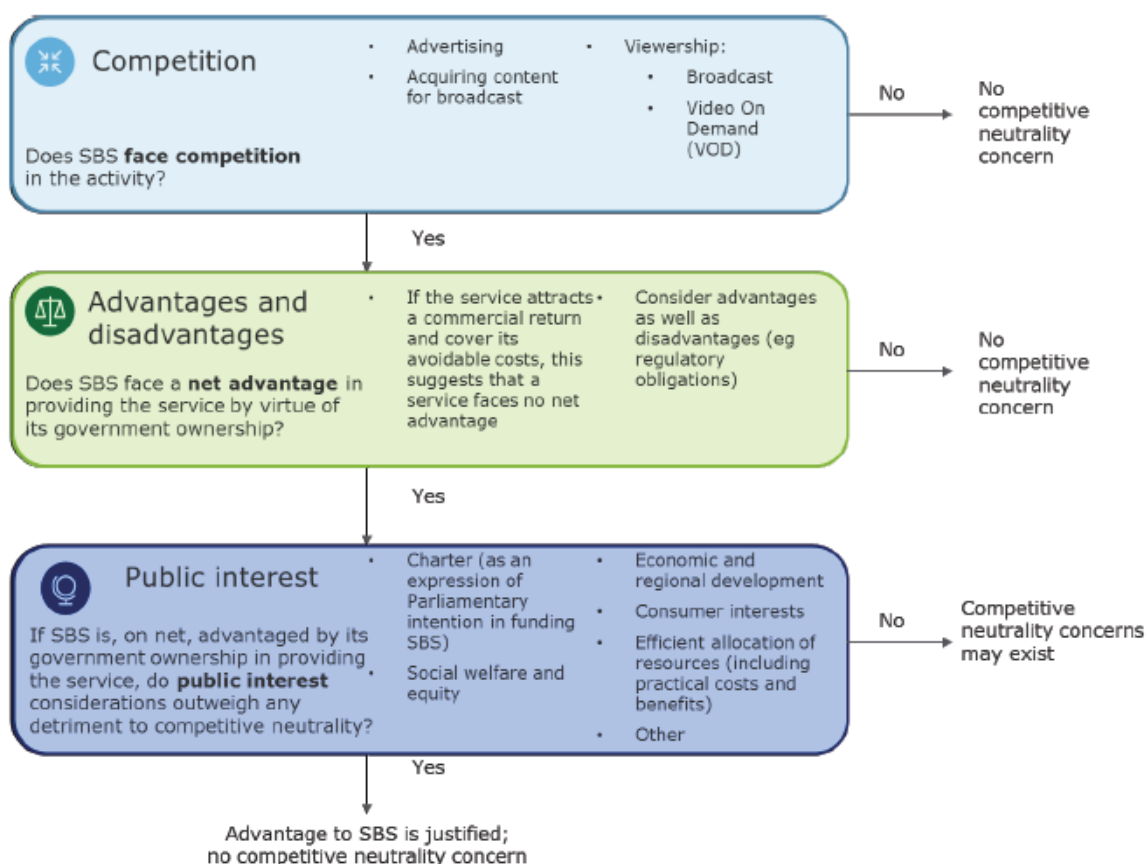
<sup>220</sup> SBS Submission (2018), p. 69.

<sup>221</sup> SBS Submission (2018), p. 69.

<sup>222</sup> SBS Submission (2018), p. 76 and Appendix 1.1, p. 28.



Figure 13: Framework provided by SBS for assessing whether SBS activities raise competitive neutrality concerns<sup>223</sup>



Adapted from Australian Government 2004 Competitive Neutrality Guidelines for Managers.

The Deloitte Report notes that SBS competes with other market participants in the following areas:

- Attracting audiences on both its television and VOD services.
- Attracting advertising.
- Acquiring content for broadcast.<sup>224</sup>

The report sets out the perceived advantages and disadvantages SBS experiences as a result of its government ownership. These include (but are not limited to):

- SBS does not need to generate a commercial rate of return across all of its services;
- SBS does not need to pay annual spectrum charges;
- SBS has limits placed on its ability to earn advertising revenue;
- SBS' programming decisions and operations are constrained by its Charter; and
- SBS is subject to a number of additional regulatory obligations which are not imposed on commercial broadcaster.<sup>225</sup>

<sup>223</sup> SBS Submission (2018), p. 76.

<sup>224</sup> SBS Submission (2018), Appendix 1.1, p. 29.

<sup>225</sup> SBS Submission (2018), Appendix 1.1, pp. 29-30

SBS' submission sets out an overview of the regulatory advantages and disadvantages for the national broadcasters relative to other television broadcasting market participants.<sup>226</sup> This includes (for example):

- that the national broadcasters enjoy an advantage in terms of government funding and income tax exemptions;
- that the national broadcasters are at a disadvantage in respect of public entity obligations and accountability requirements and restrictions on advertising; and
- the national broadcasters and other market participants are generally treated the same in terms of captioning requirements and Screen Australia funding.

SBS states that its operations can still be consistent with competitive neutrality principles if the public benefit of the activity exceeds the cost associated with not complying with these principles.<sup>227</sup> The submission notes that the reference to 'cost' might be in the form of impacts to competitive markets (e.g. materially crowding out other content or reducing advertising revenues).<sup>228</sup> The submission notes that the SBS Charter should be the 'touchstone' for determining what constitutes the 'public interest' in relation to SBS' activities.<sup>229</sup> In that respect, SBS states that its activities may broadly engage a number of other public interest benefits (e.g. social welfare and equity).<sup>230</sup> The SBS states that its operations can still be consistent with competitive neutrality principles if the public benefit of the activity exceeds the cost associated with not complying with these principles.<sup>231</sup> The submission notes that the reference to 'cost' might be in the form of impacts to competitive markets (e.g. materially crowding out other content or reducing advertising revenues)<sup>232</sup>—the SBS Charter should be the 'touchstone' for determining what constitutes the 'public interest' in relation to SBS' activities.<sup>233</sup> In that respect, SBS states that its activities may broadly engage a number of other public interest benefits (e.g. social welfare and equity).<sup>234</sup>

The submission puts forward the following hypothetical situation to illustrate the application of this public interest objective:

*The extent to which this range of regulatory advantages and disadvantages can affect competition and outcomes in the market ultimately depends on the behaviour of market participants. SBS gains an advantage from the government funding it receives but is limited in its ability to raise revenue of its own due to advertising restrictions. If this government funding was used solely to acquire programs that would otherwise have been shown by other segments of the market, there is scope for SBS to have a negative impact on competition by using their receipt of government funding to gain an unfair advantage on their commercial competitors.*

*However, if government funding is used to achieve broader public interest objectives by extending consumer choice and offering content that satisfies the objectives in its Charter then the potential impact on competition will be much lower and outweighed by the positive impact on consumer outcomes. Thus whether or not SBS is able to use any regulatory advantages to impact competition will largely depend on the operational decisions they make. Nonetheless, understanding the nature of the regulatory advantages and disadvantages that apply to SBS is*

<sup>226</sup> SBS Submission (2018), Appendix 1.1, p. 89.

<sup>227</sup> SBS Submission (2018), Appendix 1.1, p. 30.

<sup>228</sup> SBS Submission (2018), Appendix 1.1, p. 30.

<sup>229</sup> SBS Submission (2018), Appendix 1.1, p. 30.

<sup>230</sup> SBS Submission (2018), Appendix 1.1, p. 30.

<sup>231</sup> SBS Submission (2018), Appendix 1.1, p. 30.

<sup>232</sup> SBS Submission (2018), Appendix 1.1, p. 30.

<sup>233</sup> SBS Submission (2018), Appendix 1.1, p. 30.

<sup>234</sup> SBS Submission (2018), Appendix 1.1, p. 30.

*useful in assessing the extent to which they act in ways that are consistent with competitive neutrality.*<sup>235</sup>

## Panel comments

- The National Broadcasters believe they are complying on a best endeavours basis with the Competitive Neutrality Policy as it applies to their commercial activities.
- The National Broadcasters doubt that any further application of competitive neutrality principles is relevant or warranted.
- The National Broadcasters doubt that there are other significant market distortions arising from their activities that are beyond the public interest.
- SBS states that its operations can still be consistent with competitive neutrality principles if the public benefit outweighs the cost of not complying with these principles. It says that the SBS Charter should be the touchstone for determining the 'public interest'.

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<sup>235</sup> SBS Submission (2018), Appendix 1.1, p. 90.

## Chapter 6: Issues raised by stakeholders

In their submissions to the Inquiry, stakeholders raised a broad range of issues relating to the National Broadcasters, not all of which relate to the Inquiry's Terms of Reference. In order to capture the full breadth of submissions, this chapter outlines the key issues raised.<sup>236</sup>

Where issues can be responded to briefly the Panel has done so below. Where issues are more complex they are discussed and analysed further in [Chapter 7](#). Issues outside of the Terms of Reference will be referred to the Department of Communications and the Arts for further policy consideration.

Submissions contain both support for the operations of the National Broadcasters and complaints about how the National Broadcasters operate in the various markets in which they are present.

### Summary of issues

Below is a summary of the issues raised by each stakeholder group,<sup>237</sup> which are described in more detail in the following section.

- All key submissions expressed support for the role of the National Broadcasters.
- Free TV Australia, representing free-to-air broadcasters, focuses its submission on SBS. It raises concerns regarding SBS' content acquisitions policy, claiming that it is not in line with the SBS Charter.
- Subscription service Stan is concerned that SBS On Demand is a free version of paid subscription streaming services and when bidding for international content increases competition in areas which Stan believes are outside the SBS Charter obligations.
- News publishers Fairfax Media and News Corp Australia raise concerns that the free online news services of both the ABC and SBS are competing for the same audiences and therefore undermining the potential revenue base of commercial news media.
- Commercial Radio Australia, representing radio broadcasters, raises concerns in relation to the radio operations of the National Broadcasters, focusing mainly on the operations of ABC Radio. It raises concerns around a lack of regulatory neutrality and the use of ABC platforms to promote the ABC's own content.
- Independent producers, represented by Screen Producers Australia, raise issues about the behaviour of National Broadcasters in relation to bargaining power and terms of trade<sup>238</sup> for content producers.
- Small media players, including Kinderling and Story Box Library, question the fairness of the ABC's behaviour.
- Consumer and community groups, such as ABC Friends, Save our SBS and the Federation of Ethnic Communities' Councils of Australia, emphasise the importance of the National Broadcasters. Save Our SBS is concerned about SBS' advertising and the impact it has on SBS' content acquisitions policy, claiming that it drives it towards more commercially-oriented programming.

<sup>236</sup> While attempts have been made to give fair rendition to issues raised by stakeholders, to some extent all summaries in this chapter are selective based on relevance. Full submissions are available on the Department of Communications and the Arts' website: <https://www.communications.gov.au/have-your-say/inquiry-competitive-neutrality-national-broadcasters>

<sup>237</sup> A total of 6839 submissions were received by the inquiry. 22 of these were from stakeholder organisations, 194 were submitted directly by members of the public, a further 6621 were received as part of a campaign by GetUp!.

<sup>238</sup> Terms of trade refers to governing arrangements between broadcasters and producers. This includes contractual arrangements regarding fees, rights and licencing arrangements.



- Other groups including employment groups, think tanks and sector representative groups provide their perspectives on international influence and trends in Australia's media markets and share their views on the activities of the National Broadcasters.
- Of the 6816 submissions from individuals, 6621 were received via a campaign website operated by GetUp!. Submissions from members of the public overwhelmingly expressed support for the public service roles played by the National Broadcasters and opposed the privatisation of the ABC.

## Details of issues

### Free-to-air broadcasters

#### Free TV Australia

Free TV Australia is the industry body representing Australia's commercial free-to-air television broadcast licencees. Its submission states that

*Free TV Australia (Free TV) respects and supports vibrant national broadcasters that have sufficient funding to fulfil their important and distinctive roles in Australia's media landscape... The existing charters of both the ABC and SBS remain highly relevant and appropriately capture the distinctive principal functions of each broadcaster.*<sup>239</sup>

The submission notes competitive advantages enjoyed by the National Broadcasters and focuses on the activities of SBS, which Free TV considers to be increasingly competing with commercial broadcasters for content 'at the expense of charter aligned programming'.<sup>240</sup>

- Free TV's submission states that 'SBS TV (including SBS On Demand) in pursuing commercial outcomes has driven its programming scheduling away from its statutory functions.'<sup>241</sup> Free TV commissioned analysis of SBS programs to illustrate a trend of purchasing content that it considered not Charter-aligned.
- Free TV also considers that 'SBS has had a deliberate and increasing strategy to focus its prime-time TV offerings on commercial content that does not fit within the principal functions as set out in its charter'.<sup>242</sup>
- Free TV states that 'allowing advertising on SBS had an immediate impact on it moving LOTE programming to outside of prime time. A further unintended effect appears to have been to bestow upon the SBS conflicting incentives—a) to provide charter-aligned content, but b) to chase commercial audiences and deliver on commercial expectations—an uneasy trade-off with a strained balance.'<sup>243</sup>
- Commercial broadcasters point to the type of content acquired to stream directly on SBS On Demand, particularly loss-leading content<sup>244</sup> as creating a consumer expectation that content typical of SVOD services can be provided for free.<sup>245</sup>
- FreeTV argues that National Broadcasters gain a competitive advantage by virtue of their secure government funding during content acquisition, as they are able to offer better terms to television distributors to ensure they are successful in bidding for content, for example, upfront payment and entering into bulk deals in a bid to secure a particular piece of content. Free TV

<sup>239</sup> Free TV Australia Submission (2018), p. 3.

<sup>240</sup> Free TV Australia Submission (2018), p. 5.

<sup>241</sup> Free TV Australia Submission (2018), p. 1.

<sup>242</sup> Free TV Australia Submission (2018), p. 12.

<sup>243</sup> Free TV Australia Submission (2018), p. 9.

<sup>244</sup> Loss leader is a pricing strategy whereby content is provided below its market cost in order to draw audiences and generate repeat or loyal viewership that will be more profitable in the long term.

<sup>245</sup> Free TV Australia Submission (2018), p. 26.



argues that SBS can offer attractive ‘non-financial terms’ to successfully compete for commercial content,<sup>246</sup> in particular:

- SBS’ practice of paying an up-front licence fee for content, rather than payment over a fixed term, gives them an advantage over commercial broadcasters. ‘Given the carrying cost of the capital involved, it is not commercially practical for networks to offer advanced payment terms. Free TV is concerned that our members may be losing out on commercial content if SBS is applying the practice of paying upfront for some content.’<sup>247</sup>
- SBS’ practice of buying ‘off script’ gives it an advantage over commercial broadcasters. Free TV explains that it is not possible for commercial networks to buy off-script due to the margins commercial broadcasters operate on, stating that ‘this is a further example of the government owned risk profile distorting the operation of the competition content acquisition market.’<sup>248</sup>
- Free TV states that the ABC and SBS are not subject to the same regulatory regime as their commercial counterparts that are regulated under the BSA, in particular:
  - The National Broadcasters are not subject to local content obligations. Free TV considers this ‘gives the national broadcasters a competitive advantage as they are able to respond immediately to changing audience patterns.’<sup>249</sup> This is because the National Broadcasters do not have to spend their funds on fulfilling obligations associated with regulated quotas.
  - The National Broadcasters are subject to less rigorous code approval processes.
  - The National Broadcasters do not pay for spectrum and are funded by the government for transmission costs.
  - The National Broadcasters are exempt from some taxes.
- Free TV raises concerns regarding the availability of transparent information, stating that ‘SBS has also recently declined to provide revenue data to ThinkTV—the industry body that published a six-monthly total TV revenue figure.’<sup>250</sup>

In September 2018, Free TV provided a supplementary submission to the Inquiry in which it raised concerns regarding the ABC’s announcement of a new online lifestyle offering, ABC Life. Free TV put forward the view that ‘the ABC Life investment duplicates services that are freely provided by the commercial sector’<sup>251</sup> and that it would erode commercial business models by attracting similar audiences. Free TV argued that this example reinforces the need for an enhanced regulatory framework in the form of oversight by the Australian Communications and Media Authority (ACMA) to provide transparency of how the ABC takes account of services provided by the commercial sector.

The Panel notes that issues related to Charter, regulatory arrangements and commercial behaviour are dealt with in [Chapter 7](#) and [Chapter 8](#).

Free TV recommends the abovementioned issues be addressed through regulatory reform, such as:

- The introduction of an ‘enhanced regulatory function’ for the ACMA to report on the performance of the national broadcasters against their charter obligations, including how they take account of the commercial sector.<sup>252</sup>

<sup>246</sup> Free TV Australia Submission (2018), p. 25.

<sup>247</sup> Free TV Australia Submission (2018), p. 25.

<sup>248</sup> Free TV Australia Submission (2018), p. 25.

<sup>249</sup> Free TV Australia Submission (2018), p. 22.

<sup>250</sup> Free TV Australia Submission (2018), p. 24.

<sup>251</sup> Free TV Australia Supplementary Submission (2018), p. 1.

<sup>252</sup> Free TV Australia Submission (2018), p. 4.



- The introduction of a corresponding requirement for the ABC and SBS to respond to this performance, competition and Charter review, including an obligation for the National Broadcasters to include in their annual reports how they took account of the commercial sector in the preceding 12 months and set out a forward-looking plan to take account of the findings of the ACMA competition Charter review.<sup>253</sup>
  - 'SBS should also specifically be required to take account of the services provided by the commercial sector (as is already required of the ABC).'<sup>254</sup>
  - 'To address the incentive for SBS to pursue commercial revenue, the Government should provide longer term funding certainty beyond the current triennial funding model to ensure that both our national broadcasters can plan for the future in delivering the distinctive services that were envisaged when they were established.'<sup>255</sup>
  - The introduction of a requirement for the ACMA to register National Broadcaster codes of practice.<sup>256</sup>
  - Allow greater flexibility in quotas for commercial free-to-air networks.<sup>257</sup>
  - Require 'the ABC and SBS to contribute towards the cost of operating and maintaining the transmissions sites managed by RBA Holdings Pty Ltd.'<sup>258</sup>

## Subscription services

### Stan

Subscription Video on Demand (SVOD) service, Stan is jointly owned by the Nine Network and Fairfax Media. Launched in 2015, Stan is an Australian owned Subscription Video on Demand (SVOD) service. It states that it has over 1 million subscribers.<sup>259</sup> Stan's submission suggests a number of issues related to how National Broadcasters compete in Australia's media market.

- Stan states that at the same time as 'new platforms and mediums have emerged, the National Broadcasters have increasingly moved into areas of the market where there is considerable overlap with commercial operators.'<sup>260</sup>
- In particular, Stan believes that the digital on-demand streaming services of the National Broadcasters are unfairly competing with commercial SVOD services by offering a 'free' version of paid subscription services.<sup>261</sup>
- Stan states that the National Broadcasters have an unfair advantage in content acquisition markets as a result of their government funding. 'For example, national broadcasters are able to offer better payment terms to television distributors to help ensure they are successful in bidding for content.'<sup>262</sup>
- Stan opposes the ability for National Broadcasters to establish commercial partnerships with global streaming services as '[t]hese sorts of partnerships often see the global partners benefitting from Australian government funds to reduce their cost of content rights.'<sup>263</sup>

<sup>253</sup> Free TV Australia Submission (2018), p. 5.

<sup>254</sup> Free TV Australia Submission (2018), p. 4.

<sup>255</sup> Free TV Australia Submission (2018), p. 4.

<sup>256</sup> Free TV Australia Submission (2018), p. 5.

<sup>257</sup> Free TV Australia Submission (2018), p. 5.

<sup>258</sup> Free TV Australia Submission (2018), p. 5.

<sup>259</sup> Stan Submission (2018), p. 1.

<sup>260</sup> Stan Submission (2018), p. 1.

<sup>261</sup> Stan Submission (2018), p. 2.

<sup>262</sup> Stan Submission (2018), p. 1.

<sup>263</sup> Stan Submission (2018), p. 2.

The Panel notes that issues related to competition by the National Broadcasters are analysed in [Chapter 7](#).

## News publishers

### Fairfax Media

Fairfax Media is an Australian commercial news media company with investments in newspapers (including The Sydney Morning Herald, The Age, The Australian Financial Review, The Canberra Times and The Sun-Herald), digital media, radio and magazines. Fairfax's submission raises concerns regarding competition by the National Broadcasters in the online news media market, in particular how the services of the ABC and SBS might be negatively impacting the viability of commercial providers.

- Fairfax 'recognise[s] the importance of the publicly funded ABC as an integral part of the Australian community. We value the ABC's commitment to reflecting Australia's diverse viewpoints. We think the ABC has a strong role to play to ensure that marginal voices are heard, where it is not commercially viable to do so. We respect the high quality, journalistic principles that the ABC adheres to.'<sup>264</sup>
- Fairfax suggests that the entrance of the ABC into the online news market in 1995 has exacerbated the structural challenges facing the commercial sector. Fairfax considers that the ABC's 'uneconomic distribution' of news content has two major impacts:
  - Firstly, 'commercial news journalism organisations' ability to attract paying subscribers is hampered by the availability of similar content from the ABC, for free.'<sup>265</sup>
  - Secondly, the ABC 'limits the advertising revenue potential for other news websites, by attracting a substantial proportion of total news audience page views away from the commercial sector',<sup>266</sup> including though developing 'clickbait' and promoting these via Google or Facebook.
- Fairfax states that by virtue of its government funding, the ABC is competitively advantaged and distorts the online news journalism market.<sup>267</sup>
- The submission raises concerns around the type of content provided by ABC News, namely that 'the content strategy that the ABC is currently pursuing is not in keeping with the spirit of the charter, or ABC's own proclamations on its programming strategy. It celebrates its contents' high quality and distinctiveness and emphasises that its content decisions are not ratings driven... Yet much of their content is either commoditised or reproduced from the commercial sector and does not reflect these values.'<sup>268</sup>
- Fairfax further raises concerns that prior to the amendment of the ABC Act in 2013 to include provision of 'digital media services', ABC News Online constituted a breach of the ABC's Charter, which stipulates the ABC is a broadcaster.<sup>269</sup>
- Fairfax states that the strain on commercial news media is exacerbated by SBS News which is competing for advertising as well as eyeballs. 'SBS' online news site takes this market distortion one step further than the ABC's, by competing for audience in mainstream online news, as well as generating advertising from this audience—reducing the pool of available advertising revenues available to the commercial sector.'<sup>270</sup>

<sup>264</sup> Fairfax Media Submission (2018), p. 8.

<sup>265</sup> Fairfax Media Submission (2018), p. 5.

<sup>266</sup> Fairfax Media Submission (2018), p. 6.

<sup>267</sup> Fairfax Media Submission (2018), p. 6.

<sup>268</sup> Fairfax Media Submission (2018), p. 5.

<sup>269</sup> Fairfax Media Submission (2018), p. 5.

<sup>270</sup> Fairfax Media Submission (2018), p. 7.



- Fairfax claims that the ABC has underbid commercial players in order to secure commercial deals. 'There is evidence of the ABC underbidding commercial players for content deals with other news providers. A recent example of this was when the ABC underbid AAP (a joint venture between commercial players Fairfax Media and other commercial news publishers) for newswire services to an outdoor media company.'<sup>271</sup>
- Fairfax recommends that ABC News should refocus on 'distinctive, high quality content, that is not ratings driven, but that contributes to the national identity and addresses market failure, for example in regional areas that lack scale.'<sup>272</sup>
- Fairfax highlights that in the UK, 'Ofcom has been given the authority to "set a range of requirements on the BBC to protect fair and effective competition as part of the BBC's operating framework."' <sup>273</sup>

The Panel notes that issues related to competition by the National Broadcasters in relation to online news are analysed in [Chapter 7](#). Recommendations relating to changes to the National Broadcasters' Charters are outside the Terms of Reference.

### News Corp Australia

News Corp Australia is Australia's predominant newspaper publisher with investments in subscription television (Sky News, Foxtel), magazines, online news (news.com.au) and newspapers, including The Australian, The Daily Telegraph, Herald Sun and The Courier-Mail. News Corp's submission focuses on the operations of the National Broadcasters in online and broadcast news and information services.

- News Corp claims that there is a lack of a level playing field in the online news market as the National Broadcasters 'are advantaged... due to their taxpayer funding models and the out-of-date Charters that require holistic review in the digital context.'<sup>274</sup>
- News Corp also states that National Broadcasters are advantaged in the broadcast news content market 'where they compete in a commercial marketplace with commercial news providers, with dramatically different incentives as they do not have to receive a return on their taxpayer funding in order to sustain a news content business (including reinvestment in news content)'.<sup>275</sup>
- News Corp questions whether it is appropriate for the National Broadcasters to promote their news content through the use of digital marketing (for example through the purchase of Google AdWords), as it is increasing the cost of marketing for commercial news media organisations.<sup>276</sup>
- News Corp is of the view that the ABC should not compete in a commercial environment for the provision of news content, particularly where this content can be commercialised by third parties:

*The Australian News Channel's commercial news services, including SkyNews, have and continue to pursue commercial opportunities for the supply of news services beyond subscription television. In doing so [the Australian News Channel] has gone head-to-head with the ABC for the provision of news services.*

*While it is unclear what the terms of any tender or content provision arrangement has been, it is suboptimal that public broadcasters—funded by the public and not required to*

<sup>271</sup> Fairfax Media Submission (2018), p. 6.

<sup>272</sup> Fairfax Media Submission (2018), p. 9.

<sup>273</sup> Fairfax Media Submission (2018), p. 7.

<sup>274</sup> News Corp Australia Submission (2018), p. 1.

<sup>275</sup> News Corp Australia Submission (2018), p. 1.

<sup>276</sup> News Corp Australia Submission (2018), p. 5.



*self-fund news production—are able to compete with commercial news and information providers for the provision of news content.*<sup>277</sup>

- News Corp provides a number of recommendations:
  - The introduction of periodic reporting by the National Broadcasters on their Charters, including a regular statutory review of the Charters similar to the model adopted in the UK.<sup>278</sup>
  - In regards to the ABC Charter obligation that ‘the Corporation shall take account of the broadcasting services provided by the commercial and community sectors of the Australian broadcasting system’ (section 6(2)(a)(i)), ensure that obligation be applied to the provision of online news and other services.<sup>279</sup>
  - As the SBS Charter does not currently include a similar clause, News Corp recommends that section 6(2)(a)(i) of the ABC Act be reflected in the SBS Charter.<sup>280</sup>
  - Prohibit the National Broadcasters from entering into commercial news arrangements.<sup>281</sup>

The Panel notes that issues related to competition by the National Broadcasters in relation to online news are analysed in [Chapter 7](#). Recommendations relating to changes to the National Broadcasters’ Charters are outside the Terms of Reference.

## Radio broadcasters

### Commercial Radio Australia

Commercial Radio Australia (CRA) is the industry body representing commercial radio broadcasters in Australia. CRA raises a number of concerns in its submission in relation to the radio operations of the National Broadcasters, but focuses mainly on the operations of ABC Radio.

- CRA argues that commercial radio broadcasters are at a significant regulatory disadvantage to the National Broadcasters due to the requirement of the *Broadcasting Services Act 1992* for a co-regulatory Code of Practice which is administered by the ACMA and involves a lengthy period of public consultation and negotiation with the regulator.
- CRA identifies a difference in regulation between commercial and public radio broadcasters as a result of the *Broadcasting Services Act 1992* which places local content and Australian music obligations on commercial radio. CRA states that there is an

*absence of regularity neutrality between the commercial and publicly funded broadcast sectors. The commercial radio industry is subject to significant local content and Australian music obligations. No such restrictions bind the national broadcasters. This places regional radio broadcasters—who are subject to the local content regulations—at a particular disadvantage.*<sup>282</sup>

- CRA argues that the lack of equality in technical regulations applying to the National Broadcasters is a further regulatory disadvantage to commercial broadcasters, in some cases limiting their ability to reach the same audience reached by the ABC.
- CRA states that the ‘ABC uses its government funding to market aggressively against the commercial sector. For example, the ABC pays for its own services to be listed above commercial services on App Store and Facebook, even when the consumer has searched for the commercial

<sup>277</sup> News Corp Australia Submission (2018), p. 6.

<sup>278</sup> News Corp Australia Submission (2018), p. 8.

<sup>279</sup> News Corp Australia Submission (2018), p. 8.

<sup>280</sup> News Corp Australia Submission (2018), p. 8.

<sup>281</sup> News Corp Australia Submission (2018), p. 8.

<sup>282</sup> Commercial Radio Australia Submission (2018), p. 2.



service. This does not reflect the ABC's obligations either under section 6(2) of the ABC Act or under the CNP.<sup>283</sup>

The Panel notes that issues related to content and code of practice regulations and marketing strategy of the ABC, are similar to issues raised by other media organisations and are discussed in [Chapter 7](#).

The Panel notes that issues to do with technical regulation, especially licence areas, have not been fundamentally reviewed since their inception in the 1930s. The Panel has referred these issues to the Department for further policy consideration.

## Independent producers

### Screen Producers Australia

Screen Producers Australia (SPA) is a national organisation representing the interests of their members who are the producers and production companies that make feature films, television programs, interactive content and games. SPA highlights that:

*Australian public broadcasters have an incredibly important and valuable role to play in our community and content creation ecology. Their positive impact and importance should not be understated. As global content platforms enter the Australian market and viewership fractures, their importance is more critical than ever.*<sup>284</sup>

Both the ABC and SBS commission programs in drama, documentaries and entertainment from the member organisations of SPA. SPA's submission states that National Broadcasters have subjected independent producers to unfair terms of trade and refers to survey results that show that broadcaster bargaining power in the market is the most significant challenge for independent producers.<sup>285</sup> The survey asked production companies to rank their biggest challenge. This is not limited to the National Broadcasters, however the ABC and SBS represent 46% of commissions.<sup>286</sup> Some responses to the survey indicated that the National Broadcasters have a disproportionate influence on the market and producers' ability to acquire distribution rights for commissioned programs as well as broadcast rights through licence fees.<sup>287</sup>

SPA indicates that it has received complaints from its members about commercial deals made by the ABC and SBS. SPA states that these deals involve the ABC and SBS requiring broader rights packages without paying additional compensation for new rights.<sup>288</sup>

*SPA has been made aware of several deals from the ABC and SBS that are inconsistent with industry-standards and industrial agreements relating to rights afforded and fees paid to actors and writers. These deals involve the ABC and SBS requiring broader rights packages without paying additional compensation for new rights. This has significantly impacted on producers' ability to monetise and exploit certain rights in the domestic and international market and as a result, some producers have paid actors and writers out of their own fee, rather than out of the production budget.*<sup>289</sup>

<sup>283</sup> Commercial Radio Australia Submission (2018), p. 2.

<sup>284</sup> Screen Producers Australia Submission (2018), p. 2

<sup>285</sup> Screen Producers Australia Submission (2018), p. 6

<sup>286</sup> Screen Producers Australia Submission (2018), p. 2

<sup>287</sup> Screen Producers Australia Submission (2018), p. 2

<sup>288</sup> Screen Producers Australia Submission (2018), p. 9

<sup>289</sup> Screen Producers Australia Submission (2018), p. 9

SPA also states that:

*While the ABC and SBS make up a third of all broadcasters, they have a disproportionate influence on the market for television commissions. According to Deloitte Access Economics, in 2017 public broadcasters commissioned 46 per cent of all productions surveyed.*<sup>290</sup>

SPA suggests legislation which would set standards for contracting between producers and broadcasters.<sup>291</sup> It also recommends that there be processes introduced to ensure certainty in expenditure by the National Broadcasters on Australian content. This might occur through 'a local content quota, tied funding, a Statement of Ministerial Expectations or regular market forecasting.'<sup>292</sup>

The Panel notes that issues related to behaviour of the National Broadcasters are analysed in [Chapter 7](#).

## Small media providers

### Kinderling

Kinderling Kids Radio is a digital radio service launched in June 2015 targeting households with children 0 to 6 years old. Kinderling's submission states that it became aware that the ABC was looking to launch a similar product in 2018, ABC Kids Listen. Kinderling claims that the ABC holds significant advantage in its ability to leverage its presence in the children's media market. Kinderling states that the ABC was able to absorb associated costs and launch with a lower cost structure due to factors such as, access to a back-catalogue of recorded music through ABC Music, greater negotiating power for music rights and fees, existing advertising and cross promotion platforms, and existing access to on-air talent. Kinderling states that it suggested a collaborative deal to the ABC, however the ABC subsequently launched its product independently and in competition with Kinderling in 2018.<sup>293</sup>

### Story Box Library

Story Box Library is a small business established in 2012 and describes itself as specialising in providing videos of Australian celebrities reading books aloud along with images and sound effects that bring the stories to life. Access to its services is via a subscription fee. Story Box Library claims that the ABC knowingly reproduced its format as part of the ABC's series of 'Play School Story Time', without attribution of the intellectual property. Story Box Library claims that it has undermined its business and damaged its licensing arrangements with Australian publishers. 'ABC chose to ignore this opportunity to work collaboratively with us in favour of replicating our format for the ABC's sole benefit'.<sup>294</sup>

The Panel notes that issues related to the commercial ventures and behaviour of the National Broadcasters in relation to small providers are analysed in [Chapter 7](#).

### Urban Cinefile

Urban Cinefile is an online film news and review magazine established in 1997. Urban Cinefile's submission claims that its business model of syndicating content to clients including Telstra, Optus, AOL and Yahoo! Australia New Zealand was significantly undermined in 2005, when ABC began providing transcripts of the movie review television show At The Movies to Yahoo!, resulting in Urban Cinefile's contract not being renewed. The submission states that this represented a loss of revenue to the business as the ABC provided the service for free.

<sup>290</sup> Screen Producers Australia Submission (2018), p. 2

<sup>291</sup> Screen Producers Australia Submission (2018), p. 2

<sup>292</sup> Screen Producers Australia Submission (2018), p. 20

<sup>293</sup> Kinderling Kids Radio Submission (2018)

<sup>294</sup> Story Box Library Submission (2018)



## Consumer and community groups

### ABC Friends

ABC Friends is a national lobby group supporting the independence and funding of the National Broadcaster. It comprises independent organisations which exist in each state and territory and work together in national campaigns.

- ABC Friends' submission to the Inquiry protested about cuts to the ABC's budget.
- ABC Friends highlight that competitive neutrality policy in Australia weighs advantages and disadvantages of government ownership to the extent that it is in the public interest.
- ABC Friends claims that ABC is disadvantaged in the competitive market through its Charter responsibility to provide services to the Australian community that may not appeal to large audiences.
- ABC Friends states that "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."<sup>295</sup>
- ABC Friends points out that no new formal complaints have been made against the ABC through the existing competitive neutrality complaints mechanisms (AGCNCO).

### Save Our SBS

Save Our SBS is an association run by members of the public. Save Our SBS describes itself as the peak body for supporters and friends of SBS in all states and territories with a focus on representing the important role that SBS plays in Australia's multicultural society. Save Our SBS' submission claims that '[t]he principles of competitive neutrality will always be at risk as long as SBS is permitted to carry commercial advertising.'<sup>296</sup> Further views expressed by Save Our SBS are summarised below.

- Save Our SBS strongly believes in the importance of SBS.
- Save Our SBS is of the view that the SBS' ability to generate revenue from selling advertising is the cause and incentive for the National Broadcaster to use public funds to invest in commercially attractive programs, of the type expected to be seen on commercial television.
- Save Our SBS recommends changing SBS' guiding legislation to either: remove SBS' ability to generate revenue through advertising and introduce full government funding, or allow SBS to advertise between programs only.<sup>297</sup>
- Save Our SBS also seeks legislative change related to the governance of SBS, in particular to increase the availability and transparency of financial information, efficiency and delivery of SBS' Charter responsibilities.

The Panel notes that the incentive for SBS to act in a commercial manner (inherent in its legislated ability to generate advertising revenue) is analysed in [Chapter 7](#).

<sup>295</sup> ABC Friends Submission (2018), p. 5

<sup>296</sup> Save Our SBS Submission (2018), p. 1

<sup>297</sup> Save Our SBS Submission (2018), p. 5



### Federation of Ethnic Communities' Councils of Australia

The Federation of Ethnic Communities' Councils of Australia (FECCA) is the national organisation representing Australians from culturally and linguistically diverse backgrounds (CALD).

- FECCA claims that the level of accountability obligations, Charter requirements and advertising restrictions imposed on SBS, through legislation and through public scrutiny, places it at a competitive disadvantage when compared with commercial free-to-air broadcasters.
  - For example, in terms of scrutiny, in addition to FECCA there are a number of stakeholders representing the need of CALD communities and their expectations of SBS including:
    - 'Community Advisory Committee (CAC): created by the *Special Broadcasting Service (SBS) Act 1991*, the CAC provides the SBS Board with community opinion, advice, and feedback based on community needs and perspectives.'
    - Australian consumers from CALD backgrounds
    - Commercial ethnic media sector and the not-for-profit ethnic community broadcasting sector.<sup>298</sup>
- FECCA emphasises the important role played by SBS in providing products aimed at the needs of migrant, CALD, refugee, and non-English speaking background Australians.<sup>299</sup>
- FECCA claim that success of SBS 'in identifying non-traditional programming which has proved popular with audiences (for example *The Handmaid's Tale*; *If You are the One*; *The Good Fight*; *SBS PopAsia*) reflects the SBS organisation's own diversity and regular community consultation.'<sup>300</sup>
- FECCA states that the commercial revenue generated by SBS directly contributes to the provision of critical community outreach work by the SBS, 'activities which add immeasurable value to CALD communities and which could not be replicated by any other broadcaster'.<sup>301</sup>
- 'It is FECCA's view that SBS should be congratulated on its commercial successes, as it enables SBS to develop and offer high quality content for minority audiences such as settlement guides; locally made content reflecting Australia's diversity and the issues of relevance to CALD communities; programming in LOTE; and content for older Australians of CALD backgrounds.'<sup>302</sup>

### Other groups

#### Media, Entertainment and Arts Alliance

The Media, Entertainment and Arts Alliance (MEAA) is the union that represents journalists, actors and some other creative industry professionals in Australia. In its submission, the MEAA notes the relevance of this Inquiry to the Treasury Review of the CNP and the ACCC Inquiry into Digital Platforms. The MEAA reinforces the fact that competitive neutrality does not preclude the ABC and SBS from competing in markets where private interests also provide services.

The MEAA states that while it is satisfied with current compliance and reporting obligations for the ABC and SBS, it

***would like to see express and detailed reporting on how much Australian content these broadcasters produce each year.***<sup>303</sup>

<sup>298</sup> Federation of Ethnic Communities Councils of Australia Submission (2018), pp. 3-4

<sup>299</sup> Federation of Ethnic Communities Councils of Australia Submission (2018), p. 2

<sup>300</sup> Federation of Ethnic Communities Councils of Australia Submission (2018), p. 2

<sup>301</sup> Federation of Ethnic Communities Councils of Australia Submission (2018), p. 6

<sup>302</sup> Federation of Ethnic Communities Councils of Australia Submission (2018), p. 2

<sup>303</sup> Media, Entertainment and Arts Alliance Submission (2018), p. 4

The MEAA notes:

*the progressive failure by government to modernise broadcasting regulation to suit the digital era continues. For as long as this situation prevails, all producers of content in Australia will be fighting with one hand tied behind their back, revenues will continue to fall and the alarming trend of job losses will continue.*<sup>304</sup>

### ABC Alumni

ABC Alumni is a national organisation comprising former employees and associates of the ABC. Its submission asserts that:

*[t]he ABC Charter imposes obligations on the ABC to provide innovative and comprehensive broadcasting services and to provide digital media services pursuant to the Australian Broadcasting Corporation Act 1983 (Cth). In delivering innovative and high-quality services across a range of platforms... the ABC continues to acquit these obligations in a pro-competitive manner and in the public interest.*<sup>305</sup>

### Film Victoria

Film Victoria is a state government body providing leadership and support to Victorian creators of film, television and digital media. Film Victoria's submission emphasises the importance of the National Broadcasters, who are responsible for the majority of commissioned projects with the Victorian screen production industry. Film Victoria states that '[t]he importance of the national broadcasters to the local industry will continue to increase due to the continued decline of audience numbers and revenue of the commercial FTA broadcasters.'<sup>306</sup>

- Film Victoria asserts that it is essential that the ABC and SBS 'maintain a strong traditional and digital media presence in order to serve all Australians, which are increasingly online.'<sup>307</sup>
- Film Victoria states that '[c]ompetition in the media landscape faced by the FTA broadcasters is primarily due to global not domestic trends.'<sup>308</sup>

### Journalism Education and Research Association of Australia

The Journalism Education and Research Association of Australia Incorporated (JERAA Inc.) is the peak body representing Australian journalism educators and researchers from tertiary education and industry organisations.

JERAA states that the increase in criticism from commercial media has coincided with decreasing advertising revenue generated by commercial organisations and increasing competition faced in the sector from international companies such as Facebook and Google. It states that '[t]here is no doubt that the commercial news media sector in Australia faces an existential crisis to survive commercially but the origin of the problem is not the national broadcasters.'<sup>309</sup>

<sup>304</sup> Media, Entertainment and Arts Alliance Submission (2018), p. 7.

<sup>305</sup> ABC Alumni Submission (2018), p. 1.

<sup>306</sup> Film Victoria Submission (2018), p. 2.

<sup>307</sup> Film Victoria Submission (2018), p. 2.

<sup>308</sup> Film Victoria Submission (2018), p. 2.

<sup>309</sup> Journalism Education and Research Association of Australia Submission (2018), p. 3.



JERAA believes:

*there is a valid argument today that there should be at least some restrictions on the ABC's activities, especially given the difficulties faced by the commercial media sector. There is scope, then, for the national broadcasters to avoid some media platforms so as not to unduly disadvantage commercial media outlets but these should not be extensive as that would curtail news and current affairs services to which taxpayers are entitled.*<sup>310</sup>

### The Australia Institute

The Australia Institute is a public policy think tank which conducts research on a broad range of economic, social, transparency and environmental issues. The Institute's submission states that

*[c]ompetitive neutrality has little relevance for public broadcasters as they do not charge for their service and do not compete for advertising revenue. No serious complaint has been lodged with the relevant competition watchdog.*<sup>311</sup>

Regarding the way that National Broadcasters are regulated, the Institute states that

*[a]ll ABC and SBS broadcasting is done to strict standards, including legislated requirements of accuracy and impartiality, Charter requirements of independence and balance between programming with broad appeal and programming with specialised appeal (ABC) and requirements for diversity and language coverage (SBS), rigorous complaints handling expectations, advertising limits (or no advertising) and an exhaustive code of practice. Where these restrictions are present at all for commercial broadcasters, they are more limited.*<sup>312</sup>

The Institute considers that commercial and National Broadcasters are not in competition in the market, as the way that they interact with the public is substantially different. It claims that the audience of National Broadcasters are Australian citizens, whereas the audience of the commercial broadcasters are customers. It claims that

*[i]f commercial broadcasters believe that they are in competition with the ABC and SBS, then they should be required to meet the same standards as the ABC and SBS—to provide a universal service to citizens instead of to an audience of consumers. Otherwise, the national broadcasters should be left alone to provide this unique service.*<sup>313</sup>

### Per Capita

Per Capita is a think tank with a particular focus on community and social justice. Its submission reinforces the importance of public broadcasting to democracy and the interests of the public. Per Capita is of the view that principles of competitive neutrality are not applicable to the National Broadcasters and assert that there is

*no empirical evidence that the operations of the national broadcasters in the service of their public interest objectives are causing undue market disruption or directly disadvantaging the private media sector.*<sup>314</sup>

<sup>310</sup> Journalism Education and Research Association of Australia Submission (2018), p. 5.

<sup>311</sup> Australia Institute Submission (2018), p. 1.

<sup>312</sup> Australia Institute Submission (2018), p. 4.

<sup>313</sup> Australia Institute Submission (2018), p. 4.

<sup>314</sup> Per Capita Submission (2018), p. 1.

## Individuals

Of the 6815 submissions from individuals, 194 submissions were received directly from members of the public. These submissions overwhelmingly expressed the view that the National Broadcasters do not enjoy a competitive advantage by way of their government ownership, nor are they competing in the same market as commercial counterparts. (Of the few submissions that were not supportive of the National Broadcasters some claimed bias in news services and increasing commercial focus of the National Broadcasters.)

Examples of relevant statements made in public submissions are provided below.

Judith Dodd stated:

*The premise that the ABC has an unfair advantage in the marketplace is false, as the ABC exists to provide a SERVICE to taxpayers whilst commercial media exists to make a PROFIT. How can the two be compared?*<sup>315</sup>

Lynda Gordon-Squire stated:

*I do not think the national broadcasters are in competition with the private broadcasters. If indeed they were they are at a severe disadvantage rather than being advantaged by their always-at-risk public funding. I believe the national broadcasters complement the market and provide a service to those of us who prefer a better quality of programming than that delivered by the private broadcasters whose primary aim is to accumulate advertising dollars.*<sup>316</sup>

Peter Lindenmayer stated:

*The first issue here must be whether or not the public broadcasters are operating in the same "economic market" as and are in direct competition with the commercial media organisations. The ABC does not seek advertising revenue, so is obviously not participating in that particular marketplace. There is therefore only partial competition—for audiences, rather than advertisers.*

*The argument for direct competition also assumes that there is a high level of substitutability between the products of public and commercial broadcasters. I do not believe this is the case.*<sup>317</sup>

A number of submissions were received from academics. Professor John Quiggin is a Senior Research Fellow in the School of Economics at the University of Queensland. Professor Quiggin's submission provided insights into the differences experienced by national and commercial broadcasters in the media market:

*[T]he principles of competitive neutrality cannot be applied directly to the analysis of competition between the ABC and commercial broadcasters, since they are not in competition for the provision of advertising.*<sup>318</sup>

<sup>315</sup> Judith Dodd Submission (2018).

<sup>316</sup> Lynda Gordon-Squire Submission (2018).

<sup>317</sup> Peter Lindenmayer Submission (2018).

<sup>318</sup> John Quiggin Submission (2018).

*...Regular inquiries into the 'balance' displayed by the ABC constitute a burden not faced by commercial media. This burden does not fit easily into a competitive neutrality framework, but it must nonetheless be taken into account.*<sup>319</sup>

*...The ABC has an obligation to serve the Australian public as a whole, rather than to favoured demographic groups, and to provide content serving a wide range of interests, many of which may appeal only to particular audiences. This requirement is in tension with pressure for the ABC to achieve audience shares comparable with those of commercial media, a tension heightened by constrained funding. It represents another reason why a competitive neutrality framework is problematic at best in dealing with the ABC.*<sup>320</sup>

Similarly, Ian McAuley argued that:

*Neither the commercial media nor the government broadcasters are in anything that could be called a "competitive market". In neither case does one have a choice whether or not to purchase [free-to-air] broadcasting: it is provided whether people want it or not, and people are charged for it whether they want it or not. There is no interactive relationship between suppliers and consumers, a relationship that is essential in defining competitive markets. So any reference to "competitive neutrality"—a concept relevant only to competitive markets—is meaningless.*<sup>321</sup>

The submission of Emeritus Professor Trevor Barr of Swinburne University of Technology challenges the grounds on which competitors claim that the National Broadcasters are competing unfairly by providing free services:<sup>322</sup>

*Vested commercial media interests have criticised the success of iview in the common market place, and other ABC digital platform initiatives, on the grounds that such services are provided for 'free,' which puts commercial media organisations at a competitive disadvantage. But surely nothing is ever provided 'free' in the broadcasting market place.*<sup>323</sup>

A further 6621 submissions were received via a website operated by GetUp! to campaign against the privatisation of the ABC. The campaign was established following the Federal Council of the Liberal Party held on 16 June 2018, which voted in favour of a motion to privatise the ABC.<sup>324</sup> Subsequently, the Minister for Communications and the Arts, the Hon Mitch Fifield denied any intention to privatise the ABC saying that 'It's not the position of the government to alter the ownership arrangements of the public broadcasters.'<sup>325</sup>

<sup>319</sup> John Quiggin Submission (2018).

<sup>320</sup> John Quiggin Submission (2018).

<sup>321</sup> Ian McAuley Submission (2018).

<sup>322</sup> One Panel member observed that for a member of the public to access the full range of ABC and SBS services, would probably cost about \$40 per week—cost being made up from purchase of equipment depreciated over 4 years, phone and internet plans. To add subscription TV services, e.g. Stan, Netflix and Foxtel would cost another \$20 per week.

<sup>323</sup> Trevor Barr Submission (2018).

<sup>324</sup> GetUp! Action for Australia. (2018). Our ABC will not be privatised! Available at: <https://www.getup.org.au/campaigns/media/our-abc-won-t-be-privatised/our-abc-will-not-be-privatised>.

<sup>325</sup> The Hon Mitch Fifield (2018). Speech at the Liberal Party of Australia 60th Federal Council, 18 June 2018, Minister for Communications and the Arts. Available at: <https://www.minister.communications.gov.au/minister/mitch-fifield/transcripts/liberal-party-australia-60th-federal-council>.



The overwhelming majority of the GetUp! submissions expressed strong support for the operations of the ABC and opposed privatisation of the National Broadcaster. For example, one submission stated: 'It is vital in my opinion that we maintain the integrity of the ABC without the influence that would come from private ownership.'<sup>326</sup> 99% of the GetUp! submissions provided strong support to the operations of the National Broadcasters.

Some GetUp! submissions commented on issues of competition and competitive neutrality in relation to the National Broadcasters, for example:

- *This inquiry is asking the wrong question completely. Our national broadcasters should not be treated as competitors to commercial concerns. They should be treated as exactly what they are: Providers of a public service that is key to our democratic processes.*<sup>327</sup>
- *The very premise of the inquiry (to see if the ABC and SBS have an advantage over commercial outlets by virtue of being publicly funded) misses a crucial point. Public broadcasting plays an important and irreplaceable role in our democracy and shouldn't be compared with commercial media.*<sup>328</sup>
- *Private broadcasters' position that ABC 'competes' for market share is [a] broadly wrong and [b] actively counter to what the ABC does for them. Media sectors have always acknowledged that ABC constitutes the majority portion of the free-to-air avant-garde in Australia. Commercial considerations prevent the private companies from taking risks with content. Aunty broadcasts something adventurous or fun, it's a hit, corporates follow slaveringly.*<sup>329</sup>
- *In response to arguments that the ABC has an unfair market advantage—the commercials are operating in the same environment they launched their businesses to compete with the ABC. Why is it that they now feel its unfair? if the ABC is successful competitor in the market, providing services the community chooses over commercial networks, that in itself is an argument for keeping and supporting the ABC—that is, the ABC produces excellent products and constantly re-invents itself in an effort to remain relevant and competitive to the whole of Australia on a lean budget, within tight guidelines.*<sup>330</sup>
- *I believe that the ABC and SBS are competitively neutral. They are funded to a certain level by public funding. They provide jobs, pay fees, and provide news and a wide range of entertainment.*<sup>331</sup>
- *It is laughable to suggest the ABC has an 'undue advantage' over commercial outlets. It serves a different purpose—it is supposed to provide services for all people in Australia without regard to a profit motive. Commercial networks are in the business of making money and if they have a tough time with that, then let market forces rule and they can be acquired or go out of business.*<sup>332</sup>

## Panel comments

- The Panel notes that commercial stakeholders have taken full opportunity to comment on the participation by the National Broadcasters in media markets, and see them as significant players.
- Further analysis of these issues is contained in Chapters 7 and 8.

<sup>326</sup> GetUp! Submission (2018) #6533.

<sup>327</sup> GetUp! Submission (2018) #170.

<sup>328</sup> GetUp! Submission (2018) #6487.

<sup>329</sup> GetUp! Submission (2018) #326.

<sup>330</sup> GetUp! Submission (2018) #632.

<sup>331</sup> GetUp! Submission (2018) #654.

<sup>332</sup> GetUp! Submission (2018) #3708.



## Chapter 7: Discussion of issues

In response to the submissions and in light of the scope of the Inquiry and the guiding analytic principles, the Panel has identified some key issues that will be explored fully in this chapter. The Panel's views on the issues have been further informed by meetings with stakeholders, and responses to the particular questions asked of the National Broadcasters and other stakeholders. To assist impartial analysis, the Panel requested an independent consultant (Ernst & Young) to look at particular aspects of cost allocation practices by the National Broadcasters. The scope (as included in the Terms of Reference) and guiding principles for this Inquiry were set out in the Inquiry's Issues Paper released in April 2018 and are presented below.

### Scope

This Inquiry will explore the practices of the National Broadcasters and advise the Government on whether they are operating in a manner consistent with the general principles of competitive neutrality.

The Inquiry will consider how Australian Broadcasting Corporation (ABC) and Special Broadcasting Service (SBS) operate within the markets of which they are part and the basis on which they are competing with the private sector. This should focus on:

- the application of competitive neutrality principles to the business activities of the ABC and SBS, including in operational decision making and risk management
- the cost structures of business activities
- the regulatory obligations for ABC and SBS compared to those for private sector operators, insofar as these relate to competitive neutrality principles
- the adequacy of current compliance and reporting arrangements; and,
- complaints and accountability mechanisms operated by the broadcasters, insofar as they relate to competitive neutrality principles.

The panel will also make observations on the role of National Broadcasters in the modern media environment.

### Guiding principles

- public interest is the primary focus
- competition serves the public interest by promoting efficiency and choice, but it does not encompass the whole public interest
- competitive neutrality is a necessary part of competition policy because of the substantial participation by government entities in markets
- successive governments have decided that funding of the National Broadcasters is in the public interest
- transparency by government entities is needed for accountability and confidence that obligations and policies are being properly implemented, and
- as far as possible, policies and regulations should be implemented in ways that do not inhibit adaptation to changing markets and technologies.

Issues raised in submissions relate in varying degrees to the Terms of Reference, and some are clearly outside the Terms of Reference.





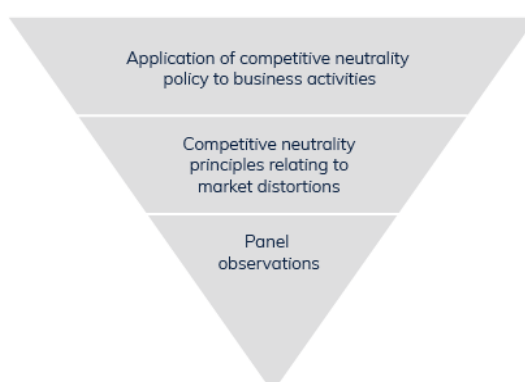
Issues within the Terms of Reference are:

- the application of the Competitive Neutrality Policy (CNP) to business activities
- issues relating to the general principles of competitive neutrality
- other specific issues mentioned in the Terms of Reference.

Some of the issues that fall outside the Terms of Reference include matters such as funding and privatisation,<sup>333</sup> programming content decisions and the National Broadcasters' Charters. The Panel considers many of these issues express valid concerns and may warrant further consideration. On this basis, the Panel has referred these issues to the Department for further policy consideration.

The competition policy environment seeks to encourage efficient competition which brings many benefits to the community. Competitive neutrality is a component of competition policy settings to support efficient competition. The benefits flowing to the public from competition are often associated with some discomfort among producers and service providers. That discomfort is a result of competition, and is not the focus of this Inquiry. However, distortions to the competitive process, arising from the market participation of government entities, if significant and sustained, would have been of concern to the Panel.

The chart below signals the sequence and priority of the Panel's considerations in this chapter.

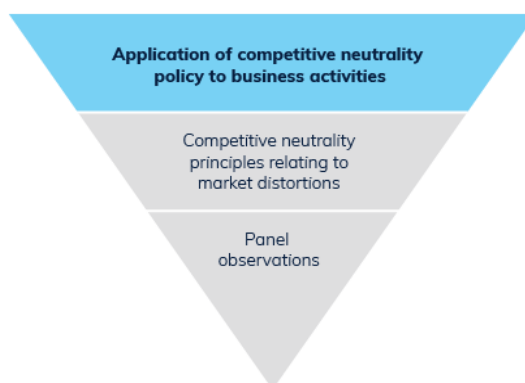


The Panel has focussed firstly on tests of the CNP in relation to business activities. The Panel has also looked more broadly at the general principles of competitive neutrality, which are designed to ensure fair competition. Most concerns raised in submissions do not directly relate to business activities of the National Broadcasters. Some further insights on other possible competition distortions are also discussed. This chapter identifies the Panel's findings on the issues.

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<sup>333</sup> Competitive Neutrality Policy typically advocates a corporate structure, but not necessarily privatisation.

## Application of the Competitive Neutrality Policy to business activities



Stemming from the general principles of competitive neutrality, the 1996 CNP applies to significant government business (i.e. commercial) activities. In 2000, COAG decided that the ABC and SBS, along with other government business entities that are not subject to Executive control, should adopt a best endeavours approach to compliance with the CNP.

The ABC conducts business activities through its commercial unit, ABC Commercial, in five key areas: content sales and distribution; retail; music; studio and media productions; and publishing.

SBS also conducts commercial business activities, primarily the sale of advertising, the sale of goods and services, sponsorship and rents (see [Chapter 4](#)).<sup>334</sup>

The application of the main elements of the CNP to the National Broadcasters' commercial business activities are discussed below. As noted in [Chapter 2](#), the Inquiry has drawn on the CNP as the Policy is the primary articulation of competitive neutrality principles in Australia as they apply to defined business activities. The Policy also applies to the National Broadcasters on a best endeavours basis. However, given the broader considerations of this Inquiry, and in recognition of the specific role of the Australian Government Competitive Neutrality Complaints Office (AGCNCO), the Panel has not attempted to replicate the complaints process followed by the AGCNCO.

ABC Commercial and SBS' commercial business activities meet the threshold tests in the CNP, namely that they are 'significant' (i.e. have commercial receipts exceeding \$10 million per year<sup>335</sup>); there is user-charging; there is an actual or potential competitor; and managers of the activity have a degree of independence.

As well as the submissions by the ABC, SBS and other stakeholders, the Panel's views have been informed by the report prepared for the Inquiry by Ernst & Young (EY) on the cost allocation and pricing practices of the National Broadcasters—cost allocation and pricing being a key element of the CNP. A summary of EY's report is provided below (the full report is included at Attachment B).

<sup>334</sup> Special Broadcasting Service. FAQs: SBS Corporate. Available at: <https://www.sbs.com.au/aboutus/faqs>.

<sup>335</sup> The ABC's Annual Report 2017 (p. 82) indicates that revenue from ABC Commercial was \$43 million in 2016–2017. SBS' Annual Report 2017 (pp. 65 and 89) indicates own source revenue of \$115.6 million which includes \$93.1 million from advertising and sponsorship.

### EY report on cost allocation and pricing practices of the National Broadcasters

To inform the Inquiry, the Department of Communications and the Arts engaged Ernst & Young (EY) to review the cost allocation and pricing practices of the ABC and SBS' business activities. EY adopted a targeted approach to the review which considered the overarching strategies and policies and focused on particular business activities of interest (e.g. most material, related to growth areas) rather than undertake a comprehensive review. Given the project's limited timeline, EY relied on a detailed review of the National Broadcasters' submissions, consultation with executive staff from the National Broadcasters and additional information provided by the two broadcasters.

EY made the following key findings in its report. The full report is at Attachment B.

#### Findings in relation to the ABC

1. The ABC does not have a formal competitive neutrality policy and it is not clear how the ABC considers competitive neutrality in decision-making.
2. There does not appear to be any evidence that the ABC's approach to cost allocation and pricing has breached the principles of competitive neutrality
3. ABC Commercial does not appear to be operating at best practice in relation to cost allocation.
4. ABC Commercial has limited ability to influence the price of its content and services.
5. The ABC's assessment of how competitive neutrality applies to ABC Commercial is a useful exercise but can be improved.

#### Findings in relation to SBS

1. SBS does not have a formal competitive neutrality policy, but there is evidence that it applies competitive neutrality principles in its decision-making.
2. There does not appear to be any evidence that SBS' approach to cost allocation and pricing has breached the principles of competitive neutrality.
3. SBS has in place a well-established cost allocation methodology.
4. SBS has limited ability to influence the price of advertising or content.
5. The approach that SBS takes to fulfilling its Charter and its funding model have important implications for its operating model.

In relation to implications for SBS' operating model (the last point above), EY noted the issues raised are distinct to the ABC. In particular:

- SBS maintains that all activities are undertaken to fulfil its Charter. However within this constraint, SBS appears to engage in a number of more 'commercially focussed' activities (i.e. activities that deliver on the Charter but are also commercially attractive to SBS), and
- SBS' hybrid funding model creates a strong incentive for these activities to at least recover the avoidable costs of undertaking them. If it does not, it will merely will reduce the funding available for other activities over the funding cycle. This would support a view that it is not breaching competitive neutrality in competing in parts of the market.



## Competitive Neutrality Policy issues raised in submissions

### Cost allocation and pricing

Fairfax and News Corp raised concerns regarding the pricing practices of the National Broadcasters in relation to their business activities when bidding for third party contracts. They allege that the ABC underbids commercial rivals. Fairfax's submission specifically references a commercial deal entered into by the ABC, claiming:

*There is evidence of the ABC underbidding commercial players for content deals with other news providers. A recent example of this was when the ABC underbid AAP (a joint venture between commercial players Fairfax Media and other commercial news publishers) for newswire services to an outdoor media company.<sup>336</sup>*

No substantive data was provided to support this allegation.

This issue relates to two elements of the CNP: the requirement to earn a market rate of return and the need to price services to fully reflect market value. No specific evidence has been presented to the Inquiry that suggests that the ABC underbid its competitors and it is therefore unclear that it is anything other than a normal commercial transaction.

Free TV raised a concern about the cost allocation practices of SBS. Its concern is that this could give SBS the capacity to divert Charter-aligned content funding to expand into other areas without any accountability. Free TV's submission states:

*A fundamental question should be how SBS makes decisions around resource allocation to achieve charter obligations. At present there is no clear evidence based on published methodology to measure SBS's performance against its charter, nor any accurate cost allocation to charter versus other services, or ability to identify the direct costs of charter functions which means there is no transparency over cost allocation. This gives the SBS the capacity to divert charter aligned content funding to expand into other areas without any accountability, such as SBS On Demand.<sup>337</sup>*

SBS' submission states that '[s]ome channels and platforms SBS offers such as Food Network, SBS VICELAND and SBS On Demand are operating on a commercial basis and covering their avoidable costs without relying on government funding'.<sup>338</sup>

EY has examined the pricing and cost allocation of both the ABC and SBS and found that there does not appear to be any evidence that the ABC and SBS' approaches to cost allocation and pricing have breached the principles of competitive neutrality. In relation to the cost allocation methods employed by SBS, EY found that:

*There does not appear to be any evidence that SBS's approach to cost allocation and pricing has breached the principles of competitive neutrality... This is supported by the fact that there has never been any competitive neutrality complaint made in relation to SBS to the Productivity Commission.<sup>339</sup>*

<sup>336</sup> Fairfax Media Submission (2018), p. 6.

<sup>337</sup> Free TV Australia Submission (2018), p. 15.

<sup>338</sup> SBS Submission (2018), p. 9.

<sup>339</sup> Attachment B: Ernst & Young (September 2018), Economic advice on cost allocation and pricing practices of the national broadcasters, p. 31.



Further, in relation to the SBS Food Network, EY found that:

*Excluding the Food Network's first year in operation, the Food Network has generated a financial return to SBS... The Food Network has exceeded SBS's discount rate (or target rate of return) of 8% on a real pre-tax basis as at 2015, which is likely to exceed the guidance on the rate of return in the 2004 Guidelines for Managers.<sup>340</sup>*

The evidence is that costs are appropriately allocated for these services and that they earn an appropriate rate of return (issues were also raised in relation to the content broadcast on these channels—these are dealt with under [‘Commercialisation’ of SBS](#)).

Both Free TV and Stan raised a concern that the National Broadcasters gain a competitive advantage by virtue of their secure government funding during content acquisition as they are able to offer better terms to distributors to ensure they are successful in bidding for content, for example, upfront payment and bulk deals. Free TV and Stan claim that it is not possible for commercial networks to offer advanced payment terms for cash flow reasons, or to enter into bulk deals without consideration of commercial viability of this content.

There were no examples in relation to the ABC paying upfront. SBS' response to this concern is as follows:

*With limited funding, SBS does not have balance sheet scale for capital and debt leverage to compete with its commercial counterparts who, due to their Australian Stock Exchange (ASX) listed shareholding or foreign-owned capital base have significantly more leverage and agility to make longer-term larger-scale content acquisitions. SBS is also unable to freely take on private debt. The average content budget of an Australian free-to-air commercial operator is six times as large as that of SBS.<sup>341</sup>*

EY's findings (based on access to SBS documentation) were that SBS' business approach included appropriate cost allocation across their different services and in their business choices. The Panel is satisfied that the pricing behaviour of SBS, including in paying upfront, properly reflects this cost allocation, and therefore does not contravene the CNP.

A separate concern was raised in Kinderling's submission in relation to accounting for the cost of in-house advertising and marketing. The Panel considers that the EY conclusions on cost allocation satisfy any concerns.

- The Panel notes that the National Broadcasters generally price to market and there is no evidence that they are not appropriately allocating costs.

<sup>340</sup> Attachment B: Ernst & Young (September 2018), Economic advice on cost allocation and pricing practices of the national broadcasters, p. 30

<sup>341</sup> SBS Submission (2018), p. 4

## Regulatory neutrality

A number of private sector operators that compete with the National Broadcasters in the television and radio markets raised concerns that they were subject to greater regulation than the National Broadcasters. Concerns tended to focus on content obligations, however, concerns were also raised in relation to other areas such as taxation, reporting, access to spectrum and the requirements around the registration of codes of practice.<sup>342</sup> For example, Free TV has provided a chart of what it sees as the imbalance in regulation for commercial broadcasters as compared to SBS (see [Figure 14](#) below).

Figure 14: Free TV table ‘Summary of regulatory imbalance’

	Free TV members	SBS
Pays all relevant corporate Australian taxes	✓	✗ <sup>343</sup>
Pays for access to spectrum for broadcasting services	✓ <sup>344</sup>	✗
Pays for transmission and distribution costs	✓	✗ <sup>345</sup>
55% of Australian content on the primary channel	✓ <sup>346</sup>	✗
1460 hours of Australian content on the multi-channels each year	✓ <sup>347</sup>	✗
20 hours of first release documentary programs each year	✓ <sup>348</sup>	✗
860 points of first-release Australian drama programs broadcast over a set three-year period	✓ <sup>349</sup>	✗
Time zones on primary channel	✓ <sup>350</sup>	✗ <sup>351</sup>
<ul style="list-style-type: none"> <li>G-only programming zones</li> <li>M film content restricted until after 7.30 pm</li> <li>MA15+ film content, restricted until after 9 pm</li> </ul>		
Requirement to show material of local significance (such as news) in prescribed regional areas	✓ <sup>352</sup>	✗

Source: Free TV Australia Submission (2018), p. 24. Note: the footnotes associated with this figure are also from Free TV’s submission.

However, SBS has provided a chart in its submission (prepared by Deloitte), looking at what it sees as forms of regulatory advantages and disadvantages of the National Broadcasters relative to commercial free-to-air broadcasters, community television and subscription television (see [Figure 15](#) below).

<sup>342</sup> Free TV Australia Submission (2018), p. 22; Commercial Radio Australia Submission (2018), p. 2

<sup>343</sup> SBS is exempt from all Commonwealth, State and Territory taxes (except FBT and GST). *Special Broadcasting Service Act 1991*, section 68.

<sup>344</sup> *Television Licence Fees Act 1964*.

<sup>345</sup> SBS has a specific budget allocation to fund its transmission and distribution services.

<sup>346</sup> At least 55% of content on the primary channel of a commercial free-to-air broadcaster must be Australian. This quota is exceeded every year by all commercial TV broadcasters. Section 121G(1) *Broadcasting Services Act 1992* (BSA).

<sup>347</sup> Each commercial television broadcaster must show 1460 hours of Australian content on its multi-channels per calendar year. Section 121G(2) BSA.

<sup>348</sup> Part 9, *Broadcasting Services (Australian Content) Standard 2005*.

<sup>349</sup> Part 6, *Broadcasting Services (Australian Content) Standard 2005*.

<sup>350</sup> Commercial Television Industry Code of Practice 2018.

<sup>351</sup> SBS Codes of Practice 2014 (updated March 2018).

<sup>352</sup> Division 5D of Part 5 of the *Broadcasting Services Act 1992*.





Figure 15: Deloitte Access Economics table from SBS submission 'Forms of regulatory advantage and disadvantage for the national broadcasters relative to other market participants'

Source of regulatory advantage/disadvantage	Position of national broadcasters relative to commercial FTA broadcasters, community TV and STV
<b>Government funding</b>	<ul style="list-style-type: none"> <li>Advantage to the national broadcasters</li> </ul>
<b>Access to spectrum/Licence fees<sup>^</sup></b>	<ul style="list-style-type: none"> <li>Advantage to both national broadcasters and commercial FTA broadcasters.</li> <li>Commercial FTA broadcasters are charged for access to spectrum, though this is heavily discounted relative to the value of spectrum. The amount paid per annum been reduced by 72% since 2013-14 with the reduction and abolition of licence fees and implementation of spectrum pricing at a lower rate (see section 4.3.5)</li> </ul>
<b>Income tax exemption</b>	<ul style="list-style-type: none"> <li>Advantage to national broadcasters</li> </ul>
<b>Local Content Rules</b>	<ul style="list-style-type: none"> <li>Disadvantage for commercial FTA broadcasters. Less restrictive content rules on drama also apply to STV relative to commercial broadcasters.</li> </ul>
<b>Charter obligations</b>	<ul style="list-style-type: none"> <li>Constrains the operation of the national broadcasters in terms of the content they focus on relative to commercial and STV broadcasters</li> </ul>
<b>Public entity obligations and accountability requirements</b>	<ul style="list-style-type: none"> <li>Disadvantage to national broadcasters</li> </ul>
<b>Anti-siphoning legislation</b>	<ul style="list-style-type: none"> <li>Provides an advantage to national broadcasters and commercial FTA broadcasters. Commercial FTA broadcasters gain the greatest monetary value from this regulation due to restrictions on advertising for the national broadcasters which limits their ability to bid for many of premium sporting events.</li> </ul>
<b>Restriction on advertising</b>	<ul style="list-style-type: none"> <li>Disadvantage to national broadcasters</li> </ul>
<b>Prohibition on 4<sup>th</sup> commercial licence</b>	<ul style="list-style-type: none"> <li>Advantage to all sectors as it reduces competition in the market but likely to have a more material financial impact on commercial FTA broadcasters.</li> </ul>
<b>Screen Australia funding</b>	<ul style="list-style-type: none"> <li>Applies to all market participants</li> </ul>
<b>Tax offsets</b>	<ul style="list-style-type: none"> <li>Applies to all four broadcast sectors through provision of tax offsets to production companies</li> </ul>
<b>Captioning requirements</b>	<ul style="list-style-type: none"> <li>Applies to all four broadcast sectors</li> </ul>

Source: SBS Submission (2018), p. 89





Free TV's submission emphasised that local content obligations on commercial broadcasters are a significant competitive disadvantage to them. This gives 'the national broadcasters a competitive advantage as they are able to respond immediately to changing audience patterns'<sup>353</sup> because the National Broadcasters do not have to spend their funds on fulfilling obligations associated with regulated quotas. Free TV calls for greater flexibility with regard to quotas for free-to-air television networks to allow them to compete on a level playing field.

Screen Producers Australia also comments on content quotas in its submission:

*Quotas, points systems and expenditure requirements are proven ways to ensure consistency in output...*<sup>354</sup>

*The commercial broadcasters have local content obligations in the form of quotas... These quotas exist for a variety of strong public policy reasons... Prima facie, it may seem that the commercial broadcasters are disadvantaged against the public broadcasters and SVOD platforms because they are regulated to deliver a certain amount of Australian content (drama, documentary and children's in particular). However, the regulatory environment for commercial broadcasters contains a significant loophole that allows the commercial broadcasters to acquit their first run Australian content obligations with second run New Zealand content that can be bought for 10 per cent of the purchase price of Australian content.*<sup>355</sup>

SPA's submission recommends that there be processes introduced to ensure certainty in expenditure by the National Broadcasters on Australian content. SPA suggests this might occur through 'a local content quota, tied funding, a Statement of Ministerial Expectations or regular market forecasting.'<sup>356</sup>

CRA's submission also notes a difference in relation to the regulation of content for national and commercial radio services stating that:

*The commercial radio industry is subject to significant local content and Australian music obligations. No such restrictions bind the national broadcasters. This places regional radio broadcasters—who are subject to the local content regulations—at a particular disadvantage.*<sup>357</sup>

MEAA's submission references the regulatory regime governing the broadcasting sector and the need to make it fit for purpose in the current digital and technological environment:

*Meanwhile, the progressive failure by government to modernise broadcasting regulation to suit the digital era continues. For as long as this situation prevails, all producers of content in Australia will be fighting with one hand tied behind their back, revenues will continue to fall and the alarming trend of job losses will continue.*<sup>358</sup>

The National Broadcasters argued that they are subject to greater regulation in many areas. They also pointed to the policy reasons for having different regulatory regimes for the national and commercial broadcasters, as well as the difficulty in assessing the net difference.<sup>359</sup>

<sup>353</sup> Free TV Australia Submission (2018), p. 22.

<sup>354</sup> Screen Producers Australia Submission (2018), p. 19.

<sup>355</sup> Screen Producers Australia Submission (2018), pp. 20–21.

<sup>356</sup> Screen Producers Australia Submission (2018), p. 2.

<sup>357</sup> Commercial Radio Australia Submission (2018), p. 2.

<sup>358</sup> Media, Entertainment and Arts Alliance Submission (2018), p. 6.

<sup>359</sup> ABC Submission (2018), p. 7; SBS Submission (2018), p. 88.



The ABC's submission argues that 'as a Commonwealth entity, the ABC is required to operate within a regulatory environment which is more rigorous than that which its commercial counterparts face... the ABC is held to a higher standard (by law, parliamentary accountability and community expectations) than its commercial counterparts, and it also operates robust, comprehensive and transparent editorial policies and complaint mechanisms.'<sup>360</sup>

The ABC considers that '[d]ifferences in the regulation that apply to public broadcasters and commercial media organisations reflect the fundamentally different purpose and motivations of these entities.'<sup>361</sup>

SBS' submission recognises that both national and commercial broadcasters are subject to regulatory disadvantages and advantages, but states that overall 'the trajectory of regulatory changes in recent years has broadly favoured the commercial FTA broadcasters relative to the national broadcasters.'<sup>362</sup>

The Panel considered the wide range of different regulatory obligations affecting commercial organisations and the National Broadcasters.

As set out in the CNP, '[r]egulatory neutrality will be achieved by subjecting, where appropriate, all identified organisations to the same regulatory environment as private sector businesses... regulatory amendment will only be made where it is appropriate and cost effective to do so.'<sup>363</sup>

There are strongly divergent views around the relative weight of the different regulatory arrangements, but the Parliament has chosen to legislate for separate responsibilities for each of the sectors. The regulatory differences, particularly relating to the delivery of Australian content, have been separately reviewed, most recently in 2017 by the Australian and Children's Screen Content Review. The Panel understands content issues are being addressed by that Review.

The Panel has approached this complex issue in two ways. Firstly, the regulatory costs, including any imbalances that might be involved, were deliberate decisions of successive Parliaments based on the public interest.

Secondly, in pursuit of regulatory neutrality, costs in the media market are hard to bring to account and in a non-user charging market a price effect makes no sense. That having been said, it may be timely to have a fresh approach to regulatory impact assessments to inform decisions in prospect to ensure as much as possible regulations remain relevant in the new media environment and are not causing market distortions that go beyond the public interest.

The Panel did not receive any submissions as to how regulatory neutrality translates financially, and in the absence of quantitative data, the Panel did not consider it could take this issue further.

- The Panel notes the differences in the regulatory arrangements for the National Broadcasters and the private sector. However, the Panel is unable to bring regulatory comparison to useful financial account.
- The Panel notes that the Australian and Children's Screen Content Review, currently with Government, is considering the content elements of the regulatory regime as it applies to commercial broadcasters and any decisions will follow from that review.
- The Panel notes that neither the Content Review, nor this Inquiry, address the content issues raised by commercial radio, and draws this to the attention of the Department for future policy consideration.

<sup>360</sup> ABC Submission (2018), p. 7.

<sup>361</sup> ABC Submission (2018), p. 7.

<sup>362</sup> Media, Entertainment and Arts Alliance Submission (2018), p. 88.

<sup>363</sup> Commonwealth of Australia, Commonwealth Competitive Neutrality Policy Statement, (1999), p. 18, Available at: <http://archive.treasury.gov.au/contentitem.asp?ContentID=275>.



- The Panel considers that a fresh approach to regulatory impact statements should be applied to decisions in prospect, to ensure regulations remain relevant, are consistent with competitive neutrality and are not causing market distortions beyond the public interest.
- In relation to those matters that do not fall within the scope of this Inquiry, or other reviews currently underway, those matters should be referred to the Department for further policy consideration.

### Taxation neutrality

Free TV and other stakeholders raised concerns regarding the National Broadcasters' exemption from certain taxes under their respective governing Acts. The ABC drew attention to the taxes that it does pay and considers that ABC Commercial does not incur competitive advantages related to taxation.<sup>364</sup> SBS noted that '[g]iven that corporate income tax is levied on profits, this is a relatively small benefit to SBS given it does not typically generate large profits.'<sup>365</sup>

EY states that 'the ABC appears to have interpreted the requirement of the 2004 Guidelines as adjusting ABC Commercial's prices based on actual tax paid, rather than notionally adjusting prices to ensure there is no distortion to the market... As a result, based on Attachment E of its submission and the additional information provided, ABC has not demonstrated its compliance with the tax neutrality requirements of the 2004 Guidelines.'<sup>366</sup> However, EY noted that '[a]s ABC Commercial sets prices with reference market rates, it does not explicitly make any adjustments for debt, taxation or regulatory neutrality.'<sup>367</sup>

EY also notes that Fringe Benefits Tax is factored into internal service charges for certain SBS activities.<sup>368</sup>

The Panel considers that taxation neutrality is of marginal relevance to the way the National Broadcasters compete in the market. Where they set prices to market rates, the need for a taxation neutrality adjustment is avoided.

- The Panel notes that to the extent that taxation issues are relevant to Competitive Neutrality Policy relating to the National Broadcasters, the evidence is that the National Broadcasters in effect comply with competitive neutrality requirements.

### Debt neutrality

The matter of debt neutrality is not raised as a substantial issue by stakeholders in their submissions to this Inquiry. Free TV's submission does request that the Panel give consideration to 'the extent to which the low or zero levels of gearing... enjoyed by SBS enable it to gain a competitive advantage from offering payment terms that cannot generally be matched by the commercial sector.'<sup>369</sup>

SBS' submission notes that it 'cannot take on private debt without the permission of the Finance Minister'.<sup>370</sup>

<sup>364</sup> ABC Submission (2018), Attachment E, pp. 6–7.

<sup>365</sup> SBS Submission (2018), p. 95.

<sup>366</sup> Attachment B: Ernst & Young Report (September 2018), p. 24.

<sup>367</sup> Attachment B: Ernst & Young Report (September 2018), p. 19.

<sup>368</sup> Attachment B: Ernst & Young Report (September 2018), p. 28.

<sup>369</sup> Free TV Australia Submission (2018), p. 25.

<sup>370</sup> SBS Submission (2018), p. 78.



The ABC notes in its submission that it only has one long-term loan which does not relate to the activities of ABC Commercial.<sup>371</sup>

- The Panel notes that to the extent that issues relating to debt are relevant to competitive neutrality, there is no evidence that the National Broadcasters do not comply with competitive neutrality requirements.

## Operational decision-making and risk management

Various submissions argued that government funding provides the National Broadcasters an unfair advantage as it allows them to be less risk averse in operational decision-making.<sup>372</sup>

As noted earlier in this chapter, examples of a higher risk appetite by the National Broadcasters provided by Free TV are the methods employed in acquiring content, such as upfront payment terms and buying content at the script stage. Similarly, Stan argues that the National Broadcasters are able to offer better payment terms to television distributors.<sup>373</sup> Free TV states that it is not commercially practical for commercial networks to buy content at the script stage due to commercial risk profile and profit margins or to offer upfront payment terms due to the carrying cost of capital.<sup>374</sup> However, it is not clear whether commercial broadcasters are unable or unwilling to adopt these practices.

In its submission SBS argues that due to its comparatively small content budget 'SBS must be far more judicious about the timing of decisions it makes. Content has a propensity to increase in cost through negotiation processes (for example—acquiring content at the “off-script” stage will often be cheaper).'<sup>375</sup> 'As a small participant in the broadcast television market, SBS has incentives to pursue more cost-effective options for purchasing content.'<sup>376</sup> Indeed, in previous reviews SBS has been found to be an efficient broadcaster.<sup>377</sup>

PwC's market analysis prepared for this Inquiry also indicated that for commercial players

*trying new formats and untried content will appear increasingly risky... leaving the role of content innovation and risk-taking to the public broadcasters.*<sup>378</sup>

Further, PwC noted that:

*[s]hould these innovations prove effective, some will be adopted by the commercial broadcast media, which has a historic capability in 'fast-following'. The role of the public broadcast sector therefore can also be seen as an informal proving ground for the entire industry.*<sup>379</sup>

Where it might be thought that the National Broadcasters have a higher appetite for risk, because of the security of their funding, outcomes may also bring benefits to the commercial sector by testing and proving possibilities. Moreover, the National Broadcasters have specific obligations for innovation and diversity in programming. In any case, the evidence is that they have well organised decision-making processes, not simply because of competitive neutrality.

<sup>371</sup> ABC submission, Attachment E, page 8.

<sup>372</sup> Free TV Australia Submission (2018), p. 25.

<sup>373</sup> Stan Submission (2018), p. 1.

<sup>374</sup> Free TV Australia Submission (2018), p. 25.

<sup>375</sup> SBS Submission (2018), p. 66.

<sup>376</sup> SBS Submission (2018), p. 82.

<sup>377</sup> SBS Submission (2018), p. 4.

<sup>378</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 23.

<sup>379</sup> Attachment A: PwC (2018). Australian Broadcast Media Landscape 2018–2022, p. 23.



The Panel has reviewed the National Broadcasters' submissions in relation to operational decision-making and risk management, and find that they are appropriate. The 2018 Efficiency Review, due to conclude in October 2018, may have further insights on operational decision-making.

- The Panel notes that the evidence is that operational decision-making and risk management are appropriate, deriving from conventional business practices, and therefore conforming to competitive neutrality requirements.

### Compliance and reporting arrangements

Under the CNP as currently constructed, individual government enterprises have not been required to report on compliance, while in the past there has been some whole-of-government reporting.

### Competitive neutrality complaints and accountability mechanisms

The Australian Government Competitive Neutrality Complaints Office (AGCNCO), within the Productivity Commission, operates as the competitive neutrality complaints mechanism. The AGCNCO has received one complaint about the ABC and no complaints about SBS (see the box below titled [Complaint about the ABC to the Competitive Neutrality Complaints Office](#)). Both National Broadcasters also have their own complaints processes in place (which are not specific to competitive neutrality), and the Australian Communications and Media Authority (ACMA) has a role in relation to complaints about the National Broadcasters, but these are not binding on the broadcasters.

#### Complaint about the ABC to the Competitive Neutrality Complaints Office

The Australian Government Competitive Neutrality Complaints Office (AGCNCO) received a complaint about the ABC in 1999. This was from Global Television Pty Ltd, which alleged that ABC Productions was not complying with competitive neutrality. It alleged that ABC Productions' access to resources purchased for non-commercial production enabled it to provide services to a lower cost than competitors. Specifically, it alleged that ABC production facilities are not priced to fully cover costs—including an appropriate allocation of capital costs, labour and on-costs—and are not subject to a range of taxes paid by private competitors.

The AGCNCO found that the allocation of costs to ABC Productions and the pricing of its services were consistent with competitive neutrality.<sup>380</sup>

There have been no complaints regarding the National Broadcasters to the AGCNCO this century. In 2018, the Australian National Audit Office (ANAO) conducted a review of the ABC's internal complaints management process, and found that it was effective. The ANAO found that:

*The ABC effectively manages complaints handled by its central complaints management area... The ABC analyses and reports complaints to internal and external stakeholders. The external information that the ABC publishes on complaints assists in maintaining its transparency and accountability as a public broadcaster.*<sup>381</sup>

- The Panel notes that there is an independent complaints process in place for competitive neutrality that has not been used this century with regard to the National Broadcasters.

<sup>380</sup> Productivity Commission (1995). Competition Policy Agreements, p. 17, Available at: <https://www.pc.gov.au/inquiries/completed/access/files/ncpageement.pdf>.

<sup>381</sup> Australian National Audit Office (2018). Australian Broadcasting Corporation—Complaints Management. Available at: <https://www.anao.gov.au/work/performance-audit/australian-broadcasting-corporation-complaints-management>.



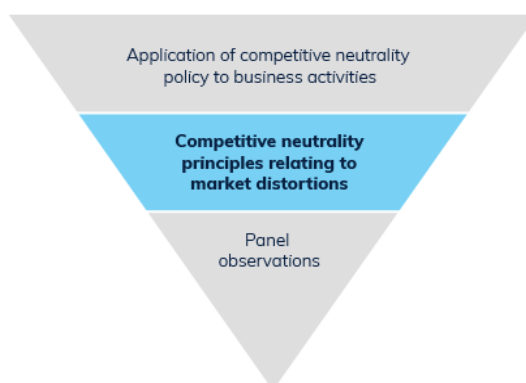
Panel comments on the application of the Competitive Neutrality Policy to business activities<sup>382</sup>

- The National Broadcasters are meeting the best endeavours approach to the Competitive Neutrality Policy (which applies to their business activities), insofar as best endeavours has been defined.
- With respect to the cost allocation methods used by the National Broadcasters for their business activities, there is no evidence that they do not conform with the Competitive Neutrality Policy. Pricing to market is evidence of no significant competitive distortion. This has been confirmed by independent consultants.
- As identified by the Ernst & Young Report, there are a number of areas where the ABC could improve its approach to cost allocation and pricing to enhance transparency and give greater confidence that its costing and pricing practices are aligned with competitive neutrality principles.<sup>383</sup>
- The average market share of commercial activities of the National Broadcasters are not large, have not increased markedly over time, and do not give rise to concerns. Nonetheless, competitive impacts may still occur in particular sub-markets.
- The National Broadcasters' processes for commercial business activities appear adequate. However, changes should be made to ensure that there are processes in place for improved transparency, accountability and reporting.

<sup>382</sup> See [Chapter 2](#) for discussion of tests for applying Competitive Neutrality Policy.

<sup>383</sup> Attachment B: Ernst & Young (September 2018), Economic advice on cost allocation and pricing practices of the national broadcasters, p. 23.

## Competitive neutrality principles relating to other market distortions



In accordance with the Inquiry's Terms of Reference, this inquiry has considered whether the National Broadcasters are applying the general principles of competitive neutrality in other respects. The Panel has considered the application of competitive neutrality principles in a broader sense and has drawn on the Inquiry's guiding principles set out earlier in the chapter.

### Online news

News Corp's submission states that the National Broadcasters are advantaged in the broadcast news content market where they 'compete in a commercial marketplace with commercial news providers, with dramatically different incentives as they do not have to receive a return on their taxpayer funding in order to sustain a news content business (including reinvestment in news content).'

<sup>384</sup>

Fairfax and News Corporation's submissions claim that the competitive practices of the ABC, and to a lesser extent SBS, in their provision of free online news is disrupting the news media market by diverting potential paying clients from commercial online news services. Fairfax considers that

*the ABC has an important role to play in this environment, by giving the commercial sector the space it needs to thrive but ensuring that consumer needs are met in areas where a commercial entity can no longer fulfil them, in line with the spirit of the charter.*<sup>385</sup>

Fairfax argues that SBS is exacerbating the situation because it is competing for advertising as well as audience.<sup>386</sup>

The ABC maintains that

*[c]onsistent with its Charter, the ABC's digital news team actively considers what stories they can leave to the commercial networks and what issues the ABC can cover to deliver value to the overall media market.*<sup>387</sup>

Ninety-six per cent of on online news users search more than one site, and only 4% of them are ABC users exclusively.<sup>388</sup> The ABC notes that the FAANGs (Facebook, Amazon, Apple, Netflix and Google, discussed further in [Chapter 3](#)) are the biggest threat to all Australian content providers, by an overwhelming degree.

<sup>384</sup> News Corp Australia Submission (2018), p. 1.

<sup>385</sup> Fairfax Media Submission (2018), p. 1.

<sup>386</sup> Fairfax Media Submission (2018), p. 7.

<sup>387</sup> ABC Submission (2018), p. 44.

<sup>388</sup> ABC Submission (2018), p. 45.





The Panel notes that the National Broadcasters have adapted to changing consumer habits and technological opportunities by offering news on a range of platforms and services. In 2013, both the Charters of the ABC and SBS were amended to include the requirement to ‘provide digital media services’. Therefore, the Panel considers that the ABC and SBS are responding appropriately in line with their Charters. The Panel considers that the National Broadcasters are not having a significant negative impact on the commercial market. Given the competition from overseas providers, if the ABC were not to provide online news, then its audience would not necessarily flow to Australian providers (see [Figure 16](#)).

- The Panel finds that in relation to the provision of online news services, the ABC and SBS are behaving in accordance with their Charters.<sup>389</sup> These services also comply with the general principles of competitive neutrality.

### Dealings with smaller providers

The inquiry has received similar complaints from two small media companies, Kinderling Kids Radio and Story Box Library documenting what they believe was unfair behaviour by the ABC in their dealings with the broadcaster. The ABC addresses its interaction with Kinderling in its submission.<sup>390</sup> Story Box Library’s submission states:

*Our experience... demonstrates that the ABC aggressively and unfairly competes in the market to the detriment of existing commercial operators. Our experience clearly demonstrates that the ABC places little to no value or emphasis on complementing existing providers, and is willing to unfairly and detrimentally employ its public ownership and funding to undermine existing operators.*<sup>391</sup>

Kinderling’s submission argues that the ABC has an unfair marketing advantage due to its government ownership in relation to the ability of the ABC to cross-promote its products and the cost of advertising to small providers:

*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.*<sup>392</sup>

Kinderling’s submission indicates that it initially proposed a partnership with the ABC to deliver an ABC kids radio service.<sup>393</sup> Similarly, Story Box Library claims to have offered to collaborate with the ABC.<sup>394</sup> Competition is generally considered to be good for consumers, however the complaints from these businesses suggest they do not consider that to be the case. Rather they perceive that the ABC behaved without regard to their existence and used their larger presence in the market to overshadow a smaller competitor.

<sup>389</sup> The Panel notes that, in addition to base funding, the Government is providing the ABC \$41.4 million over three years from 2016–2017 for enhanced newsgathering to sustain local news and current affairs, particularly those services located outside capital cities.

<sup>390</sup> ABC Submission (2018), p. 38.

<sup>391</sup> Story Box Library Submission (2018), p. 7.

<sup>392</sup> Kinderling Submission (2018), p. 6.

<sup>393</sup> Kinderling Submission (2018), p. 9.

<sup>394</sup> Story Box Library Submission (2018), p. 3.



The Panel notes that the ABC has collaborated on projects with private companies in the past. For example, ABC Reading Eggs is a partnership between ABC Commercial and Blake eLearning that delivers a program (for a fee) combining online lessons with activity books to teach children aged 2–13 how to read.<sup>395</sup>

- The Panel notes that ABC Commercial, in collaborating with smaller companies, must observe best practice business negotiations to avoid appearance of unfair competition (see also [Chapter 8](#)).

### Terms of trade with content providers

Terms of trade refer to contractual arrangements guiding fees and rights afforded to each party in agreements entered into with the National Broadcasters.

SPA's submission questioned the bargaining practices of the National Broadcasters by highlighting survey results that indicate that Australian commercial and National Broadcasters use their substantial bargaining power in the marketplace to exert undue influence over content producers. SPA indicates that it has received complaints from its members including accusations that the ABC and SBS have made deals that are inconsistent with industry standards and industrial agreements.

- The Panel notes that the issues raised in relation to 'terms of trade' are essentially contract issues and do not relate to competitive neutrality. However, there may be scope for the National Broadcasters to improve the way they interact with market participants to ensure transparency and good business practice (see [Chapter 8](#)).

### Advertising and marketing of own services

Various submissions have raised concerns that the ABC and SBS receive an unfair competitive advantage through advertising of their services. Examples provided include:

- paying to promote news articles via Google or Facebook
- paying for services to be listed above commercial rivals on the App Store and Facebook
- cross-promotion of television, radio and online services.

News Corp is concerned about the ABC's practice of 'amplifying' its online content through the use of digital platforms, Google and Facebook. For example,

*during Federal Budget week that year [2017], the ABC invested in a marketing campaign and bought AdWords to promote its Federal Budget coverage... The purchase of AdWords was designed to 'boost' the results to the top ranking/s... We query the need to amplify news published by public broadcasters given that these news stories would be discoverable in search results in the usual course of searching.*<sup>396</sup>

Fairfax's submission argues that ABC is:

*[u]sing government funds to develop "clickbait" (news items with solely entertainment value, neither high quality nor distinctive), and paying to promote these via Google or Facebook to generate traffic back to the ABC site.*<sup>397</sup>

<sup>395</sup> Readingeggs.com.au. (2018). Learning to Read for Kids. Available at: <https://readingeggs.com.au/>.

<sup>396</sup> News Corp Australia Submission (2018), p. 5.

<sup>397</sup> Fairfax Media Submission (2018), p. 7.



The ABC's submission defends the use of digital marketing, stating that:

*Traditionally, the ABC has advertised its content mainly through outdoor, print or radio advertising. With the broader shift of media spend to digital, which can be very targeted and therefore more efficient, the ABC has also shifted its spend in line with these broader media trends. The ABC's digital marketing is the modern equivalent to historical marketing activities.*

*The ABC's small investment in digital marketing is an important and cost-effective way for it to ensure that its taxpayer funded Australian content reaches audiences.<sup>398</sup>*

The ABC advertises its services to facilitate consumer access. Evidence is that 96% of on online news users search more than one site, and only 4% of them are ABC users exclusively.<sup>399</sup> Overseas-based online news services also have a significant share of the Australian market (see [Figure 16](#) below). Given these factors, any increase in the number of unique users of the ABC's online news as a result of advertising is unlikely to significantly reduce the number of users of other Australian online news providers (and vice versa).<sup>400</sup>

Figure 16: Online news sources (February 2018)

Name	Unique Audience (000)	Sessions Per Person	Time Per Person (HH:MM:SS)
news.com.au	5,749	13	00:33:31
ABC News websites	4,849	10	00:32:28
nine.com.au	4,557	15	00:57:28
smh.com.au	3,910	7	00:43:30
Yahoo7 News websites	3,072	8	00:15:16
Daily Mail Australia	2,778	13	00:34:53
The Guardian	2,570	8	00:29:07
BBC	2,411	10	00:32:59
MSN News	2,141	6	00:16:44
The Age	2,042	6	00:32:09

Source: PwC report, page 20, Figure 22—based on Nielsen Digital Ratings (Monthly), February 2018, People 2+, Current Events & Global News sub-category.

CRA's submission raised concerns regarding the ability for the ABC to use its multiple platforms to promote its own content, for example, promoting podcast content in news formats.

*The absence of third party advertising means it has time to promote heavily its own programs and products. The range of platforms over which the ABC operates allows extensive cross platform promotion, which on occasion blurs the line between news and entertainment content. This particularly benefits the ABC when launching new and emerging content formats, such as podcasts.<sup>401</sup>*

<sup>398</sup> ABC Submission (2018), p. 48.

<sup>399</sup> ABC Submission (2018), p. 45.

<sup>400</sup> For example, if ABC advertising increased abcnews.com.au clicks by 20%, then the fall in market share by either of the other principal Australian online news services would only be 0.2%. This corresponds to the marginal impact of the BBC found by a similar inquiry by the House of Lords in the UK.

<sup>401</sup> Commercial Radio Australia Submission (2018), p.2



- The Panel notes the National Broadcasters are able to promote their services online. This is consistent with the way they have always promoted their radio and television services to ensure the widest possible audience reach. The Panel considers normal competitive interactions are occurring, and there are no concerns for competitive neutrality principles.
- The Panel notes there is nothing in the National Broadcasters' Charters, nor in the general principles of competitive neutrality, that prevents them from promoting their own services. The Panel notes that in the context of the Competitive Neutrality Policy, competitive advantages arising from size are not considered a concern.

### 'Commercialisation' of SBS

A number of submissions raised concerns about 'popular' or 'commercial' content being shown by the National Broadcasters, particularly SBS. In particular, Free TV, Stan and Fairfax have levelled complaints at SBS over the content of its digital channels and catch-up service SBS On Demand. Similar complaints have been made about the commercial nature of SBS' Food Network and VICELAND channels.<sup>402</sup> While criticisms are couched in terms of the popularity or commercial nature of content, the underlying issue undoubtedly relates to the potential advertising revenue attracted by this type of content.

Save Our SBS takes particular issue with what it considers to be an inherent conflict created by the SBS' ability to generate advertising revenue, believing it to have detracted from the SBS Charter requirement to deliver multicultural and multilingual content. Save Our SBS states that

*[t]he role of SBS as a public broadcaster has gradually changed as a consequence of it being granted the right to carry advertising. In its current hybrid state, SBS remains a public broadcaster increasingly dependant [sic] on commercial activities.*<sup>403</sup>

SBS' submission states that:

*...constraints within the SBS Act, in particular the limitations enforced on advertising activities, mean that SBS's capacity to successfully compete with commercial counterparts is severely restricted, even though it must operate within a highly commercial environment, with limited funding. With a 0.6 per cent share of Australia's total advertising market, SBS's very small share of advertising fails to meet a materiality threshold for SBS to compromise competitive neutrality principles.*<sup>404</sup>

In contrast, the submission of the Federation of Ethnic Communities' Councils of Australia (FECCA) states that:

*It is FECCA's view that SBS should be congratulated on its commercial successes, as it enables SBS to develop and offer high quality content for minority audiences such as settlement guides; locally made content reflecting Australia's diversity and the issues of relevance to CALD communities; programming in LOTE; and content for older Australians of CALD backgrounds.*<sup>405</sup>

<sup>402</sup> Free TV Australia Submission (2018), p. 35.

<sup>403</sup> Save Our SBS Submission (2018), p.8.

<sup>404</sup> SBS Submission (2018), p. 3.

<sup>405</sup> Federation of Ethnic Communities Councils of Australia Submission (2018).



In relation to SBS On Demand, SBS indicates that:

*As with the SBS main channel, where content is not CALD or LOTE, it plays a critical and successful role in engaging audiences with SBS On Demand which enables SBS to promote the breadth of its offering across channels and platforms, specifically CALD and LOTE programs.<sup>406</sup>*

The ability for SBS to generate some revenue from the selling of advertising space is a significant point of competitive impact difference between the operations of the ABC and SBS. The inherent conflict for SBS is that the incentive to do well in pursuit of its Charter includes being attractive to advertisers. This hybrid model produces a different set of objectives and incentives to a public broadcaster that is completely government funded, which are challenging to manage.

- The Panel notes that what has been exhibited by private sector organisations is competitive discomfort. As long as the National Broadcasters' decisions are endorsed by their Boards and are subject to parliamentary review then, by definition, the activity is in the public interest. (Also see the discussion in [Chapter 8](#) relating to the responsibilities of the ABC and SBS Boards.)

#### Panel comments on competitive neutrality principles relating to other market distortions

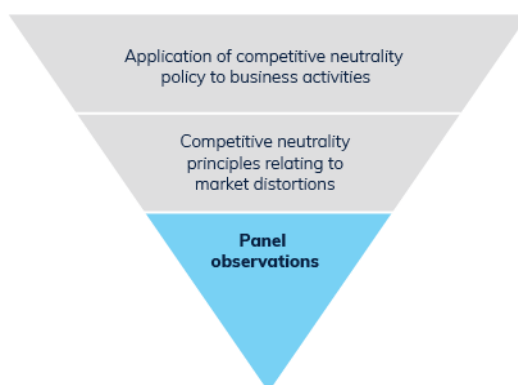
- The issues raised reflect increased competition generally in the digital space whether streaming services or online news services.
- They also reflect a context of increased viewer demands and expectation along with the rapid take-up of new technologies.
- As stated above, as long as the National Broadcasters are within their Charters then, by definition, the activity is in the public interest.
- However, the Charters of both National Broadcasters are broad and open to interpretation by the Boards.
- In relation to the matters under review by this Inquiry, both National Broadcasters would benefit from more public transparency around how they approach the issues of fair competition.
- Accountability is difficult, especially as there is no opportunity for Charter complaints to be addressed.

Other resulting observations on market behaviour are made in [Chapter 8](#).

<sup>406</sup> SBS Submission (2018), p. 54.

## Chapter 8: Panel observations on the role of the National Broadcasters in the modern media environment

The Inquiry's Terms of Reference invite the Panel to make observations on the role of the National Broadcasters in the modern media environment. Rather than a wholesale review of broadcasting and the role of the ABC and SBS, for which the Panel has neither the mandate nor the resources, the Panel has interpreted this invitation to look for useful insights arising from submissions and information stemming from the consideration of competitive neutrality questions.



These insights extend the discussion and constitute such issues as capacity to compete, transparency, the relevance of Charters to markets, market entry and participation, and accountability. These issues are intertwined.

Based on the submissions received by the Inquiry there is strong community and sector support for the continued roles of the National Broadcasters. As observed in similar markets internationally the role of the National Broadcasters in a fragmenting media environment may be more not less, important. Tony Hall, Director of the British Broadcasting Corporation (BBC) recently stated that:

*Public service broadcasting (PSB) has never been more important and it plays a crucial role—not just in providing impartial news—but in producing programmes that reflect the lives and aspirations of the public it serves. But, in a globalised world, public service broadcasting faces a number of challenges, with changing viewing habits and new ways of consuming news. How PSBs adapt and indeed lead change is something I think we can work on together to the benefit of those we serve.*<sup>407</sup>

However, there is also additional responsibility on the Boards and management of the National Broadcasters to ensure that they are participating in the modern media environment in a way that is both publicly transparent and accountable and complies with best practice in implementation of competitive neutrality principles.

<sup>407</sup> European Broadcasting Union (EBU) Press Release: Tony Hall and Delphine Ernotte Cunci elected President and Vice-President of EBU as of 2019, (29 June 2018). Available at: <https://www.ebu.ch/news/2018/06/tony-hall-and-delphine-ernotte-cunci-elected-president-and-vice-president-of-ebu>.



## Capacity to compete

It is worth considering the impact of the competitive neutrality obligations on the National Broadcasters and whether they might affect their ability or willingness to participate in markets. Regulation generally carries with it a burden on costs and flexibility. However, it seems unlikely that compliance with the CNP would impose a significant burden on the National Broadcasters. This is because competitive neutrality requirements generally correspond to good internal business practices. In particular, clear cost allocation across activities allows the trade-offs between the choices of different activities to be properly identified. Moreover the same approach to identifying costs should assist the assessment of a business case for commencing a new activity.

Hence, the National Broadcasters are likely to continue to explore new opportunities, constrained only by the limits of their funding and their Charters. In regulatory terms, the Panel considers that the National Broadcasters have greater agility and flexibility than their competitors. Experience suggests that consumers benefit from this situation. A fixed budget with insignificant debt raising capacity implies a limited opportunity to cross-subsidise free services: the trade-offs between expenditure choices are sharp. This would inherently constrain the chances of new market disruption, unless budgets are expanded.

This inference is clearer for the ABC, but SBS presents a more complex case. With a hybrid funding model, SBS receives only partial funding from government (approximately 72%<sup>408</sup>), but budgetary considerations still have some bearing.

SBS is required to generate the remaining revenue from advertising. SBS therefore has an incentive to maximise its television advertising revenue. At a time of declining revenues in television advertising, SBS has successfully developed new strategies to compete for advertising revenue in the market. This has been seen as a market disruptor by their private sector competitors and explains the basis of their concern.

- The Panel considers that the National Broadcasters should be able to adapt to new market opportunities in the public interest. However, choice will be limited by a finite budget.
- The Panel notes that the amount of money being generated by SBS through advertising revenue represents a small percentage of total television advertising, and therefore, is not considered material.
- Furthermore, following the Efficiency Review of 2014 the SBS budget was cut and the Government stated that SBS should make up part of the shortfall through advertising.<sup>409</sup>

<sup>408</sup> Based on Australian Government (2018). Portfolio Budget Statements 2018–19. Budget Related Paper No. 1.3. Communications and the Arts Portfolio, p. 285.

\*Total funds from government \$281.6 million, total funds from other sources \$106.7 million.

<sup>409</sup> The Panel notes that in the 2018–19 Budget, the Government provided \$14.6 million over two years from 2018–19 to SBS to replace revenue from advertising and product placement that SBS could not raise because legislation to provide the broadcaster with further ‘advertising flexibility’ has not been passed by the Parliament.





## Transparency

Private sector operators have transparency obligations, deriving mostly from corporate law and ASX requirements.

For the National Broadcasters the picture is both simpler and more complex. The ABC Act and the SBS Act require annual reporting to Parliament, but the scrutiny of this information by Parliament seems to the Panel to be selective and haphazard. Both National Broadcasters also meet a statutory obligation to provide a corporate plan, which previously has not addressed issues in relation to the CNP or principles. However, the Panel notes that in a supplementary submission to the Inquiry, the ABC has indicated that they have improvements in prospect.

While defending their current transparency and accountability mechanisms, the ABC stated that:

*A number of initiatives currently underway will further improve the ABC's transparency and accountability, including the way it signals future activities to the market and engages constructively with its vast array of industry stakeholders.*<sup>410</sup>

With respect to the CNP (best endeavours) obligations, even though there seem to be no specific reporting requirements, the Panel sees no reason why the National Broadcasters should not provide an assurance through their annual reports that they are complying. This would be auditable by the ANAO. The National Broadcasters should also be able to respond to complaints about competitive neutrality. If the response is not satisfactory to the complainant, the formal option of a complaint to the AGCNCO would still be available. This would increase the sensitivity of the National Broadcasters to the market impacts they are occasioning.

While these assurances should apply to the current particular application of the CNP, the same foundations for that assurance, particularly appropriate cost allocation and good decision-making and risk assessment, would give confidence about compliance with broader interpretations of competitive neutrality principles.

- The Panel supports the ABC's commitment to improve transparency and accountability through its corporate plan and invites SBS to do likewise.
- The Panel notes that the National Broadcasters' annual reports are of necessity 'backward looking' documents. The Panel considers that the National Broadcasters should provide a statement of intentions covering how they intend to spend their funds in the future which would provide Parliament and the public with greater transparency and accountability of the expenditure of funds.

## Charters

Various submissions claimed that one or other of the National Broadcasters were operating outside their Charters. The National Broadcasters firmly declared they were within Charter and emphasised this was a matter of Board responsibility.

The Panel took the view that it was not in a position to place its view about Charters above that of the Boards. If activities were beyond Charter, there might conceivably be untoward effects on competition, although the countervailing factors (such as a hard budget constraint and well costed plans) continue to apply.

<sup>410</sup> ABC Supplementary Submission (2018), p. 16.



In relation to the requirement in the ABC's Charter to take account of commercial broadcasters,<sup>411</sup> the ABC argues that it provides content that is distinct from other broadcasters and online services. By way of example, the ABC identified certain content, such as major television sporting events and reality television, undertaken by the commercial broadcasters that the ABC does not offer.<sup>412</sup>

The Panel did not find all the National Broadcasters' assurances about Charter performance entirely convincing. The Panel is aware, for instance, that a major reason that the ABC does not provide coverage of major sporting events is due to the rights to these event being extremely expensive (although it is possible for the ABC to share rights with other providers).

In regards to Free TV's concerns about the ABC's online lifestyle offering, ABC Life, the ABC stated in its supplementary submission that:

*it is clear that it fits squarely within the ABC's Charter remit and is markedly different in tone, presentation and story selection compared to online lifestyle content offered by the commercial sector, such as Nine Honey.*<sup>413</sup>

The Panel notes that Fairfax and News Corp, as the major commercial competitors of the ABC's online news services, have not raised similar concerns with the Inquiry.

In relation to the SBS Charter, SBS argues that a holistic view of its activities is appropriate, and this view supports a mix of programming, some of which would be outside a narrow definition of multiculturalism, if viewed in isolation. The Managing Director of SBS, Michael Ebeid, made this point during Senate Estimates in February 2018:

*I remind the committee that we do from time to time have programs that have absolutely nothing to do with our charter that are broad entertainment programs, to be able to attract a slightly broader audience to then cross-promote...*<sup>414</sup>

Some public statement on the limits to SBS' strategy of using programs of broader appeal to attract a wider audience and help achieve the objectives of the SBS Charter would help to inform competitive circumstances.<sup>415</sup>

It seems to the Panel that the questions about Charter compliance will not fade away. New market opportunities will (and should) be pursued by the National Broadcasters. This may elicit more claims about Charter boundaries. On the other hand the Panel found it hard to conceive of an activity or program that could not arguably be fitted under the Charters as they are currently written.

The Panel considers that a clearer explanation by the National Broadcasters about their Charter performance in relation to the general principles of competitive neutrality (fair competition) is appropriate. This is especially so for new activities. With an enhanced corporate plan, this would provide the market with a better understanding of what is and will be going on. The Panel sees no need for the National Broadcasters to maintain the advantage of commercial surprise.

<sup>411</sup> Section 6(2) of the *Australian Broadcasting Corporation Act 1983*. Available at: <https://www.legislation.gov.au/Details/C2013C00136>.

<sup>412</sup> ABC Submission (2018), pp. 31, 6.

<sup>413</sup> ABC Supplementary Submission, p. 15.

<sup>414</sup> Ebeid, Michael, 27 February 2018 Senate Estimates Hearing (2018). Available at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Festimate%2Fe7a8364f-1f69-4a4b-9f10-70eef15e6814%2F0006;query=Id%3A%22committees%2Festimate%2Fe7a8364f-1f69-4a4b-9f10-70eef15e6814%2F0000%22>.

<sup>415</sup> SBS Submission, Appendix 1.1 (2018), p. 9.



- The Panel considers that the National Broadcasters should improve their reporting of Charter performance in the context of the general principles of competitive neutrality. If this enhanced reporting does not occur, the government should consider a way of managing complaints about Charter performance in this area.

## Market entry and participation

The National Broadcasters are having many different interactions with other market participants. This includes both competition and cooperation. For instance, Fairfax's submission highlights the issues with competition in relation to the provision of online news services, while at the same time, it has taken advantage of new opportunities to collaborate with the ABC in investigative journalism. For the most part the Panel finds no reason to think this has been anything but beneficial to consumers. Some competitive discomfort has been experienced by private sector operators. The Panel has asked itself whether these interactions could be improved, to the benefit of consumers and competition.

Market entry, in the form of new services, products and facilities, is a case in point. If for example a private sector operator shelved plans for a service or program when it discovered that a National Broadcaster was about to launch a closely related service, would that be a resource saving? Or would that deprive consumers of a choice?

In the same way that government entities are expected to conduct themselves as model litigants in the legal arena, the same public entities might be expected to conduct themselves as model market participants in competitive markets (see [Appendix 4](#)).

Rather than seek to prescribe such a novel approach, with unknown costs and difficulties, the Panel prefers to put the invitation to the Boards to provide additional guidance to their managements. Such guidance could cover the launch of new services, the management of commercial negotiations, consultation processes on market impacts, dealings with small entities, and a clear rationale and process for entering into third party arrangements.

- The Panel is of the view that appropriate guidance from the Board would give some substance to the ABC's Charter obligation to take account of commercial broadcasters.
- While SBS has no equivalent Charter obligation, there seems no reason why the SBS Board should not pursue similar benefits for the market.

## Insights from overseas

Examples of public broadcasters that are funded by a combination of government and commercial revenue include the Canadian Broadcasting Corporation, RTÉ in Ireland and Prasar Bharati in India.

In many countries in Europe, including France and Germany, public broadcasters are funded through a mix of advertising and public finance, either through a licence fee or directly from the government and Channel Four in the UK is publically owned but draws all its revenue from advertising.

The recent major review of the BBC in the UK presents some useful insights. This review responded in part to concerns about competitive impacts. Of course the BBC is a more significant player in the UK market than is the ABC or SBS in the Australian market. Moreover, the UK has a regulatory structure for competition with specific sector regulators (Ofcom in the case of communications).

This sort of regulatory regime does not fit with the Australian approach. The Panel does not favour that sort of direct regulation of National Broadcasters, with its unknown effects on flexibility and efficiency.



Nonetheless, recent changes introduced in 2018 to the regulatory accountability of the BBC provide some useful insights to ensuring good governance and better transparency, accountability and fair competition.

Of real interest is the deliberate parliamentary decision to grant an extended Royal Charter<sup>416</sup> to the BBC for a period of 11 years with only one review after five years. This extended Charter period provides the BBC with more certainty, and as noted in the paper *A BBC for the future: a broadcaster of distinction released by the Department of Culture Media and Sport in 2016*, takes the Charter negotiations out of the parliamentary cycle:

*A longer Charter period would give the BBC freedom to operate with greater certainty and confidence... There is also a benefit in further distancing the Charter renewal process from the UK national electoral cycle... The continuance of the Royal Charter system in this reformed manner will ensure that the right balance continues to be struck between scrutiny and independence; ensuring the BBC has clarity about its long term objectives and is protected from political influence.*<sup>417</sup>

The legislation enshrines the BBC's independence, while introducing a new regulatory regime through Ofcom. It also provides a process for the BBC to develop a forward-looking plan which provides the marketplace with clarity around how the BBC will operate in the 10 year period.

Further, the act gives Ofcom the responsibility to hold the BBC accountable to its 10 year plan. The first Ofcom report on the BBC's implementation of the plan will occur in mid-2019. In relation to what the UK legislation refers to as 'fair competition', the BBC is required to seek approval from Ofcom for any new services in order to evaluate their impact on the market, while also recognising the public interest.

(The first such investigation has already been conducted over the BBC's plans to launch a new Scottish news channel and online news service, targeted specifically at a Scottish audience. Despite some concerns from private sector competitors, Ofcom approved the application, noting that while there may be some competition concerns, it was overall in the public interest.)

Of relevance to the Australian context, the requirement for the broadcaster to design and promote a 10 year plan enables clarity with what they intend to do with future funding, reporting on competition concerns and a much higher standard of measurable outcomes.

## Panel recommendation

- The Panel recommends that government considers options, drawing on the UK example, to give a longer term framework for the funding of the National Broadcasters, accompanied by increased transparency and accountability to the benefit of consumers and competition more broadly.

<sup>416</sup> Royal Charter carries a slightly different meaning to the statutory meaning in the Australian context.

<sup>417</sup> UK Department for Culture, Media & Sport, *A BBC for the future: a broadcaster of distinction* (May 2016), p. 57—58, Available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/524863/DC\\_MS\\_A\\_BBC\\_for\\_the\\_future\\_linked\\_rev1.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/524863/DC_MS_A_BBC_for_the_future_linked_rev1.pdf)



## Appendix 1—list of meetings

The Panel held the following meetings with external stakeholders and other individuals and organisations to inform this report. The list does not include meetings with the consultants engaged to prepare reports for the Inquiry.

### 9 April 2018

- Commercial Radio Australia
- Nine Network
- Stan

### 10 April 2018

- Fairfax
- Screen Producers Australia
- Michael Woods

### 16 April 2018

- Special Broadcasting Service (SBS)
- Free TV Australia

### 17 April 2018

- Nine
- Ten Network
- Australian Broadcasting Corporation (ABC)

### 19 April 2018

- Film Victoria
- Professor Ian Harper
- Stuart Simson

### 20 April 2018

- Australian Children's Television Foundation (ACTF)
- Lyn Maddock

### 24 April 2018

- News Corp Australia and Foxtel
- Australian Competition and Consumer Commission (ACCC)
- WIN Corporation

### 26 April 2018

- Macquarie Media
- Create NSW
- Australian Broadcasting Corporation (ABC)



## 27 April 2018

- Kinderling
- Seven West Media

## 22 May 2018

- PwC (UK)

## 23 May 2018

- Ofcom
- Channel 4
- University of Oxford

## 24 May 2018

- British Broadcasting Corporation (BBC)
- UK Department of Digital, Culture, Media and Sport

## 25 May 2018

- ITV

## 14 August 2018

- Special Broadcasting Service (SBS)

## 22 August 2018

- Australian Broadcasting Corporation (ABC)
- Australian Communications and Media Authority (ACMA)
- Free TV Australia

## Appendix 2—list of submissions

- ABC
- ABC Supplementary Submission
- ABC Friends
- Abigail Watkins
- Alan Wardrop
- Andrew Jakubowicz
- Angela Williamson
- Annette Barbetti
- Anonymous Submission 01
- Anonymous Submission 02
- Anonymous Submission 03
- Anonymous Submission 04
- Anonymous Submission 05
- Anonymous Submission 06
- Anonymous Submission 07
- Anonymous Submission 08
- Anonymous Submission 09
- Anonymous Submission 10
- Anonymous Submission 11
- Anonymous Submission 12
- Anonymous Submission 13
- Anonymous Submission 14
- Anonymous Submission 15
- Anonymous Submission 16
- Anonymous Submission 17
- Anonymous Submission 18
- Anonymous Submission 19
- Anonymous Submission 20
- Anonymous Submission 21
- Anonymous Submission 22
- Anonymous Submission 23
- Anonymous Submission 24
- Anonymous Submission 25
- Anonymous Submission 26
- Anonymous Submission 27
- Anonymous Submission 28
- Anonymous Submission 29
- Anonymous Submission 30
- Barry Mitchell
- Bernie McComb
- Beth Slatyer
- Bill Thompson
- Camilla Webster
- Caroline Flynn
- Commercial Radio Australia
- Dale Johnston
- Damian Walsh





- Daniel O'Connor
- David Bath
- David Bruce-Steer
- David Liversidge
- David Taylor
- Deanna B White
- Dennis Pratt
- Dr George H Wills
- Dr M E March
- Dr Michael Yelland
- Dr Nicholas Reid
- Dr Trevor Barr
- Eldon Ball
- Elizabeth Hirst
- Fairfax Media
- Federation of Ethnic Communities Councils of Australia (FECCA)
- Film Victoria
- Free TV Australia—public
- Free TV Australia—confidential
- Free TV Australia Supplementary Submission
- Gayle Davies
- Georgina Murray
- GetUp! submissions 1-6621
- Gida
- Gillian Wells
- Greg Wilesmith on behalf of ABC Alumni
- Helen Moore
- Henry Gaughan
- Henry Haszler
- Horst Strecker
- Hugh Adamson
- Hylton McLean
- Ian McAuley
- id David Eames-Mayer
- Ivonne Teoh
- Jacinta O'Shea
- Jackson Brown
- James King
- Jamie Morse
- Jay Shah
- Jennifer Gawne
- Jennifer Whipp
- Jenny Bell
- Jenny Simons
- Jim Elliott
- Joan Henley
- Joanna Adamson
- John Durr
- John Muzzatti



- John Quiggin
- Jonathan Nevill
- Journalism Education and Research Association of Australia (JERAA)
- Judith Brett
- Judith Dodd
- Judith James
- Julie Kidd
- Karen Pryosusilo
- Karol Fisher
- Karyn Green
- Kathy Teakle
- Keir Winesmith
- Keith Thompson
- Kim Andrews
- Kinderling Kids Radio
- Lachie A'Vard
- Lesley Watt
- Lou Baxter
- Louise Wilson
- Luke Graham
- Luke Silcock
- Lynda Gordon-Squire
- Malcolm and Barbara Armitage
- Manfred Frese
- Margaret Ryan
- Margaret Barnes
- Margaret Ludowyk
- Marilyn Chalkley
- Marlene Hall
- Mary Debrett
- Maurice Wilkinson
- Media, Entertainment and Arts Alliance
- Michael Fearn-Wannan
- Michael Pace
- Michael Sullivan
- News Corp Australia
- Nigel Drake
- Oliver Raymond
- Pauline Brown
- Per Capita
- Peter Callil
- Peter Dawson
- Peter Lindenmayer
- Phil Hunt
- PL Horn
- Professor Alexander Reid AM
- Rees Barrett
- Rhodes Hart
- Rosemary Kinne



- Sandra D Clague
- Save Our SBS
- SBS
- Screen Producers Australia
- Stan—public
- Stan—confidential
- Stirling Warren
- Story Box Library
- Stuart James Ewings
- Susan Hanson
- Susan Wood
- Tanya Henley
- The Australia Institute
- Tony Pratt and Dr Glenda Cloughley
- Urban Cinefile
- Vintage Reds
- William Miller
- Yvette Alberti Devlin



## Appendix 3—background paper on the definition of a ‘business’

A key component of competitive neutrality is the concept of a ‘business’. The Commonwealth Competitive Neutrality Policy applies to ‘significant government business activities’ of government entities that involve, among other things, user-charging.<sup>418</sup> However, the impact of the National Broadcasters on the private sector extend beyond goods and services where there is user-charging.

In order to inform what might be meant by the term ‘business’ in the context of the National Broadcasters, this Appendix discusses a complaint about the ABC made to the Australian Government Competitive Neutrality Complaints Office (AGCNCO); a published analysis by two competition lawyers; and the concepts of ‘business’ and ‘carrying on a business’ in law.

### Competitive Neutrality Policy

The Commonwealth Competitive Neutrality Policy states that the following criteria must be met to be considered a ‘business activity’ for the purposes of competitive neutrality:

- there must be user-charging for goods or services (the user may be in the private sector or public sector)
- there must be an actual or potential competitor (either in the private or public sector)—i.e. users are not restricted by law or policy from choosing alternative sources of supply, and
- managers of the activity have a degree of independence in relation to the production or supply of the good or service and the price at which it is provided.<sup>419</sup>

The guidelines also state that Government Business Enterprises (GBEs), other share-limited trading companies, and all designated business units satisfy the ‘significant business’ test. In relation to non GBEs, ‘where an authority also operates a commercial activity with a (commercial) sales turnover in excess of \$10 million per annum, then that business activity will be subject to competitive neutrality arrangements’.<sup>420</sup>

In November 2000, the Council of Australian Governments (COAG) acknowledged that some significant business activities may not be subject to Executive control, such as where their legislation states that they are not subject to government direction. COAG agreed that in such circumstances, certain Commonwealth entities (including the ABC and SBS) should adopt a best endeavours approach to compliance with the Policy.

### Complaint to the AGCNCO

In 2000 the AGCNCO investigated a complaint against the ABC in regards to its production division ABC Productions’.<sup>421</sup> The complainant, Global Television, argued that the ABC held a competitive advantage due to its tax-exempt status. It argued that while taxes form part of a private business’s cost base, and that cost is generally passed to consumers, the ABC’s production facilities are not subject to the same range of taxes or priced to fully cover costs. This includes an appropriate allocation of capital costs, labour and on-costs. Global Television stated that this resulted in the under-pricing of ABC Productions’ services.

<sup>418</sup> Commonwealth Competitive Neutrality Policy Statement p. 7.

<sup>419</sup> Commonwealth Competitive Neutrality Policy Statement p. 7.

<sup>420</sup> Commonwealth Competitive Neutrality Policy Statement p. 10.

<sup>421</sup> Part of the ABC Program Production Portfolio (ABCPPP), a separate division of the ABC which tenders to provide production facilities and labour to other film and television producers on a commercial basis.



In response to the complaint the ABC questioned whether competitive neutrality policy formally applies to its commercial activities. The ABC referred to section 78(7) of the *Australian Broadcasting Act 1983* which exempts the ABC from the relevant provisions of the *Commonwealth Authorities and Companies (CAC) Act 1997*. The final report of the AGCNCO explained that despite these arguments, the ABC stated that it supports the principles underlying competitive neutrality policy and provided information to help the AGCNCO in undertaking the investigation. The report found that ABC Productions' cost allocation and pricing *was* consistent with competitive neutrality principles.

## Published analysis by two competition lawyers

According to Alexandra Merrett and Rachel Trindade in their analysis of competitive neutrality in Australia, the ABC's online news service does not meet a threshold test of being a 'significant business' and therefore falls outside the scope of competitive neutrality. The article does not make mention of the reason why and no further mention is made of other business activities of the ABC (nor does it address SBS' activities). The article only goes on to state that where this test is met, exceptions can be made in the public interest.

## Corporations law

In considering the meaning of a 'business', commentary in the *Australian Corporations Law Principles and Practice*<sup>422</sup> refers to authorities which suggest that 'to carry on a business' required a series or repetition of acts. In the case of *Smith v Anderson*<sup>423</sup> Justice Brett stated that 'the expression 'carrying on' implies a repetition of acts and excludes the case of an association formed for doing one particular act which is never to be repeated. That series of acts is to be a series of acts which constitute a business... The association, then, must be formed in order to carry on a series of acts having the acquisition of gain for their object.'

Similarly, in the case of *Hyde v Sullivan* the Full Court of the Federal Court of NSW found that to 'carry on a business' is 'to conduct some form of commercial enterprise systematically and regularly with a view to profit', the concept involving 'features of continuity and system'.<sup>424</sup> In a High Court judgement, Chief Justice Barwick observed that 'the word 'business' imports the notion of system, repetition and continuity', and the absence of such elements 'may well deny that a business is being carried on', although the fact that a person conducts a transaction regularly and systematically does not necessarily establish that the transaction is in the course of carrying on a business.<sup>425</sup> Repetition, however may not be an absolute indication. It has been found in the High Court that a single venture may, depending upon its scope, still amount to the carrying on of a business.<sup>426</sup>

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<sup>422</sup> See particularly [1.2.0935] and [1.2.0945].

<sup>423</sup> (1880) 15 Ch D 247 [at 277–8]

<sup>424</sup> *Hyde v Sullivan* (1956) 56 SR (NSW) 113.

<sup>425</sup> *Hungier v Grace* (1972) 127 CLR 2010 at 217.

<sup>426</sup> Dawson J in *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1, applying *Ballantyne v Raphael* (1889) 15 CLR 538.



Halsbury's Laws of Australia<sup>427</sup> describes the word 'business' as being a word of 'extensive use and indefinite, flexible meaning. With reference to common law, the word 'business' typically refers to an identifiable<sup>428</sup> commercial venture,<sup>429</sup> in the nature of a going concern<sup>430</sup> which occupies the time and attention of a person or persons for the purpose of profit<sup>431</sup> or gain.<sup>432</sup>

There is a degree of overlap between the Corporations Act and income tax law, with cases in the latter context providing further authority as to the characteristics which indicate the carrying on of a business. This additional case law assists in guiding broader interpretation and provides some more consistent bases on which it can be determined whether an activity constitutes a business, or whether a business is being carried on.

## Government entities and carrying on business

Courts have further considered the question of what is 'carrying on a business' in relation to matters of competition policy and government entities. For example, *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) has been cited to state that the term 'business' should be considered broadly. In his analysis of the application of the term to the government commercial activities, Justice Griffith notes that in addition, the overall context of the organisation and its activities should also be considered.

The case *Sun Earth Homes Pty Ltd and Others v Australian Broadcasting Corporation*<sup>433</sup> considered the issue in relation to the ABC. In this case, the ABC broadcasted in its '2BL Drivetime' radio program a discussion between a radio host and a host on an ABC television program, 'The Investigators'. The discussion on the radio program was 'intended to advertise the television program, to be telecast in the evening of the same day'. During the discussion, the television host made comments about mud brick home designers, which were to be featured on that night's television program. The application to the court claimed that anyone listening to the broadcast, and who later watched the television program, would be able to identify the company about whom these comments were being made. Justice Burchett considered that the ABC does carry on a business within the meaning of the *Trade Practices Act 1974* (Cth), stating: 'An activity may be a business, though not carried on for profit: *Ku-ring-gai Building Society* (FLR at 142, 159-60). In my opinion, it would be plainly wrong to strike out paragraphs of the statement of claim on the footing that the ABC does not carry on a business.'

In *New South Wales v RT & YE Falls Investments Pty Ltd* [2003] Appeal Justice Hodgson stated that a government agency will be considered to be conducting business where its activities are 'sufficiently systematic and regular, and sufficiently similar to commercial activities that private persons might engage in, to justify being characterised as a business'. Similarly, in the case of *Paramedical Services Pty Ltd v Ambulance Service of New South Wales* [1999] it was determined that what is considered 'carrying on a business' in regards to commercial activity will simply be a question of fact.

<sup>427</sup> See [120-2070], HLA.

<sup>428</sup> *Pioneer Concrete Services Ltd v Galli* [1985] VR 675 at 706.

<sup>429</sup> *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321 at 326.

<sup>430</sup> *Hope v Council of the City of Bathurst* (1980) 144 CLR 1 at 8.

<sup>431</sup> *Hope v Council of the City of Bathurst* (1980) 144 CLR 1 at 8.

<sup>432</sup> *Wigfield v Potter* (1882) 45 LT 612 at 615 per Grove J.

<sup>433</sup> (1990) 98 ALR 101



## Appendix 4—background paper on ‘model market participant’

The concept of a model litigant provides guidelines for best practice for the Commonwealth when government agencies are involved in civil litigation matters. This paper outlines what model litigant is, why the concept of model litigant was introduced, and the behaviours model litigant seeks to address. It then explores the behaviours of National Broadcasters of interest to the Inquiry, and sets out some of the existing legislative requirements that target these behaviours. Finally, it provides a discussion of how a ‘model market participant’ concept could assist in the context of the National Broadcasters and competitive neutrality principles.

### What does the concept of ‘model litigant’ seek to achieve and why?

The concept of a model litigant is outlined in the *Legal Services Directions 2017*. It is designed to provide guidelines for best practice for government agencies in civil litigation matters. The ‘Model Litigant Rules’, as they are known, oblige the Commonwealth to act as a model litigant. This ‘may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations’.

Under the direction, government agencies involved in legal proceedings are required to:

- deal with claims promptly
- not take advantage of a claimant who lacks the resources to litigate a legitimate claim
- pay legitimate claims
- avoid litigation
- keep costs to a minimum, and
- apologise where the State has acted inappropriately.

The development of this obligation in conducting litigation can be traced to *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 where Chief Justice Griffith explained it as ‘[t]he old fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects’. In that case the Court criticised that ‘[t]he Crown should not take technical points’. In *SCI Operations v The Commonwealth*, which concerned the failure of a government agency to refund money within a reasonable time, Justices Beaumont, Einfeld and Sackville stated that ‘the position of the Crown itself, especially given its default... should also be taken into account. Otherwise the Crown would be taking, or be seen to be taking, advantage of its own default, whereas it is well established that the Crown must act, and be seen to act, as a model litigant’.

More recently, in *Morley & Ors v Australian Securities and Investments Commission* the NSW Court of Appeal stated that the principle is ‘not limited to the criminal law’ and extends to civil practice and procedure. It was critical of ASIC’s approach to litigation stating that ‘the government agency has no legitimate private interest of the kind which often arises in civil litigation. It acts, and acts only, in the public interest as identified in the regulatory regime’. The Court also stated, ‘ASIC cannot be regarded as an ordinary civil litigant when it institutes proceedings... No other person could have brought these proceedings. In partial answer to the first of the questions, whether its failure to call a witness can constitute a breach of the obligation of fairness, in our opinion it can’.

Thus, the concept of model litigant has two functions: (1) **to address an imbalance of power** and resources between the Commonwealth and other parties—both perceived and actual—in legal disputes; and (2) to guide Commonwealth litigants to **behave as models** and demonstrate transparent and equitable use of time, financial resources, perceived power and regulatory advantage.





## What might be issues of relevance to the National Broadcasters?

The Australian Competition and Consumer Commission (ACCC) has previously considered that there is a national market for audio visual content.<sup>434</sup> The National Broadcasters would compete directly with commercial and subscription television licensees in any such market. The ACCC's 'Media Merger Guidelines 2017' identifies three areas of overlap that might affect potential media mergers as:

1. the supply of content to consumers, either directly or via a firm which acquires and aggregates content for supply to consumers
2. the supply of advertising opportunities to advertisers, and
3. the acquisition of content from content providers.

The ABC does not supply advertising opportunities, so the two potential behaviours of interest to the ABC are the first and the third, while all three apply to SBS. This list of broadcaster behaviours is not exhaustive, but forms a guide for potential areas that a model guideline could address. Specific behaviours of interest would be those that raise competitive neutrality issues or take advantage of an imbalance of power between the parties more broadly.

## Are there existing rules that cover these issues?

Depending on the specific behaviour of concern, there may be existing rules in place to address it. Most notably, the Competitive Neutrality Policy addresses potential competitive advantages enjoyed by government businesses, including: exemptions from various taxes, access to borrowings at concessional interest rates, exemptions from complying with regulatory arrangements imposed on private sector competitors and other benefits associated with not having to achieve a commercial rate of return on assets. Laws such as competition and consumer laws (to the extent that they apply to the National Broadcasters) may also address certain behaviours.

## Discussion

The concept of model litigant seeks to address both perceived and actual power imbalances between Commonwealth litigants and others involved in legal proceedings. It addresses behaviours specific to the context of legal disputes in which the Commonwealth might be able to exert power by nature of its financial and other resources. It also guides Commonwealth litigants to behave in a way that models best practice to demonstrate acting in good faith.

The market context has some differences to the legal context with regard to how Commonwealth agencies operate.

First, legal disputes are inherently and explicitly more confrontational and adversarial than a market context. Although entities in markets are in competition, whether this be for goods and services to sell or consumers to whom they can sell, this process is not necessarily oppositional to the extent legal disputes are. For the purposes of applying a 'model' participant to the work of the Inquiry, the Inquiry is interested in the Australian media context, particularly the competition between the National Broadcasters and commercial broadcasters.

Second, there are certain behaviours that litigants can engage in that do not apply to market participants. Handling claims, deciding to pursue litigation or appeals, and changing the scope of legal proceedings are among some of the actions that apply only to parties in legal disputes, and the behaviours model litigant addresses are largely exclusive to such actions.

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<sup>434</sup> Saunder, Sophie (2018). Making the dual model work: Competitive neutrality and net neutrality issues facing the Australian Broadcasting Corporation.

While the specific elements of the model litigant concept may therefore not be directly relevant, the high level principle to act as a 'model' could be applied to the behaviours of the National Broadcasters as they interact with commercial providers in the media market. This may assist in addressing any imbalance of power between the National Broadcasters and commercial broadcasters (perceived or otherwise). It could also set a clear expectation for the National Broadcasters and act as overarching guidance to assist the functioning of existing rules that may apply to the behaviours in question.

There is a precedent for such a high level requirement. Section 33 of the *Australian Broadcasting Corporation Act 1983* states that the ABC 'shall endeavour to achieve and maintain high standards as an employer'. This applies to terms and conditions of employment, occupational health, industrial safety, industrial democracy, non-discriminatory employment practices and other matters. Section 55 of the *Special Broadcasting Service Act 1991* includes the same requirement for SBS.



## Attachments

A: Australian Broadcast Media Landscape 2018–2022—  
PricewaterhouseCoopers

B: Economic advice on cost allocation and pricing practices of the national  
broadcasters—Ernst & Young

C: Estimates of labour productivity trends in Australian public and private  
broadcasting—Bureau of Communications and Arts Research