

Inquiry into the competitive neutrality of the national broadcasters

Submission

Competitive 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.

Submission

Richard Denniss

David Richardson

Bill Browne

Ebony Bennett

June 2018

ABOUT THE AUSTRALIA INSTITUTE

The Australia Institute is an independent public policy think tank based in Canberra. It is funded by donations from philanthropic trusts and individuals and commissioned research. We barrack for ideas, not political parties or candidates. Since its launch in 1994, the Institute has carried out highly influential research on a broad range of economic, social and environmental issues.

OUR PHILOSOPHY

As we begin the 21st century, new dilemmas confront our society and our planet. Unprecedented levels of consumption co-exist with extreme poverty. Through new technology we are more connected than we have ever been, yet civic engagement is declining. Environmental neglect continues despite heightened ecological awareness. A better balance is urgently needed.

The Australia Institute's directors, staff and supporters represent a broad range of views and priorities. What unites us is a belief that through a combination of research and creativity we can promote new solutions and ways of thinking.

OUR PURPOSE - 'RESEARCH THAT MATTERS'

The Institute publishes research that contributes to a more just, sustainable and peaceful society. Our goal is to gather, interpret and communicate evidence in order to both diagnose the problems we face and propose new solutions to tackle them.

The Institute is wholly independent and not affiliated with any other organisation. Donations to its Research Fund are tax deductible for the donor. Anyone wishing to donate can do so via the website at <https://www.tai.org.au> or by calling the Institute on 02 6130 0530. Our secure and user-friendly website allows donors to make either one-off or regular monthly donations and we encourage everyone who can to donate in this way as it assists our research in the most significant manner.

Level 1, Endeavour House, 1 Franklin St
Canberra, ACT 2601

Email: mail@tai.org.au

Website: www.tai.org.au

ISSN: 1836-9014

Summary

Competitive neutrality policy aims to ensure that government business activities do not have unfair advantages over private sector competitors, particularly in relation to cost or pricing advantages. Price-setting and user-charging are necessary criteria for a competitive neutrality issue to arise. These are not relevant to the ABC or SBS which provide services by which, for the most part, are not charged for.

Similarly, commercial broadcasters generally do not charge their audiences any access price. Commercial broadcasters charge advertisers for access to their audiences. The ABC has no advertising, meaning there is no competition with commercial broadcasters and no relevant competitive neutrality issues. The SBS does carry some advertising, which could be seen to compete with commercial stations. The simplest way to eliminate any concern on this front is to remove SBS's advertising.

Commercial media in Australia does face serious competitive challenges, but these relate less to the ABC than to the rise of Google, Facebook, Netflix and other competitors for advertising revenue.

The irrelevance of competitive neutrality issues to the public broadcasters is reflected in the lack of complaints registered with the Australian Government Competitive Neutrality Complaints Office. The SBS has never been the subject of a competition complaint and the only complaints against the ABC relate not to broadcasting, but to studio rental and content acquisition. Even in the small parts of the national broadcasters' operations that are relevant, competitive neutrality complaints have been rare and not upheld by the Complaints Office.

More broadly, the similarities between the commercial broadcasters and the public ones are superficial. As Julianne Schultz puts it:

Commercial broadcasters engage with an audience of consumers, seeking to maximise their numbers and the profits that can be derived by successfully entertaining and informing them.

Public broadcasters are required to provide a universal service to fulfil their responsibility to citizens.¹

¹ Schultz (2015) *You'll miss it when it's gone: Why public broadcasting is worth saving*, <http://www.abc.net.au/news/2015-08-25/why-public-broadcasting-is-worth-saving/6722246>

This distinction leaves little for the public broadcasters and commercial broadcasters to compete over. The audience of the ABC and SBS is citizens and their services are for citizens, while the audience of the commercial broadcasters is customers and their services are for customers.

The ABC and SBS provide emergency broadcasting, regional coverage and high quality public interest broadcasting that is qualitatively different to that provided by the commercial broadcasters. No other current affairs show in the country has provoked the long list of Royal Commissions and inquiries that Four Corners has. The ABC's commercial "competitors" recognise the ABC as best placed to provide more regional coverage.

All 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.

If 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.

Introduction

The Australia Institute has conducted research into the public broadcasters, especially the ABC, for many years. Our past research shows that:

- the public strongly supports ABC funding and independence,²
- the ABC plays a critical role in regional Australia,³
- the ABC is not biased against business,⁴
- the Charter, board and funding of the ABC should be depoliticised⁵ and
- there are opportunities to reform the public broadcasters for the 21st Century.⁶

THE INQUIRY

The expert panel conducting the inquiry has proposed seven questions for interested stakeholders. Our submission does not strictly follow these questions and we do not think that the inquiry should be limited to them.

Most significantly, the questions do not seem to consider either that competitive neutrality is the wrong lens through which to look at the public broadcasters, or that differential treatment of the ABC and SBS could put them at a disadvantage – not an advantage.

Our submission suggests that if the public broadcasters are truly in competition with the commercial broadcasters, then the commercial broadcasters should face the same requirements of quality, coverage and transparency that are demanded of the public broadcasters.

² The Australia Institute (2017) *Attacking the ABC could be One Nation's least popular policy yet: Poll*, <http://www.tai.org.au/content/attacking-abc-could-be-one-nation%E2%80%99s-least-popular-policy-yet-poll>

³ Johnson (2015) *Heartland*, <http://www.tai.org.au/content/heartland-why-bush-needs-its-abc>

⁴ Campbell and Pitt (2016) *Your ABC or your ASX*, <http://www.tai.org.au/content/your-abc-or-your-asx>

⁵ Pitt (2016) *No politics at Aunty's table*, <http://www.tai.org.au/content/no-politics-auntys-table>

⁶ Pitt (2016) *I want my ABC (and SBS and NITV)*, <http://www.tai.org.au/content/new-report-examines-risks-and-potential-benefits-public-broadcasting-rationalisation>

Competitive neutrality in context

Since 1994, the Australian Government has adopted a policy of competitive neutrality, meaning that:

government business activities should not enjoy net competitive advantages over their private sector competitors simply by virtue of public sector ownership.⁷

The reasoning behind competitive neutrality is to avoid any unfair advantage if government businesses can charge prices for goods and services that do not reflect their costs. For example, a government business might not be subject to payroll tax – allowing it to undercut competitors even if their other costs are identical or higher to private industry.⁸

Competitive neutrality arose in an era when a significant number of commercial services were provided directly by governments that competed directly with private sector providers. For example, governments once provided insurance, banking and airlines in direct competition with private providers.

Public broadcasting is different to banking, insurance and flights. While the theoretical and practical significance of competitive neutrality is arguable for most of these services, the concept has less relevance to the provision of services by a national broadcaster which, for the most part, are not charged for. The public broadcasters ostensibly compete with private providers that, on the whole, also do not charge prices.

In the 1993 Hilmer report on National Competition Policy that recommended competitive neutrality, the examples given were government-owned electricity

⁷ Commonwealth Government (1996) *Commonwealth competitive neutrality policy statement*, p 1, 4, <http://archive.treasury.gov.au/documents/275/PDF/cnps.pdf>; although it is found in the Treasury archive, this is the current policy and it appears on the home page of the AGCNCO: Productivity Commission (n.d.) *Competitive neutrality complaints*, <https://www.pc.gov.au/about/core-functions/competitive-neutrality>

⁸ Commonwealth Government (1996) *Commonwealth competitive neutrality policy statement*, p 4–5, <http://archive.treasury.gov.au/documents/275/PDF/cnps.pdf>

generators, telecommunications companies and banks. Neither the ABC nor the SBS is mentioned in the competitive neutrality section.⁹

While commercial television, radio and even online news services might lose ‘eye balls’ or ‘ears’ to the ABC, the fact that the ABC does not accept paid advertising means it is impossible for commercial media outlets to lose revenue to the national broadcaster.

Put simply, when something is provided at no cost to consumers the potential for a government-owned competitor to under-price the product is zero.

The SBS does attract some commercial advertising. However, the function of the SBS – as required by its Charter – is to provide foreign language and multicultural content. Regardless, the government could remove any conceivable competitive neutrality concern by stopping the SBS from running advertising and instead funding it from consolidated revenue, as we suggest under “Reform” below.

Just as technological change has driven significant change in the communications, retail and street directory businesses, the emergence of online classified advertising has had a significant impact on the profitability of a wide range of commercial media outlets. Given that the ABC did not receive any revenue from classified advertising the shift away from print classified to online advertising has had no impact on the ABC.

In turn, the challenges faced by commercial media in Australia are unrelated to the behaviour of the ABC and are more closely related to the rise of Google and Facebook, as identified by the Senate Select Committee on the Future of Public Interest Journalism based on submissions by Schwartz Media and the Media, Entertainment and Arts Alliance (MEAA):

In Australia, internet advertising revenues are scheduled to grow from \$3.93 billion in 2013 to \$7.25 billion in 2018, but that revenue is not going direct to news organisations that produce journalistic and other content. In increasing amounts, it is going to intermediaries. Morgan Stanley in Australia say that Facebook and Google are taking all of the ad market growth and then some. They estimated last year that Google and Facebook will collectively extract \$4 billion to \$5 billion worth of ad revenue, representing 35 to 40 per cent of total ad revenue.¹⁰

⁹ Hilmer (1993) *National competition policy*, p 293–309,
<http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%20The%20Hilmer%20Report,%20August%201993.pdf>

¹⁰ MEAA, quoted in Senate Select Committee on the Future of Public Interest Broadcasting (2018) *Report*, p 26-27

In addition, Netflix has entered the Australian streaming market and quickly become a dominant player, with the Sydney Morning Herald reporting:

[Netflix] operates the most popular video streaming service in the country - one that has driven significant upheaval in the domestic media industry.¹¹

If the government wished to provide cash subsidies to commercial media outlets to protect them from the threat of online competition from new commercial operators, they may wish to do so – but such a decision would be unrelated to issues of competitive neutrality with the ABC.

The Charter requires the ABC:

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 ...

to transmit to countries outside Australia broadcasting programs of news, current affairs, entertainment and cultural enrichment ...

to provide digital media services; and

to encourage and promote the musical, dramatic and other performing arts in Australia.¹²

Put simply, the ABC provides the services its Charter requires it to provide and, in doing so, does not reduce the revenues of commercial media outlets.

The vast majority of the ABC and SBS's work is in the form of public interest activities that clearly do not provoke competitive neutrality concerns.

AREAS OF COMPETITION

The three criteria for something to be considered “business criteria” for the purposes of competitive neutrality are:¹³

¹¹ McDuling (2018) *Australia loves Netflix. But does Netflix love Australia?*, <https://www.smh.com.au/business/companies/the-relentless-rise-of-netflix-will-come-at-a-cost-20180308-p4z3cm.html>

¹² *Australian Broadcasting Corporation Act 1983* (Cth), s 6, <https://www.legislation.gov.au/Details/C2016C00300>

¹³ Emphasis appears in the source: Commonwealth Government (1996) *Commonwealth competitive neutrality policy statement*, p 7, <http://archive.treasury.gov.au/documents/275/PDF/cnps.pdf>

1. “there must be user-charging for goods and services” (“commerciality”)
2. “there must be an actual or potential competitor”
3. “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”

The three areas where media may be in competition are for the supply of content to consumers, the supply of advertising to advertisers and the acquisition of content from content providers.¹⁴

The setting of appropriate user-charging is central to the pursuit of competitive neutrality but, of course, neither the ABC nor the commercial television or radio stations charge their users to consume their product. Instead, for commercial broadcasters the product is the audience and it is their time and attention that is sold to the advertisers who are the customers of commercial media companies.

Put simply, user-charging is not a feature of the television or radio industries in Australia outside of the small ‘pay per view’ market which is a subset of the relatively small pay TV market in Australia. Indeed, the fact that the ABC and SBS are, respectively, prevented and restricted in showing commercial advertising helps to protect the oligopolistic owners of the private media companies by further reducing the amount of competition they face – which addresses the second criterion that there be an actual or potential competitor. As for the third criterion, the legislative limitations on the ABC and SBS significantly curtail the powers of management with regards to production and pricing of goods and services.

RELEVANT ABC AND SBS ACTIVITIES

The ABC and SBS are explicitly identified as non-Government Business Enterprise (GBE) authorities in the competitive neutrality policy, meaning that they “mainly engage in public interest activities which require subsidies from the government”. Non-GBE authorities *can* be subject to competitive neutrality requirements if they “also”

¹⁴ ACCC (2017) *Media merger guidelines*, p 3, https://www.accc.gov.au/system/files/Media%20Merger%20Guidelines%202017_0.pdf in Nicholls (2018) *Making the dual model work: Competitive neutrality and net neutrality issues facing the Australian Broadcasting Corporation*, p 307, <https://www.lexisnexis.com.au/en/products-and-services/lexisnexis-journals/current-issues/Competition-and-Consumer-Law-Journal-2018-Volume-25-Part-3>

operate a commercial activity, but it is “that business activity” that is subject to competitive neutrality arrangements – *not* the business as a whole.¹⁵

The ABC and SBS do operate commercial activities, a fact acknowledged in the competitive neutrality policy document. However, the commercial activities are identified as “consumer goods and studio rentals” (ABC) and “consumer goods” (SBS). Their potential advantages are identified as “exemption from Australian Broadcasting Authority regulations”, “first refusal on some television event rights” and “transmission provided at no cost”.¹⁶

That the business activities of the ABC and SBS for the purpose of competitive neutrality are identified as consumer goods and studio rentals is significant. This inquiry is focused on broadcasting and digital activities – not on retailing of consumer goods like DVDs and studio rentals.

NO COMPLAINTS MADE

A unit within the Productivity Commission, the Australian Government Competitive Neutrality Complaints Office (AGCNCO) is required to investigate complaints about “unfair competition from the public sector” and provide independent advice to the government on their findings.¹⁷

The Neutrality Complaints Office has considered complaints on topics as broad as the NBN, Defence Housing Australia, and the Sydney and Camden airports.

The Competitive Neutrality Complaints Office accepts complaints from “[a]ny individual, organisation or government body with an interest in the application of competitive neutrality”,¹⁸ an extremely broad remit which would permit any of the commercial broadcasters – and potentially a great deal of other stakeholders – from making a complaint if they had a concern.

¹⁵ Commonwealth Government (1996) *Commonwealth competitive neutrality policy statement*, p 10, c.f. 30, 32, <http://archive.treasury.gov.au/documents/275/PDF/cnps.pdf>

¹⁶ Commonwealth Government (1996) *Commonwealth competitive neutrality policy statement*, p 30, 32, <http://archive.treasury.gov.au/documents/275/PDF/cnps.pdf>

¹⁷ Productivity Commission (n.d.) *Competitive neutrality complaints*, <https://www.pc.gov.au/about/core-functions/competitive-neutrality>

¹⁸ Productivity Commission (n.d.) *Competitive neutrality complaints*, <https://www.pc.gov.au/about/core-functions/competitive-neutrality>; see also Commonwealth Government (1996) *Commonwealth competitive neutrality policy statement*, p 20, <http://archive.treasury.gov.au/documents/275/PDF/cnps.pdf> [http://archive.treasury.gov.au/document s/275/PDF/cnps.pdf](http://archive.treasury.gov.au/documents/275/PDF/cnps.pdf)

Despite this, the inquiry itself notes that with regards to public broadcasters:

[T]here have been no specific complaints to the Australian Government
Compete [sic] Neutrality Complaints Office¹⁹

The SBS has never been the subject of a Competitive Neutrality Complaints Office investigation.

A division of the ABC, ABC Productions, was the subject of a 2000 investigation by the office. Significantly, the investigation concerned the price one part of the ABC charged another for studio rentals – an area where the analogy to price-setting by businesses is apparent.²⁰ The key question was “whether the prices set ... generate sufficient revenue to cover all relevant costs” – note that even this question would be incoherent if applied to the priceless broadcasting and digital activities of the ABC. The ultimate finding was that ABC Productions was consistent with competitive neutrality principles.²¹

So as far as the acquisition of content is concerned, the current system has been tested and the methods of the ABC were – in that instance – found to be legitimate.

It is not clear why the Competitive Neutrality Complaints Office is unsuitable to continue doing its job monitoring the public broadcasters, or why an inquiry should be required in the absence of any complaint from any of the very broad range of parties that are eligible to make such complaints.

¹⁹ Department of Communications and the Arts (2018) *FAQs*,
<https://www.communications.gov.au/have-your-say/inquiry-competitive-neutrality-national-broadcasters>

²⁰ Commonwealth Competitive Neutrality Complaints Office (2000) *ABC Production Facilities*,
<http://www.pc.gov.au/inquiries/completed/abc-production/report4.pdf>

²¹ Commonwealth Competitive Neutrality Complaints Office (2000) *ABC Production Facilities*,
<http://www.pc.gov.au/inquiries/completed/abc-production/report4.pdf>

The ABC and SBS: Never just broadcasters

The ABC and SBS have never been just broadcasters, and they have always operated differently to commercial broadcasters. The distinction is made clear by academic Julianne Schultz from Griffith University:

Commercial broadcasters engage with an audience of consumers, seeking to maximise their numbers and the profits that can be derived by successfully entertaining and informing them.

Public broadcasters are required to provide a universal service to fulfil their responsibility to citizens.²²

With regards to Australia’s public broadcasters, this “universal service” includes regional and remote broadcasting, National Indigenous Television (NITV), foreign language and multicultural content, emergency broadcasting, and so on.

In this conception, the similarity between public and commercial broadcasters is superficial – concerning mostly the way that they utilise the same broadcasting technologies and reporting and storytelling techniques. When it comes to foundational questions of audience, purpose and responsibility, however, the public and commercial broadcasters have nothing in common – and, by extension, nothing to compete over.

Indeed, even if the ABC increases its share of eyeballs it cannot increase its share of the market for advertising revenue above zero.

The ABC’s special duty to report public emergencies is an example of this fundamental difference. The ABC fulfils this duty through local stations, ABC News, ABC News 24 and ABC Emergency, reaching people via social media, radio, television, mobile and online.²³ There is no equivalent obligation or expectation on commercial broadcasters, nor do broadcasters have the history, relationships, infrastructure, multimedia and public respect that would make high quality, broad emergency broadcasting possible.

²² Schultz (2015) *You’ll miss it when it’s gone: Why public broadcasting is worth saving*, <http://www.abc.net.au/news/2015-08-25/why-public-broadcasting-is-worth-saving/6722246>

²³ ABC Emergency (n.d.) *About*, <http://www.abc.net.au/news/emergency/2012-08-27/about-abc-emergency/4225628>

In the government's review of the ABC's rural and regional advocacy, three-quarters of submissions "expressed concern over limited or no radio reception and inferior mobile and internet coverage", particularly in relation to natural disasters.²⁴ Those making submissions weren't calling for commercial broadcasters to branch out into shortwave radio – they were asking for the ABC to do its duty as the emergency broadcaster.

Our 2015 report *Heartland* identified a retreat from regional media by the commercial broadcasters, with the end of broadcast studios in Tamworth, Orange and Wagga Wagga, the closure of bureaus in Albany, Geraldton and Broome, and the loss of 80 Fairfax newspaper staff on regional newspapers. At that time, a third of regional areas were below the media diversity required by the *Broadcasting Services Act*,²⁵ an unacceptable gap in provision by commercial broadcasters.

Heartland was critical of the ABC's regional media coverage, finding that the ABC was close to failing to fulfil its Charter in that regard. The paper recommended additional ABC funding for regional news services to address this issue, for which there is broad public support (for example, 58% of Australians living in capital cities supported an increase in funding, as high as the support in regional centres).²⁶

Heartland also detailed how the commercial TV industry group Free TV Australia identified the ABC as best placed to provide regional services, with the group saying:

If it is determined that there is a need for additional local news and information services in particular licence areas, then this should be provided by the government²⁷

The public broadcasters also do news and current affairs better and differently to commercial broadcasters. While it is true that the commercial broadcasters engage in news and current affairs reporting, including public interest journalism, this reporting takes place in the context of commercial imperatives that are not present for the public broadcasters.

The high number of Royal Commissions and other inquiries prompted by Four Corners reports (a selection are detailed in the appendix) is living proof of this. The distinction

²⁴ Deakin University (2017) *Deakin study reveals concerns over ABC emergency broadcasting*, <http://www.deakin.edu.au/about-deakin/media-releases/articles/deakin-study-reveals-concerns-over-abc-emergency-broadcasting>

²⁵ Johnson (2015) *Heartland*, <http://www.tai.org.au/content/heartland-why-bush-needs-its-abc>

²⁶ Johnson (2015) *Heartland*, <http://www.tai.org.au/content/heartland-why-bush-needs-its-abc>

²⁷ Free TV Australia (2013) *Submission by Free TV Australia*, http://www.freetv.com.au/media/submissions/2013_0016_ACMA_Regional_television_local_content.pdf

between the public broadcaster's current affairs programming and the commercial broadcaster's has been elaborated upon by many commentators, with Brian McNair and Adam Swift saying that without the influence of the ABC, current affairs would likely be reduced to "a light, frothy, occasionally sensationalised and prurient mix of human interest, lifestyle and advertorial content."²⁸

Denis Muller from the Centre for Advancing Journalism goes further, saying that:

There are some broader competition questions, as well, [in the inquiry] but the only part of its vast portfolio the ABC is specifically asked about is its news output. Yet, if there is one category of program content that most obviously and unmistakably distinguishes the ABC from commercial broadcasters, it's news.²⁹

To the limited extent that the ABC and SBS do overlap with commercial providers, this dynamic has existed since 1932. Where the competitive neutrality implications of ABC policies are discussed in academia, the analysis tends to be limited to recent, quasi-commercial arrangements. For example, academic Rob Nicholls identifies bidding to supply the "Australia Network" and whether access to online services is metered by internet providers as raising competitive neutrality questions – rather than the ABC's journalism or even its iView watch-on-demand service in and of itself.³⁰

INNOVATION

An editorial in *The Australian* has suggested that the ABC and SBS abuse their charters when they compete against commercial stations for content provided by third parties.³¹ This sort of argument may always be with us. Years ago the ABC was the only broadcaster interested in sport. Nowadays that role of the public broadcasters has been surrendered as the commercial broadcasters are able to outbid them.

²⁸ McNair and Swift (2014) *What would the Australian media look like without the ABC?*, <https://theconversation.com/what-would-the-australian-media-look-like-without-the-abc-24033>

²⁹ Muller (2018) *The politics behind the competitive neutrality inquiry into ABC and SBS*, <https://theconversation.com/the-politics-behind-the-competitive-neutrality-inquiry-into-abc-and-sbs-95925>

³⁰ Nicholls (2018) *Making the dual model work: Competitive neutrality and net neutrality issues facing the Australian Broadcasting Corporation*, <https://www.lexisnexis.com.au/en/products-and-services/lexisnexis-journals/current-issues/Competition-and-Consumer-Law-Journal-2018-Volume-25-Part-3>

³¹ Davidson and Brook (2018) *Government panel to review competitive neutrality of ABC, SBS*, <https://www.theaustralian.com.au/business/media/government-panel-to-review-competitive-neutrality-of-abc-sbs/news-story/cf9bd3f9370b6357d9ad5a3cff7745b3>

Soccer gives a recent example, with the SBS sublicensing the exclusive screening rights to 39 of Russia 2018's 64 matches to Optus because the SBS could no longer afford the rights to the whole tournament.³²

Ultimately, Optus failed to deliver, with technical issues "plaguing" their paid service. SBS said that they "stand ready to help Optus further", and Optus subsequently agreed for all remaining matches to be broadcast on SBS.³³

Traditionally both the ABC and SBS have broken programs in Australia which no one else was interested in – only to be outbid by commercial broadcasters when those programs eventually proved popular.

That brings us to the question of innovation generally. The ABC in particular has proved very innovative in reaching young audiences through programs such as Countdown and the radio station Double J and then Triple J. Indeed, under the power 'postal, telegraphic, telephonic, and other like services' as provided under section 51 of the Constitution, the Australian Government has a history of innovation going right back to 1901 when it needed to operate communications services at the cutting edge of technology.

In an argument entirely analogous to the ABC/SBS, Mariana Mazzucato argues that we should 'view the BBC through a market creation and market shaping framework [and] that the criteria for evaluating and assessing public organizations that stem from such a framework are very different from those that stem from a market failure one'.³⁴ The term 'market failure' has rarely been used in the Australian discussion, but it is implied when critics say that the ABC/SBS should only do those things that the market cannot

³² SBS (2016) *SBS strike EPL deal with Optus*, <https://theworldgame.sbs.com.au/sbs-strike-epl-deal-with-optus>; Ansell (2018) *SBS to keep World Cup soccer games as Optus woes deepen*, <https://www.smh.com.au/business/companies/sbs-to-keep-world-cup-soccer-games-as-optus-woes-deepen-20180620-p4zmoc.html>

³³ Wilson (2018) *World Cup: Optus hands over remaining group matches to SBS after streaming debacle*, <http://www.abc.net.au/news/2018-06-20/world-cup-optus-hands-over-group-matches-to-sbs/9891118>; ABC News (2018) *World Cup: Optus brand battered by streaming fail, with still no guarantee of a fix*, <http://www.abc.net.au/news/2018-06-19/world-cup-optus-streaming-issues/9885172>

³⁴ Mazzucato (2016) *The BBC as market shaper and creator*, p 2, <http://sro.sussex.ac.uk/65249/1/The%20BBC%20as%20market%20shaper%20and%20creator%20Open%20Democracy%20FINAL.pdf>

provide – and it was used explicitly in Senator Paterson’s editorial last month where he accused the ABC of “political blackmail”.³⁵

Mazzucato says ‘the BBC is a perfect example of an organization that by remaining ahead of the game, investing in its own competencies and capabilities, has been able to attract top talent, and steer, shape and create new market landscapes and opportunities for both public and private actors’.³⁶ It should be assessed in terms of its innovation and leadership rather than static economic perspectives.

Some of the differences include the risk-averse nature of the commercial television sector which runs a far smaller proportion of ‘first-run’ content. In Australia if we exclude proven content from abroad then we expect the figures would also show a very large difference between the ABC/SBS and the commercial broadcasters. The development of reality TV in Australia began with the ABC’s *Sylvania Waters* in 1992 – a format that was enthusiastically taken up by the commercial broadcasters.

Similarly, the ABC’s digital services have broken ground and created new markets. ABC Online was launched in 1995, and by 1996 the ABC was the first major media group to provide a regular news service.³⁷ Radio National offered all of its programming online as audio-on-demand from 2002, well before this was common practice, and the first ABC podcasts began in 2005.³⁸ iView, which the ABC launched in 2008, was the first online catch-up service in Australia.³⁹

The ABC/SBS leadership role in programing and other aspects should be highlighted in the inquiry’s findings. The ABC/SBS have, over the years, provided a training ground for sound engineers and camera crew through to directors/producers/actors. Many of those in the for-profit sector have been trained in the public sector.

³⁵ Paterson (2018) *ABC exists for market failure, not to be media conglomerate*, <https://www.afr.com/opinion/columnists/abc-exists-for-market-failure-not-to-be-media-conglomerate-20180527-h10lc7>

³⁶ Mazzucato (2016) *The BBC as market shaper and creator*, p 4, <http://sro.sussex.ac.uk/65249/1/The%20BBC%20as%20market%20shaper%20and%20creator%20Open%20Democracy%20FINAL.pdf>

³⁷ ABC (n.d.) *10 Years of ABC Online: History*, <http://www.abc.net.au/innovation/site-archive/10years/history.htm>

³⁸ ABC (n.d.) *10 Years of ABC Online: History*, <http://www.abc.net.au/innovation/site-archive/10years/history.htm>

³⁹ ABC Television (2015) *ABC TV at the forefront of innovative content delivery*, <https://tv.press.abc.net.au/abc-tv-at-the-forefront-of-innovative-content-delivery>

MARGINAL COST

Rupert Murdoch once made the point that no matter what platforms are used to broadcast to people it is the content that is all important and that is why the Fox empire concentrated on collecting a large library of content; the proposed merger with Disney would make that library so much bigger again, if it goes ahead. As Murdoch put it some years ago:

We've spent billions of dollars developing unique sports, news and general entertainment programming. We have a library as rich as anyone in this world. Our job now is to bring this content profitably into the broadband world - to marry our video to our publishing assets, and to garner our fair share - hopefully more than our fair share -- of the advertising dollars that will come from successfully converging these media.⁴⁰

That insight that content is important seems to have been adopted by the ABC/SBS in deciding to enter new delivery platforms and populating the content with previously aired content or adaptations of content destined for traditional platforms. Following a similar train of thought the Productivity Commission said:

The national broadcasters, particularly the ABC, are important sources of content and they must be able to disseminate this information. The convergence between traditional broadcasters and new media operators presents the national broadcasters with the opportunity to deliver their content to the rest of the world via a range of platforms.⁴¹

The important thing here is that, for a broadcaster, as the very name 'broadcaster' suggests, the marginal cost of delivering to another viewer is virtually zero. It costs a certain amount to create programming and disseminate it but once that cost is met it makes little difference if the program is seen by 10 or 10 million viewers. Likewise having established two or more platforms for delivery, the marginal cost of delivering on the additional platform is virtually zero.

⁴⁰ Murdoch (2005) *Speech to the American Society of Newspaper Editors*, <https://www.theguardian.com/media/2005/apr/14/citynews.newmedia>

⁴¹ Productivity Commission (2000) *Broadcasting, Report no. 11*, p 273–274

Reform

Although there are no competitive neutrality concerns with the public broadcasters, the inquiry provides an opportunity to resolve issues that might provoke competitive neutrality concerns in the future. These include the public broadcasters being required to negotiate metering with internet service providers – which could be resolved by legislating an arrangement, perhaps that these should be unmetered; advertising on SBS – which could be resolved by removing advertising from SBS; and tenders for matters of state – which could be resolved by not tendering for broadcasting which serves the purposes of soft diplomacy and national security.

STANDARDS

Critics of the ABC have called for its Charter to include a requirement for the broadcaster to be “fair and balanced”, most recently in legislation proposed by the government.⁴² The *ABC Act* already requires the ABC to be accurate and impartial, and the code of practice identifies “a balance that follows the weight of evidence” as a hallmark of impartiality.⁴³

A general requirement of “balance”, with no reference to evidence, fails to understand the difference between balance and objectivity. Mungo McCullum years ago pointed out that if the English cricket side touring Australia played abysmally and went home disgraced it would be a strain indeed to write a ‘balanced’ account which might strive to spend equal time on the positives of each side’s performance. However, whatever one came up with the description would certainly not be objective. The objective perspective would be that England played abysmally.

The attempt to provide balance rather than objectivity expresses itself in such things as programs which give equal time to climate change deniers as they do to scientists working on climate change. In that way programs presented as informational are turned into entertainment with no concern about the consequences of giving credence to the crank end of opinion.

⁴² SBS News (2017) *ABC 'fair and balanced' laws in parliament*

⁴³ ABC (2016) *Code of practice*, p 5, <http://about.abc.net.au/wp-content/uploads/2016/05/ABCCodeOfPractice2016-1.pdf>; *Australian Broadcasting Corporation Act 1983* (Cth)

Likewise the commercial broadcasters are more and more prone to mixing advertisements with news and entertainment. Morning shows are full of commercial interests displaying their products in ways that present as either news or entertainment.

This is largely kept out of the ABC/SBS, although it is not completely absent. When there are important economic events the commentators we hear tend to be those who are keen to have their employer's name included in the 'news' item. Examples include financial commentary from stockbrokers that includes their branding in the backdrop. In such coverage the ABC/SBS should use in-house expertise or at the very least avoid allowing commercial interests a 'free plug'.

METERING OF CONTENT

The ABC's provision of content online does not raise competitive neutrality issues, since there is no user-pricing – as discussed above. The narrow area of potential neutrality problems is that of commercial arrangements with internet service providers, and specifically whether they decide to meter or not meter ABC content.

UNSW visiting fellow Rob Nicholls identifies the dilemma:

The ABC is a public service broadcaster that is maintaining relevance by becoming a public service media provider. However, the ability of consumers of a public service to enjoy that service is constrained by internet service providers exercising commercial and market power. For those internet service providers which do not meter the ABC, the consumption of ABC content is markedly higher than on internet service providers that do meter. As a result, consumers' use of the ABC on internet service providers that do not meter ABC content is higher than more generally. However, arguments for either not metering or a 'must carry' regime for public service broadcasters have been rejected by free market writers. The other national broadcaster, SBS, has made a specific call that all SBS programming delivered using the National Broadband Network (which is operated by the state-owned enterprise NBN Co) be unmetered.⁴⁴

⁴⁴ Nicholls (2018) *Making the dual model work: Competitive neutrality and net neutrality issues facing the Australian Broadcasting Corporation*, p 313–314, <https://www.lexisnexis.com.au/en/products-and-services/lexisnexis-journals/current-issues/Competition-and-Consumer-Law-Journal-2018-Volume-25-Part-3>

Nicholls recommends policy change to reconcile this problem, giving as an option that the ABC could pay for transmission services on a cost-based price.⁴⁵ We think this approach, or the others like legislating no metering for public broadcasters, should be considered to remove this minor competitive neutrality concern.

NO ADVERTISING

As discussed above, the SBS competes in the advertising market with commercial broadcasters to a limited extent.

Advertising on the SBS has been criticised from a number of quarters since it was introduced. The jarring and ironic advertising interventions during the SBS' screening (online and via television) of *The Handmaid's Tale* attracted particular commentary,⁴⁶ and increased advertising on SBS is deeply unpopular among Australians.⁴⁷

The commercial broadcasters have always said that three private licenses are all the Australian market can sustain given the limited advertising revenue in Australia, and recently argued that every dollar of additional advertising revenue earned by SBS "will be drawn entirely from the commercial broadcasters".⁴⁸ It is also likely that most of SBS' existing advertising revenue is also drawn from commercial broadcasters.

The SBS could be withdrawn from competing with commercial broadcasters by ending advertising and sponsorship on the SBS. Government funding could easily make up the

⁴⁵ Nicholls (2018) *Making the dual model work: Competitive neutrality and net neutrality issues facing the Australian Broadcasting Corporation*, p 313–314, <https://www.lexisnexis.com.au/en/products-and-services/lexisnexis-journals/current-issues/Competition-and-Consumer-Law-Journal-2018-Volume-25-Part-3>

⁴⁶ Convery (2017) *Handmaid's Tale: SBS streaming ad placement almost as brutal as Gilead*, <https://www.theguardian.com/tv-and-radio/2017/jul/11/handmaids-tale-sbs-streaming-ad-placement-almost-as-brutal-as-gilead>

⁴⁷ Knox (2017) *Survey says SBS viewers reject increased ads*, <https://tvtonight.com.au/2017/04/survey-says-sbs-viewers-reject-increased-ads.html>; Save our SBS (2017) *Survey 2017 about SBS*, <https://saveoursbs.org/wp-content/uploads/2017/04/Survey-2017-about-SBS.pdf>

⁴⁸ *Communications Legislation Amendment (SBS Advertising Flexibility) Bill 2017* (Cth), "Explanatory memorandum", <https://www.legislation.gov.au/Details/C2017B00045/Explanatory%20Memorandum/Text>; see also Free TV Australia (2015) *Submission to Senate Environment and Communications Legislation Committee*, http://www.freetv.com.au/Media/Submissions/2015_0007_SUB_FINAL_Senate_Environment_and_Communications_Committee_SBS_Advertising_Flexibility_and_Other_Measures_Bill.pdf

gap of about \$76 million per year.⁴⁹ This would improve the viewing experience for the SBS' audience and the removal of a competitor would serve as a subsidy for commercial broadcasters. Similarly, the ABC should not introduce advertising.

AVOIDING TENDERS FOR MATTERS OF STATE

One example of potential competitive neutrality issues was whether the Australia Network (an international television service then operated by the ABC) should be put out for tender. Then-managing director of the ABC Mark Scott argued that the Australia Network was an instrument of soft diplomacy (the implication being that only the state can conduct diplomacy), a view “consistent” with that of the communications minister at the time.⁵⁰ DFAT held an inquiry, where most submissions argued against a tender process, and DFAT ultimately concluded that the contract should not be retendered.⁵¹

Despite this, the government did publish a request for tender for the Australia Network, then amended and eventually terminated the tender.

The difficult and avoidable position that this put the ABC in is explained in detail by Nicholls, but in short the ABC ended up attacked in the commercial media for acting in accordance with competitive neutrality principles.⁵² The ABC should never have been put in this position, because a tender was not only unnecessary but actually advised against.

⁴⁹ *Communications Legislation Amendment (SBS Advertising Flexibility) Bill 2017* (Cth), “Explanatory memorandum”,

<https://www.legislation.gov.au/Details/C2017B00045/Explanatory%20Memorandum/Text>

⁵⁰ Nicholls (2018) *Making the dual model work: Competitive neutrality and net neutrality issues facing the Australian Broadcasting Corporation*, p 310, <https://www.lexisnexis.com.au/en/products-and-services/lexisnexis-journals/current-issues/Competition-and-Consumer-Law-Journal-2018-Volume-25-Part-3>

⁵¹ Nicholls (2018) *Making the dual model work: Competitive neutrality and net neutrality issues facing the Australian Broadcasting Corporation*, p 310–311, <https://www.lexisnexis.com.au/en/products-and-services/lexisnexis-journals/current-issues/Competition-and-Consumer-Law-Journal-2018-Volume-25-Part-3>

⁵² Nicholls (2018) *Making the dual model work: Competitive neutrality and net neutrality issues facing the Australian Broadcasting Corporation*, p 310–311, <https://www.lexisnexis.com.au/en/products-and-services/lexisnexis-journals/current-issues/Competition-and-Consumer-Law-Journal-2018-Volume-25-Part-3>

In the future, international broadcasting with soft diplomacy and national security purposes should be reserved as a key duty of the public broadcasters, like domestic emergency broadcasting.

Competitive neutrality cuts both ways

One of the approaches for reconciling competitive neutrality issues that is proposed in the Hilmer 1993 National Competition Policy review is to reform specific advantages and disadvantages. While typically this would take the form of removing specific advantages that apply to public operations or removing specific disadvantages that apply to private operations, the alternative approach would be to apply the disadvantages that apply to public operations to private ones as well.

In other words, competitive neutrality cuts both ways. If commercial broadcasters want the ABC and SBS to compete on an equal footing, it is reasonable to expect commercial broadcasters to meet the strict requirements on the public broadcasters.

While there is no doubt that the difficulties faced by some commercial media outlets are unrelated to the ABC there is evidence that the ABC faces significant disadvantages its competition with commercial media outlets in the chase for eye balls, as opposed to advertisers.

That is, in order to meet its charter obligations the ABC is required to employ more people in regional areas and oversees than commercial television and radio stations who have been granted the privilege of broadcasting licences.

Similarly, in order to provide high quality and diverse coverage of complicated issues the ABC retains staff with specialised skills and experience to ensure that their coverage of important national issues such as elections is timely and of high quality.

Further, the obligation to provide broad coverage of broad issues (as opposed to the commercial focus on specific demographic groups), means that the ABC incurs greater costs in the provision of the same amount of programming.

The SBS is restricted in the duration and location that it can air ads. Although we suggest removing advertising from the SBS to stop it from competing with commercial broadcasters for ad dollars, an alternative could be to limit commercial broadcasters to the same advertising duration and location as the SBS.

There is legislation currently before the Parliament that would force the ABC and SBS to disclose the salaries it pays its staff. Competitive neutrality would suggest that the legislation should be extended it to all commercial broadcasters as well.

And finally, the obligation to take all complaints seriously, to have significant managerial oversight dedicated to ensuring that content is accurate and impartial, comes at significant cost.

If the Government is interested in the creation of competitive neutrality for a services high is freely provided it would seem that the most logical course of action would be to ensure that all commercial media outlets are required to adhere to the same level of editorial oversight and to adhere to a similar level of commitment to broadcast to diverse geographic and cultural backgrounds

Conclusion

The similarities between the ABC and SBS on one hand and the commercial broadcasters on the other are superficial. The public broadcasters provide a universal service to citizens – including emergency reporting, public interest current affairs journalism, multicultural and multilingual content – while commercial broadcasters cultivate audiences that they entertain and inform in order to sell their time and attention to advertisers.

Competitive neutrality policy covers goods and services with user-pricing, and so by definition it cannot apply to most of the ABC and SBS' work – including, significantly, the news and digital services that have been the subject of particular scrutiny.

Although commercial broadcasters complain about the ABC and SBS, the public broadcasters are not responsible for their recent revenue woes. The public broadcasters have continued to meet their Charter obligations as they always have done. If the commercial broadcasters do see the public broadcasters as competitors, then they should be required to provide the same high-quality and closely regulated service that the public broadcasters do.

Appendix: Royal Commissions and other inquiries

Public interest journalism from the ABC has prompted numerous government inquiries and investigations – with Josh Taylor in *Crikey* calling it “The Four Corners effect”.

Some of the most influential contributions from ABC journalism are:

- *The big league*, the 1983 Four Corners investigation into misappropriation of funds and judicial corruption, resulted in the NSW Royal Commission into Certain Committal Proceedings Against K. E. Humphreys (the Street Royal Commission) which found that magistrate Murray Farquahar had illegally intervened in the legal process.⁵³
- *The moonlight state*, the 1987 Four Corners investigation that revealed extensive Queensland police corruption.⁵⁴ The program resulted in the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (the “Fitzgerald Inquiry”), which spent two years investigating long-term systemic political corruption and abuse of power and which is described as the “most successful inquiry in Australian history”.⁵⁵ Four ministers were jailed, numerous police were convicted, Sir Joh Bjelke-Petersen was charged with perjury, and the Criminal Justice Commission (as it then was) was founded as a result of its recommendations.⁵⁶
- *Code name Mantra*, the 1994 Four Corners investigation that revealed that former ASIS officers believed that the organisation’s accountability was questionable, prompted the Commission of Inquiry into the Australian Secret Intelligence Service (the Samuels and Codd Report).⁵⁷
- *Corruption Inc*, the 2004 Four Corners investigation that revealed that the Australian Crime Commission was “wearing the stain of corruption”, resulted in

⁵³ New Matilda (2014) *Wran, the Balmain boy gone bad*, <https://newmatilda.com/2014/04/24/wran-balmain-boy-gone-bad/>

⁵⁴ Four Corners (1987) *The moonlight state*, <http://www.abc.net.au/4corners/the-moonlight-state---1987/2832198>

⁵⁵ Hanrahan (2016) *What does it take to make a royal commission successful?*, <http://www.abc.net.au/news/2016-10-19/four-corners-nt-royal-commission-history/7945640>

⁵⁶ Crime and Corruption Commission Queensland (2014) *The Fitzgerald Inquiry*, <http://www.ccc.qld.gov.au/about-the-ccc/the-fitzgerald-inquiry>

⁵⁷ Commission of Inquiry into the Australian Secret Intelligence Service (1995) *Report on the Australian Secret Intelligence Service – public edition*, <http://apo.org.au/node/37293>

a commitment from the government to set up an independent national anti-corruption body, which would become the Australian Commission for Law Enforcement Integrity.⁵⁸

- *Banking bad*, the 2014 Four Corners investigation that revealed a “sales-driven culture” within the Commonwealth Bank’s financial planning division, helped prompt the Senate inquiry that went on to recommend the Financial Services Royal Commission.⁵⁹
- *Australia’s shame*, the 2016 Four Corners investigation that revealed strip searching, assaults and tear gassing of young offenders at the Don Dale Youth Detention Centre, led to a Royal Commission being announced the next day (formally established days later as the Royal Commission into the Protection and Detention of Children in the Northern Territory).⁶⁰
- *Pumped*, the 2017 Four Corners investigation that revealed that billions of litres of water were being harvested by irrigators despite being purchased by the government for environmental use.⁶¹ The program resulted in the South Australian government’s Murray-Darling Basin Royal Commission to investigate the Murray-Darling Basin system.⁶²

There is simply nothing like this resulting from the work of commercial broadcasters, even those conducting public interest journalism.

⁵⁸ Four Corners (2004) *Corruption Inc*; Kirk (2004) *Fed Govt announces new national anti-corruption body*, <http://www.abc.net.au/worldtoday/content/2004/s1133017.htm>; ABC News (2004) *Govt to set up national anti-corruption body*, <http://www.abc.net.au/news/2004-06-16/govt-to-set-up-national-anti-corruption-body/1993618>; Brown (2008) *Towards a Federal Integrity Commission: The challenge of institutional capacity-building in Australia*, p 3

⁵⁹ Four Corners (2014) *Banking bad*, <http://www.abc.net.au/news/2014-05-05/banking-bad/5433156>; Chau and Clark (2018) *Banking royal commission: How did we get here?*, <http://www.abc.net.au/news/2017-11-30/banking-royal-commission-how-did-we-get-here/9210248>

⁶⁰ Taylor (2016) *The Four Corners effect: 12 hours later, a royal commission*, <https://www.crikey.com.au/2016/07/26/four-corners-effect-hours-later-royal-commission/>; Standish (2016) *25 years after the Royal Commission into Aboriginal Deaths in Custody*, <http://www.abc.net.au/local/audio/2016/09/05/4532950.htm>

⁶¹ Besser, Fallon and Carter (2017) *Murray-Darling Basin Plan: Taxpayer-purchased water intended for rivers harvested by irrigators*, <http://www.abc.net.au/news/2017-07-24/murray-darling-basin-water-pumped-by-irrigators/8732702>

⁶² Dayman (2018) *Murray-Darling Basin Plan potentially unlawful, royal commissioner warns*, <http://www.abc.net.au/news/2018-05-01/murray-darling-basin-plan-potentially-unlawful/9713534>; ABC News (2017) *Murray-Darling Basin: SA launches royal commission into alleged water theft*, <http://www.abc.net.au/news/2017-11-26/sa-to-launch-royal-commission-into-river-murray-theft/9194368>