INTERIM REPORT BY A.L.P. SENATORS

ABC ONLINE INQUIRY

EXECUTIVE SUMMARY

- The proposed arrangement between Telstra and the ABC has given rise to public concerns at the potential detrimental impact on the ABC and its future independence and integrity.
- Concerns raised in evidence to the Committee include:
 - reliance on funds from commercial arrangements;
 - self-censorship or undue or inappropriate regard for the views of contractual partners;
 - concerns about advertising;
 - compromise of the ABC's competitive advantage and result in a failure to realise the potential of ABC online;
 - concerns about the privacy of consumers;
 - the overall breadth of the agreement which covers topics incidental to the licensing of ABC Online content.
- There are significant differences between the proposed ABC/Telstra arrangement and those arrangements already in place with other corporations.
- It is self evident that the ABC has been forced to pursue alternative sources of revenue as a result of this Government's funding cuts, contrary to the Coalition's 1996 election commitment to maintain existing levels of Commonwealth funding.
- It is ultimately a matter for the ABC Board to determine, within the framework of its Charter and the legislative and regulatory framework, whether and on what terms the ABC will agree to deal with Telstra. Labor Senators believe that the Board should approach its decision with due regard to the concerns that have been raised.
- Concerns relating to the inadequacy of existing editorial controls and consequent concerns about the ABC's independence have been raised with the Committee. Support for the sale by the MEAA and Friends of the ABC was contingent on assurances that the ABC will maintain editorial independence. The ABC must ensure its editorial independence is maintained in the context of commercial arrangements.

- Labor Senators remain concerned at some of the provisions in the term sheet developed between the ABC and Telstra that relate to matters that are at best incidental to the core content arrangements proposed by the terms under negotiation. These concerns include:
 - digital spectrum rights: Labor Senators recommend that this provision be omitted from any final agreement with Telstra as it is purely incidental to proposed content arrangements and deals with an area of public policy administration of substantial public interest.
 - contract compliance monitoring: there is an apparent lack of clear and specific ongoing contract compliance monitoring practices or guidelines as evidenced by the recent contract breaches by Redrock and Equitycafe. Labor Senators recommend the introduction of clearly articulated, rigorous, ongoing compliance monitoring practices.
 - Telstra ongoing right to consult: Labor Senators believe that this provision suggests that Telstra will have the capacity to influence ABC decisions about content mix and variety for a commercial purpose. It may be more reasonable to renegotiate contractual arrangements in their entirety if amendments are proposed, to avoid the perception of undue influence on ABC editorial decisions.
 - advertising revenue: the term sheet being negotiated contains provisions for the ABC to share advertising revenue generated by Telstra's website. Labor Senators consider that given that this is contrary to current ABC Board policy, the relevant provisions should be omitted from any arrangement pending detailed consideration of the principles involved, including by the Committee in its final report.
 - Telstra "absolute discretion" to present material: Labor Senators are concerned about the granting of absolute discretionary rights in respect of the presentation of ABC content. It may be more appropriate that minimum guidelines for content presentation are developed by the ABC, and incorporated as part of standard thirdparty content arrangements.
- Labor Senators regard the maintenance of the independence and integrity of the ABC as essential.
- The ABC needs to be transparent in its operations and accountable to the taxpayers who provide its funding. Decisions need to be made in accordance with a principled public policy framework to assure the accountability and transparency of the Corporation's activities.
- The ABC must protect its editorial control and independence in considering a possible arrangement with Telstra. Consideration of the legitimate concerns presented to the Committee in submissions and evidence in public hearings would be essential in the Board's final deliberations on the proposed ABC/Telstra online content arrangement.

INTRODUCTION

- 1.1 The Australian Broadcasting Corporation's online activities and the commercial arrangements relating to such activities are the subject of this Committee's inquiry. Since the ABC's inauguration in 1932, it has played a unique and critically important role in Australian society. The ABC is Australia's national, non-commercial, public broadcaster, and in this role its independence and integrity have come to be recognised and valued by Australians. ABC Online was initiated in 1995, and has rapidly become a significant medium for the delivery of ABC material to audiences.¹
- 1.2 It is in the context of the ABC's role as an independent provider of information to Australians that concerns relating to a proposed commercial arrangement reflected by a term sheet for an agreement between the ABC and Telstra in respect of ABC online content gave rise to calls for Parliamentary and public scrutiny of the detail of the proposed agreement.

PROPOSED ABC/TELSTRA ARRANGEMENT

- 1.3 The proposed agreement with Telstra includes provisions for:
- non-exclusive licensing of ABC Online content to Telstra, including some reversioning of content for use on new platforms;
- allowing the ABC access to new media delivery systems through cooperative activities;⁴
- undertaking co-productions under the ABC's editorial control;⁵ and
- cross-promotion of ABC and Telstra products.
- 1.4 Public concerns regarding the proposed arrangement encompassed a wide range of issues with the potential to have a detrimental impact on the ABC and its future independence and integrity. These included:
- unacceptable and growing reliance on funds from commercial arrangements;⁷

¹ Mr. B. Johns, Additional Estimates, Senate Environment, Communications, Information Technologies and the Arts Legislation Committee, *Official Committee Hansard*, 10 February 2000, p.106; ABC website at http://www.abc.gov.au/default.htm and http://www.abc.gov.au/corp/hist1.htm.

² Mr. B. Johns, Additional Estimates, Senate Environment, Communications, Information Technologies and the Arts Legislation Committee, *Official Committee Hansard*, 10 February 2000, p.106.

³ ABC, Submission 7, p.31. Labor Senators understand reversioning and re-purposing to mean the reformatting of material for delivery on alternative media.

⁴ Mr. B. Johns, Additional Estimates, Senate Environment, Communications, Information Technologies and the Arts Legislation Committee, *Official Committee Hansard*, 10 February 2000, p.106.

⁵ ABC, Submission 7, p.33.

⁶ ABC, Submission 7, p.31.

⁷ For example Friends of the ABC, Submission 5, p.7; Media, Entertainment and Arts Alliance, Submission 10, p.7.

- concerns that editorial independence would be compromised by self-censorship⁸ or undue or inappropriate regard for the views of contractual partners;⁹
- concerns about advertising around ABC Online content on other sites, notwithstanding
 editorial guidelines which require that ABC pages not be surrounded by advertising;¹⁰
- the risk that the ABC will fail to realise the potential of ABC Online and will compromise its competitive advantage by licensing its content to competitors; 11
- insufficient regard for the privacy interests of consumers; 12
- the overall breadth of the proposed agreement, which covers topics which are at best incidental to ABC Online activities or content. 13
- 1.5 The ABC's advice to the Committee in respect of these concerns is as follows:

editorial independence:

The ABC believes its editorial independence to be guaranteed by the following means:

- structural separation between the editorial responsibility and the commercial activities within the ABC; 14
- comprehensive editorial policies which cover ABC multimedia and its online activities; 15
- the ABC only entering licensing agreements 'with companies who are prepared to accept our editorial policies', policies which are 'very rigorous, ..extensive, (and) make very considerable demands because we regard the value of our independence in our editorial integrity as absolutely paramount'; 16
- regular monitoring of compliance with licence or contractual conditions; ¹⁷
- the ABC insisting on full and unfettered editorial control over content licensed to third parties.¹⁸

¹² Mr. S. Fist, Official Committee Hansard, 17 March 2000, pp.43, 44.

⁸ Mr. S. Fist, *Official Committee Hansard*, 17 March 2000, p.45; Mr. G. Thompson, CPSU, *Official Committee Hansard*, 24 March 2000, p.67.

⁹ Official Committee Hansard, 17 March 2000, per Mr. Q. Dempster, pp.30-32 and Mr. S. Fist, p.42; Mr Q. Dempster, Submission 4, p.4.

¹⁰ Mr. S. Fist, *Official Committee Hansard*, 17 March 2000, p.42.

¹¹ Mr. S. Fist, Submission 3, p.11.

¹³ Specific concerns relate to digital spectrum, advertising and cross-promotion.

¹⁴ Dr. J. Schultz, ABC, Official Committee Hansard, 17 March 2000, p.8.

¹⁵ Mr. C. Griffith, Official Committee Hansard, 17 March 2000, p.5; Dr. J. Schultz, Official Committee Hansard, 24 March 2000, p80.

¹⁶ Dr. J. Schultz, Official Committee Hansard, 17 March 2000, p7.

¹⁷ Mr. H. Bardwell, Official Committee Hansard, 17 March 2000, p.10.

self-censorship:

The ABC believes that an institutional culture against self-censorship exists within the organisation, and that this, combined with active discouragement of self-censorship by the ABC as an unacceptable practice, will ensure that self-censorship does not occur;¹⁹

advertising:

The ABC has taken the view that advertising on third party sites which contain ABC content is not problematic because of the strict controls in place relating to advertising and the need for the ABC to avoid being put "at a disadvantage in that we would become invisible". The ABC Board has consistently taken the view that advertising must not occur on the ABC's online service; ²¹

compromise competitive advantage:

The licensing of ABC content assists in ensuring that ABC Online remains a strong, vibrant and growing service and ensures that ABC produced content develops a strong online presence rather than being inconsistent with that principle;²²

cross-promotion:

Rather than being a core part of the proposed arrangement, the ABC considers cross-promotion as a matter for ongoing discussion over the life of the proposed arrangement;²³

external funding reliance:

The ABC considers that for some time its funding has been inadequate for it to do everything that it wants to do and in that time the ABC has sought means of generating revenue to ensure its ability to undertake additional activities within the framework of the Act. With careful protection of editorial policies, independence and integrity, the ABC will secure funds from appropriate sources;²⁴

privacy:

The ABC considers that existing legislated privacy requirements, industry self-regulation codes and policy guidelines of individual corporations are adequate in the absence of specific legislative intervention;²⁵

¹⁸ Dr. J. Schultz, Official Committee Hansard, 17 March 2000, p.8.

¹⁹ Dr. J. Schultz, *Official Committee Hansard*, 24 March 2000, pp.86-88.

²⁰ Dr. J. Schultz, *Official Committee Hansard*, 24 March 2000, p.89-94, quote at pp.91-92.

²¹ Dr. J. Schultz, Official Committee Hansard, 24 March 2000, p.80.

²² Dr. J. Schultz, Official Committee Hansard, 17 March 2000, p.12.

²³ Dr. J. Schultz, Official Committee Hansard, 24 March 2000, p.83.

²⁴ Dr. J. Schultz, Official Committee Hansard, 24 March 2000, p.89.

²⁵ Dr. J. Schultz, Official Committee Hansard, 24 March 2000, p.84-86.

breadth of the agreement:

The ABC submitted to the Committee that the term sheet being examined by the Committee contains matters which are open for further discussion, and that the term sheet is seen by the ABC as simply a framework for ongoing negotiations.²⁶

- 1.6 There are significant differences between the ABC's proposed arrangement with Telstra and those arrangements already in place with other corporations.
- 1.7 The quantum of the financial consideration for the proposal of more than \$67 million over five years is an obvious distinguishing feature, as are the proposed cooperative and co-production elements of the deal.
- 1.8 These differences have raised questions as to the compatibility of the proposed arrangement with the ABC's functions pursuant to the *ABC Act* 1983.

GOVERNMENT FUNDING OF THE ABC

- There is an obvious link between the recent history of the Government's funding cuts to the ABC and the commercial arrangements with ABC Online, including the proposed Telstra arrangement. It is the Government's responsibility to adequately fund the national public broadcasters. Contrary to the Coalition's 1996 election commitment to maintain levels of Commonwealth funding to the ABC, the Government proceeded to cut \$65 million from the ABC's two year budget allocation in the Coalition's 1996 budget. The base value of the proposed deal with Telstra is a minimum of \$13.5 million per annum over five years; a total of more than \$67 million. The coalition is a minimum of \$13.5 million per annum over five years; a total of more than \$67 million.
- 1.10 On the night of the 1996 election, Senator Richard Alston, Minister designate for Communications, Information Technology and the Arts, stated that:

Coalition policy with regard to the ABC was to "maintain existing levels of Commonwealth funding and triennial funding for the ABC".

When asked whether the Coalition would honour its commitment to maintain funding in real terms to the ABC, Senator Alston said:

"Absolutely. I think John Howard has made it very plain that we want to maintain – honour – all our commitments, and the ABC is a very important part of that." ²⁹

²⁶ Dr. J. Schultz, Official Committee Hansard, 24 March 2000, pp.90, 91.

²⁷ Discussed in interviews with Senator R. Alston, Minister for Communications, Information Technology and the Arts, *PM*, 16 July 1996, and *7.30 Report*, 16 July 1996.

²⁸ ABC, Submission 7, p.32.

²⁹ Interview with Jim Middleton, ABC tally room, 10 March 1996.

The very first Coalition budget upon attaining Government contained the aforementioned funding cuts.³⁰

1.11 The adequacy of the ABC's funding is a particularly pertinent issue in the present technological environment where the ABC requires significant resources to facilitate digitalisation and expansion into new areas of the changing market. It is unconscionable for a government to impose digitalisation demands upon a public broadcaster without simultaneously providing certainty with respect to funding for the process. Having been placed in this position by the Government's refusal to decide on the ABC's triennial funding submission, the ABC is undoubtedly under pressure to ensure its continued financial security.

1.12 The ABC confirmed that:

"...ongoing government funding is absolutely crucial. It is fundamental to the ABC. It is primarily a government funded agency." ³¹

Additionally, the ABC noted that:

[The ABC seeks] "to gain additional revenue where that is possible and in keeping with our legislative framework. That is not to replace the money which should be provided by government. It is in addition and where it is an efficient use of public resources to do so."³²

- 1.13 It is self evident that the ABC has been forced to pursue alternative sources of revenue as a result of the Government's lack of funding, and revenue from external sources has increased over the last few years to \$117 million last financial year.³³
- 1.14 It has been argued that the degree of external revenue to be received from Telstra places the ABC in a vulnerable position because inevitably the ABC will depend upon those revenues, with the consequence that the independence of the broadcaster will be jeopardised.³⁴ Commercialisation resulting in compromised editorial content is considerably less likely to occur (if at all) where the ABC enters multiple commercial arrangements of an 'off-the-shelf' nature, whereby the ABC provides content to commercial organisations in a form which the ABC has produced.
- 1.15 The substantial degree of consideration involved in the Telstra proposal and the controversial substance of some proposed terms of the agreement have been the subject of media and public scrutiny. Submissions to the Committee contended that the ABC's actions

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³⁰ See paragraph 1.9.

³¹ Dr. J. Schultz, Australian Broadcasting Corporation, Official Committee Hansard, Canberra, 17 March 2000, p.7.

³² Ibid.

³³ Dr. J. Schultz, Australian Broadcasting Corporation, Official Committee Hansard, Canberra, 17 March 2000, p.6.

³⁴ Mr. Q. Dempster, Submission 4, pp.2-4.

were inappropriate because of their potential to compromise the ABC's independence and editorial content.³⁵

1.16 In evidence to the Committee, some witnesses suggested that it is entirely inappropriate for the ABC to be involved in any commercial arrangements such as the licensing of ABC Online content. While ultimately, it is a matter for the ABC Board, consistent with the ABC Act and Charter, to determine whether and on what terms the ABC will agree to deal with Telstra, Labor Senators believe that the Board should approach its decision with due regard to the concerns that have been raised.

EDITORIAL INDEPENDENCE

- 1.17 Evidence to the Committee from a variety of interested parties indicated that the primary issue was that the editorial independence of the ABC might be compromised by commercial arrangements. Similarly, it has been indicated that journalistic staff of the ABC would only accept commercial arrangements subject to the enforcement of online guidelines binding external parties and ABC management, and that there are positive outcomes to such arrangements. Friends of the ABC are concerned that editorial independence would be compromised by these commercial arrangements. The CPSU expressed concerns about the inadequacy of existing editorial guidelines in its submission and consequent concerns about the ABC's independence. ³⁹
- 1.18 Friends of the ABC and the Media, Entertainment and Arts Alliance (MEAA) indicated support for ABC Online's sale of content subject to assurances that the ABC will maintain editorial independence. The MEAA, representing 600 or so journalists, supported the notion that ABC journalists had a strong commitment to independence and would seek to maintain this standard. All
- 1.19 The ABC responded to the concerns relating to editorial control, stating that:⁴²
- integrity and independence are of paramount importance to the Board, management and staff of the organisation, and the general public, and for this reason it is unlikely that independence will be permitted to be compromised;

³⁶ Mr. S. Fist, Submission 3, and Mr. J. Millard, Submission 8.

⁴⁰ Mr. C. Warren, Media, Entertainment and Arts Alliance, *Official Committee Hansard*, 17 March 2000, p.23; Mr. J. Cassidy, Friends of the ABC, *Official Committee Hansard*, 17 March 2000, p.49.

³⁵ See paragraphs [1.17]-[1.20] below.

³⁷ Friends of the ABC, Submission 5, p.10.

³⁸ Friends of the ABC, Submission 5, pp.7-11.

³⁹ Submission 19, p.11.

⁴¹ Media, Entertainment and Arts Alliance, Official Committee Hansard, 17 March 2000, p.23.

⁴² Dr. J. Schultz, Australian Broadcasting Corporation, Official Committee Hansard, Canberra, 24 March 2000, pp.96-97.

- editorial policies set up mechanisms and processes that ensure independence from commercial pressures;
- internal processes and structures, such as internal training, staff development and internal reporting, seek to preserve and enhance the integrity and independence of the ABC;
- policies specifically relating to online services have been built into editorial policies and licensing agreements are made subject to these editorial policies;
- the ABC's independence is important to Telstra and Telstra is not seeking to put the ABC in a situation where the ABC's independence is compromised.
- 1.20 As well, in a clear response to publicly expressed concerns, the ABC indicated amendments to the Telstra term sheet, provided to the Committee on a commercial-inconfidence basis. These amendments indicate Telstra's support for ABC editorial independence and recognise and affirm Telstra's support of ABC editorial guidelines in their arrangements. 43

ONGOING CONCERNS

1.21 While the ABC have provided assurances in respect of some of the concerns raised during the Committee inquiry process, Labor Senators remain concerned at some of the provisions in the term sheet developed between the ABC and Telstra that relate to matters that are at best incidental to the core content arrangements proposed by the terms under negotiation.

1.22 These concerns include:

• **Digital spectrum rights.** The term sheet contains a provision⁴⁴ for Telstra to be granted a first right of negotiation under certain circumstances in respect of acquiring digital spectrum that the ABC may in the future decide to sell. Labor Senators recommend that this provision be omitted from any final agreement with Telstra, as it is entirely incidental to proposed content arrangements and deals with an area of public policy administration of substantial public interest as evidenced by high rates of bidding in recent spectrum auctions;⁴⁵

⁴⁴ Clause 8(b) in original term sheet, available at http://www.electric-words.com/abc/index.html.

⁴³ Dr. J. Schultz, Official Committee Hansard, 24 March 2000, p.95.

⁴⁵ Recent auctions of mobile phone (GSM) spectrum have resulted in world record prices. The latest auction of spectrum in Australia resulted in a total of \$1.327 billion being paid – the largest price paid in the world in a spectrum sale. This total is about four times that collected in May 1998 when the last mobile spectrum auction when 50 per cent more GSM spectrum was auctioned: I. Henderson, S. Mitchell, M. Gilchrist, "Airwave Sale nets bonanza", *The Australian*, 16 March 2000; K. Morrison, "Mobile spectrum sale reaps \$1.33bn", *The Sydney Morning Herald*, 16 March 2000. Similarly remarkable figures of over 3.5 billion pounds are emerging in the second phase of a UK auction of radio frequencies to run third generation mobile networks: Radiocommunications Agency, UK; details available at http://www.spectrumauctions.gov.uk.

- Contract compliance monitoring. The lack of clear and specific ongoing contract compliance monitoring practices or guidelines. While the ABC has demonstrated that an approach to this issue exists, ⁴⁶ the fact that there have already been breaches in respect of contractual compliance by third-party clients, namely Redrock and Equitycafe demonstrates, in the view of Labor Senators, the need for clearly articulated rigorous ongoing compliance monitoring practices;
- Telstra ongoing right to consult. Provisions in the terms being negotiated give Telstra consultative rights in respect of meetings regarding content. Labor Senators believe that while consultation is important, this provision suggests that Telstra will have the capacity to influence ABC decisions about content mix and genres for a commercial purpose. It may be more reasonable to renegotiate contractual arrangements in their entirety if amendments to content arrangements are proposed, to avoid the perception of undue influence on ABC editorial decisions;
- Advertising revenue. The term sheet being negotiated contains provisions at clause 3 that allow for the ABC to share advertising revenue generated by Telstra's website, 47 contrary to current ABC Board policies. Labor Senators consider that given this is not currently permissible under existing ABC Board policy, the relevant provisions should be omitted from any proposed arrangement pending detailed consideration of the principles involved including by this Committee in its final report;
- Telstra "absolute discretion" to present material. Labor Senators are concerned about the granting of absolute discretionary rights in respect to the presentation of ABC content. It may be more appropriate that minimum guidelines for content presentation are developed by the ABC, and incorporated as part of standard third-party content arrangements.

(2) the aggregate of

A. 5% of all e-commerce revenues derived by its relat[ed] bodies corporate where traffic originates from a Telstra site where there is no ABC content; and

B. 15% of all "advertising" revenue derived by Telstra and its related bodies corporate from Telstra sites containing ABC content (to the extent that the relevant page contains non-ABC content then this fee will be proportionately reduced.

Labor Senators note that sub-clause (A) relates to e-commerce revenue and para (B) relates to advertising revenue. ABC spokespersons conceded sub-clause (B) is currently outside Board guidelines and could only be accessed with a change of Board policy: Dr. J. Schultz,. Additional Estimates, Senate Environment, Communications, Information Technologies and the Arts Legislation Committee, *Official Committee Hansard*, 10 February 2000, p.112.

⁴⁶ Mr. H. Bardwell, Dr. J. Schultz, Official Committee Hansard, 17 March 2000, p.10.

⁴⁷ Term sheet available at http://www.electric-words.com/abc/index.html: Clause 3(b)(1) and (2)(A) and (2)(B) which state (in relation to fees payable by Telstra):

⁽b) Plus, after the first two years a payment equal to the higher of:

^{(1) \$2.5} million; and

CONCLUSIONS

- 1.23 Labor Senators regard as essential the maintenance of the independence and integrity of the ABC. As a public agency, with a Charter legislated by Parliament, the ABC needs to be transparent in its operations and accountable to the taxpayers who provide its funding. The ABC's decisions need to be made in accordance with a principled public policy framework to assure the accountability and transparency of the Corporation's activities.
- 1.24 The ABC indicated during public hearings that amendments to the term sheet for the proposed agreement had been made. 48 The fact that subsequent to public debate changes to the original term sheet were made serves as evidence of the importance of such matters being in the public domain. Had the ABC approached the matter openly from the outset, the adverse public reaction that has resulted for the ABC could have been avoided.
- 1.25 It is for the ABC Board to determine whether, and on what terms, it will enter an agreement with Telstra, or any other corporation. The ABC has its own Charter, legislative and regulatory framework within which to make its decisions. There is a clear need for the ABC to be subject to ongoing public scrutiny of decisions which are of a commercial nature.
- 1.26 The ABC Board, in considering a possible arrangement with Telstra must protect the ABC's editorial control and independence. Those who have presented submissions and evidence to the Committee in public hearings have raised legitimate concerns and issues. Consideration of the issues raised would be essential in the Board's final deliberations on the proposed ABC/Telstra online content arrangement.

Senator Mark Bishop

Senator the Hon. N Bolkus

Senator K Lundy

⁴⁸ Dr. J. Schultz, *Official Committee Hansard*, Canberra, 17 March 2000, p.12.