

Communications Legislation Amendment (SBS Advertising Flexibility and Other Measures) Bill 2015

Introduction

1.1 On 26 March 2015, on the recommendation of the Selection of Bills Committee, the Senate referred the provisions of the Communications Legislation Amendment (SBS Advertising Flexibility and Other Measures) Bill 2015 (the bill) to the Senate Environment and Communications Legislation Committee (the committee) for inquiry and report by 8 May 2015.¹ The reporting date was subsequently extended to 29 May 2015.

Conduct of the inquiry

1.2 In accordance with its usual practice, the committee advertised the inquiry on its website and wrote to relevant individuals and organisations inviting submissions by 15 April 2015.

1.3 The committee received 27 submissions, which are listed at Appendix 1, and held a public hearing in Melbourne on 18 May 2015. The public submissions and Committee Hansard are available on the committee's website at:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/SBS_advertising

Background to the bill

1.4 The Special Broadcasting Service (SBS) is established as a corporation under the *Special Broadcasting Service Act 1991* (SBS Act). The role and functions of SBS are set out in its Charter under section 6 of the SBS Act.

1.5 Funding for SBS comes from two sources: the majority of SBS's operating budget is provided by the Australian Government with the remainder from SBS's commercial activities including advertising, sponsorship announcements and the sale of goods and services. The level of advertising and sponsorship announcements is restricted under the SBS Act to no more than five minutes of advertising and sponsorship announcements in any hour of broadcasting before or after programs or during natural program breaks. This equates to a total daily limit of 120 minutes of advertising and sponsorship per television channel.

1.6 In early 2014, at the request of the Hon Malcolm Turnbull MP, the Minister for Communications, the Department of Communications undertook a study into the

1 *Journals of the Senate*, No. 90, 26 March 2015, pp 2458–60.

efficiency of the operations of both the Australian Broadcasting Corporation (ABC) and SBS. The Efficiency Study was undertaken by Mr Peter Lewis. In November 2014, the Minister for Communications announced that savings would be made over five years from 2014–15 for the ABC and SBS as a result of the findings of the Efficiency Study.²

1.7 In addition, the Efficiency Study considered advertising on SBS. It was noted that SBS currently has a strict limit on the level of advertising; however, the Efficiency Study identified an opportunity for SBS to make more effective use of its advertising time through greater flexibility in scheduling. The Efficiency Study recommended that the SBS Act be amended to allow SBS to transfer advertising minutes between hours of broadcast so as to maximise its advertising revenue at peak viewing times and during popular programs. No change to the maximum number of minutes of advertising per day was recommended. The Efficiency Study also identified product placement as an additional revenue source.³

Purpose of the bill

1.8 The purpose of the bill is to amend the SBS Act to provide SBS with increased flexibility with respect to the broadcast of advertisements and sponsorship announcements, as well as providing clarity regarding SBS's ability to include product placement, and to earn revenue through product placement, in broadcast programs and in content on its digital media services.

1.9 The bill proposes to repeal existing paragraph 45(2)(b) of the SBS Act and substitute a new paragraph which will provide for an increase from five minutes to 10 minutes in the total time for broadcasting of advertisements and sponsorship announcements in any hour of broadcasting. The total time for broadcasting of advertisements and sponsorship announcements is to be maintained at 120 minutes in any 24 hours of broadcasting.⁴

1.10 The bill also proposes to amend section 45 to include a reference to product placement as follows:

- subsection 45(1) is to be amended to specifically authorise SBS to broadcast programs that include product placement; and
- subsections 45(4) and (6) are to be amended to require SBS to develop and publicise particular guidelines relating to product placement. This requirement is additional to, and equivalent to, the existing requirements for advertising and sponsorship announcements.⁵

2 The Hon Malcolm Turnbull MP, Minister for Communications, *The Future of Our Public Broadcasters*, 19 November 2014.

3 Explanatory Memorandum, p. 4.

4 Explanatory Memorandum, p. 17.

5 Explanatory Memorandum, p. 18.

1.11 It is proposed to amend section 45A to clarify that SBS may include product placement in content on its digital media services and to develop and publicise guidelines relating to product placement.

1.12 Paragraph 57(e) is to be amended to add that 'money of the SBS' includes money received by SBS in respect of the inclusion of product placement in programs and in content provided on digital media services. Paragraph 73(f) is to be amended to require SBS to include information regarding its product placement activities in its annual report.⁶

1.13 The bill also proposes minor technical amendments to provision in the legislation governing the ABC and SBS and repeals various redundant Acts and provision from Communications portfolio legislation.⁷

Financial impact of proposed amendments

1.14 In his second reading speech, the Minister for Communications stated that it is anticipated that the SBS advertising and sponsorship measures will result in an increase in SBS's advertising revenue of \$28.5 million over four years from 2015–16.⁸ This estimated revenue takes into consideration the cost of additional staff and resources SBS will need in order to sell additional advertising, and that SBS is unlikely to consistently fill 10 minutes of advertising during peak viewing times due to the nature of much of its Charter content.⁹

1.15 In addition, it was noted that the additional revenue earned by SBS is 'highly unlikely to have a material impact on the advertising revenue of the commercial broadcasting industry, which totalled \$3.9 billion in 2013–14'.¹⁰

1.16 The Minister concluded:

The government is committed to repairing the federal budget and ensuring the public broadcasters are as efficient as possible. The government has recently reformed the procurement of and funding arrangements for transmission services of the ABC and SBS to encourage the broadcasters to adopt more efficient practices and realise savings that can be directed towards producing new content and services.

Similarly, the SBS advertising measures in this bill will allow SBS to earn additional advertising revenue which could in the future be used to fund new programming.¹¹

6 Explanatory Memorandum, p. 19.

7 Explanatory Memorandum, pp 20–24.

8 The Hon Malcolm Turnbull MP, Minister for Communications, *Proof House of Representatives Hansard*, 25 March 2015, p. 3356.

9 Explanatory Memorandum, p. 9.

10 The Hon Malcolm Turnbull MP, Minister for Communications, *Proof House of Representatives Hansard*, 25 March 2015, p. 3356.

Issues raised in evidence

1.17 The committee received a range of views on the bill.¹² The Federation of Ethnic Communities' Councils of Australia (FECCA) noted the contribution made by SBS to Australia's success as a migrant country by facilitating social cohesion between groups of differing backgrounds. While expressing disappointment at the funding reductions for SBS, FECCA indicated its support for the bill as it 'provides SBS with flexibility in scheduling advertising and sponsorship announcements on its broadcasting services'. FECCA indicated that it believed that:

...the additional advertising revenue is necessary to ensure that the role of SBS in supporting multicultural communities is not diminished following the SBS funding reduction.¹³

1.18 FECCA went on to state that it 'is of the view that given that the overall advertising time in a 24 hour cycle will not increase it will not make a major difference to the way the broadcaster currently operates'. FECCA concluded:

SBS has played and continues to play a significant role in the settlement of migrants and refugees into the Australian community. Given the significant number of Australians that do not speak English well or do not speak English at all, SBS's role is even more critical with helping meet the information, education and entertainment needs of this group of Australians. It is FECCA's view that this role could be compromised if the Bill is not passed and SBS is forced to cut programs, services and staff.¹⁴

1.19 Other submitters were not supportive of the bill. In particular, Free TV Australia (Free TV) and Save our SBS argued that the amendments would result in SBS becoming the fourth fully commercial television channel 'by stealth'.¹⁵ This view was rejected by SBS with Mr Michael Ebeid, Managing Director SBS, stating that:

It's baffling to see opponents label this proposal as the onset of SBS becoming the fourth commercial television network. I'd be the first person to crow about SBS programming but let's get real here—SBS is one of many players in a highly competitive market with a special purpose that speaks to particular audiences and advertisers.¹⁶

11 The Hon Malcolm Turnbull MP, Minister for Communications, *Proof House of Representatives Hansard*, 25 March 2015, p. 3357.

12 In the following section, the term 'advertising' generally relates to advertising and sponsorship announcements as provided for in s. 45, SBS Act.

13 Federation of Ethnic Communities' Councils of Australia, *Submission 3*, p. 2.

14 Federation of Ethnic Communities' Councils of Australia, *Supplementary Submission 3.1*, p. 2.

15 See Mr Quinton Dempster, Save Our SBS, *Committee Hansard*, 18 May 2015, p. 9; Ms Julie Flynn, Free TV Australia, *Committee Hansard*, 18 May 2015, p. 27.

16 Mr Michael Ebeid, 'Other Countries envy SBS's contribution', *The Australian*, 30 March 2015, <http://www.theaustralian.com.au/business/media/other-countries-envy-sbss-contribution/story-e6frg996-1227283684099> [accessed 18 April 2015]

1.20 In addition, SBS reiterated that the proposed amendments will not increase the total amount advertising and sponsorship announcements during a 24 hour period will not increase. It will remain at 120 minutes, which is well below the 350 minutes of advertising that commercial broadcasters are permitted per channel per day under the Commercial Television Industry Code of Practice.¹⁷ Furthermore, SBS's proposed limits are lower than a range of other public broadcasters. SBS provided the following examples:

- Channel 4 in the United Kingdom is permitted to broadcast an average of seven minutes per hour across the broadcasting day (for a total of 168 minutes of advertising per day) and an average of eight minutes an hour during primetime;
- There are no limits on the amount of advertising permitted to be broadcast by the Canadian Broadcast Corporation (CBC). On average, CBC TV broadcasts 12 minutes of advertising per hour during primetime; and
- The Swiss Broadcasting Corporation is permitted to a maximum of 12 minutes of advertising on TV per hour.¹⁸

1.21 Other matters raised by submitters who did not support the bill included the potential effect of the bill on the SBS's ability to meet its Charter obligations and adverse implications for commercial free-to-air broadcasters and the Australian screen production sector. These issues are discussed below.

Effect of the amendments on SBS's Charter obligations

1.22 The committee received evidence which outlined concerns relating to the possible effect on SBS's ability to meet its Charter obligations if the proposed amendments to allow SBS to generate revenue from product placements and flexibility in advertising are passed.

1.23 GetUp!, in opposing the proposed changes to the advertising arrangements and to permit product placement in SBS programming, commented that further commercialisation of SBS would place the needs of advertisers before the needs of the viewer. GetUp! pointed to two studies which indicated that participants were of the view that, since the introduction of in-program advertising on SBS, SBS was 'less faithful to the Charter'.¹⁹ GetUp! commented that 'the studies strongly suggest that SBS will be less efficient in Charter delivery if it were to double prime time advertising'.²⁰

17 Mr Peter Khalil, Director, Corporate Affairs, Special Broadcasting Service (SBS), *Proof Committee Hansard*, 18 May 2015, p. 29.

18 SBS, *Submission 7*, p. 10.

19 Get Up!, *Submission 4*, p. 1; see also Save our SBS, *Submission 5*, pp 7–8.

20 Get Up!, *Submission 4*, p. 2.

1.24 In addition, GetUp! argued that product placement will threaten SBS's independence and went on to comment:

Having a product placed on set, within programs will severely diminish the integrity of the SBS, as presenters would be gagged from making any comment that could be perceived to negatively portray the product or associated companies being advertised.²¹

1.25 Save Our SBS was similarly opposed to the changes to the advertising arrangements and product placement in SBS broadcasts. Save Our SBS stated that the changes 'would further elevate the advertiser as client (instead of the viewer) and in lieu of the Charter'. Further, the proposed amendments represent:

...a fully commercial strategic plan for SBS. This will dominate executive 'brain space' by the revenue imperative at the expense of the Charter. SBS will become Australia's fourth free to air TV network.²²

1.26 Save Our SBS concluded:

...the Bill, which will take SBS further down the commercial road, should be rejected. If the Bill to increase advertising via averaging and product placement passes, SBS will forever suffer far greater losses than monetary losses only.²³

1.27 The possibility of pressure from advertisers on programming decisions was also raised by the Communications Law Centre (CLC). The CLC commented that if the amendments were agreed to, the regulatory framework should be strengthened to ensure that the character and quality of SBS services do not suffer.²⁴ In relation to product placements, the CLC commented that:

Any change to the SBS Act to allow product placement would be an important change to the way advertising is presented on SBS and has the potential to adversely affect viewers by misleading them with respect to sponsorship arrangements.²⁵

1.28 The CLC went on to recommend that the SBS Codes of Practice should be amended to ensure that viewers are not misled. The CLC stated that the SBS Codes of Practice should, at a minimum, meet the standard of the Commercial Television Industry Code of Practice in relation to promotional material in programs.²⁶

21 Get Up!, *Submission 4*, p. 2.

22 Save Our SBS, *Submission 5*, p. 11.

23 Save Our SBS, *Submission 5*, p. 11.

24 Communications Law Centre, *Submission 27*, p. 2.

25 Communications Law Centre, *Submission 27*, p. 3.

26 Communications Law Centre, *Submission 27*, p. 3.

1.29 FECCA stated that it was 'cognisant of the risks that increased advertising within programs could place on SBS that could potentially result in SBS not being able, or seen to not be able, to continue to effectively meet its Charter obligations'. However, FECCA went on to comment that it viewed the flexibility offered by the bill 'in a positive way', as the bill seeks to enable SBS to further maximise opportunities and strengthen its capacity to improve programs and services.²⁷ In order to reassure its audience and other stakeholders that the programming and the integrity of the SBS Charter would not be, or seen to be compromised or influenced by advertisers, FECCA recommended that SBS put in place safeguards and guidelines.²⁸

1.30 SBS responded to concerns raised by submitters about the possible adverse impact of the changes on the delivery of SBS's Charter obligations. It stated that:

The organisation is well-positioned to responsibly and sensitively manage increased flexibility in advertising and sponsorship in line with audience and stakeholder expectations, whilst maintaining the integrity of the SBS Charter.

SBS would only implement additional advertising and sponsorship in programs and timeslots where it would not detract from efforts to reflect the Charter.²⁹

1.31 Mr Peter Khalil, Director of Corporate Affairs, SBS, also responded to the assertion by submitters that increased advertising would affect SBS's ability to meet its Charter obligations. He stated that:

...the SBS charter...is at the heart of SBS. To paraphrase the charter, the principal function of SBS is to provide multilingual and multicultural content that informs, educates and entertains all Australians promote a multicultural society. That remains at the heart of SBS's mission, and what we do is all about that.

...I want to dispel this notion...that any additional minutes of advertising are somehow going to be a real threat to our charter; we have been doing this for 25 years and we know how to do it.³⁰

1.32 Mr Khalil went on to comment that SBS would not make program commissioning decisions based on advertising minutes and added 'we never have and never will. The minutes are simply a flexibility to allow us to add some minutes if we can fill them on the charter commissioned content'. Mr Khalil concluded:

27 Federation of Ethnic Communities' Councils of Australia, *Supplementary Submission 3.1*, p. 3.

28 Federation of Ethnic Communities' Councils of Australia, *Supplementary Submission 3.1*, p. 3; see also Ms Eugenia Grammatikakis, Federation of Ethnic Communities' Councils of Australia, *Committee Hansard*, 18 May 2015, p. 3.

29 SBS, *Submission 7*, p. 3.

30 Mr Peter Khalil, Director, Corporate Affairs, SBS, *Proof Committee Hansard*, 18 May 2015, p. 29.

I can assure you that the commissioning decisions and the content decisions, the acquisition decisions, within SBS are not being driven by five minutes of advertising or 10 minutes of advertising, frankly; they are being driven by what we are supposed to be doing as part of our obligations as a taxpayer funded organisation.³¹

1.33 In addition, the committee notes that the SBS Board will be required to develop governance and reporting requirements regarding the use of product placement, which will be released publicly. The guidelines on product placement will also be incorporated in SBS's Code of Practice, which 'would be subject to the overriding requirement under the SBS Act that such arrangements do not compromise SBS's integrity or editorial independence'.³² SBS is 'also required to notify the Australian Communications and Media Authority (ACMA) of these codes' and the ACMA may investigate 'complaints related to the content broadcast on SBS television or radio'.³³ In addition to these governance and reporting requirements, SBS will be required to report on its use of product placement within its annual report to Parliament.³⁴

Impact on commercial free-to-air broadcasters

1.34 Free TV, representing commercial free-to-air broadcasters, strongly opposed the proposed amendments to the SBS Act. Free TV argued that free-to-air broadcasters will be adversely affected through a decrease in the revenue they will receive from advertising. Free TV reasoned that, as SBS increases its advertising minutes in prime time, 'any additional revenues earned by the SBS will be at the expense of commercial free-to-air broadcasters'.³⁵ In addition, Free TV stated that SBS competes with commercial broadcasters for the same advertisers and audiences at a time when the advertising market is fragmenting, placing television advertising under significant pressure.

1.35 Free TV went on to comment that there will be job losses and cuts to Australian content as a result of the proposed changes to the SBS Act. Free TV pointed to the level of television licence fees, the corporate taxes paid by commercial broadcasters and the local content obligations commercial broadcasters must meet while Australian programming on SBS is only 10 per cent of its schedule.³⁶

31 Mr Peter Khalil, Director, Corporate Affairs, SBS, *Proof Committee Hansard*, 18 May 2015, p. 36.

32 Explanatory Memorandum, p. 7; see also SBS, *Submission 7*, p. 2.

33 Explanatory Memorandum, p. 7.

34 Explanatory Memorandum, p. 19.

35 Ms Julie Flynn, Chief Executive Officer, Free TV Australia, *Proof Committee Hansard*, 18 May 2015, p. 19.

36 Free TV Australia, *Submission 6*, pp 2-3.

1.36 Free TV concluded that:

By enabling product placement and more prime time advertising to gain additional revenues for SBS, the Government is effectively requiring commercial television broadcasters to subsidise SBS funding cuts.³⁷

1.37 Foxtel also commented on the impact of increased advertising by SBS on subscription television. Foxtel stated that subscription television broadcasters:

...stand to be directly affected by the provisions in the Bill which would permit SBS to double the amount of advertising that may be broadcast in any hour. SBS is highly likely to increase advertising content in programmes that target high-value consumer/viewer 'eyeballs' allowing it to extract greater yield and greater volumes of advertising, therefore directly impacting [Multi Channel Network's] and Foxtel's revenue potential.³⁸

1.38 In addition, Foxtel commented that the changes to allow product placement in SBS programming will directly affect Foxtel as commercial partners may move products to SBS programs. Foxtel argued that this will mean that the private sector 'is being asked to subsidise a Government broadcaster'.³⁹

1.39 The Minister for Communications, in his second reading speech, acknowledged the opposition from the commercial television broadcasters to the bill. However, he observed that:

...the challenges, the pressures, on the commercial television industry...are not coming from SBS. They should not be worried about SBS. Their issues are essentially online and changes to television viewing habits and the way in which all of us consume content.⁴⁰

1.40 SBS responded to the concerns of the free-to-air and subscription television industries and noted that advertisers may not be attracted to the type of programming shown on SBS:

The ability to generate additional revenue will not automatically lead to increased revenue. SBS is by no means assured of this revenue as it still needs to be earned by attracting advertisers to content which can be challenging and hard to sell in a very competitive market where a diversity of advertising options exist.⁴¹

1.41 Mr Khalil, SBS, also commented that, if the proposed amendments are passed and SBS reached its target of \$28.5 million through greater advertising flexibility, 'the

37 Free TV Australia, *Submission 6*, p. 5.

38 Foxtel, *Submission 2*, p. 2.

39 Foxtel, *Submission 2*, p. 2.

40 The Hon Malcolm Turnbull MP, *Proof House of Representatives Hansard*, 25 March 2015, p. 3357.

41 SBS, *Submission 7*, p. 9.

estimated incremental gross revenue SBS expects to earn represents less than 0.3 per cent of the total free-to-air television market revenue in each year'.⁴² Mr Khalil went on to comment that, while the advertising market for commercial advertising for television is \$3.8 billion, the total advertising market in Australia is about \$13 billion and thus the SBS share of the advertising market is 'miniscule'.⁴³

1.42 SBS also responded to the view that commercial television broadcasters were subsidising the funding reductions and stated:

...we have been doing this since 1992 and we have been competing as a hybrid organisation within the commercial sector since 1992. That is almost 25 years. We are not increasing the 120 minutes; we are simply seeing in this amendment an ability for flexibility to actually use some of those minutes in different timeslots during that 24-hour period across the schedule.⁴⁴

Revenue projections

1.43 In its comments on the adverse effects of the proposed amendments for commercial free-to-air broadcasters, Free TV questioned the projection of revenue provided by the Government and SBS that SBS would only earn \$28.5 million over four years from the changes proposed in the bill. Ms Flynn, Free TV, commented that 'our analysis suggests the government has seriously underestimated the potential revenue available to SBS under these proposals'.⁴⁵

1.44 In the first instance, Free TV commented that there were inconsistencies with the SBS financial modelling and revenue projection associated with the proposed advertising and product placement amendments. Free TV noted that the Minister for Communications that the Efficiency Study had suggested that SBS could rise up to \$20 million per annum as a result of the amendments.⁴⁶ However, the Regulatory Impact Statement (RIS) accompanying the bill indicated that SBS's financial modelling and revenue projections were for revenue of \$8 to \$9 million per annum (by the fourth year). Free TV stated that the estimate of revenue accruing to SBS was 'incorrect and grossly underestimated'.⁴⁷

42 Mr Peter Khalil, Director, Corporate Affairs, SBS, *Proof Committee Hansard*, 18 May 2015, p. 30.

43 Mr Peter Khalil, Director, Corporate Affairs, SBS, *Proof Committee Hansard*, 18 May 2015, p. 33.

44 Mr Peter Khalil, Director, Corporate Affairs, SBS, *Proof Committee Hansard*, 18 May 2015, p. 30.

45 Ms Julie Flynn, Chief Executive Officer, Free TV Australia, *Proof Committee Hansard*, 18 May 2015, p. 19.

46 Free TV Australia, *Submission 6*, p. 6.

47 Free TV Australia, *Submission 6*, p. 4.

1.45 In response to the disparity between the figures used by the Government, which Free TV argued raised 'serious questions about the adequacy of the modelling on which they are based', Free TV commissioned independent modelling by Anomaly.⁴⁸ The Anomaly modelling found that SBS could earn an additional \$148 million over the next four year 'and is far greater' than the projected additional SBS revenues in the RIS.⁴⁹ Free TV stated that it was confident 'that the Anomaly figures represent a fair projection of the possible revenue that SBS can derive from the proposed changes'.⁵⁰

1.46 The committee sought further information from Free TV regarding figures quoted in the Anomaly modelling. Mr Ian Paterson, Managing Director GTV9, Nine Network Australia, told the committee that:

It takes a raw set of numbers that are available to us and, as I said, looks at the potential that comes from setting themselves in such a way, in this case with a focus on an ability to write revenues through 10 minutes of advertising per hour, between the hours of 6 pm and 12 midnight...

These are gross figures. They do not include cost of sales in the sales department. Obviously, there is the sales department itself, the licence fees...the commissions paid back to advertising agencies; that is 10 per cent. So, it is not net of costs; it is a gross figure.⁵¹

1.47 The committee notes that it is indicated in the Explanatory Memorandum that the disparity between the modelling conducted by Anomaly and SBS's modelling was caused by a difference in underlying assumptions relating to 'fill rates', growth, rate cards, SBS's 2014 advertising revenue and cost of sales.⁵² Mr Khalil, SBS, also commented on the inconsistencies between the Lewis review and the Explanatory Memorandum and stated:

...the Lewis review contained an element that was not contained within the legislative package that is before us, and it really spoke in terms of gross revenue as well...At the time of the Lewis review, the actual legislation being proposed by the government was not entirely clear. In fact, as far as we are aware, the legislation was drafted approximately six months after the completion of the Lewis review. So they were quite different in that respect.⁵³

48 Free TV Australia, *Submission 6*, p. 6.

49 Free TV Australia, *Submission 6*, pp 6–7.

50 Free TV Australia, *Submission 6*, p. 7.

51 Mr Ian Paterson, Managing Director GTV9, Nine Network Australia, *Proof Committee Hansard*, 18 May 2015, p. 22.

52 Explanatory Memorandum, pp 12–13.

53 Mr Peter Khalil, Director, Corporate Affairs, SBS, *Proof Committee Hansard*, 18 May 2015, p. 30.

1.48 While SBS has not released its modelling publicly, SBS outlined the assumptions on which the anticipated revenue projections are based. The assumptions include:

- SBS's 'fill rates' – the proportion of available advertising airtime that is paid advertising;
- SBS's 'rate card' – the rate charged for advertising and sponsorship;
- the suitability of specific properties towards advertising and sponsorship;
- sales and agency costs; and
- audience trends on the primary free-to-air channels, observed over the past five years.⁵⁴

1.49 In relation to 'fill rates', the Explanatory Memorandum stated that Anomaly's modelling assumed SBS's fill rates are at 100 per cent across all schedules and channels.⁵⁵ However, SBS noted that this is not the case.⁵⁶ While acknowledging that some programs, such as food and live sports, may attract additional advertising, SBS went on to detail the reasons why it was unable to sell all advertising time:

- fill rates differ strongly across metropolitan and regional broadcasts and across SBS's multiple channels;
- SBS content can be challenging and hard to sell in a very competitive market where a diversity of advertising options exist.⁵⁷

1.50 Mr Khalil concluded:

We want audience because audience equals relevance for us as a public broadcaster, but sometimes larger audience does not necessarily translate into advertising dollars, because some advertisers are not interested in that type of program. There is the difference.⁵⁸

1.51 Free TV refuted this statement in its submission and explained that the Anomaly modelling 'assumes a fill rate of 70 per cent fill on peak times'.⁵⁹ Mr Paterson, Nine Network Australia, explained further that:

...all of the networks are not full all of the time in every market and, if we were to bring it back to a number that is considered reasonable, then

54 SBS, *Submission 7*, p. 8.

55 Explanatory Memorandum, p. 11.

56 Mr Andrew Cook, Director, Advertising Sales, SBS, *Proof Committee Hansard*, 18 May 2015, p. 31.

57 SBS, *Submission 7*, p. 8, p. 9; Mr Peter Khalil, Director, Corporate Affairs, SBS, *Proof Committee Hansard*, 18 May 2015, p. 40.

58 Mr Peter Khalil, Director, Corporate Affairs, SBS, *Proof Committee Hansard*, 18 May 2015, p. 36.

59 Free TV Australia, *Submission 6*, p. 8.

somewhere between 70 or 80 per cent, depending on your commercial model.⁶⁰

1.52 The Anomaly's modelling used the growth rate of 1.4 per cent over the next five years from the PricewaterhouseCoopers *Australian Entertainment and Media Outlook 2014–18*. However, it was noted in the Explanatory Memorandum that the 1.4 per cent growth rate applies to 'the free-to-air television industry as a whole, including broadcasters that are not subject to the same restrictions and earn over ten times the advertising revenue of SBS'.⁶¹ Consequently, SBS modelled its growth rate on audience trends from its primary free-to-air channels, which have been 'declining at 5 per cent per annum'.⁶²

1.53 In relation to rate cards, the Explanatory Memorandum foreshadowed that SBS, as a premium buy for advertisers, will need to 'discount the existing rate card by around 15 per cent' in order to attract new advertisers.⁶³ In contrast, the Anomaly modelling assumed that there would be no discount to SBS's rate card. SBS considered this assumption to be 'unrealistic'.⁶⁴

1.54 In response to the committee's questions regarding SBS's proposed reduction of 15 per cent to its advertising rates, Ms Annabelle Herd, Head of Broadcast Policy, Network Ten Limited, commented that it 'brings the whole market down for everyone'.⁶⁵

1.55 The Explanatory Memorandum stated that the Anomaly modelling used SBS's advertising revenue from 2014 as its starting point. SBS's advertising revenue in 2014 was higher than 'business as usual' due to the 2014 FIFA World Cup.⁶⁶ However, Free TV refuted this suggestion and stated that 'the Anomaly modelling recognises that the FIFA World Cup does not reflect "business as usual" and makes an adjustment to the model to account for this'.⁶⁷

60 Mr Ian Paterson, Managing Director GTV9, Nine Network Australia, *Proof Committee Hansard*, 18 May 2015, p. 27.

61 Explanatory Memorandum, p. 12.

62 Explanatory Memorandum, p. 12.

63 Explanatory Memorandum, p. 11.

64 Document tabled by Mr Michael Ebeid, 'Comparison of SBS model with Free TV model', Additional estimates 2014–15, 24 February 2015, p. 1.

65 Ms Annabelle Heard, Head of Broadcast Policy, Network Ten Limited, *Proof Committee Hansard*, 18 May 2015, p. 27.

66 Explanatory Memorandum, p. 12.

67 Free TV Australia, *Submission 6*, p. 8.

1.56 Finally, SBS indicated that its estimate of additional revenue assumes a 'net cost of sales and commissions', whereas the Anomaly model is based upon 'a gross revenue figure, which does not subtract these costs'.⁶⁸

Independent assessment of SBS's projected advertising revenue

1.57 SBS's modelling of projected advertising revenue has been independently evaluated by Optimum Media Direction Pty Ltd (OMD) and Deloitte Touche Tohmatsu (Deloitte). Mr Peter Horgan, Chief Executive Officer, OMD, commented that:

Having reviewed SBS's methodology and underlying assumptions, it is the considered view that the incremental gross revenue estimate of \$39.5 million (before selling costs and agency commissions) provided by SBS is a reasonable assessment of the additional TV advertising that SBS could earn over the forecast period.⁶⁹

1.58 Mr Horgan further stated that:

The proposed legislative change will allow SBS to effectively double the volume of primetime advertising. However, as a niche commercial audience provider faced with navigating charter requirements, SBS is a long way back in the queue for an additional share of advertising budgets. As such, in the face of the realities of the current television landscape and advertising market, OMD believes the incremental revenue estimates provided by the SBS are reasonable.⁷⁰

1.59 Deloitte commented 'in undertaking our analysis we have not observed any assumptions that are materially inconsistent with SBS's historical advertising revenue performance, business and industry trends, or other relevant supporting documentation and calculations'.⁷¹

Potential impact on the Australian screen production sector

1.60 Free TV suggested that the bill will have a detrimental impact on the Australian screen production sector, as 'a loss of revenue for commercial free-to-air broadcasters will undermine their major contribution to the production of expensive Australian content across a range of genres'.⁷² Screen Australia's *Drama Report 2013–14* confirmed that the largest proportion of finance for Australian television drama in 2013–14 came from commercial free-to-air broadcasters.⁷³

68 Explanatory Memorandum, p. 12.

69 SBS, *Submission 7*, Appendix C.

70 SBS, *Submission 7*, Appendix C.

71 SBS, *Submission 7*, Appendix C.

72 Free TV Australia, *Submission 6*, p. 12.

73 Screen Australia, *Drama Report 2013–14*, p. 14.

1.61 Free TV also questioned SBS's commitment to Australian content and pointed to evidence that Mr Michael Ebeid, Managing Director of SBS, gave to the committee at additional estimates 2014–15. At that hearing, Mr Ebeid stated that 'only about 10 per cent of our schedule is Australia content—90 per cent of schedule is foreign-acquired programs'. Mr Ebeid also told the committee that:

We would very much like to be able to make more Australian content. We are pretty much out of drama, for example. We just cannot afford to tell Australian stories through drama anymore because it is so expensive, even though we would absolutely love to.⁷⁴

1.62 Free TV responded in its submission that 'there is no reason to believe that the amount SBS spends on commissioning Australian content would change'.⁷⁵ Therefore, the committee encourages SBS to develop a terms of trade agreement with the Screen Producers Association of Australia (SPAA), similar to the terms of trade agreement between SPAA and ABC, regarding the production of television programs. This would also provide the Australian screen production sector with an indication of SBS's commitment to Australian content.

Other matters raised

1.63 The CLC raised three further matters in its submission. Firstly, the CLC noted that development and implementation of guidelines are the sole responsibility of the SBS Board and that the guidelines do not provide a basis for viewers to complain to the broadcaster of the communications regulator in the event that the viewer is unhappy with the broadcaster's response. The CLC stated that 'broadcaster activity that is capable of adversely affecting viewers' interests, such as activity relating to advertising, should be included in broadcasting codes'.⁷⁶

1.64 Secondly, the CLC argued that the SBS's position on editorial independence should be reflected in the SBS Codes of Practice and should also be explicitly provided for in the SBS Charter.⁷⁷

1.65 Thirdly, the CLC recommended that further amendments be made to include a definition of 'product placement' in the SBS Act to clarify which advertising and sponsorship practices are to be permitted. In addition, 'advertising' should not be defined as excluding 'product placement', rather a separate clause within section 45 of the Act should specifically exclude product placement in the calculation of advertising

74 Mr Michael Ebeid, Managing Director of SBS, Senate Environment and Communications Legislation Committee, *Proof Estimates Hansard*, 24 February 2015, p. 63.

75 Free TV Australia, *Submission 6*, p. 13.

76 Communications Law Centre, *Submission 27*, p. 3.

77 Communications Law Centre, *Submission 27*, pp 3–4.

minutes. The CLC saw no substantive reason for the exclusion, other than the calculation of permitted advertising minutes under the Act.⁷⁸

Potential impact on SBS of the bill failing to pass

1.66 Should the bill fail to be passed, SBS stated that 'as an already lean and agile organisation' it will be 'required to implement \$28.5 million in programming and service cuts over the next four years'.⁷⁹ Mr Khalil indicated that, as a consequence, SBS would be in a 'very, very difficult position'.⁸⁰ SBS would need to find an additional \$4.1 million in savings from its budget for 2015–16 which would be achieved through 'job losses and reduction in content expenditure'.⁸¹

1.67 SBS acknowledged that a reduction in its content expenditure would 'specifically impact major Australian programming and service areas' and lead to 'a decreased investment in the Australian media and creative economy'.⁸² This would 'reduce not only SBS's attractiveness for audiences and advertisers, but will severely limit the organisation's ability to fulfil SBS Charter obligations'.⁸³ SBS also expressed concern that it was 'unlikely any reduction in content from SBS would be offset by competitor activities'.⁸⁴

1.68 Save our SBS, while opposed to the bill, commented that SBS has built a 'sense of inclusion and national cohesion by designing, acquiring and broadcasting multilingual radio and TV programs'.⁸⁵ It also suggested that at a time when 'geo-political tensions threaten domestic peace and as the internet can be used as a vehicle for jihadi recruitment...the role of SBS as a binding influence on migrant communities is clearly more important than ever'. Save our SBS concluded that 'SBS can play a major role in extending the entire polity's understanding of complex religious and ethnic tensions'.⁸⁶

78 Communications Law Centre, *Submission 27*, p. 4.

79 SBS, *Submission 7*, p. 11.

80 Mr Peter Khalil, Director, Corporate Affairs, SBS, *Proof Committee Hansard*, 18 May 2015, p. 29.

81 SBS, *Submission 7*, p. 11.

82 SBS, *Submission 7*, pp 11–12.

83 SBS, *Submission 7*, p. 11.

84 SBS, *Submission 7*, pp 11–12.

85 Save Our SBS, *Submission 5*, p. 11.

86 Save Our SBS, *Submission 5*, p. 11.

Conclusion

1.69 The committee acknowledges the important role that SBS plays in building social cohesion between Australia's diverse communities through the provision of information, education and entertainment across its broadcast channels and digital platforms.

1.70 The committee has considered the evidence received and does not believe that the proposed amendments represent a move to establish SBS as a fourth fully commercial television channel. It is clear that the bill proposes to introduce flexibility to the SBS advertising and sponsorship announcement arrangements, not to change the status of SBS. The maximum amount of advertising and sponsorship permitted to be broadcast on SBS within a 24 hour period will not increase. Rather, SBS will be able to take advantage of programs attractive to advertisers to include a maximum of 10 minutes of advertising and sponsorship announcements per hour.

1.71 Similarly, the committee does not consider that the proposed amendments pose a threat to the delivery of SBS's Charter obligations. SBS provided clear evidence that it has managed its existing advertising and sponsorship announcements arrangements for many years and continued to deliver its Charter obligations. The committee has been assured that SBS's programming commissioning and content decisions have not been, or will be, driven by advertising or sponsorship announcement revenue concerns.

1.72 In addition, the committee notes that the SBS board will be required to develop governance and reporting requirements regarding the use of product placements. This requirement mirrors that already applied to advertising and sponsorship announcements. Together, they will provide transparency to SBS's advertising, sponsorship announcements and product placement.

1.73 Free TV was strongly opposed to the bill and argued that the proposed changes will adversely impact commercial free-to-air broadcasters. The committee acknowledges that the advertising market for television is contracting as new media platforms emerge and viewer habits change. However, the committee notes that SBS indicated its share of the free-to-air television advertising market is very small—less than 0.3 per cent.

1.74 The revenue projection on which SBS's comments are based was questioned by Free TV. Indeed, Free TV commissioned independent modelling of revenue projections which resulted in a revenue projection of \$148 million over four years compared to \$28.5 million contained in the Explanatory Memorandum. Detailed comments on the assumptions underlying the independent analysis were provided in the Explanatory Memorandum and by SBS. Of particular note were the comments on the SBS 'fill rate' which indicate that, although many SBS programs are popular with viewers, they are less attractive to advertisers because of their content. Thus, advertising on SBS can be difficult to sell. In addition, the committee notes that SBS's

modelling of projected revenue has been independently evaluated. This evaluation found that SBS's projections were a reasonable assessment.

1.75 While acknowledging the concerns of the commercial free-to-air broadcasters, given the comparatively small size of SBS's advertising activities, the committee does not consider that changes to SBS's advertising arrangements will have a material effect on commercial free-to-air broadcasters. However, the committee considers that the proposed amendments will provide SBS with much needed flexibility in its advertising, sponsorship announcements and product placement arrangements and will assist SBS to maintain investment in multicultural and multilingual programs and services.

Recommendation 1

1.76 The committee recommends that the Communications Legislation Amendment (SBS Advertising Flexibility and Other Measures) Bill 2015 be passed.

Senator Anne Ruston
Chair